

No. 24-2931

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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, )

Defendants-Appellants, )

v. )

UNITED STATES OF AMERICA, )

Plaintiff-Appellee. )

On Appeal from the United States  
District Court for the Western District  
of Wisconsin, Southern Division  
Case No. 3:24-cv-00664-jdp

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANTS-APPELLANTS,  
TOWN OF THORNAPPLE, WISCONSIN; ANGELA JOHNSON, RALPH C.  
KENYON, TOM ZELM, and JACK ZUPAN

Matthew M. Fernholz  
Cramer Multhauf LLP  
1601 E Racine Ave  
Suite 200  
Waukesha, WI 53186  
Telephone: (262) 542-4278

Richard P. Lawson  
*pro hac vice*  
America First Policy Institute  
1455 Pennsylvania Ave., N.W.  
Suite 225  
Washington, D.C., 20004  
Telephone: (813) 952-8882

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: No. 24-2931

Short Caption: TOWN OF THORNAPPLE WISCONSIN, et. al v. UNITED STATES OF AMERICA

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The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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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

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

America First Policy Institute, Cramer Multhauf LLP, & Husch Blackwell LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: s/Matthew M. Fernholz Date: December 9, 2024

Attorney's Printed Name: Matthew M. Fernholz

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes  No

Address: 1601 E Racine Ave, #200, Waukesha, WI 53186

Phone Number: (262) 542-4278 Fax Number: 262-542-4270

E-Mail Address: mmf@cmlawgroup.com

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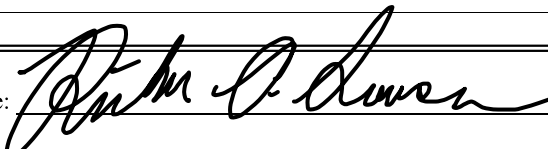
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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: 

Date: December 5, 2024

Attorney's Printed Name: Richard P. Lawson

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes  No

Address: 1455 Pennsylvania Ave., N.W., Ste. 225, Washington, D.C., 20004

Phone Number: (813) 952-8882

Fax Number: \_\_\_\_\_

E-Mail Address: rlawson@americafirstpolicy.com

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## JURISDICTIONAL STATEMENT

### I. Jurisdiction of the District Court

The District Court has original jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1345, 3301(a) and 52 U.S.C. § 21111.

### II. Jurisdiction of the Court of Appeals

Defendants-Appellants bring this interlocutory appeal to challenge the District Court's order granting a preliminary injunction and denying Defendants-Appellants' motion to dismiss. Appellate jurisdiction exists under 28 U.S.C. § 1292(a)(1). Specifically:

- a. This appeal is taken from an Order Granting Preliminary Judgment of the United States District Court for the Western District of Wisconsin entered on October 4, 2024, *Dkt. 27*; App. 134-136, by the Honorable James D. Peterson. Pursuant to Circuit Rule 28(a)(2), this interlocutory appeal does not involve a motion for new trial or motion for alteration of a judgment and is not a direct appeal from the decision of a magistrate judge.
- b. A joint proposed case management plan was adopted by the District Court wherein the Parties agreed to leave the preliminary injunction in effect and stay all other proceedings unrelated to enforcement of the injunction, pending resolution of the instant appeal.
- c. There are no prior or related appellate proceedings.



- d. The issues on appeal center on the District Court's conclusion that the United States established a reasonable likelihood on the merits and the presence of irreparable harm.
- e. Specifically, the District Court denied the Defendants-Appellants' motion to dismiss based on the statutory definition of "voter system" as used within the Help America Vote Act of 2002, 52 U.S.C. § 21081.
- f. The Defendants-Appellants Kenyon, Zelm, and Zupan have been sued in their representative capacities as members of the Town Board of Thornapple; Defendant-Appellant Johnson is named in her official capacity as Town Clerk for the Town of Thornapple.
- g. A Notice of Appeal was filed with the District Court on October 25, 2024.

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## STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34, Appellants hereby respectfully requests oral argument before this Court to fully present the significant legal issues raised in the appeal, particularly regarding the District Court's statutory interpretation of the definitions contained within the Help America Vote Act.

This case involves a discrete analysis of statutory language, and oral argument will aid the court in considering the textualist argument raised by the Appellants. Furthermore, this appeal involves novel legal interpretations that could significantly impact future litigation in the Seventh Circuit regarding the scope of the Help America Vote Act. Finally, the District Court's ruling on the definition of "voting system" is demonstrably flawed and requires further analysis through oral argument to ensure proper application of the law.

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. Whether the District Court erred as a matter of law in issuing a preliminary injunction in ruling that the United States established a reasonable likelihood of success on the merits.
- II. Whether the District Court erred as a matter of law in issuing a preliminary injunction in ruling that the United States established the presence of irreparable harm.

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## STATEMENT OF THE CASE

### I. Statutory Overview

This action was brought by the Justice Department, based on allegations that the Defendants were in violation of the Help America Vote Act of 2002, Pub. L. 107-252, title III ("HAVA"). Central to the arguments of the parties is the definition of "voting system" under HAVA. "[V]oting system" as defined by HAVA includes "the total combination of mechanical, electromechanical, or electronic equipment" used in the election process.<sup>1</sup>

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<sup>1</sup> 52 U.S.C. ¶ 21081(b) states as follows:

(b) Voting system defined

In this section, the term "voting system" means--

(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).

*(emphasis added)*

In the District Court, Thornapple asserted that HAVA was inapplicable to the Town because no aspect of its election process involved “mechanical, electromechanical, or electronic” equipment—Thornapple exclusively uses paper ballots that are hand counted. The Government responded that a voting system under HAVA included any method by which a municipality like Thornapple casts and counts votes. The District Court adopted this position in its ruling when it held that “HAVA ... applies to whatever voting system a municipality uses.”

This case turns exclusively on the narrow issue of the scope of HAVA’s definition of a “voting system”—does it include “whatever voting system a municipality uses” or is it necessarily limited to the more narrow and detailed provisions of HAVA’s definitional section, 52 U.S.C. § 21081(b).

## II. Factual Background

On June 13, 2023, the Town Board of Thornapple Wisconsin, a town of less than 800,<sup>2</sup> voted to stop using its expensive electronic voting machines which were manufactured by Dominion, and instead opted to rely entirely on paper ballots. *Dkt.* 13 at 2; App. 060; *see also*, *Dkt.* 1, ¶¶ 25-29; App 006-007. To implement the Town’s decision to “opt out of using ‘voting machines or electronic voting systems,’” officials withheld a Dominion machine and instead provided paper ballots for use by voters at

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<sup>2</sup> The Town’s population is just 721. *See*, 2020 United States Census, available at <https://www.census.gov/searchresults.html?q=thornapple+wisconsin&page=1&stateGeo=none&searchtype=web&cssp=SERP& charset =UTF-8> The Court can take judicial notice of official government records or reports such as the United States Census. *See*, *United States v. Orozco-Acosta*, 607 F. 3d 1156, 1164, n.5 (9th Cir. 2010); *see also*, Fed. R. Evid. 201. Given the Town’s small population, hand counting paper ballots is simple and manageable.

the Town's sole polling place during the April 2, 2024 and August 13, 2024, federal primary elections. Subsequent to two federal elections in which Thornapple used paper ballots, the Justice Department initiated this case, alleging "the Town of Thornapple failed to provide accessible voting systems for use by voters in Wisconsin's April 2, 2024, and August 13, 2024, federal primary elections." *Dkt.* 1 at ¶1; App. 001-002. As a result, the Government sought a preliminary injunction prior to the November 2024 federal elections alleging "Thornapple voters with disabilities risk imminent disenfranchisement or the denial of their right to participate on the same grounds as other voters." *Dkt.* 4 at 11; App. 025. The Thornapple Board has taken no official action to reverse or reconsider its June 2023 decision to eliminate the use of the electronic voting machine and use of paper ballots in federal elections since the institution of the present action.

The Government initiated this action on September 20, 2024, alleging that the '[d]efendants' failures to ensure the availability of at least one required accessible voting system at each polling place, violates Section 301 of HAVA." Compl. at ¶ 47. The Government then brought a motion for a preliminary injunction to enjoin the Defendants and force them to utilize "at least one direct recording electronic voting system or other voting system," during the November, 2024 general election. *See*, Compl. at 10. In its Complaint and Motion for Preliminary Injunction, the Government argued "[p]aper ballots are not a method of voting that is accessible to voters with disabilities," *Dkt.* 4 at 11; App. 025, and that Thornapple's election day operation "must include 'at least one direct recording electronic voting system or other

voting system equipped for individuals with disabilities at each polling place.” Compl. at ¶ 18 (quoting 52 U.S.C. § 21081(b)(1)(B)).

On September 27, 2024, the District Court held an evidentiary hearing at the conclusion of which the Court granted the Justice Department’s request for a preliminary injunction; this was reduced to writing in an order (“Order”) issued on October 4, 2024. *Dkt.* 27; App. 134-136. Central to this appeal is the Court’s conclusion that the Government had demonstrated a reasonable likelihood of success on the merits. *See, Dkt.* 27 at 1-2; App. 134-125. The Order rested the Court’s determination that paper ballots constitute “voting systems” under HAVA, and thus Thornapple would be subject to HAVA’s disabled voter requirements. Tr. Hrg. at 49:20-22; App. 125. The Court also determined that the Town’s voting regime caused irreparable harm, burdening the rights of disabled voters. *Id.* at 50:14-22. Finally, the Court ruled there was no undue burden placed on the Town by the preliminary injunction, saying that any fiscal burden was “really quite slight.” *Id.* at 51:16-17.

The Thornapple Defendants<sup>3</sup> now appeal the issuance of the preliminary injunction on the basis that HAVA is inapplicable to voting systems where paper

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<sup>3</sup> The individually named defendants, Ms. Angela Johnson, Mr. Ralph Kenyon, Mr. Tom Zelm, and Mr. Jack Zupan are not proper parties under HAVA. Pub. L. 107-252, § 401 (“The Attorney General may bring a civil action against any State or jurisdiction . . . as may be necessary to carry out the uniform and nondiscriminatory election technology and administration requirements under [the Act].” (emphasis added). Additionally, their naming to the case is unnecessarily redundant, and grounds for dismissal. *Burreson v. Barneveld School Dist*, 434 F.Supp.2d 588 (W.D. Wis. 2006) (official-capacity suits against municipal decision-makers are redundant when the municipality is named as another defendant); *Comsys, Inc. v. City of Kenosha Wisconsin*, 223 F.Supp.3d 792 (E.D. Wis. 2016) (stating that official-capacity suits are another way of pleading an action against the entity, and such claims are routinely dismissed as redundant when the municipality is also named); *Ball v. City of Muncie*, 28 F.Supp.3d 797 (S.D. Ind. 2014) (dismissing claims against the mayor in his official capacity as duplicative of the claims against the city,

ballots are counted by hand and that the Department of Justice failed to establish the presence of irreparable harm.

### SUMMARY OF THE ARGUMENT

In this case, the District Court erred in granting a preliminary injunction based on its expansive interpretation of HAVA. The core issue is whether the Town of Thornapple's use of paper ballots qualifies as a "voting system" under HAVA. The statute defines a "voting system" as one that involves mechanical, electromechanical, or electronic equipment. 52 U.S.C. § 21081(b). Since Thornapple's elections rely solely on paper ballots, which do not involve such equipment, the Court erred in applying HAVA's requirements to the Town's practices. The Government's argument that any voting method used by a municipality qualifies as a "voting system" under HAVA contradicts the clear, specific statutory language. The District Court's broad interpretation disregards the statute's precise definition and legislative intent, making it a clear error of law.

Additionally, the District Court erred in finding irreparable harm. The Government's claim that the Town's use of paper ballots disenfranchises disabled voters is speculative and unsupported by the record. Testimony at the hearing indicated that the Town has accommodated all disabled voters, with those few voters impacted preferring paper ballots over electronic voting machines. There is no evidence of any actual harm or disenfranchisement, and the Government's broad claims are speculation at best. This speculative nature of the alleged harm does not

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reiterating that the real party in interest is the municipality). As of this interlocutory appeal, the Court has yet to rule on the issue of these individually named defendants.



meet the legal standard for granting a preliminary injunction. *See, Payton v. Walsh*, 579 F.Supp.3d 1057, 1062 (S.D. Ind. 2022). (“Speculative injuries do not justify the extraordinary remedy of injunctive relief.”) (quoting *E. St. Louis Laborers’ Local 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 704 (7th Cir. 2005)). Therefore, the Court should reverse the District Court's ruling, as it was based on an incorrect interpretation of clear statutory language and an insufficient showing of irreparable harm.

### ARGUMENT

In order to grant a preliminary injunction, the court must be satisfied that the moving party has a reasonable likelihood of success on the merits, that the moving party will suffer irreparable harm absent an injunction, that the balance of harms favors the moving party, and that the public interest would be served by granting the injunction. *Int’l Assoc. of Fire Fighters, Local 365 v. City of East Chicago*, 56 F.4th 437 (7th Cir. 2022) (citing *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992)).

The District Court erred as a matter of law in determining that the Government was reasonably likely to prevail on the merits. The Court’s ruling rested on an overly broad interpretation of a narrowly crafted statute. Despite Congress using a carefully crafted definition of “voting system” in HAVA, the Court erroneously expanded this definition from systems using “mechanical, electromechanical, or electronic equipment” to *any* system used by a municipality. This broad interpretation is unsupported by either the text or legislative history of the statute.

## Standard of Review

“When evaluating a district court's grant of a preliminary injunction, [courts of appeal] review its ‘findings of fact for clear error, its legal conclusions *de novo*, and its balancing of the factors for a preliminary injunction for abuse of discretion.’” *Int’l Assoc. of Fire Fighters*, at 446 (quoting *Doe v. Univ. of S. Ind.*, 43 F.4th 784, 791 (7th Cir. 2022)) (internal citations omitted).

### I. The District Court erred as a matter of law in determining that the Town of Thornapple’s paper ballots constitute a “voting system” under HAVA.

The core issue in this case is whether the Town of Thornapple employs a “voting system” as defined by HAVA. The Government asserts that “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.’” Compl. at ¶ 18 (quoting 52 U.S.C. § 21081(b)(1)(B)). However, the Town does not use a “voting system” as that term is defined in HAVA and, thus, the above requirement cannot apply to the manner by which the Town conducts elections.

HAVA states that “[e]ach *voting system* used in an election for Federal office shall meet the following requirements . . .” 52 U.S.C. § 21081(a) (*emphasis added*). A “voting system” is a defined term under HAVA, and at its core a “voting system” must utilize some combination of “mechanical, electromechanical, or electronic equipment.” 52 U.S.C. § 21081(b). HAVA’s lengthy and detailed definitional section is comprised of two sections which have an all-important conjunctive “and” connecting them:

(b) Voting system defined

In this section, the term “voting system” means--

(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).

52 U.S.C. § 21081(b) (*emphasis added*). This definitional section is not some smorgasbord where a “voting system” that meets one provision is necessarily encompassed within HAVA. Rather, a voting system can only fall within HAVA if it first and foremost satisfies the initial requirement that it incorporate “mechanical, electromechanical, or electronic equipment.”

Furthermore, Congress knows how to craft statutes that are written broadly enough to capture virtually any form of activity. If Congress wanted HAVA to cover, as the District Court put it, “whatever voting system a municipality uses,” then it

could easily have done so without adopting detailed references to “mechanical, electromechanical, or electronic equipment” and the lengthy—and conjunctive—set of criteria in 52 U.S.C. §§ 21081(b)(1) and (b)(2). The Supreme Court has repeatedly deferred to Congress’s ability to accurately define the scope of its own statutory language. *U.S. v. Locke*, 471 U.S. 84 (1985) (emphasizing that the judiciary is not licensed to soften the clear import of Congress' chosen words); *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004) (stating that it is beyond the judiciary's province to rescue Congress from its drafting errors).

Additionally, where HAVA uses the narrow “and” to define the limited scope of “voting system,” Congress has repeatedly demonstrated its ability to use expansive language, such as “including but not limited to,” to sweep in broad areas of activity. *See, e.g. Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 225 (2008) (the absence of a list of specific items undercuts the inference that Congress focused on a common attribute when using a catchall phrase, suggesting that “including but not limited to” should be interpreted broadly). This expertise in statutory drafting is evident

throughout the Nation's law, from the U.S. Tax Code,<sup>4</sup> to care for senior citizens under the Affordable Care Act,<sup>5</sup> to education spending.<sup>6</sup>

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<sup>4</sup> Pursuant to 26 U.S.C. § 61, “gross income” is defined as follows (*emphasis added*):

(a) General definition.--Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, *including (but not limited to)* the following items:

- (1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
- (2) Gross income derived from business;
- (3) Gains derived from dealings in property;
- (4) Interest;
- (5) Rents;
- (6) Royalties;
- (7) Dividends;
- (8) Annuities;
- (9) Income from life insurance and endowment contracts;
- (10) Pensions;
- (11) Income from discharge of indebtedness;
- (12) Distributive share of partnership gross income;
- (13) Income in respect of a decedent; and
- (14) Income from an interest in an estate or trust.

<sup>5</sup> Pub. L. 111-148, title II, subtitle E, Section 2401. “. . . The term ‘instrumental activities of daily living’ includes (but is not limited to) meal planning and preparation, managing finances, shopping for food, clothing, and other essential items, performing essential household chores, communicating by phone or other media, and traveling around and participating in the community.”

<sup>6</sup> Section 312 of the Consolidated Appropriations Act, 2023, Pub. L. 117-328, provides for \$19,000,000.00 “to provide support services to the Institute of Education Sciences (including, but not limited to information technology services, lease or procurement of office space, human resource services, financial management services, financial systems support, budget formulation and execution, legal counsel, equal employment opportunity services, physical security, facilities management, acquisition and

By its express terms, HAVA is only applicable to “voting systems.” 52 U.S.C. § 21081(a). Further, “voting systems” is a defined term within HAVA, and is limited to “mechanical, electromechanical, or electronic equipment.” 52 U.S.C. § 21081(b)(1). These terms are unambiguous. It is axiomatic that when the statutory terms are clear, the analysis stops there—there is no need to examine the statute’s purpose, legislative history, let alone entertain additional factors. *See, e.g., Boyle v. U.S.*, 556 U.S. 938 (2009) (“Because the statutory language is clear, there is no need to reach petitioner’s remaining arguments based on statutory purpose, legislative history, or the rule of lenity.”); *see also Shlahitichman v. 1-800 Contacts, Inc.*, 615 F.3d 794, 802 (FN 3) (7th Cir. 2010), *cert den.*, 562 U.S. 1179 (2011) (“We need not explore ... legislative history in view of the unambiguous terms of the statute.”); *F.T.C. v. Credit Bureau Center, LLC*, 937 F.3d 764, 782 (7th Cir. 2019), *vacated on other grounds*, 141 S. Ct. 810 (2020) (“an exploration of statutory purpose is no longer the Supreme Court’s polestar in cases raising interpretive questions about the scope of statutory remedies ... William N. Eskridge, Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 81 (2016)) (“We are all textualists. That means that a judge must relate all sources of and arguments about statutory interpretation to a text the legislature has enacted.”)) HAVA’s language demonstrates a clear legislative intention that the statute only apply to mechanical and electronic voting machines.<sup>7</sup>

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contract management, grants administration and policy, and enterprise risk management)[.]”

<sup>7</sup> *See King v. Burwell*, 576 U.S. 473, 516-17 (2015) (Scalia, J., dissenting) (stating that the Court does not revise legislation simply because the text creates an apparent anomaly. The terms of the law govern, not the unenacted will of lawmakers). “If

However, a review of HAVA's legislative history shows that it was crafted in response to the mechanical troubles which plagued the 2000 election and was never designed to cover the manual processes used by Thornapple. See, Help America Vote Act of 2002, PL 107-252, October 29, 2002, 116 Stat 1666, stating its intent "[t]o establish a program to provide funds to States to replace punch card voting systems..."); see also, Congressional Research Service, The Help America Vote Act of 2002 (HAVA): Overview and Ongoing Role in Election Administration Policy, P. 2.

HAVA's focus on "mechanical, electromechanical, or electronic equipment" is no accident; Congress was only concerned with fixing pervasive issues with mechanical voting equipment that plagued the 2000 general election. After House and Senate negotiators reached an agreement on what became HAVA, Senator Dodd, HAVA's author and then-Chair of the Senate Rules Committee, said the legislation "will help America move beyond the days of hanging chads, butterfly ballots and illegal purges of qualified voters." 148 Cong. Rec. 136, S10514 (statement of Sen. Christopher Dodd). During the floor vote, numerous senators spoke about the necessity of the bill's appropriations to curtail the issues of the 2000 Presidential election. See *id.* at S10514-16. Senator Harry Reid (D-NV), then the Majority Whip, said the bill would "make elections fair, and . . . make people feel good about their votes counting." *Id.* at S10515 (statement of Sen. Harry Reid). Furthermore,

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Congress enacts something different from its intent, it should amend the statute to conform to its intent." *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004). The Courts "ha[ve] no roving license . . . to disregard clear language simply on the view that . . . Congress 'must have intended' something broader." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 794 (2014) (*emphasis added*).

language to “require States and localities to meet uniform and nondiscriminatory election technology and administration requirements applicable to Federal elections” was only added by amendment, and not part of the original language of HAVA. 148 Cong. Rec. 39, S2598.

The appropriations within HAVA provide equally compelling evidence of Congress’s intent to narrowly address the mechanical balloting machines that plagued the 2000 general election rather than paper ballots. Title I of HAVA is aptly named “PAYMENTS TO STATES FOR ELECTION ADMINISTRATION IMPROVEMENTS AND REPLACEMENT OF PUNCH CARD AND LEVER VOTING MACHINES.” Pub. L. 107-252, title I. Within Title I, Congress authorized \$650,000,000 equally to fund “payments to states for activities to improve administration of elections” and “replacement of punch card or lever voting machines.” *See id.* at § 104 (a)(1)-(2). This allocation clearly demonstrates the focus of HAVA: fixing problems with previous mechanical voting methods. Clearly, Congress did not contemplate—much less intend—altering or eliminating paper ballots.

The District Court’s reliance on the Government’s interpretation as to the scope of HAVA is clearly broader than the legislature intended, because such an interpretation renders the definition in § 21081(b) irrelevant surplusage. The canon against surplusage applies “only where a competing interpretation gives effect ‘to every clause and word of a statute.’” *Microsoft Corp. v. I4I Ltd. Partnership*, 564 U.S. 91, 106 (2011) (quoting *Duncan v. Walker*, 533 U.S. 167, 174, (2001)). Here, the



Government and the District Court's interpretation of Section 301 of HAVA would make the definition of "voting system" which describes "mechanical, electromechanical, or electronic equipment" meaningless, by applying it to "whatever voting system a municipality uses." Contrariwise, if "voting system" excludes processes that do not employ these technologies (such as paper ballots) such a reading is in harmony with the principle that statutes should be read in such a way as to give meaning to every section. If Congress wanted HAVA to cover, as the District Court put it, "whatever voting system a municipality uses" then it could easily have done so without adopting detailed references to "mechanical, electromechanical, or electronic equipment" and the lengthy—and conjunctive—set of criteria in 52 U.S.C. §§ 21081(b)(1) and (b)(2). Otherwise, it defies logic to posit that a paper ballot is "mechanical, electromechanical, or electronic equipment." Because the statutory definition of "voting system" under HAVA cannot reasonably include paper ballots, the District Court erred as a matter of law when it determined that the Town of Thornapple employs a "voting system" which is covered by the Help America Vote Act. This Court should remand the case with instructions to rescind the District Court's order of October 4, 2024.

**II. The District Court erred as a matter of law in determining that the Town of Thornapple's exclusive use of paper ballots created irreparable harm to the electorate.**

To establish irreparable harm, the moving party must show more than a mere possibility of harm; the harm must be likely to occur absent the injunction. *See, Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 787 (7th Cir. 2011) (citing

*Winter v. National Resource Defense Counsel, Inc.*, 555 U.S. 7, 21–23 (2008)). A preliminary injunction is “an extraordinary and drastic remedy, one that should not be granted unless the movant, by a *clear showing*, carries the burden of persuasion.” *Goodman v. Illinois Dept. of Financial and Professional Regulation*, 430 F.3d 432, 437 (7th Cir.2005) (*emphasis in original*) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). This means that the harm must be concrete and not speculative. *Payton v. Walsh*, 579 F.Supp.3d 1057, 1062 (S.D. Ind. 2022). “Speculative injuries do not justify the extraordinary remedy of injunctive relief.” *Id.* (quoting *E. St. Louis Laborers’ Local 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 704 (7th Cir. 2005)).

In the present case, there is insufficient evidence in the record to demonstrate irreparable harm. Instead, the limited testimony and information upon which the District Court relied in issuing the injunction shows the harms the Government alleges are speculative at best. The Government argues that, absent injunctive relief, “voters with disabilities are at risk of suffering the irreparable harm of either disenfranchisement or the denial of their right to participate on the same grounds as other voters.” *Dkt.* 4 at 3; App. 017. In support of this argument, the Government relies upon broad national and statewide data about voting accessibility. *See, id.* at 11-12. In fact, the Government has not alleged a single factual basis for the belief that the Town of Thornapple in particular has disenfranchised voters. *See generally, id.*, going so far as to say “[n]or does it matter whether Thornapple is aware of any voters with disabilities within the Town . . . There is no basis in the text of Section

301 for such a requirement.” *Id.* at 12. Instead, the Government relies solely on the axiom that violation of the statute—which is inapplicable in the instant case—is disenfranchisement *per se*, and thus constitutes irreparable harm. *Id.* at 11 (“Absent immediate injunctive relief to remedy Thornapple Defendants’ HAVA violations, Thornapple voters with disabilities risk imminent disenfranchisement . . .”).

This position, which was adopted by the District Court in its ruling, Tr. Hrg. at 51:9-11; App. 127, is in clear contradiction with the evidence in the record. According to the testimony of the only witness questioned at the hearing on the Government’s motion, Thornapple is a town with approximately 420 registered voters and averages between “zero and one” ‘disabled voters’ per election. *Id.* at 36:13-47:2. This testimony also demonstrates that every single voter with any physical disability whatsoever has been well accommodated and in no way stymied in his or her aspiration to cast a ballot. *Id.* at 37:3-28:11. Furthermore, even when voting machines that provide for the electronic marking of ballots are provided, disabled voters have declined to use them stating “they’ve heard that they’re too complicated to use,” and would prefer physical assistance using a paper ballot. *Id.* at 38:12-16.

Accordingly, any argument that the Town of Thornapple’s practices might disenfranchise disabled voters is not only speculative; it is outright contradicted by the record. There is simply no evidence that Thornapple compromises accessibility for disabled voters. Instead, the only testimony in the record shows that even disabled voters wish to cast their votes on paper ballots, even when electronic voting machines are available. These facts do not support a finding of irreparable harm without

heavy—and legally impermissible—speculation, and therefore are insufficient as a matter of law to support the grant of injunctive relief. Therefore, this Court should remand the case with instructions to rescind the District Court’s order of October 4, 2024.

## CONCLUSION

To prevail on a motion for preliminary injunction a movant must show a reasonable likelihood of success on the merits, irreparable harm absent an injunction, that the balance of harms favors the moving party, and that the public interest would be served by granting the injunction. Based on the record at hearing, a finding that the Government met its burden is unsupported in this case.

The use of paper ballots does not meet HAVA’s definition of a voting system, and thus, the requirements for electronic systems under HAVA do not apply to its elections. Armed only with a statute that so clearly does not apply to the Town of Thornapple, the Government cannot feasibly succeed on the merits. Further complicating the Government’s case, claims of irreparable harm in the form of potential disenfranchisement of disabled voters in Thornapple are speculative and contradicted by the evidence in the record. As the testimony indicates, disabled voters in Thornapple are already well accommodated and prefer paper ballots.

For these reasons, the Government has failed to satisfy its burden of justifying relief, and therefore the District Court erred in granting the preliminary injunction. Therefore, this Court should remand the case with instructions to rescind the District Court’s order of October 4, 2024.

Respectfully submitted this 10th day of December, 2024.

s/ Matthew M. Fernholz

s/ Richard P. Lawsen

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Matthew M. Fernholz  
Cramer Multhauf LLP  
1601 E Racine Ave  
#200  
Waukesha, WI 53186  
Telephone: (262) 542-4278

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Richard P. Lawson  
*pro hac vice*  
America First Policy Institute  
1455 Pennsylvania Ave., N.W.  
Suite 225  
Washington, D.C., 20004  
Telephone: (813) 952-8882

*Counsel for the Appellants*

*Counsel for the Appellants*

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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMIT

The undersigned counsel hereby certifies, under penalty of perjury, that:

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Dated this 10th day of December, 2024.

s/ Matthew M. Fernholz

s/ Richard P. Lawson

---

Matthew M. Fernholz  
Cramer Multhauf LLP  
1601 E Racine Ave  
Suite 200  
Waukesha, WI 53186  
Telephone: (262) 542-4278

---

Richard P. Lawson  
*pro hac vice*  
America First Policy Institute  
1455 Pennsylvania Ave., N.W.  
Suite 225  
Washington, D.C., 20004  
Telephone: (813) 952-8882

*Counsel for the Appellants*

*Counsel for the Appellants*

## CERTIFICATION OF COMPLIANCE WITH APPENDIX REQUIREMENTS

The undersigned counsel hereby certifies, under penalty of perjury, that:

1. All materials required to be included in the appendix, pursuant to Cir. R. 30(a) and 30(b), are included herein.

Dated this 9<sup>th</sup> day of December, 2024.

s/ Matthew M. Fernholz

s/ Richard P. Lawsen

---

Matthew M. Fernholz  
Cramer Multhauf LLP  
1601 E Racine Ave  
Suite 200  
Waukesha, WI 53186  
Telephone: (262) 542-4278

---

Richard P. Lawson  
*pro hac vice*  
America First Policy Institute  
1455 Pennsylvania Ave., N.W.  
Suite 225  
Washington, D.C., 20004  
Telephone: (813) 952-8882

*Counsel for the Appellants*

*Counsel for the Appellants*

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### CERTIFICATE OF SERVICE

#### Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on December 9, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Matthew M. Fernholz



### CERTIFICATE OF SERVICE

#### Certificate of Service When Not All Case Participants Are CM/ECF Participants

I hereby certify that on \_\_\_\_\_, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

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counsel / party:

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s/ \_\_\_\_\_



APPENDIX

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**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-664

**COMPLAINT**

Plaintiff United States of America alleges:

**INTRODUCTION**

1. The United States files this action for declaratory and injunctive relief to enforce Section 301 of the Help America Vote Act of 2002 (“Section 301” and “HAVA”), 52 U.S.C. § 21081. Section 301 requires, among other things, that each voting system used in an election for federal office be accessible for voters with disabilities in a manner that provides the same opportunity for access and participation, including privacy and independence, as for other voters.<sup>1</sup> To satisfy this requirement, voting systems used in federal elections must include at

<sup>1</sup> As used in this Complaint, a “voter with a disability” refers generally to voters with disabilities who, absent access to an accessible voting system, would not enjoy “the same opportunity for access and participation . . . as for other voters.” See 52 U.S.C. § 21081(a)(3)(A).

least one voting system equipped for individuals with disabilities at each polling place. States and their sub-jurisdictions must comply with Section 301 of HAVA, and Congress required states to ensure statewide compliance with Section 301. But the Town of Thornapple failed to provide accessible voting systems for use by voters in Wisconsin's April 2, 2024, and August 13, 2024, federal primary elections. And the Town of Lawrence failed to provide accessible voting systems for use by voters in Wisconsin's April 2, 2024, federal primary election. Those failures violated Section 301 of HAVA.

### **JURISDICTION AND VENUE**

2. This Court has original jurisdiction over this action under 28 U.S.C. §§ 1331, 1345, and 2201(a) and 52 U.S.C. § 21111.

3. Venue is proper in this Court under 28 U.S.C. §§ 130(b) and 1391(b) as both towns are within the Western District of Wisconsin.

### **PARTIES**

4. Plaintiff United States of America seeks declaratory and injunctive relief pursuant to Section 401 of HAVA, 52 U.S.C. § 21111, which authorizes the Attorney General to bring a civil action against any state or jurisdiction to enforce the requirements of Section 301 of HAVA.

5. Defendant Town of Thornapple ("Thornapple") is a municipality in Rusk County within the Western District of Wisconsin. 28 U.S.C. § 130(b). Thornapple is governed by a Town Board, which is empowered to decide "all affairs of the town not committed by law to another body or officer or to a town employee." Wis. Stat. § 60.22. Wisconsin townships are required to comply with Section 301 requirements. 52 U.S.C. § 21081(d).

6. Defendant Angela Johnson is the Town Clerk for Thornapple. Wisconsin's municipal clerks are responsible for administering elections, including providing for the purchase

and maintenance of election equipment. See Wis. Stat. § 7.15(1); *Wisconsin Election Administration Manual for Municipal Clerks* (Feb. 2024), at 5, 113 (hereinafter “Manual”), <https://perma.cc/7R8Z-439D>. The Town Clerk shall “[p]erform the duties required by chs. 5 to 12 [of Wisconsin State law] relating to elections,” Wis. Stat. § 60.33(4)(a), which includes ensuring that accessible voting machines are available to all electors to cast their ballots, *id.* § 5.25(4); Manual at 146. Ms. Johnson is sued in her official capacity.

7. Defendant Ralph C. Kenyon is Chairman of the Town Board of Thornapple. Chairman Kenyon is sued in his official capacity.

8. Defendant Tom Zelm is a member of the Town Board of Thornapple. Supervisor Zelm is sued in his official capacity.

9. Defendant Jack Zupan is a member of the Town Board of Thornapple. Supervisor Zupan is sued in his official capacity.

10. Defendant Town of Lawrence (“Lawrence”) is a municipality in Rusk County within the Western District of Wisconsin. 28 U.S.C. § 130(b). Lawrence is governed by a Town Board. The Town is subject to Section 301 requirements. 52 U.S.C. § 21081(d).

11. Defendant Charidy Ludescher is the Town Clerk for the Lawrence. Ms. Ludescher is sued in her official capacity.

12. Defendant Bob Nawrocki is Chairman of the Town Board of Lawrence. Chairman Nawrocki is sued in his official capacity.

13. Defendant Stacy Zimmer is a member of the Town Board of Lawrence. Supervisor Zimmer is sued in her official capacity.

14. Defendant Duane Biller is a member of the Town Board of Lawrence. Supervisor Biller is sued in his official capacity.



20. Each state and each state sub-jurisdiction that administers elections must comply with Section 301 requirements. 52 U.S.C. § 21081(d).

21. Section 301’s minimum requirement for accessible voting systems at each polling place applies to all jurisdictions without regard to the size of the population within the jurisdiction and without regard to whether and how many voters with disabilities reside there.

22. HAVA requires states to ensure statewide compliance with Section 301 requirements. 52 U.S.C. § 21004(a)(4) (requiring states to create a “state plan” for implementing HAVA-compliant voting system guidelines and processes, including accessible voting systems at every polling location, as a condition for receipt of HAVA funds); *id.* § 21003 (requiring states to certify compliance with the state plan with the U.S. Election Assistance Commission each fiscal year).

### **Accessible Voting in Wisconsin**

23. The U.S. Centers for Disease Control and Prevention estimate that 1,275,864 adults in Wisconsin—or 28% of the state’s population—have a disability. *See* U.S. Centers for Disease Control and Prevention, *Disability & Health U.S. State Profile Data for Wisconsin* (July 2024), <https://perma.cc/22ZG-4PV8>. Many of these individuals have disabilities that can make voting more difficult: 11% of the state’s adult population has a disability that seriously impairs mobility, and 8% of the population has a disability that impedes independent living. *Id.*

24. On June 14, 2024, the Wisconsin Elections Commission released a document regarding the use of electronic voting equipment in Wisconsin. *See* Wisconsin Elections Commission, *Frequently Asked Questions Regarding the Use of Electronic Voting Equipment in Wisconsin Elections* (June 14, 2024), <https://perma.cc/LX7S-KQR2>. That document clarified that a Wisconsin “municipality cannot entirely abandon all electronic [voting] equipment” while

“still comply[ing] with laws requiring each polling place to make accessible voting equipment available to voters.” *Id.* at 2. The document further clarified that Wisconsin municipalities cannot satisfy these obligations by “provid[ing] a person with a disability an assistant in lieu of offering accessible voting equipment.” *Id.*

### **The ImageCast Evolution**

25. Rusk County, Wisconsin, has purchased Dominion ImageCast Evolution (“ImageCast Evolution”) voting systems for use by each municipality within Rusk County in the conduct of elections, including the Towns of Thornapple and Lawrence.

26. The ImageCast Evolution can function as a tabulator, or counter, of votes cast. Wisconsin Elections Commission, *Final Commission Memo Test Report for Dominion D-Suite 5-5 C and 5-5CS* at 3 (June 2, 2021), <https://elections.wi.gov/media/14401/download> (hereinafter “Final Commission Memo”).<sup>2</sup>

27. The ImageCast Evolution can also function as a ballot marking device, that is, a device that records a voter’s choices on a paper ballot prior to counting. Final Commission Memo at 3.<sup>3</sup>

28. The United States Election Assistance Commission has certified the Dominion Voting Systems Democracy Suite 5.5-C, of which the ImageCast Evolution is a component, as

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<sup>2</sup> Once the ImageCast Evolution has tabulated a ballot, the ballot is deposited into a secure storage bin at the base of the machine. Final Commission Memo at 3. The vote totals reported by the ImageCast Evolution can be verified against the actual cast ballots retrieved from the secure ballot box.

The vendor of the ImageCast Evolution offers devices that, when attached to the ImageCast Evolution, allow election results to be sent via encrypted, secure wireless transmission from the polling place to the election administrator’s office. *Id.* Use of that external device is optional, and their use or non-use is not relevant to the HAVA violation at issue here. Neither Thornapple nor Lawrence use such devices to transmit election results, and the United States does not seek an order requiring the Towns to use wireless transmission for any purpose.

<sup>3</sup> When a voter uses the ImageCast Evolution’s ballot-marking functionality to complete their ballot, the marked ballot is returned to the voter for review. Final Commission Memo at 4. Only after the voter has had an opportunity to view the marked ballot is the ballot again inserted into the ImageCast Evolution to be tabulated. *Id.*



having met an identified set of federal voting system standards, including those regarding accessibility. U.S. Election Assistance Comm'n, *Certificate of Conformance: Dominion Voting Systems Democracy Suite 5.5-C* (July 9, 2020), <https://perma.cc/6796-87BH>.

29. The Wisconsin Elections Commission has approved the Dominion Voting Systems Democracy Suite 5.5-C, of which the ImageCast Evolution is a component, for use in conducting elections in Wisconsin. See Wisconsin Elections Commission, *Open Session Minutes* at 4-7 (June 2, 2021), <https://perma.cc/FNJ4-VG7C>.

### **Town of Thornapple**

30. On June 13, 2023, the Town Board of Thornapple (the “Thornapple Board”) voted to “stop use of the electronic voting machine and use paper ballots” (“June 13 decision”).

31. In elections preceding the June 13 decision, Thornapple used an ImageCast Evolution machine to mark and tabulate votes during elections, including those for federal office.

32. Thornapple implemented the June 13 decision by withholding the ImageCast Evolution machine and instead making available only paper ballots for use by voters at the Town’s sole polling place during the April 2, 2024, federal primary election.

33. Thornapple did not make available the ImageCast Evolution or any other equipment that would enable a voter with a disability to mark a paper ballot privately and independently at the Town’s polling place during the April 2, 2024, federal election.

34. Accordingly, for the April 2, 2024, federal primary election, Thornapple’s polling location lacked a voting system that was “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.” 52 U.S.C. § 21081(a)(3)(A).

35. Thornapple's Chief Election Officer, Suzanne Pinnow, characterized the Town's June 13, 2023, vote as one to "opt out of using 'voting machines or electronic voting systems.'"

36. During the August 13, 2024, federal primary election, Thornapple again made available only paper ballots for use by voters at the Town's polling place.

37. The Town of Thornapple again did not make available any equipment that would enable a voter with a disability to mark a paper ballot privately and independently at its polling place during the August 13, 2024, federal primary election.

38. Thornapple's polling location thus lacked a voting system that was "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," 52 U.S.C. § 21081(a)(3)(A), during the August 13, 2024, federal primary election.

39. The Thornapple Board has taken no official action to reverse or reconsider its June 2023 decision to eliminate the "use of the electronic voting machine and use paper ballots" in elections, including those for federal office.

### **Town of Lawrence**

40. On January 16, 2023, the Town Board of Lawrence (the "Lawrence Board") "decided [the Town] will not be turning on the voting machine" for a February 21, 2023, state primary election ("January 16 decision"). Charidy Ludescher, Lawrence's Town Clerk, took notes by hand at that meeting.

41. Lawrence characterized the January 16 decision as one where the Lawrence Board decided to "simply not plug the voting machines in for the administration of elections" in Lawrence and "to opt out of using 'voting machines or electronic voting systems.'"

42. Prior to the January 16 decision, Lawrence had used the ImageCast Evolution tabulator and ballot marking device to mark and tabulate votes during elections, including those for federal office.

43. Lawrence did not use “voting machines or electronic voting systems” during the April 2, 2024, federal primary election. Instead, the Town withheld the ImageCast Evolution machine and made available only paper ballots for use by voters at the Town’s polling place during that federal primary election.

44. Lawrence did not make available any equipment that would enable a voter with a disability to mark a paper ballot privately and independently at the Town’s polling place during the April 2, 2024, federal primary election.

45. For the April 2, 2024, federal primary election, Lawrence’s sole polling location thus lacked a voting system that was “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.” 52 U.S.C. § 21081(a)(3)(A).

### **CAUSE OF ACTION**

46. The United States realleges and incorporates by reference the allegations set forth in all prior paragraphs of this Complaint.

47. Defendants’ failures to ensure the availability of at least one required accessible voting system at each polling place, as set forth above, violates Section 301 of HAVA.

48. Unless enjoined by order of this Court, Defendants will continue to violate Section 301 by failing to ensure that all polling places are equipped with at least one accessible voting system during federal elections.

**PRAYER FOR RELIEF**

WHEREFORE, the United States prays that this Court enter an order:

(1) Declaring that Defendants have failed to ensure that the State’s voting systems are accessible for individuals with disabilities by using at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place, in violation of Section 301 of the Help America Vote Act, 52 U.S.C. § 21081;

(2) Enjoining Defendants, their employees, agents, and successors in office, and all persons acting in concert with them, from failing to ensure that a voting system equipped for individuals with disabilities is present at each polling place in the State, as required by Section 301 of HAVA, 52 U.S.C. § 21081;

(3) Enjoining Defendants, their employees, agents and successors in office, and all persons acting in concert with them, from engaging in any act or practice that denies the rights secured by Section 301 of HAVA, 52 U.S.C. § 21081;

(4) Directing Defendants, their agents and successors in office, and all persons acting in concert with them to take appropriate action to ensure uniform compliance with this Court’s order by all entities administering the State’s electoral processes, including through issuance of forms, guidance, written or verbal directives, orders, and instructions to local election officials; and

(5) Granting such additional relief as the interests of justice may require.

Date: September 20, 2024

KRISTEN CLARKE  
Assistant Attorney General  
Civil Rights Division

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

/s/ Brian Remlinger  
R. TAMAR HAGLER  
RICHARD A. DELLHEIM  
BRIAN REMLINGER  
MARGARET M. TURNER  
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

**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-664

**UNITED STATES’  
MOTION FOR A PRELIMINARY  
INJUNCTION**

**MOTION FOR A PRELIMINARY INJUNCTION**

Plaintiff United States of America (“United States”), pursuant to Rule 65 of the Federal Rules of Civil Procedure, moves for entry of a preliminary injunction to remedy violations of the requirements of Section 301 of the Help America Vote Act of 2002 (“HAVA”), 52 U.S.C. § 21081. On September 20, 2024, the United States filed a complaint in this Court alleging violations of HAVA arising from the failure of the Town of Thornapple (“Thornapple”), Thornapple Town Clerk Angela Johnson, and Town Board Supervisors of the Town of Thornapple Ralph C. Kenyon, Tom Zelm, and Jack Zupan (collectively, “Thornapple Defendants”), to ensure that each voting system used in an election for federal office in Thornapple “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.” 52 U.S.C.

§ 21081(a)(3)(A). Specifically, the Thornapple Defendants violated HAVA by failing to make available “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).

In support of its motion, the United States asserts that (1) it is substantially likely to prevail on the merits of its HAVA claim, (2) unless enjoined, the Thornapple Defendants’ continued noncompliance with Section 301 of HAVA will irreparably harm voters with disabilities, (3) the United States’ interest in protecting the rights of voters with disabilities outweighs any burden imposed on the Thornapple Defendants, and (4) enjoining the Thornapple Defendants’ failure to comply with Section 301 of HAVA will serve the public interest.

The basis for the United States’ motion is set forth in the accompanying Memorandum of Law in Support of the United States’ Motion for a Preliminary Injunction and the Proposed Statement of Record Facts in Support of the United States’ Motion for a Preliminary Injunction, as well as supporting declarations. A proposed order also accompanies this filing.

In accordance with this Court’s Procedure to be Followed on Motions for Injunctive Relief, through counsel Richard Lawson, the United States has provided actual and immediate notice to the Thornapple Defendants of the filing of this Motion for Preliminary Injunction and will provide actual and immediate notice of the date for any hearing scheduled.<sup>1</sup> In addition, the United States is promptly serving counsel for the Thornapple Defendants with copies of all materials filed with the Court.

Respectfully submitted,

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<sup>1</sup> Though the United States seeks a preliminary injunction against Thornapple Defendants only, the United States has also provided actual and immediate notice to the State of Wisconsin through counsel Charlotte Gibson and is promptly serving the State with copies of all materials filed with this Court. The United States will provide the State of Wisconsin with actual and immediate notice for the date of any hearing scheduled.

Date: September 20, 2024

KRISTEN CLARKE  
Assistant Attorney General  
Civil Rights Division

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

/s/ Brian Remlinger  
R. TAMAR HAGLER  
RICHARD A. DELLHEIM  
BRIAN REMLINGER  
MARGARET M. TURNER  
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

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**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-664

**UNITED STATES'  
MEMORANDUM OF LAW IN  
SUPPORT OF ITS MOTION FOR A  
PRELIMINARY INJUNCTION**

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**UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF ITS  
MOTION FOR A PRELIMINARY INJUNCTION**

Plaintiff United States of America (“United States”), pursuant to Rule 65 of the Federal Rules of Civil Procedure, respectfully moves this Court for an order granting immediate injunctive relief against the Town of Thornapple, Wisconsin (“Thornapple”), and Angela Johnson, Ralph C. Kenyon, Tom Zelm, and Jack Zupan, in their official capacities as Town Clerk and members of the Town Board of Thornapple (collectively, “Thornapple Defendants”), to remedy violations of the requirements of Section 301 of the Help America Vote Act of 2002 (“HAVA” or “Section 301”), 52 U.S.C. § 21081.

**I. INTRODUCTION**

Voters with disabilities<sup>1</sup> face manifold barriers to casting in-person paper ballots with the same degree of privacy and independence as other voters. Congress passed Section 301 in part to address that issue. This action arises from Defendants’ failures to comply with Section 301, which requires, among other things, that each voting system used in an election for federal office be accessible for voters with disabilities in a manner that provides “the same opportunity for access and participation . . . as for other voters,” including affording those voters the same opportunity for “privacy and independence.” 52 U.S.C. § 21081(a)(3)(A). Voting systems used in federal elections satisfy this requirement by making available “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).

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<sup>1</sup> As used in this Memorandum, a “voter with a disability” refers generally to voters, including voters with vision, manual, learning, developmental, cognitive, and other disabilities, who, absent access to an accessible voting system, would not enjoy “the same opportunity for access and participation . . . as . . . other voters.” *See* 52 U.S.C. § 21081(a)(3)(A).

In 2023, the Town Board of Thornapple (“Thornapple Board”) voted to opt out of using the electronic voting machine that Thornapple had used in prior elections and which the Wisconsin Elections Commission had previously approved as compliant with Section 301. The Thornapple Board did not replace that machine with a voting system that is accessible for individuals with disabilities in the manner required by Section 301(a)(3). The Thornapple Board has taken no official action to reverse or reconsider its decision to stop use of that machine. As a result, the Thornapple Defendants violated Section 301 of HAVA by failing to provide HAVA-compliant accessible voting systems during the subsequent federal primary elections held in April and August 2024. Absent preliminary relief, the Thornapple Defendants are poised again to deny voters with disabilities their right to vote privately and independently in the November 5, 2024, federal general election.

Preliminary relief is appropriate here. First, the undisputed facts establish that Thornapple failed to provide HAVA-compliant voting systems during two consecutive federal elections, and so the United States is substantially likely to prevail on the merits of its HAVA claim. Second, absent immediate injunctive relief, voters with disabilities are at risk of suffering the irreparable harm of either disenfranchisement or the denial of their right to participate on the same grounds as other voters in the November 5, 2024, federal general election. Finally, the preliminary relief sought would impose no undue burden upon Thornapple Defendants, especially when balanced against that acute harm of disenfranchisement. Indeed, Thornapple has previously used a HAVA-compliant accessible voting system; Thornapple simply refuses to use it now. Accordingly, to ensure that all eligible Thornapple voters with disabilities can exercise their right to vote using accessible voting systems in the November 5, 2024, general election, the United States respectfully moves this Court for a preliminary injunction.

## II. BACKGROUND

### A. Statutory Background

The Help America Vote Act of 2002, 52 U.S.C. §§ 20901-21145, establishes minimum standards for states to follow in key aspects of election administration in federal elections, including voting systems, voter registration databases, and provisional ballots. Title III of HAVA directs state officials to, among other things, adhere to certain minimum standards in the conduct of federal elections.

Specifically, Section 301 directs state officials to meet certain general requirements for voting systems used in elections for federal office. 52 U.S.C. § 21081(a). As defined by HAVA, a “voting system” includes 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 . . . to cast and count votes . . . .” *Id.* § 21081(b)(1)(B).

Section 301 also requires that each voting system used in an election for federal office “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.” 52 U.S.C. § 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.”<sup>2</sup> *Id.* § 21081(a)(3)(B), (d).

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<sup>2</sup> A “direct recording electronic voting system” (DRE) is one of a nonexclusive list of three voting systems explicitly contemplated by HAVA. *See* 52 U.S.C. § 21081(a)(1)(A) (setting out requirements for “voting system[s] . . . including any lever voting system, optical scanning voting system, or direct recording electronic system”). HAVA does not explicitly define DRE, optical scanning, or any other voting system. The Wisconsin Elections Commission, however, describes the ImageCast Evolution

The requirements of Section 301(a)(3) apply to all jurisdictions conducting a federal election, regardless of the size of the jurisdiction or whether voters with disabilities identify themselves as such at their polling places. *See id.* § 21081(a)(3)(A)-(B), (d).

## **B. Factual Background**

### **1. The Thornapple Board's Decision To Stop Use of Its Electronic Voting Machine**

On June 13, 2023, the Thornapple Board voted to “stop use of the electronic voting machine and use paper ballots.” United States’ Proposed Statement of Record Facts in Support of Its Motion for a Preliminary Injunction (PSRF) ¶¶ 23, 33. Thornapple had in prior elections used a Dominion ImageCast Evolution (“ImageCast Evolution”) combination “tabulator and . . . ballot marking device,” which had been approved by the Wisconsin Elections Commission for use as part of a HAVA-compliant accessible voting system. *Id.* ¶¶ 14-17, 22. The Dominion Voting Democracy Suite 5.5-C, of which the ImageCast Evolution is a component, has been certified by the United States Elections Assistance Commission as meeting an identified set of federal voting system standards, including those regarding accessibility.<sup>3</sup> *Id.* ¶¶ 12-13.

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previously used by Thornapple to serve as both an “optical scan” “tabulator” and as a “ballot marking device.” PSRF ¶ 17.

Voting via an “optical scan” system is a two-step process. First, a voter uses a pen or pencil “to fill in a bubble or arrow by the name of the candidate [they] wish[] to vote for.” *Wexler v. Anderson*, 452 F.3d 1226, 1228 (11th Cir. 2006). Then, when the ballot is completed, the ballot is counted by being “run through an automatic tabulation machine.” *Id.* Ballot marking devices, which “are voting machines that electronically mark, and then physically print, the voter’s ballot,” are part of the first step of that process. *Nat’l Fed’n of the Blind, Inc. v. Lamone*, 438 F. Supp. 3d 510, 518 (D. Md. 2020). A ballot marking device like the ImageCast Evolution is an example of a “voting system equipped for individuals with disabilities at each polling place,” 52 U.S.C. § 21081(a)(3)(B), which a jurisdiction may make available to satisfy its responsibility under HAVA to provide a voting system “accessible for individuals with disabilities,” *id.* § 21081(a)(3)(A).

<sup>3</sup> Once the ImageCast Evolution has tabulated a ballot, the ballot is deposited into a secure storage bin at the base of the machine. PSRF ¶ 18. When a voter uses the ImageCast Evolution’s ballot-marking functionality to complete their ballot, the marked ballot is returned to the voter for review. *Id.* ¶ 19. Only

Thornapple did not record any discussion in its June 13, 2023, meeting on whether or how it would, absent use of the ImageCast Evolution, satisfy HAVA's accessibility requirements. *Id.* ¶ 24.

## 2. April 2, 2024, Federal Primary Election

Thornapple has one polling location. *Id.* ¶ 21. During the April 2, 2024, federal primary election, and consistent with the Town Board's vote to stop using electronic voting machines, Thornapple failed to provide its previously-used accessible voting system at that polling place. *Id.* ¶¶ 22, 25-26. Instead, Thornapple provided paper ballots to voters as the sole means by which voters could record their choices. *Id.* ¶ 27.

## 3. Communications with Defendants

By letter dated May 7, 2024, the United States notified Thornapple that it had received reports that Thornapple lacked a HAVA-compliant accessible voting system during the April 2, 2024, federal primary election and requested additional information. *Id.* ¶ 28. That letter also informed Thornapple of HAVA's accessibility-related requirements. *Id.* ¶ 29. In response, Thornapple's Chief Election Inspector, Suzanne Pinnow, characterized the Town's June 13,

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after the voter has had an opportunity to view the marked ballot is the ballot again inserted into the ImageCast Evolution to be tabulated and deposited into the secure storage bin. *Id.* The vote totals reported by the ImageCast Evolution can be verified against the actual cast ballots retrieved from the secure ballot box.

The vendor of the ImageCast Evolution offers devices that, when attached to the ImageCast Evolution, allow election results to be sent via encrypted, secure wireless transmission from the polling place to the election administrator's office. *Id.* ¶ 20. Use of that external device is optional, *id.*, and their use or non-use is not relevant to the HAVA violations at issue here. Neither Thornapple nor Lawrence use such devices to transmit election results, and the United States does not seek an order requiring the Towns to use wireless transmission for any purpose.

2023, vote as one to “opt out of using ‘voting machines or electronic voting systems’” and attached the minutes from that meeting. *Id.* ¶¶ 30-33.

On July 8, 2024, the United States informed the Thornapple Defendants that Thornapple’s failure to make available an accessible voting machine during the April 2024 federal primary violated HAVA. *Id.* ¶ 34.

#### **4. August 13, 2024, Federal Primary Election**

During the August 13, 2024, federal primary election—and despite the United States’ notification that failure to provide at least one accessible voting system in federal elections violates HAVA—Thornapple’s sole polling location again lacked HAVA-compliant accessible voting systems. *Id.* ¶¶ 35-37. The August primary is the second consecutive federal election in which Thornapple failed to comply with Section 301 of HAVA.

#### **C. Procedural History**

The United States filed this suit on September 20, 2024. *See* Complaint, ECF No. 1. The complaint alleged that the Thornapple Defendants violated Section 301 by failing to make an accessible voting system available to voters in the April 2, 2024, and August 13, 2024, federal primary elections. PSRF at ¶¶ 30-39, 46-48. The complaint also named the Town of Lawrence (“Lawrence”) and, in their official capacities, Lawrence Town Clerk Charidy Ludescher and Lawrence Town Board members Bob Nawrocki, Stacy Zimmer, and Duane Biller (collectively, “Lawrence Defendants”). *Id.* at ¶¶ 10-14. The complaint alleged that, following a January 16, 2023, vote by the Town Board of Lawrence to stop using its electronic voting machine in elections, Lawrence violated Section 301 by failing to make an accessible voting system available to voters in the April 2, 2024, federal primary election. *Id.* at ¶¶ 40-45. The United States and the Lawrence Defendants resolved those allegations. On September 20, 2024, the

parties moved jointly for this Court to enter their agreement as a consent decree. *See* ECF No.

2. The United States thus moves this Court for preliminary relief as to the Thornapple Defendants only based on that Town’s prior deliberate HAVA violations and the likelihood of yet another HAVA violation in the November 5, 2024, federal general election. The United States does not believe preliminary relief against the State is justified at this time.

### **III. ARGUMENT**

Plaintiffs seeking a preliminary injunction must show that “(1) they will suffer irreparable harm in the absence of an injunction, (2) traditional legal remedies are inadequate to remedy the harm, and (3) they have some likelihood of success on the merits.” *Camelot Banquet Rooms, Inc. v. U.S. Small Bus. Admin.*, 14 F.4th 624, 628 (7th Cir. 2021). “If the movant successfully makes this showing, the court must engage in a balancing analysis, to determine whether the balance of harm favors the moving party or whether the harm to other parties or the public sufficiently outweighs the movant’s interests.” *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017). This balancing process involves a “sliding scale” approach: the more likely the plaintiff is to win on the merits, the less the balance of harms needs to weigh in his favor, and vice versa. *Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 895-96 (7th Cir. 2001). Because the United States has met all three threshold factors and the balancing analysis tips sharply in its favor, this Court should order preliminary relief.

#### **A. The United States is Substantially Likely to Succeed on the Merits.**

HAVA permits jurisdictions to use a range of voting systems for federal elections, but it requires that the voting system used “be accessible for individuals with disabilities” by using “at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place.” 52 U.S.C. §§ 21081(a)(3)(A)-(B), 21085.





*Blind v. County of Alameda*, 985 F. Supp. 2d 1229, 1232 (N.D. Cal. 2013) (describing accessible voting machines required by federal law as those allowing a blind voter to use audio and tactile features “to privately and independently complete and submit a ballot”). Without an accessible voting system, such voters cannot cast a paper ballot without assistance. And, while voters with disabilities have a right to an assistor of their choice, *see* 52 U.S.C. § 10508, they also have a right to “accessible” voting systems “that provide[] the same opportunity for access and participation” as is provided to other voters, 52 U.S.C. § 21081(a)(3)(A). Because voters without disabilities may cast a ballot without assistance and in complete secrecy, voters with disabilities are only provided equal access when they are afforded, through the use of an accessible voting system, the ability to vote without assistance. *Id.* (requiring accessible voting systems to allow voters with disabilities to enjoy the same “privacy and independence” available to voters without disabilities).

As a direct result of the Thornapple Board’s official actions, Thornapple’s sole polling location lacked an accessible voting system during the April and August 2024 federal primary elections, including lacking any devices equipped to be accessible to individuals with disabilities “in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.” 52 U.S.C. § 21081(a)(3)(A); PSRF ¶¶ 21, 25-26, 35-36. Those failures violated Section 301.

As of the filing date of this motion, the Thornapple Board has taken no official action to reverse or reconsider its 2023 decision to deny voters the opportunity to use HAVA-compliant accessible voting systems in elections for federal office. Indeed, the Town deliberately failed to make an accessible voting system available for the August 2024 federal election—even after the United States informed Thornapple that its decision to withhold its electronic voting machines in

the April 2024 federal primary election violated HAVA. PSRF ¶ 34. Accordingly, absent injunctive relief, the Thornapple Defendants are poised again to violate Section 301 during the November 5, 2024, federal general election and beyond.

**B. Thornapple Voters Will Suffer Irreparable Harm Absent Immediate Injunctive Relief.**

Absent immediate injunctive relief to remedy Thornapple Defendants' HAVA violations, Thornapple voters with disabilities risk imminent disenfranchisement or the denial of their right to participate on the same grounds as other voters during the November 5, 2024, federal general election. The right to vote is both "fundamental," *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009), and "the essence of a democratic society," meaning that "any restrictions on that right strike at the heart of representative government," *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). It is well settled that infringing on the fundamental right to vote constitutes an irreparable injury. *See, e.g., Jones v. Governor of Fla.*, 950 F.3d 795, 828-29 (11th Cir. 2020); *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 9, 12-13 (D.C. Cir. 2016); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *see also Common Cause Ind. v. Lawson*, 327 F. Supp. 3d 1139, 1154 (S.D. Ind. 2018) (collecting cases).

The U.S. Centers for Disease Control and Prevention estimate that 1,275,864 adults in Wisconsin—or 28% of the State's population—have a disability. PSRF ¶ 9. Many of these individuals have disabilities that may make voting more difficult, including the 4% of Wisconsin's population living with serious vision impairments. *Id.* ¶ 10.

The ability to participate in elections on equal terms as other voters is therefore essential for voters with disabilities to access the franchise meaningfully. *See, e.g., Shelley*, 324 F. Supp. 2d at 1125. Voters with disabilities are significantly more likely than other voters to experience difficulties while voting, often due to the inaccessibility of election infrastructure. For example,

an audit run by the Wisconsin Elections Commission from 2022 to 2023 found an average of 5.9 accessibility problems per polling place, 44% of which were “high severity” problems, meaning they “would be likely to prevent a voter with a disability from entering a polling place and casting a ballot privately and independently.” PSRF ¶ 11. HAVA reflects Congress’s determination that accessibility for voters with disabilities is a vital national interest. To illustrate, one of HAVA’s sponsors stated that “[t]he accessibility standard for individuals with disabilities is perhaps one of the most important provisions of this legislation,” and “the purpose” is to ensure voters with disabilities “have an equal opportunity to cast a vote and have that vote counted, just as all other non-disabled Americans, with privacy and independence.” 148 Cong. Rec. S10488-02 (2002) (statement of Sen. Christopher Dodd). Moreover, any burden placed on voters with disabilities is likely to have a ripple effect, because “denial of equal access to the electoral process discourages future participation by voters.” *United States v. Berks County*, 250 F. Supp. 2d 525, 540 (E.D. Pa. 2003).

Nor does it matter whether Thornapple is aware of any voters with disabilities within the Town who require the use of an accessible voting system to vote privately and independently. There is no basis in the text of Section 301 for such a requirement. And Congress, in passing HAVA, explicitly addressed the possibility that a jurisdiction may “have no known disabled voters.” 148 Cong. Rec. S10488-02 (2002) (statement of Sen. Christopher Dodd). Congress determined that “[i]t is simply not acceptable that individuals with disabilities should have to hide in their homes and not participate with other Americans on election day simply because no one knows that they exist” and that it was “equally unacceptable to suggest that individuals with disabilities must come forward and declare their disability in order to participate in democracy through the polling place.” *Id.* Congress required every election-conducting jurisdiction subject

to HAVA to comply with Section 301’s requirements for exactly this reason: to avoid placing the burden on voters with disabilities to request that their election jurisdiction provide an accessible voting system.<sup>4</sup>

**C. Traditional Legal Remedies Are Inadequate To Address Infringements On The Right To Vote.**

The final threshold factor asks whether traditional legal remedies would be adequate. The United States seeks—and is entitled only to—declaratory and injunctive relief. Section 401 of HAVA authorizes the Attorney General to bring a civil action for declaratory and injunctive relief as may be necessary to enforce the mandates of Section 301. 52 U.S.C. § 21111. And even if the United States could sue for damages, infringement on the right to vote cannot be redressed by monetary damages. *See Democratic Nat’l Comm. v. Bostelmann*, 447 F. Supp. 3d 757, 770 (W.D. Wisc. 2020) (finding traditional legal remedies inadequate because infringement on the “constitutional right to vote cannot be redressed by money damages”); *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (“[O]nce the election occurs, there can be no do-over and no redress.”). The United States has satisfied all three threshold factors for preliminary relief.

**D. Any Burden on Defendants is Minimal and Is Far Outweighed by the Risk of Harm to Voters with Disabilities.**

Where, as here, a movant “is likely to win on the merits, the balance of harms need not weigh as heavily in [its] favor.” *Speech First, Inc. v. Killeen*, 968 F.3d 628, 637 (7th Cir. 2020) (citation omitted). Nevertheless, the balance of harms starkly favors the United States.

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<sup>4</sup> Congress’s decision here makes particular sense in light of the fluid nature of the voting electorate. Even if an election-conducting jurisdiction could know that no voter with a disability requiring the use of an accessible voting system was part of the jurisdiction’s electorate in a prior election, the jurisdiction cannot know whether a voter newly moving into the jurisdiction has, or if an existing voter will develop, a disability requiring the use of an accessible voting system.

The balancing process considers the public interest. *Speech First*, 968 F.3d at 637. The public has a clear interest in the enforcement of federal statutes that protect constitutional rights, including, and especially, voting rights. *United States v. Raines*, 362 U.S. 17, 27 (1960) (“there is the highest public interest in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights”). Given the right to vote’s primacy in guaranteeing other freedoms, protecting this right “is without question in the public interest.” *NAACP v. Cortes*, 591 F. Supp. 2d 757, 767 (E.D. Pa. 2008); see *id.* (granting motion for preliminary injunction in voting rights case); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (reiterating that the right to vote “rank[s] among our most precious freedoms”). And courts have recognized in other voting rights cases that both irreparable harm and the public’s interest in an injunction are presumed where the United States—rather than a private party—seeks injunctive relief pursuant to statute. See *United States v. Alabama*, No. 06-cv-392, 2006 WL 1598839, at \*2 (M.D. Ala. 2006) (“[A]n examination of whether an injunction pursuant to a statute is in the public interest is unnecessary because Congress acts in the public’s interest.” (citations and internal quotation marks omitted)).

Granting a preliminary injunction in this case will also impose minimal hardship on the Thornapple Defendants. Appropriate remedial action would involve requiring the Thornapple Defendants to provide a HAVA-compliant accessible voting system for the November 5, 2024, federal general election. Thornapple did so in the past; it just *chooses* not to do so now. That decision must be reversed. The United States’ interest in protecting access to the franchise for all eligible voters and in prohibiting the use of voting practices that violate HAVA outweighs any burden placed on the Thornapple Defendants in complying with court-ordered relief.

#### IV. SCOPE OF RELIEF SOUGHT

The relief the United States seeks is appropriately tailored to remedy the Thornapple Defendants' violations of HAVA. The United States respectfully seeks an order: (1) requiring Thornapple Defendants to ensure that during the November 5, 2024, federal general election, every polling place in Thornapple has available at least one voting system equipped for individuals with disabilities as required by Section 301 of HAVA, and that that voting system is, for the full period that the polling place is required to be open under Wisconsin law, plugged into a functioning electrical outlet, turned on, and readily visible and accessible to voters; (2) requiring Thornapple Defendants to post signage prominently in every Thornapple polling place alerting voters that an accessible voting system is available for use; (3) requiring Thornapple Defendants to ensure that all appropriate election officers and officials in Thornapple receive appropriate training on how to implement HAVA-compliant accessible voting systems, update any relevant materials within their control, monitor compliance with Section 301 requirements, and take any other steps necessary to ensure the availability of at least one required accessible voting system in every polling place in Thornapple; (4) requiring Thornapple Defendants to permit a representative of the United States Department of Justice to enter any Thornapple polling place for the sole purpose of monitoring compliance with this Court's remedial order during the November 5, 2024, federal election; (5) requiring the Town Board of Thornapple to revoke its unlawful June 13, 2023, decision to "stop use of the electronic voting machine;" and (6) requiring the Thornapple Defendants to cooperate fully with the State of Wisconsin and any State agency's efforts to enforce State or federal law regarding the provision of accessible voting systems for use in elections.

**V. CONCLUSION**

For these reasons, the United States respectfully requests that the Court grant its motion for a preliminary injunction and enter the attached proposed Order granting immediate relief for the HAVA violations described herein.

Date: September 20, 2024

KRISTEN CLARKE  
Assistant Attorney General  
Civil Rights Division

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

/s/ Brian Remlinger  
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





**UNITED STATES’ PROPOSED STATEMENT OF RECORD FACTS IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION**

Plaintiff United States of America submits this Proposed Statement of Record Facts in Support of Its Motion for a Preliminary Injunction pursuant to the United States District Court for the Western District of Wisconsin’s Procedure to be Followed on Motions for Injunctive Relief.

**Parties, Jurisdiction, and Venue**

1. Plaintiff United States of America (“United States”) brought this suit for declaratory and injunctive relief pursuant to Section 401 of the Help America Vote Act (HAVA), 52 U.S.C. § 21111, which authorizes the Attorney General to bring a civil action against any state or jurisdiction to enforce the requirements of Section 301 of HAVA. Complaint, ECF No. 1, at ¶ 4.

2. Defendant Town of Thornapple (“Thornapple”) is a municipality in Rusk County, Wisconsin, which is within the jurisdiction of the Western District of Wisconsin. Rusk County, Wisconsin, *Township of Thornapple* (last visited Sept. 17, 2024), <https://perma.cc/9GLE-DJVT>.

3. Defendant Angela Johnson, or her successor in interest, is the Town Clerk for Thornapple. Rusk County, Wisconsin, *Township of Thornapple* (last visited Sept. 17, 2024), <https://perma.cc/9GLE-DJVT>.

4. Defendant Ralph C. Kenyon, or his successor in interest, is Chairman of the Town Board of Thornapple. Declaration of Brian Remlinger, September 20, 2024, (“Remlinger Decl.”) ¶ 6, Ex 4, at 2; Rusk County, Wisconsin, *Township of Thornapple* (last visited Sept. 17, 2024), <https://perma.cc/9GLE-DJVT>.

5. Defendant Tom Zelm, or his successor in interest, is a member of the Town Board of Thornapple. Remlinger Decl. ¶ 6, Ex. 4, at 2; Rusk County, Wisconsin, *Township of Thornapple* (last visited Sept. 17, 2024), <https://perma.cc/9GLE-DJVT>.

6. Defendant Jack Zupan, or his successor in interest, is a member of the Town Board of Thornapple. Remlinger Decl. ¶ 6, Ex. 4, at 2; Rusk County, Wisconsin, *Township of Thornapple* (last visited Sept. 17, 2024), <https://perma.cc/9GLE-DJVT>.

7. This Court has original jurisdiction over this action under 28 U.S.C. §§ 1331, 1345, and 2201(a) and 52 U.S.C. § 21111.

8. Venue is proper in this Court under 28 U.S.C. §§ 1390(b) and 1391(b) as all Defendants are within the Western District of Wisconsin.

### **Background**

#### **Voters With Disabilities**

9. The U.S. Centers for Disease Control and Prevention estimate that 1,275,864 adults in Wisconsin—or 28% of the state’s population—have a disability. See U.S. Centers for Disease Control and Prevention, *Disability & Health U.S. State Profile Data for Wisconsin* (July 2024), <https://perma.cc/22ZG-4PV8>.

10. 4% of Wisconsin’s population have a serious vision impairment. See U.S. Centers for Disease Control and Prevention, *Disability & Health U.S. State Profile Data for Wisconsin* (May 2023), <https://perma.cc/22ZG-4PV8>.

11. An audit run by the Wisconsin Elections Commission from 2022 to 2023 found an average of 5.9 accessibility problems per polling place, 44% of which were “high severity” problems, meaning they “would be likely to prevent a voter with a disability from entering a polling place and casting a ballot privately and independently.” Wisc. Elections Comm’n,

*Barriers Faced by Elderly Voters and Voters with Disabilities* at 3, 7-10 (June 2023),  
<https://perma.cc/R9H5-M6CZ>.

### **The ImageCast Evolution**

12. The Dominion ImageCast Evolution (“ImageCast Evolution”) is part of the Dominion Voting Systems Democracy Suite 5.5-C. U.S. Election Assistance Comm’n, *Certificate of Conformance: Dominion Voting Democracy Suite 5.5-C* at 1 (July 9, 2020), <https://perma.cc/6796-87BH>; Wisconsin Elections Comm’n, *Final Commission Memo Test Report for Dominion D-Suite 5-5 C and 5-5CS* at 3 (June 2, 2021), <https://elections.wi.gov/media/14401/download> (hereinafter “Final Commission Memo”).

13. The Dominion Voting Systems Democracy Suite 5.5-C has been certified by the United States Election Assistance Commission. U.S. Election Assistance Comm’n, *Certificate of Conformance: Dominion Voting Democracy Suite 5.5-C* (July 9, 2020), <https://perma.cc/6796-87BH>.

14. The Dominion Voting Systems Democracy Suite 5.5-C has been approved for use in elections in Wisconsin by the Wisconsin Elections Commission. Wisconsin Elections Comm’n, *Open Session Minutes* at 4-7 (June 2, 2021), <https://perma.cc/FNJ4-VG7C>.

15. As part of its approval of the Dominion Voting Systems Democracy Suite 5.5-C for use in Wisconsin, the Wisconsin Elections Commission concluded that the Dominion Voting Systems Democracy Suite 5.5-C satisfied the accessibility requirements of Section 301 of HAVA, 52 U.S.C. § 21081(a)(3). Final Commission Memo at 22-23.

16. The Wisconsin Elections Commission listed Thornapple, as of 2022, as using the ImageCast Evolution as its “Accessible Voting Equipment.” Remlinger Decl. ¶ 3, Ex. 1 (excerpt

of spreadsheet made available by the Wisconsin Elections Commission reflecting that, as of 2022, Thornapple used the approved ImageCast Evolution machine).

17. The Wisconsin Elections Commission considers the ImageCast Evolution to be an “optical scan” “tabulator and a ballot marking device.” Wisconsin Elections Comm’n, *Dominion ImageCast Evolution*, <https://perma.cc/7F4R-LBSV> (last visited Aug. 20, 2024); *see also* Final Commission Memo at 3, 28.

18. Once the ImageCast Evolution has tabulated a ballot, the ballot is deposited into a secure storage bin at the base of the machine. Final Commission Memo at 3.

19. When a voter uses the ImageCast Evolution’s ballot-marking functionality to complete their ballot, the marked ballot is returned to the voter for review. Final Commission Memo at 4. Only after the voter has had an opportunity to view the marked ballot is the ballot again inserted into the ImageCast Evolution to be tabulated and deposited into the secure storage bin. *Id.*

20. The vendor of the ImageCast Evolution offers optional devices that, when attached to the ImageCast Evolution, allow election results to be sent via encrypted, secure wireless transmission from the polling place to the election administrator’s office. Final Commission Memo at 3; Dominion Voting, *Dominion ImageCast Evolution* (last visited Sept. 17, 2024), <https://perma.cc/KA82-A2Z9>. Use of that external device is optional, *id.* and Thornapple does not use such a device to transmit election results.

### **Elections in Thornapple**

21. Thornapple has one polling place. Declaration of Erin Webster, Sept. 18, 2024, (“Webster Decl.”) ¶ 4.

22. Thornapple used an electronic voting machine to conduct an election held on April 4, 2023. Webster Decl. ¶¶ 8-9.

23. On June 13, 2023, the Thornapple Town Board voted to “stop use of the electronic voting machine and use paper ballots.” Remlinger Decl. ¶ 6, Ex. 4, at 2 (Thornapple Town Board Meeting Minutes (June 13, 2023)).

24. The meeting minutes from the Thornapple Town Board’s June 13, 2023, meeting did not record any discussion of whether or how Thornapple would, absent use of the ImageCast Evolution, provide a voting system accessible to voters with disabilities. Remlinger Decl. ¶ 6, Ex. 4, at 2 (Thornapple Town Board Meeting Minutes (June 13, 2023) (containing no discussion of provision of accessible voting systems)).

25. Thornapple did not make available any electronic voting machine during the April 2, 2024, federal primary election. Webster Decl. ¶¶ 8, 11.

26. No electronic voting machine was present in Thornapple’s sole polling place during the April 2, 2024, federal primary election. Webster Decl. ¶¶ 4, 8, 11.

27. No method of voting other than completing a paper ballot by hand was provided by Thornapple during the April 2, 2024, federal primary election. Webster Decl. ¶¶ 12-14.

28. By letter dated May 7, 2024, the United States notified Thornapple that it had received reports that Thornapple lacked a HAVA-compliant accessible voting system during the April 2, 2024, federal primary election and requested additional information. Remlinger Decl. ¶ 4, Ex. 2 (Letter from R. Tamar Hagler to Suzanne Pinnow (May 7, 2024)) (“May 7 Letter”).

29. The May 7 Letter also informed Thornapple of HAVA’s accessibility-related requirements. Remlinger Decl. ¶ 4, Ex. 2 (Letter from R. Tamar Hagler to Suzanne Pinnow (May 7, 2024)).

30. Suzanne Pinnow responded to the May 7 Letter. Remlinger Decl. ¶ 5, Ex. 3 (Email from Suzanne Pinnow to U.S. Dep't of Just. (May 21, 2024)).

31. Suzanne Pinnow signed her response to the May 7 Letter as Thornapple's Chief Election Inspector. Remlinger Decl. ¶ 5, Ex. 3, at 3 (Letter from Suzanne Pinnow to U.S. Dep't of Just. (May 21, 2024))

32. Suzanne Pinnow's response to the May 7 Letter characterized the Town Board's June 13, 2023, vote as one to "opt out of using 'voting machines or electronic voting systems.'" Remlinger Decl. ¶ 5, Ex. 3, at 2 (Letter from Suzanne Pinnow to U.S. Dep't of Just. (May 21, 2024)).

33. Suzanne Pinnow's response to the May 7 letter attached the minutes from the June 13, 2024, meeting of the Thornapple Town Board where the Board decided to "stop use of the electronic voting machine." Remlinger Decl. ¶ 5, Ex. 3 (Letter from Suzanne Pinnow to U.S. Dep't of Just. (May 21, 2024)), *Id.* ¶ 5, Ex. 4 (Thornapple Town Board Meeting Minutes (June 13, 2023)).

34. On July 8, 2024, the United States informed the Thornapple Defendants that Thornapple's failure to make available an accessible voting machine during the April federal primary election violated HAVA. Remlinger Decl. ¶ 7, Ex. 5 (Letter from Assistant Attorney General Kristen Clarke to Wisconsin Election Officials (July 8, 2024)).

35. Thornapple did not use any electronic voting machine during the August 13, 2024, federal primary election. Webster Decl. ¶¶ 17.

36. No electronic voting machine was even present in Thornapple's sole polling place during the August 13, 2024, federal primary election. Webster Decl. ¶¶ 17.

37. No method of voting other than completing a paper ballot by hand was provided by Thornapple during the August 13, 2024, federal primary election. Webster Decl. ¶¶ 4, 17-18.

Date: September 20, 2024

KRISTEN CLARKE  
Assistant Attorney General  
Civil Rights Division

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

/s/ Brian Remlinger  
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

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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-664

**DECLARATION OF BRIAN  
REMLINGER IN SUPPORT OF  
THE UNITED STATES' MOTION  
FOR A PRELIMINARY  
INJUNCTION**

I, Brian Remlinger, an attorney duly admitted to practice law before this Court, hereby declare and certify to the best of my knowledge and belief the following:

1. I am a trial attorney in the Voting Section of the Civil Rights Division of the United States Department of Justice.
2. I am familiar with the facts and circumstances of the subject matter of this lawsuit and submit this Declaration in support of the United States of America's ("United States") Motion for a Preliminary Injunction.
3. Attached as Exhibit 1 is a true and correct copy of an excerpt from the Excel file "Accessible Voting Equipment List by Municipality 2022," which is posted on the Wisconsin

Elections Commission's website and shows the accessible voting machines used in each town in Wisconsin as of 2022, available at <https://elections.wi.gov/accessible-voting-equipment>.

4. Attached as Exhibit 2 is a true and correct copy of a letter sent from R. Tamar Hagler, Chief of the Voting Section of the Civil Rights Division of the United States Department of Justice, to Suzanne Pinnow, dated May 7, 2024 ("May 7 Letter").

5. Attached as Exhibit 3 is a true and correct copy of the response to the May 7 Letter, delivered via email, by Suzanne Pinnow, dated May 21, 2024.

6. Attached as Exhibit 4 is a true and correct copy of the attachment to Suzanne Pinnow's response regarding the May 7 Letter, which Ms. Pinnow represented to be the Meeting Minutes for the Thornapple Town Board Meeting that occurred on June 13, 2023.

7. Attached as Exhibit 5 is a true and correct copy of a letter from United States Assistant Attorney General Kristen Clarke to Wisconsin Election Officials, dated July 8, 2024.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 20, 2024.

/s/ Brian Remlinger  
BRIAN REMLINGER  
Attorney, Voting Section  
Civil Rights Division  
U.S. Department of Justice  
950 Pennsylvania Avenue NW  
Washington, DC 20530  
brian.remlinger@usdoj.gov  
202-717-4154

# Exhibit 1

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# Exhibit 2

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Voting Section  
950 Pennsylvania Ave, NW  
4CON 8<sup>th</sup> Floor  
Washington, DC 20530

May 7, 2024

Suzanne Pinnow  
Chief Election Officer  
Town of Thornapple  
W10101 Thornapple Road  
Ladysmith, WI 54848  
[Suzannep\\_townoft@yahoo.com](mailto:Suzannep_townoft@yahoo.com)

Dear Ms. Pinnow:

The United States Department of Justice has received reports that the Thornapple Town Board may have voted to remove all electronic voting machines in all elections, including the presidential preferential primary on April 2, 2024. We have also received reports that some voters with disabilities in the Town of Thornapple requested to use an accessible voting machine but were not provided with that opportunity during the April 2, 2024 election for federal office. We write to obtain the Town of Thornapple's response to these reports and to remind the Town of federal law governing voting systems used in federal elections and protecting voters with disabilities in all elections.

The Help America Vote Act of 2002 (HAVA), 52 U.S.C. §§ 20901-21145, establishes minimum standards for states to follow in several key aspects of election administration in Federal elections, including voting systems, voter registration databases, and provisional ballots. Section 301 of HAVA requires that each voting system used in an election for Federal office meet specified requirements. 52 U.S.C. § 21081(a). Particularly relevant here, each voting system must "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.* § 20181(a)(3)(A). To satisfy this requirement, voting systems must use "at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place." *Id.* § 20181(a)(3)(B).

Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12134, as amended (ADA), and its implementing regulation, 28 C.F.R. Part 35, require public entities to make their services, programs, and activities accessible to qualified individuals with disabilities. *See* 42 U.S.C. § 12132; 28 C.F.R. §§ 35.130, 35.160. This includes the Town's voting programs for federal, state, and local elections. Under Title II and its implementing regulation, a public entity must furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity, including voting programs,

unless the public entity can demonstrate that doing so would result in a fundamental alteration or in undue financial and administrative burdens. To be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability. 28 C.F.R. § 35.160. For voting programs, an auxiliary aid, such as an accessible voting system, is necessary to provide effective communication to voters who are blind or have print disabilities.

We would appreciate a prompt and thorough response to the reports described above and the following information:

1. If the Town is represented by an attorney, the name and contact information of the attorney;
2. A copy of any Town resolution related to electronic voting equipment and any related Town documents, such as Town Board meeting minutes or recordings;
3. Any documents related to requests for an accessible voting machine during the April 2, 2024 election;
4. Any documents related to accommodating voters with disabilities in 2024.

We respectfully request your response within 14 days from the date of this letter, addressed to Barbara Oswald ([barbara.oswald@usdoj.gov](mailto:barbara.oswald@usdoj.gov)) and Jennifer Yun ([jennifer.yun@usdoj.gov](mailto:jennifer.yun@usdoj.gov)). If you would like to discuss this matter, we would be happy to arrange a meeting with appropriate Town officials and counsel.

Thank you for your attention to this important matter.

Sincerely,

R. Tamar Hagler  
Acting Chief

By:

/s/ Jennifer J. Yun  
 Richard A. Dellheim  
 Jennifer J. Yun  
 Margaret M. Turner  
 Attorneys  
 Voting Section  
 Civil Rights Division

/s/ Barbara L. Oswald  
 Leslie Herje  
 Barbara L. Oswald  
 Assistant U.S. Attorneys  
 United States Attorney's Office  
 Western District of Wisconsin

cc: Chairman Ralph C. Kenyon, Town of Thornapple  
 Supervisor Tom Zelm, Town of Thornapple  
 Supervisor Jack Zupan, Town of Thornapple  
 Ronda Parker, Thornapple Municipal Clerk  
 Administrator, Wisconsin Elections Commission

# Exhibit 3

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**From:** [Suzanne Pinnow](#)  
**To:** [Oswald, Barbara \(USAWIW\)](#)  
**Subject:** [EXTERNAL] Thornapple Response Letter  
**Date:** Tuesday, May 21, 2024 4:31:04 PM  
**Attachments:** [2023-06-13 Meeting Removing Voting Machines.pdf](#)

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May 21, 2024

To: Barbara Oswald and Jennifer Yun

From: Suzanne Pinnow,  
Town of Thornapple  
Chief Election Officer

Re: May 7, 2024 DOJ Letter

Thank you for the opportunity to respond to the May 7, 2024, letter from your Office regarding the usage of electronic voting machines in the Town of Thornapple, Rusk County, Wisconsin.

The Town of Thornapple takes the integrity of the administration of elections very seriously and strictly abides by the United States Constitution, the Wisconsin Constitution, Wisconsin State Statutes, Legislative Reference Bureau, settled Case Law involving the administration of elections, Legislative Oversight, States Rights, the Congressional Research Service, the Legislative Audit Bureau, the Wisconsin Election Commission and Staff Memos, non-profit election integrity organizations, cyber security experts and Law Enforcement assistance.

This response will be formatted to include the disclosure of each issue raised in your May 7, 2024, letter and the appropriate related information:

Your letter states in part,

*"The United State Department of Justice has received reports that the Thornapple Town Board may have voted to remove all electronic voting machines in all elections, including the presidential preferential primary on April 2, 2024."*

Your letter goes on to state,

*"We have also received reports that some of voters with disabilities in the Town of Thornapple requested to use an accessible voting machine but were not provided with that opportunity during the April 2, 2024 election for federal office."*

Your letter goes on to state,

*"We write to obtain the Town of Thornapple's response to these reports and to remind the Town of federal law governing voting systems used in federal elections and protecting voters with disabilities in all elections."*

Finally, your letter makes reference to the Help America Vote Act of 2002 (HAVA) and Title II of the Americans with Disabilities Act of 1990 (ADA) regarding provision(s) of accessibility for individuals with disabilities using voting systems.

Your letter also concludes,

*"Under Title II and its implementing regulation, a public entity must furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity, including voting programs, unless the public entity can demonstrate that doing so would result in a fundamental alteration or undue financial and administrative burdens. To be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability."*

Please consider the following responses to the 4 questions at the end of your May 7, 2024, letter:

1. Name and contact information of an attorney that represents the Town. We are not represented by an attorney for this response.
2. Please find attached the Town minutes of the June 13, 2023, Town Board Meeting voting to opt out of using "voting machines or electronic voting systems" as authorized and stipulated per State Statute 5.40.
3. There are no documents "...related to requests for an accessible voting machine during the April 2, 2024 election". The Town of Thornapple did not have any electors participate in the April 2, 2024 election that needed "assistance" or had "a physical disability" as stated in various parts of Wisconsin State Statute 5.40.

4. There are no documents "...related to accommodating voters with disabilities in 2024." The Town of Thornapple did not have any electors participate in 2024 elections that needed "assistance" or had "a physical disability" as stated in various parts of Wisconsin State Statute 5.40.

5. The Town of Thornapple is not aware of any "reports" that you refer to in your letter.

Thank you again for the opportunity to address this most important and critical matter to make sure that every effort is exhausted, while administering elections with integrity without the influence of false claims and misinformation released to the public, without any fact finding, that causes confusion and distrust.

Suzanne Pinnow  
Town of Thornapple,  
Chief Election Inspector

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# Exhibit 4

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**NOTICE OF REGULAR TOWN BOARD MEETING**

NOTICE HEREBY GIVEN that a Township Monthly Board Meeting for the Township of Thornapple in the County of Rusk, State of Wisconsin, for Transaction of business as is by Law required or permitted to be transacted. Such meeting will be held at the Thornapple Town Hall located at CTH E, Bruce, WI on **Tues, June 13, 2023 at 7:00 pm**

At this time, please silence your cell phones. If you need to reply to a call, you must leave the building. This is a business meeting. Please keep all distractions and interactions to a minimum or you will be asked to leave the building. Thank you.

**AGENDA:**

Call meeting to order  
Pledge of allegiance

Roll Call and verify Quorum.

Open meeting compliance and posted in the 3 places referenced below

1. Reading and action on minutes as presented
2. Review and action on the Treasurer's report as presented
3. Review and approve payment of bills due
4. Roads
5. Equipment
6. Buildings/Town Hall/Recycling Center
7. Online bank access for Treasurer/Clerk
8. Voting Machine
9. Citizens Participation
10. Adjourn Meeting

This Notice and Agenda was prepared and posted in three locations 72 hours prior to the meeting date: At the Town Hall on CTH E, Town Recycling Center on Thornapple Road and Heiny Road by Ronda Parker.

**\*\* Please abide by PPE: Personal Protective Equipment guidelines if attending this meeting.**

*Cliff's copy*

**Minutes of the Regular Board Meeting of the Thornapple Township: 06-13-2023**

Chairman Ralph Kenyon called the meeting to order at 7:03pm, followed by the Pledge of Allegiance. Open meeting compliance was verified with notice posted in three locations.

**Roll Call:** Board members present: Acting Chairman: Jack Zupan, Ralph Kenyon, Supervisors: Tom Zelm-Absent, Jack Zupan. Treasurer: Suzanne Pinnow. Clerk: Ronda Parker. Quorum was verified.

1. **Board Minutes** Motion to approve last month's minutes as presented by Kenyon, seconded by Zupan. Carried.
2. **Treasurer's Report:** Pinnow reported. Motion to approve report as presented by Kenyon, seconded by Zupan. Carried. Reports are now from Quickbooks formerly Quicken and for Superior Checking and Cumberland Bank as we will be switching over to Cumberland within the next month. Discussion held. Pinnow received a returned check for a building permit. Discussion held.
3. **Bills due:** The months' bills were reviewed. Motion to approve payments by Zupan, seconded by Kenyon. Carried.
4. **Roads:** Baker reported the brush cleanup is moving along but it is taking a long time. There are lots of tangled trees. The rental equipment goes back on Monday. Discussion held regarding culverts.
5. **Equipment:** Baker reported the tractor needs attention the dump truck will be going over to Meyer. Discussion held. Baker will work on updated the Township Asset list.
6. **Buildings/Town Hall/Recycling Center:** Pinnow reported it is so busy and the deposits are almost tripled another township has told them they could use our dump. Discussion held.
7. **Online bank access for Treasurer/Clerk:** Motion to approve Treasurer/Clerk to access online banking as outlined in the Cumberland Bank specifications form by Kenyon, seconded by Zupan, Carried.
8. **Voting Machine:** Pinnow reported due to the controversial nature of electronic voting machines and the costs associated with them as well as that if you have less than 7000 voters you are not required to have a electronic voting machine. Discussion held. Motion to stop use of the electronic voting machine and use paper ballots by Kenyon, seconded by Zupan. Carried.
9. **Citizen Participation:** None.
10. **Adjourn Meeting:** Motion to adjourn at 8:0pm by Zupan, seconded by Kenyon. Carried.

Next month's board meeting will be on: Tuesday, July 11, 2023 at 7:00pm.

Minutes prepared by: Ronda Parker, Clerk

*Ralph Kenyon*  
Ralph Kenyon

*Jack Zupan*  
Jack Zupan

*Tom Zelm*  
Tom Zelm

# Exhibit 5

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July 8, 2024

Attorney General Josh Kaul  
Wisconsin Department of Justice  
P.O. Box 7857  
Madison, WI 53707  
kauljl@doj.state.wi.us

Administrator Meagan Wolfe  
Wisconsin Elections Commission  
201 W. Washington Ave.  
Madison, WI 53703  
elections@wi.gov

Angela Johnson  
Town Clerk  
Town of Thornapple  
P.O. Box 83  
Ladysmith, WI 54848  
thornappleclerk@mail.com

Charidy Ludescher  
Town Clerk  
Town of Lawrence  
W3570 Walrath Rd.  
Glen Flora, WI 54526  
cludeschertownclerk@gmail.com

Dear Attorney General Kaul, Administrator Wolfe, Ms. Johnson, and Ms. Ludescher:

This is to notify you that I have authorized the filing of a lawsuit on behalf of the United States against the State of Wisconsin, the Wisconsin Elections Commission, the Commission Administrator, the Town of Thornapple, the Town of Lawrence, and the Town Clerks and Town Board Supervisors of Thornapple and Lawrence, pursuant to Section 301 of the Help America Vote Act of 2002 (“HAVA”), 52 U.S.C. § 21081. HAVA authorizes the Attorney General to bring an action in federal district court for such declaratory and injunctive relief as is necessary to carry out the requirements of Title III of HAVA. 52 U.S.C. § 21111.

Section 301 of HAVA sets forth standards for all states for each voting system used in an election for federal office. Among other things, Section 301 requires that each 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.” 52 U.S.C. § 21081(a)(3)(A). To satisfy this requirement, any voting system currently in use for federal elections 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). States and their jurisdictions are required to comply with Section 301 of HAVA. *Id.* § 21081(d).

Based on our investigation, we have concluded that the State of Wisconsin and the Towns of Thornapple and Lawrence, located in Rusk County, Wisconsin, failed to make at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities available at each polling place, including during the April 2, 2024, federal primary election, in violation of Section 301(a)(3)(A) of HAVA.

We hope to resolve this matter amicably and to avoid protracted litigation. Accordingly, we are prepared to delay filing the complaint briefly to permit us time to negotiate a consent decree to be filed with the complaint. Margaret Turner, an attorney with the Civil Rights Division’s Voting Section, will call your offices to discuss your interest in settlement. Ms. Turner may be reached at (771) 217-6882 or by email at [margaret.m.turner@usdoj.gov](mailto:margaret.m.turner@usdoj.gov).

We look forward to working with you to resolve this matter promptly.

Sincerely,



Kristen Clarke  
Assistant Attorney General  
Civil Rights Division

cc: Chairman Ralph C. Kenyon, Town of Thornapple, WI  
Supervisor Tom Zelm, Town of Thornapple, WI  
Supervisor Jack Zupan, Town of Thornapple, WI  
Chairman Bob Nawrocki, Town of Lawrence, WI  
Supervisor Stacy Zimmer, Town of Lawrence, WI  
Supervisor Duane Biller, Town of Lawrence, WI

**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.: \_\_\_\_\_

**Declaration of Erin Webster**

I, Erin Webster, hereby declare as follows:

1. I am a U.S. citizen and a resident of Rusk County, Wisconsin.
2. I am registered to vote in the Town of Thornapple, Wisconsin.
3. I have voted in Thornapple for over a decade. In most of those elections, I have voted in-person on Election Day.
4. Thornapple has only one polling place.
5. When I have voted in-person in Thornapple, I have voted at that polling place.
6. I voted in-person at the Thornapple polling location on April 2, 2024, for the federal presidential primary election.
7. I appeared to vote in that election early in the morning.

8. When I appeared to vote for the April 2024 election, I saw that the voting machine that had been used during the April 4, 2023, election was not at the polling place.
9. This was notable to me because, in the April 2023 election, I had cast my ballot by inserting my completed paper ballot into a machine to be read and counted.
10. After I put my ballot in the machine during the April 2023 election, the machine notified me that I had not voted in a school board election and asked me to confirm I had not intended to vote for any candidate in that race.
11. The polling place is located in a small, one-room building. I know that the machine was not in the polling place during the April 2024 election because, if it had been in the polling place, I would have seen it.
12. When I arrived at the polling place to vote during the April 2, 2024, federal primary election, I was given a paper ballot.
13. I completed the paper ballot by filling in the circles next to the names of my preferred candidates with a pen.
14. When I was finished voting, I deposited my completed paper ballot in a wooden box.
15. I voted in-person at the Thornapple polling location on August 13, 2024, for the federal Senate and Congressional primary elections.
16. I appeared to vote early in the day.
17. When I appeared to vote for the August 2024 election, I again saw that the machine that had been used in elections prior to the April 2024 election was not in the polling place.
18. I voted by using a pen to complete a paper ballot in the same manner that I had voted during the April primary. As in the April 2024 election, when I was finished voting, I deposited my completed paper ballot in a wooden box.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 18, 2024.

Erin M. Webster  
ERIN WEBSTER

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICAN,

Plaintiff,

v.

TOWN OF THORNAPPLE, WISCONSIN;  
ANGELA JOHNSON, RALPH C.  
KENYON, TOM ZELM, and JACK ZUPIN,  
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,

Case No.: 3:24-cv-664

Defendant.

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**DEFENDANTS' TOWN OF THORNAPPLE, WISCONSIN; ANGELA JOHNSON,  
RALPH C. KENYON, TOM ZELM, and JACK ZUPAN  
MOTION TO DISMISS**

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Defendants Town of Thornapple, Wisconsin (the "Town"), Angela Johnson,<sup>1</sup> Ralph C. Kenyon, Tom Zelm, and Jack Zupan (Johnson, Kenyon, Zelm, and Zupan, collectively, "Official Capacity Defendants;" Town and Official Capacity Defendants, collectively, "Thornapple Defendants"), by their counsel and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, move this Court for and order dismissing the Government's claim under Section 301 of the Help America Vote Act of 2002 ("HAVA"), 52 U.S.C. § 21081.

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<sup>1</sup> Johnson resigned from her position on July 22, 2024.

When reviewing motions to dismiss under Rule 12(b)(6), courts are not to undertake fact-finding inquiries or weigh evidence; rather, the court is to accept all the factual allegations in a complaint as true and determine if they establish a plausible claim for relief. *One Wisconsin Institute, Inc., v. Nichol*, 155 F. Supp. 3d 898, 901 (W.D. Wis. 2015). The Government cannot meet this standard because the alleged method of casting and counting ballots in the Town does not amount to a “voting system” under HAVA as a matter of law. Furthermore, the naming of the Official Capacity Defendants is a redundancy in light of the Town being named as a Defendant, and these individuals should be dismissed from the action.

### I. THE GOVERNMENT’S CLAIM UNDER HAVA

In this action, the Government seeks to enforce Section 301 of HAVA, which, as the Government notes, “requires, among other things, that each *voting system* used in an election for federal office be accessible for voters with disabilities in a manner that provides the same opportunity for access and participation, including privacy and independence, as for other voters.” (Compl. ¶ 1, emphasis added). In 2023, the Town’s Board of Supervisors (“Thornapple Board”) decided to discontinue the use any electronic voting equipment and rely, instead, on the use and hand counting of paper ballots.<sup>2</sup>

The Government asserts that Section 301 requires the Town to utilize electronic voting machines for disabled voters even though the Town does not use any electronic voting equipment in the first instance. The Government is wrong. The Government asserts that “any voting system in use on or after January 1, 2006, must include ‘at least one direct recording electronic voting

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<sup>2</sup> The Town’s population is just 721. See 2020 United States Census, available at <https://www.census.gov/search-results.html?q=thornapple+wisconsin&page=1&stateGeo=none&searchtype=web&cssp=SERP& charset =UTF-8>. The Court can take judicial notice of official government records or reports such as the United States Census. See *United States v. Orozco-Acosta*, 607 F. 3d 1156, 1164 n.5 (9<sup>th</sup> Cir. 2010). Given the Town’s small population, hand counting paper ballots is simple and manageable.

system or other voting system equipped for individuals with disabilities at each polling place.” (Compl. ¶ 18, quoting 52 U.S.C. § 21081(b)(1)(B)). However, the Town does not use a “voting system” as that term is defined in HAVA and, thus, the above requirement cannot apply to the manner in which the Town conducts elections.

The very first line of HAVA states that “[e]ach *voting system* used in an election for Federal office shall meet the following requirements ...” 52 U.S.C. § 21081(a) (emphasis added). A “voting system” is a defined term under HAVA, and at its core a “voting system” must utilize some combination of “mechanical, electromechanical, or electronic equipment.” 52 U.S.C. § 21081(b). By the terms of Section (a), HAVA’s voting requirements—including the disabled voter provisions at the heart of the Government’s claim—are only applicable to ballot casting processes that qualify as a “voting system.” Because elections in the Town involve no “mechanical, electromechanical, or electronic equipment,” the Government has not, and cannot, allege that the Thornapple Defendants have violated HAVA.

Specifically, “voting system” is defined at 52 U.S.C. § 21081(b) and states as follows (emphasis added):

(b) Voting system defined

In this section, the term “voting system” means--

**(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).

As is clear from the statutory language, Sections (b)(1) and (b)(2) are conjunctive and relate to ballot casting and counting processes that involve some “combination of mechanical, electromechanical, or electronic equipment.” Antonin Scalia & Bryan A. Garner, *Reading Law* 116 (2012) (“Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives.”) (emphases in original); Loja v. Main St. Acquisition Corp., 906 F.3d 680, 683 (7th Cir. 2018). However, the Government’s Complaint never alleges that the Town employed a “voting system,” which is necessarily comprised of “mechanical, electromechanical, or electronic equipment.” To the contrary, the Government acknowledges that the Town Board “voted to ‘stop use of the electronic voting machine and use paper ballots.’” Compl. ¶ 30.

The Government alleges that two Town elections failed to comply with HAVA. First, the Complaint references an April 2, 2024, federal primary election (“April Election”) and alleges the process there failed to satisfy the disabled voting standards set out in 52 U.S.C. § 21081(a)(3)(A). Compl. ¶ 34. The Complaint alleges that the Town did not utilize any equipment to accommodate disabled voters. Compl. ¶ 33. Nowhere, however, does the Government allege that the Town employed a “voting system” comprised of “mechanical, electromechanical, or electronic equipment” during the April Election.





- Mandate that the ballot must be notated as having been completed with assistance (*Id.*);
- Set out the specific language the assistant must use when asking how he or she wishes to cast ballot (Wis. Stat. § 6.82(2)(b)); and,
- Require election officials to note that the voter cast a ballot using an assistant (Wis. Stat. § 6.82(2)(d)).

Notably, Wisconsin law envisions that disabled voters will be casting ballots in jurisdictions that do not use voting machines as well as those that do, and accounts for how these respective election officials will handle such votes. Wis. Stat. § 6.82(2)(a) (reading, in pertinent part, “The selected individual [*i.e.*, assistant] shall certify on the back of the ballot that it was marked with his or her assistance. Where voting machines are used, certification shall be made on the registration list.”). As to the machines themselves, Wisconsin only requires their use by municipalities with a population equal to or greater than 7,500. Wis. Stat. § 5.40(1). With a population of 721 (see footnote 2, above) the Town falls comfortably below this threshold.

While it should be noted that Wis. Stat. § 5.25(4)(a) requires a municipality’s “voting system” to “permit all individuals with disabilities to vote without the need of assistance and with the same degree of privacy”<sup>3</sup> as nondisabled voters, this requirement neither conflicts with the

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<sup>3</sup> Wis. Stat. § 5.25(4) reads as follows:

- (4) (a)** Each polling place shall be accessible to all individuals with disabilities. The commission shall ensure that the voting system used at each polling place will permit all individuals with disabilities to vote without the need for assistance and with the same degree of privacy that is accorded to nondisabled electors voting at the same polling place. This paragraph does not apply to any individual who is disqualified from voting under s. [6.03 \(1\) \(a\)](#).
- (b)** In any jurisdiction that is subject to the requirement under [42 USC 1973aa-1a](#) to provide voting materials in any language other than English, the commission shall ensure that the voting system used at each polling place in that jurisdiction is in compliance with [42 USC 1973aa-1a](#).
- (d)** No later than June 30 of each odd-numbered year, the commission shall submit a report on impediments to voting faced by elderly and handicapped individuals to the appropriate standing committees of the legislature under s. [13.172](#)

assistant provisions detailed above nor calls into question the Town's process. Just like HAVA, Wis. Stat. § 5.25(4)(a) is only applicable to "voting systems," which, pursuant to Wis. Stat. § 5.02(24w), is limited to the now familiar and all-important qualifying phrase, "total combination of mechanical, electromechanical, or electronic equipment."<sup>4</sup> Accordingly, the Town's process is both envisioned by and consistent with Wisconsin's laws ensuring that individuals with disabilities can exercise their right to vote.

By its express terms, HAVA is only applicable to "voting systems." 52 U.S.C. § 21081(a). Further, "voting systems" is a defined term within HAVA, and is limited to "mechanical, electromechanical, or electronic equipment." 52 U.S.C. § 21081(b)(1). These terms are unambiguous. It is axiomatic that when the statutory terms are clear, the analysis stops there—there is no need to examine the statute's purpose, legislative history, let alone entertain additional factors.. *See, e.g., Boyle v. U.S.*, 556 U.S. 938 (2009) ("Because the statutory language is clear, there is no need to reach petitioner's remaining arguments based on statutory purpose, legislative history, or the rule of lenity."); *see also Shlahtichman v. 1-800 Contacts, Inc.*, 615 F.3d 794, 802 (FN 3) (7th Cir. 2010), *cert den.*, 562 U.S. 1179 (2011) ("We need not explore ... legislative

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(3). In preparing its report under this paragraph, the commission shall consult with appropriate advocacy groups representing the elderly and handicapped populations.

<sup>4</sup> Wis. Stat. § 5.02(24w) reads as follows:

**(24w)** "Voting system" means:

**(a)** The total combination of mechanical, electromechanical, or electronic equipment, including the software, hardware, and documentation required to program, control, and support the equipment, that is used to define ballots, to cast and count votes, to report or display election results, and to maintain and produce any audit trail information.

**(b)** The practices and associated documentation for any of the following purposes:

1. To identify equipment components and versions of such components.
2. To test the equipment during its development and maintenance.
3. To maintain records of equipment errors and defects.
4. To determine specific equipment changes to be made after the initial qualification of the equipment.
5. To make available any materials to an elector.

history in view of the unambiguous terms of the statute.”) and *F.T.C. v. Credit Bureau Center, LLC*, 937 F.3d 764, 782 (7th Cir. 2019), *vacated on other grounds*, 141 S. Ct. 810 (2020) (“an exploration of statutory purpose is no longer the Supreme Court's polestar in cases raising interpretive questions about the scope of statutory remedies ... William N. Eskridge, Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 81 (2016) (“We are all textualists. That means that a judge must relate all sources of and arguments about statutory interpretation to a text the legislature has enacted.”)). However, even if this Court did review HAVA’s legislative history it would find that it was crafted in response to the mechanical troubles which plagued the 2000 election and was never designed to cover the manual processes used by the Town. *See*, Help America Vote Act of 2002, PL 107–252, October 29, 2002, 116 Stat 1666, stating its intent “[t]o establish a program to provide funds to States to replace punch card voting systems...”); *see also*, Congressional Research Service, *The Help America Vote Act of 2002 (HAVA): Overview and Ongoing Role in Election Administration Policy*, p. 2.

HAVA’s express language unequivocally limits its standards and requirements to “voting systems” which involve “mechanical, electromechanical, or electronic equipment.” Because the Government has not, and cannot, allege that the Town’s process for casting and counting ballots involves “mechanical, electromechanical, or electronic equipment” the Thornapple Defendants respectfully move this Court to dismiss the Government’s Complaint.

## II. OFFICIAL CAPACITY DEFENDANTS

In the present case, the claims against the Official Capacity Defendants should be dismissed as unnecessary and redundant. It is well established that a lawsuit against a government official in their official capacity is treated as a lawsuit against the governmental entity itself. As articulated in *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985), an official-capacity suit is "in

all respects other than name, to be treated as a suit against the entity." This principle has been consistently applied by district courts, which routinely dismiss official capacity claims where the municipality is also a named defendant, as such claims are duplicative. *See Comsys, Inc. v. City of Kenosha Wisconsin*, 223 F. Supp. 3d 792, 802 (E.D. Wis. 2016) (The District Court dismissed official capacity claims against city officials, finding them redundant because the municipality was already a defendant). Accordingly, the Court should dismiss all claims against the individually named defendants in their official capacities, leaving the Town of Thornapple as the sole defendant in this matter.

### **CONCLUSION**

Because HAVA does not apply to the manual process employed by the Town of Thornapple and the inclusion of the Official Capacity Defendants is a redundancy, Defendants respectfully move this Court to dismiss the Government's Complaint.

Dated this 25<sup>th</sup> day of September, 2024.

HUSCH BLACKWELL LLP  
Attorneys for Defendants – Town of  
Thornapple, Wisconsin; Angela Johnson,  
Ralph C. Kenyon, Tom Zelm and Jack Zupan

Electronically signed  
By: /s/ Eric M. McLeod  
Eric M. McLeod, 1021730  
33 East Main Street, Suite 300  
Madison, Wisconsin 53703  
608.255.4440  
608.258.7138 (fax)  
[eric.mcleod@huschblackwell.com](mailto:eric.mcleod@huschblackwell.com)

Rebecca C. Furdek, 1101543  
511 North Broadway, Suite 1100  
Milwaukee, Wisconsin 53202  
414.273.2100  
414.223.5000 (fax)  
[rebecca.furdek@huschblackwell.com](mailto:rebecca.furdek@huschblackwell.com)

Richard P. Lawson  
*(Pro hac vice to be submitted)*  
America First Policy Institute  
1455 Pennsylvania Ave., N.W.  
Ste. 225  
Washington, D.C., 20004  
(813) 952-8882  
[rlawson@americafirstpolicy.com](mailto:rlawson@americafirstpolicy.com)

**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)**

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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,<sup>1</sup> 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

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<sup>1</sup> 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).





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

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,  
Plaintiff,

-vs-

Case No. 24-CV-664-JDP

TOWN OF THORNAPPLE, WISCONSIN,  
ET AL.,

Madison, Wisconsin  
September 27, 2024  
11:04 a.m.

Defendants.

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STENOGRAPHIC TRANSCRIPT OF EVIDENTIARY HEARING  
HELD BEFORE CHIEF U.S. DISTRICT JUDGE JAMES D. PETERSON

APPEARANCES:

For the Plaintiff:

United States Department of Justice  
BY: RICHARD DELLHEIM  
MARGARET TURNER  
Civil Rights Division  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530

Office of the United States Attorney  
BY: BARBARA L. OSWALD  
222 West Washington Avenue, Suite 700  
Madison, Wisconsin 53703

Also appearing: ALEX SAMUEL, Paralegal

Jennifer L. Dobbratz, RMR, CRR, CRC  
U.S. District Court Federal Reporter  
United States District Court  
120 North Henry Street, Rm. 410  
Madison, Wisconsin 53703  
(608) 261-5709

APPEARANCES (Continued):

For the Defendants:

America First Policy Institute  
 BY: RICHARD P. LAWSON (**appearing via video**)  
 1455 Pennsylvania Avenue, Suite 225  
 Washington, D.C. 20004

Husch Blackwell, LLP  
 BY: ERIC M. MCLEOD  
 33 East Main Street, Suite 300  
 Madison, Wisconsin 53701-1379

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(Proceedings called to order at 11:04 a.m.)

THE CLERK: Case No. 24-CV-664-JDP, the *United States of America v. Town of Thornapple, Wisconsin, et al.*, is called for an evidentiary hearing.

May we have the appearances, please.

MR. DELLHEIM: Good morning, Your Honor. Richard Dellheim for the United States.

THE COURT: Good morning.

Who else is with you there?

MS. TURNER: Margaret Turner also for the United States.

MS. OSWALD: Barbara Oswald with the U.S. Attorney's



1 Office, and with me is Alex Samuel, also from my office.

2 THE COURT: Very good. Good morning to all of you. I  
3 think our audio is on.

4 MR. LAWSON: Are you ready for the defendant?

5 THE COURT: Hold on one second. I'll just ask --  
6 remind everybody that we need to be able to hear what's going on  
7 and also make a recording of our proceeding as a backstop on  
8 making a good transcript, so I'll ask everybody to stay close to  
9 a microphone.

10 All right. And for the defendants?

11 MR. LAWSON: Your Honor, Richard Lawson appearing by  
12 Zoom with the America First Policy Institute for the Town of  
13 Thornapple, and I believe local counsel, Mr. McLeod, may be  
14 present before the Court.

15 MR. MCLEOD: Yes, Your Honor.

16 Eric McLeod of Husch Blackwell appears on behalf of the  
17 defendant also.

18 THE COURT: All right. Good morning to you.

19 All right. So I had noticed this as an evidentiary  
20 hearing. I'm not really sure there are any evidentiary issues  
21 that need to be addressed because I didn't get any factual  
22 objection to the government's submission.

23 So, Mr. Lawson, I have inferred from the filings here that  
24 the defendants' position really relies on a statutory  
25 interpretation argument about the Help America Vote Act and that

1 the defendants are not contesting the facts as they were  
2 submitted by the government; is that correct?

3 MR. LAWSON: That's more or less correct, Your Honor.

4 I will note obviously one aspect of our legal defense is  
5 the factual issue as to whether or not any mechanical,  
6 electromechanical, or electronic equipment was present. That  
7 may be something that we want to clarify today, but I think the  
8 Court understands we're not going to be making a factual  
9 defense. It will be mainly legal.

10 THE COURT: All right. Well, why don't you clarify  
11 that lingering factual issue then. Kind of explain it to me, if  
12 you will.

13 MR. LAWSON: Sure. So in our motion to dismiss on the  
14 complaint, our core allegation is that the complaint contains no  
15 allegations establishing that the system used, the process --  
16 you'll understand why I'm saying "process" rather than "system"  
17 as a defined term under HAVA -- that the process used by  
18 Thornapple doesn't use any electronic, mechanical, or  
19 electromechanical devices. There's no allegations of that.

20 Separate and apart from that is obviously the preliminary  
21 injunction request, which I do think involves some level of fact  
22 finding.

23 THE COURT: That's what I'm trying to --

24 MR. LAWSON: I will note --

25 THE COURT: -- get at right now. Tell me what the

1 factual dispute is.

2 MR. LAWSON: Well, I don't think there's really any  
3 dispute as to what they've alleged. I don't think they say  
4 something in the -- in the preliminary injunction --

5 THE COURT: You said -- excuse me. Excuse me.

6 MR. LAWSON: -- that is additional --

7 THE COURT: Mr. Lawson --

8 MR. LAWSON: -- to what's alleged in the complaint --

9 THE COURT: Mr. Lawson --

10 MR. LAWSON: -- so I think the same issue is there.  
11 So, I mean, if there were to be an evidentiary hearing, the key  
12 factor --

13 (Video feed freezes.)

14 THE COURT: Mr. Lawson, can you hear us?

15 MR. LAWSON: -- if there's no dispute from that with  
16 the government -- sorry.

17 THE COURT: I'll ask you to be a little cautious so  
18 that we don't talk over each other. Because of your appearance  
19 by Zoom, it makes it a little harder for you to see when I'm  
20 trying to talk.

21 So I really want to get at the root of the factual issue.  
22 I understand your statutory interpretation issue. You said  
23 there was a dispute about whether the electronic machine was  
24 there, and I want to identify what the factual issue is that  
25 you're asserting.

1 MR. LAWSON: Okay. I apologize if I said dispute. I'm  
2 not sure there is a dispute. I just think it is a basic ground  
3 line -- or a baseline issue as to whether or not there were any  
4 of the tripartite standards of HAVA of the mechanical --

5 THE COURT: I understand that. I just want to get to  
6 the root of the factual dispute, if there is one.

7 So you agree that the Town has an electronic voting machine  
8 that complies with HAVA.

9 MR. LAWSON: It has in its possession. It hasn't used  
10 it in the last elections.

11 THE COURT: Okay. And that was my next question is  
12 they have not used it in the last two federal elections.

13 MR. LAWSON: We don't dispute that. That's correct.

14 THE COURT: Okay. All right. I think that resolves  
15 the factual disputes here. So it seems to me that the case  
16 turns entirely then on the statutory interpretation argument  
17 about whether HAVA applies to the Town's process for voting.

18 MR. LAWSON: (No response.)

19 THE COURT: That was a question to Mr. Lawson. It  
20 seems like we might have had a little interruption in his  
21 connection.

22 There we go. Seems like we're back. Can you hear us,  
23 Mr. Lawson?

24 MR. LAWSON: I can, and I'm texting with Mr. McLeod, so  
25 if it happens again, we can switch to his phone.

1 THE COURT: Okay. All right. So the question is the  
2 factual dispute really turns entirely on whether HAVA applies to  
3 the voting process used by the Town of Thornapple; is that  
4 correct?

5 MR. LAWSON: Yes.

6 THE COURT: Okay. All right. And so let me ask you a  
7 couple of questions then about that.

8 Your position is that if a community opts to use paper  
9 ballots and voting booths, HAVA just doesn't apply to it; is  
10 that correct?

11 (Video feed freezes.)

12 THE COURT: All right. Mr. McLeod, we're going to have  
13 to switch over to you.

14 MR. MCLEOD: That's fine, Your Honor.

15 The answer to your question is "yes" but also because we're  
16 not just talking about paper ballots. We're talking about paper  
17 ballots and hand counting of those ballots.

18 THE COURT: Yes.

19 MR. MCLEOD: Paper ballots can obviously be used in  
20 connection with electronic equipment tabulation machines where  
21 the ballots are fed through, which is a common practice --

22 THE COURT: Right.

23 MR. MCLEOD: -- seen. But the gist of our position is  
24 that because HAVA does not require us to have a voting system,  
25 HAVA regulates what voting systems must include, entail, it's --

1 THE COURT: I understand the argument. I want to drill  
2 down on this one point. So a community -- a municipality that  
3 uses paper ballots and counts them by hand is exempt from the  
4 requirements in Section 301 of HAVA.

5 MR. MCLEOD: That's correct.

6 THE COURT: That's your position.

7 MR. MCLEOD: That's our position, Your Honor.

8 THE COURT: All right. Explain to me then why HAVA  
9 makes reference to "paper ballot voting systems."

10 MR. MCLEOD: "Voting systems" being the defined term,  
11 which requires electronic equipment. "Paper ballot voting  
12 system" would be what I just described a moment ago, and that is  
13 a piece of equipment that receives a paper ballot and tabulates  
14 it.

15 THE COURT: So as long as you hand count it, you don't  
16 have a voting system?

17 MR. MCLEOD: That's our position, Your Honor.

18 THE COURT: All right. And in the 22 years --

19 Mr. Lawson, go ahead. Go ahead, Mr. Lawson.

20 MR. LAWSON: I would like to just -- I believe the  
21 Court was referring to the HAVA definition of "voting system"  
22 and (b) (2) (E) regarding paper ballots?

23 THE COURT: Yes.

24 MR. LAWSON: I would -- it is our position that "voting  
25 system" under (b) is defined with (1) and (2) as conjunctive.

1 We rely on that for (b) (1) (D). If you look at that for the  
2 definitional section, it has a very critical word "and" at the  
3 end of it. It is not disjunctive "or." So (b) (1) -- or  
4 (b) (2) (E), when it references paper ballots, (b) (2) has to be  
5 read in harmony with (b) (1), and (b) (1) is where it says you've  
6 got to have the combination of mechanical, electromechanical,  
7 electronic equipment.

8 So we would view that there's no way to separate out. This  
9 is not a menu. You've got to hit at least --

10 THE COURT: I understand --

11 MR. LAWSON: -- that sub --

12 THE COURT: -- your argument. Please answer the  
13 questions that I'm posing to you.

14 Explain -- and I think Mr. McLeod did -- there is a  
15 reference to "paper ballot voting systems" several times in  
16 Section 301, so obviously the use of paper ballots is conceived  
17 in HAVA as to be part of a voting system. So the use of paper  
18 ballots doesn't mean you don't have a voting system.

19 MR. LAWSON: It would have to be in -- a voting system  
20 as defined by HAVA would have to be in combination with the  
21 machinery, equipment, if we can use it that way. For example,  
22 here in Florida, I'll use a paper ballot to mark it up, and then  
23 it will get dropped into a machine. So that's a combination of  
24 paper ballots and the mechanical.

25 THE COURT: Okay. So -- but "machine" means something

1 very specific to you. It means a voting machine that tabulates  
2 the ballots; is that correct?

3 MR. LAWSON: When I'm saying "machine," I'm trying to  
4 track mechanical, electromechanical, electronic equipment. That  
5 could be in the casting of the ballot. It could be a computer  
6 where you put your ballot. It could be just a simple apparatus  
7 like where I do. I drop my paper ballot into a counter. It  
8 could be what I used to do when I lived in New York was this  
9 big, huge apparatus where I had to pull a mechanical lever after  
10 flipping switches.

11 THE COURT: The definition obviously doesn't require a  
12 computer because it says a combination of mechanical,  
13 electromechanical, or electronic equipment. So you could have  
14 no electronic equipment whatsoever and you still have a voting  
15 system.

16 MR. LAWSON: That's what I experienced when I was in  
17 New York with the big -- you flip various levers, and then you  
18 pull the machine. It's a mechanical apparatus. Our position is  
19 that Thornapple has nothing that falls within any of these  
20 definitions. It's pure hand.

21 THE COURT: Do they have a box where the ballots go?

22 MR. LAWSON: Yes.

23 THE COURT: Is it locked?

24 MR. LAWSON: I don't know.

25 THE COURT: It doesn't seem to me that the definition



1 here requires any particular level of sophistication of the  
2 mechanical devices. Why wouldn't a locked ballot box count as a  
3 mechanical system?

4 MR. LAWSON: I would -- I would think if that  
5 qualified, then -- you know, obviously you have to print the  
6 ballots. You have to use a pencil to mark them. At some point  
7 a machine is being involved in the process. The term, if it  
8 would include a lock, would be -- if "mechanical" included lock,  
9 it would be so broad as to include things -- almost anything --

10 THE COURT: I guess that's my --

11 MR. LAWSON: -- so that would be the --

12 THE COURT: That's my point, that it seems to me that  
13 "voting system" is defined here in a very broad way so that it  
14 does, in fact, cover the method that communities might use to  
15 vote, even if it's a paper ballot and a voting booth.

16 MR. LAWSON: Well, I would also submit that when you  
17 look at it in the context of what they're talking about, of  
18 mechanical, electromechanical, and electronic equipment, that I  
19 think the electromechanical and electronic equipment involves  
20 some type of, you know, process that the voter would be engaging  
21 with in some capacity, whether it's putting the ballot in the  
22 counting machine or flipping the switches when you're actually  
23 casting the ballot.

24 Also, if you -- you know, if there is ambiguity in the term  
25 of "mechanical" and we want to go back and look at the history

1 of it, this was all from the 2000 presidential election and the  
2 debacle with all the hanging chads and so forth. So it is  
3 within this context of something other than the baseline voting  
4 system that communities have been using forever of just the  
5 paper ballot and drop it in a box.

6 THE COURT: But HAVA specifically says there's nothing  
7 in here that requires you to change your voting system from what  
8 you used in the 2000 election.

9 MR. LAWSON: Well, that's an important point if I -- I  
10 think I understand the Court's question, but I think it's an  
11 important point that HAVA is not requiring anybody to adopt a  
12 certain system. As we read HAVA, HAVA says voting systems are  
13 to comply with X, Y, Z, and it defines "voting system," but if  
14 you're not a voting system, I don't read HAVA as saying you have  
15 to -- you have to adopt a system that fits the HAVA's  
16 definition.

17 THE COURT: I agree with you.

18 MR. LAWSON: Did I answer your question?

19 THE COURT: No, I agree with you, which -- the key here  
20 is that you are proposing that the definition of "voting system"  
21 restricts the coverage of HAVA to only machine-based systems or  
22 computer-based systems, and it seems to me that the more  
23 reasonable interpretation of the definition of voting system is  
24 that it's every kind of voting system, and it applies to  
25 everyone. You can use whatever system you want, but you have to

1       comply, for federal elections, with the safeguards that are  
2       provided for voting systems, and that includes accessibility for  
3       people with disabilities.

4               And let me ask you this: In the 22 years since HAVA has  
5       been passed, has there been any court that has held that it  
6       doesn't apply to paper ballots and voting booths with ballots  
7       counted by hand? Is there -- because you didn't cite any cases  
8       in your motion. I would think that if it didn't apply to paper  
9       ballots counted by hand, somebody would have pointed that out by  
10      now.

11              MR. LAWSON: There's -- in our research, we found very  
12      little cases interpreting it. I think there's an explanation  
13      for that in that there's very limited opportunity for private  
14      litigation, so it's going to be DOJ cases, which will  
15      necessarily limit the number.

16              But if I could also mention, to go back to the depth of  
17      this, if -- I would submit that mechanical, electromechanical,  
18      electronic equipment should be read somewhat in harmony.  
19      Certainly (b) (1) and (b) (2) are all about the apparatuses, the  
20      processes, the systems and components, maintaining of the  
21      machines. If you look at all that, Congress could have gotten  
22      rid of all of that and said a voting system could be any manner  
23      of voting. It could have gotten rid of all of it. None of this  
24      is needed if it includes something as simple as a lock on a  
25      ballot drop box.

1 THE COURT: Well, let me ask you this: It seems to me  
2 that if Congress had meant to exclude paper ballots counted by  
3 hand, that could have been more simply stated, and there's -- I  
4 don't see where it says that. I don't see anything suggesting  
5 that anyone has ever thought that or taken this position before.

6 MR. LAWSON: Well, I would submit that, you know, under  
7 the Constitution, most of all of the regulations regarding  
8 elections, votings, et cetera, is handled by the state. So the  
9 federal government only operates in this field by express  
10 action. So the baseline is whatever the state does. To the  
11 degree the Supremacy Clause and also the provisions of the  
12 elections clauses and so forth allow Congress to get involved,  
13 it has to be very specific in what it's doing. So there is no  
14 presumption of here's -- you know, it's -- of this statute  
15 necessarily meaning any voting system. None of this -- neither  
16 (b) (1) nor (b) (2) in the detail that they've listed there is  
17 needed if they could have simply just used any voting system.  
18 And, remember, this was in clear response to the hanging chad  
19 debacle of 2000, which was punch cards. If you even look at  
20 HAVA in the very preamble to the bill, this is in response to  
21 the punch card issues in south Florida. So there is --

22 THE COURT: I take it you accept that the punch card  
23 system is a voting system?

24 MR. LAWSON: It would at least be electromechanical  
25 because you punch the card, even if it's just punching it,

1 but --

2 THE COURT: That counts as a machine, but marking it  
3 with a pen doesn't count.

4 MR. LAWSON: Not necessarily.

5 THE COURT: That's not your position?

6 MR. LAWSON: As I view the punch cards, you would get a  
7 little prod, and you would have to punch out a hole --

8 THE COURT: Yes.

9 MR. LAWSON: -- into the card, and then the card would  
10 get fed and read and counted. It's at least that step, I would  
11 readily concede. It's at the very least mechanical, far more so  
12 than a lock on a box, but I would submit that the act of taking  
13 the metal prod and poking out a hole in the card is no more  
14 mechanical than using a pencil to fill in a bubble.

15 THE COURT: All right.

16 MR. LAWSON: And if that's what they wanted, if they  
17 wanted that breadth, they wouldn't have needed any of this  
18 specificity.

19 THE COURT: All right. Thank you.

20 Mr. Dellheim, I'm assuming you have the point for the  
21 United States here?

22 MR. DELLHEIM: Yes, sir, Your Honor. Thank you very  
23 much.

24 And --

25 THE COURT: If you would, I'll give you a little time

1 to wind up here, but I really want to know essentially  
2 hand-counted, hand-marked ballots, not a mechanical system. Are  
3 you disputing that?

4 MR. DELLHEIM: Our position, Your Honor, and I think  
5 it's clear from the text of the statute, is that Congress did  
6 not disrupt the voting systems that are used by many  
7 jurisdictions in this country, including paper ballots. It did  
8 outlaw certain voting systems like punch cards. The statute  
9 eliminated that, but it left more or less --

10 THE COURT: Where is that? I'm not sure I --

11 MR. DELLHEIM: It's in the preamble to the statute.  
12 It's also in Section 102 of the statute entitled *Replacement of*  
13 *Punch Card or Lever Voting Machines*.

14 THE COURT: Okay.

15 MR. DELLHEIM: But -- and Congress eliminated certain  
16 voting systems, and it was very intent on two things in HAVA,  
17 among others, but as is relevant today, it wanted to carefully  
18 prescribe the kinds of voting systems that were permissible in  
19 federal elections, and as Mr. Lawson pointed out, that's set  
20 forth in subsection (b) of the statute. It is, as the Court  
21 noted, a very broad definition of the systems that are  
22 permissible, and all one needs to do is look at subsection  
23 (b) (2) (E) to note that the voting systems permitted by Congress  
24 include, number (2), "the practices and associated documentation  
25 used," and if we drop down to (E), "to make available any

1 materials to the voter (such as paper ballots.)" So the process  
2 of making paper ballots available to voters is a voting system  
3 that Congress specifically approved. It's a voting -- it's a  
4 voting system used by many jurisdictions in this country, and  
5 Congress did not disrupt that.

6 But Congress made clear something else, that the voting  
7 system -- excuse me -- that the voting system used by  
8 jurisdictions, approved voting systems under HAVA, have also to  
9 be accessible, and there is a conflict there. There's a tension  
10 between using paper ballots and -- using a "paper ballot voting  
11 system," as Congress used three times in this section of the  
12 statute, and having them be accessible, because paper ballots  
13 are inherently inaccessible. Congress specifically noted that  
14 among the voters with disabilities it was concerned with are  
15 those who are blind and visually impaired, and, of course, most  
16 or many blind or visually impaired voters can't fill out --  
17 ordinarily fill out a paper ballot without assistance. And HAVA  
18 requires that the accessibility be to the degree that the voter  
19 with disabilities be able to vote independently and privately to  
20 the same degree as other voters, and if you need assistance to  
21 fill out a paper ballot, you don't have that privacy and  
22 independence. So it specifically --

23 THE COURT: Let me be -- I don't really hear the  
24 defense challenging what HAVA requires with regard to  
25 accessibility. The argument here is that they don't have a

1 voting system, so HAVA doesn't apply.

2 To be as clear as possible, is it your position that every  
3 manner of voting is a voting system? Every municipality has a  
4 voting system, even if it's just hand-marked and hand-counted  
5 ballots?

6 MR. DELLHEIM: Those are among the voting systems  
7 permitted expressly by HAVA. Congress wrote that definition  
8 broadly, as you note, but it's not the Department's or the  
9 United States' view that any method of voting that anyone can  
10 conjure would be an acceptable voting system under HAVA --

11 THE COURT: Not acceptable. Just it is a voting --  
12 every municipality's method of voting counts as a voting system  
13 under HAVA.

14 MR. DELLHEIM: It counts as a voting system, but it may  
15 not be permissible under HAVA for use in federal elections. I  
16 mean, HAVA specifically outlaws punch cards, for instance.  
17 Jurisdictions can use them in state elections and local  
18 elections but just not in federal elections.

19 THE COURT: It's still a voting system.

20 MR. DELLHEIM: Yes, sir.

21 THE COURT: Voting system means just however the  
22 municipality casts and counts its votes. That's their voting  
23 system.

24 MR. DELLHEIM: Yes, sir. That's our position.

25 THE COURT: Okay. All right. All right. And so I



1 take it then -- I mean, that's really the threshold issue here,  
2 whether HAVA applies to all methods of voting or only to a  
3 certain subset of voting systems and that voting system is a  
4 defined term, and it doesn't apply to hand-counted and  
5 hand-marked paper ballots. You reject that entirely.

6 MR. DELLHEIM: Yes, sir. We think that is atextual.  
7 We think that the statute explicitly acknowledges paper ballots  
8 as a permissible voting system for federal elections.

9 THE COURT: Okay. Now, are you aware of any -- because  
10 there were a couple of cases cited in the United States'  
11 submissions to me, but none really addressed this issue. Are  
12 you aware of any court who has entertained the question of  
13 whether HAVA applies to every single voting system in the United  
14 States?

15 MR. DELLHEIM: No, Your Honor, we're not aware of any  
16 court that has considered the question raised by Thornapple in  
17 this case. We are equally unaware of any jurisdiction that has  
18 adopted the view of Thornapple in this case.

19 THE COURT: All right.

20 MR. DELLHEIM: In other words, if I may continue --

21 THE COURT: Yeah.

22 MR. DELLHEIM: -- there are many jurisdictions that, in  
23 absolute harmony with HAVA, conduct their elections using paper  
24 ballots. Voters fill out the paper ballots. The paper ballots  
25 are hand counted. That is all -- that coheres with HAVA. The

1       only -- the only additional requirement of HAVA in those  
2       jurisdictions is that, because the voting systems have to be  
3       accessible, the way Congress dealt with that tension is that in  
4       jurisdictions that count -- or require voters to cast their  
5       paper ballots and their ballots are hand counted, those  
6       jurisdictions have to provide at least one accessible machine  
7       for voters with disabilities or any other voters who wish to use  
8       it. We're unaware of any jurisdiction in America, and I  
9       can't -- I cannot tell the Court that we have canvassed every  
10      jurisdiction, but we're simply, as the agency that enforces  
11      HAVA, we are unaware of any jurisdiction that has adopted the  
12      view that Thornapple presents in this proceeding.

13                THE COURT: So to paraphrase, you can have hand-marked  
14      and hand-counted ballots, but you still have to have an  
15      accessible voting machine for -- in every polling place.

16                MR. DELLHEIM: Yes, sir. That was how Congress dealt  
17      with the tension between, number one, its explicit  
18      acknowledgment that paper ballots is an acceptable voting  
19      system, but they also had a twin command that all the voting  
20      systems used have to be accessible. Paper ballots are not so --

21                THE COURT: And also, to be clear then, also the  
22      machine doesn't have to do anything but allow the voter to  
23      record the vote. So it can just be a ballot-marking device. It  
24      doesn't have to count it, tabulate it, transmit the information.  
25      It's just a method of marking the ballot for a disabled voter.



1 Town of Thornapple has been provided with one of these voting  
2 machines that it didn't have to pay for, right? It was provided  
3 by county money, if I understand that correctly?

4 MR. DELLHEIM: So that's our understanding, Your Honor.  
5 When Congress passed HAVA, it knew that the changes it was  
6 requiring would be expensive and that there are many  
7 jurisdictions, small jurisdictions like Thornapple or Rusk  
8 County, that couldn't afford to buy these expensive machines,  
9 and Congress set aside an enormous amount of money to help  
10 transform the election system in America.

11 So, yes, it is our understanding that Thornapple did not  
12 have to pay for this machine. In fact, it's our understanding,  
13 based on an agreement with the county, that if they refuse to  
14 use the machine or stop using the machine, Thornapple has to pay  
15 the county because the county used county funds to help buy  
16 those machines.

17 THE COURT: All right. So, Mr. Lawson, I just want to  
18 be clear about the scope of the dispute here. I understand that  
19 you think there's a restrictive definition of "voting system" in  
20 HAVA, but if I were to decide that that was not the proper  
21 interpretation of the term "voting system" as used in HAVA, you  
22 concede then, if contingent on my finding there, then that the  
23 Town of Thornapple would be obligated then to maintain an  
24 operable electronic, accessible ballot-marking device?

25 MR. LAWSON: There are some nuances to that, Your

1 Honor. If the Court states that a hand-cast ballot and  
2 hand-counted ballot qualifies as a voting system, then that  
3 necessarily means that, if you look at the definitions -- or the  
4 requirements for disabled voting access under HAVA, I believe it  
5 uses the phrase "electronic voting system or other voting  
6 system," so there may be a method by which Thornapple could  
7 comply with HAVA where at least it's not an electronic voting  
8 system. I believe I found the right section of (a) (3) (B) where  
9 it's talking about, "Accessibility for individuals with  
10 disabilities. The voting system shall," and then in (B),  
11 "satisfy the requirements of (A) through at least one direct  
12 electronic recording voting system or other voting system." So  
13 if a voting system can include pen and paper and a box that has  
14 a lock on it, then we might be able to -- Thornapple, I think,  
15 might be able to craft a voting system without a machine. So  
16 that's one issue.

17 A couple other points in response to the government's  
18 point, but I'll wait for the Court.

19 THE COURT: All right. So what is that system?

20 MR. LAWSON: I'm sorry?

21 THE COURT: I'm waiting to hear how a nonmachine system  
22 is going to meet the requirements of (3) (A), which is the --  
23 essentially the definition of accessibility.

24 MR. LAWSON: Well, obviously Wisconsin law has pretty  
25 extensive details of how to satisfy issues of disabled voter

1 access. We would submit that Wisconsin law, if we follow  
2 Wisconsin law, that should be sufficient here. It becomes a  
3 different legal argument is what I'm driving at. There's sort  
4 of this threshold issue, are you covered by HAVA. And then  
5 assume we are covered by HAVA and assume even in the last two  
6 elections we didn't comply with HAVA, there may be a way in the  
7 future to comply with HAVA that doesn't meet -- that doesn't  
8 involve electronics or electrical issues or anything like that  
9 or machinery, and we would -- our starting point would be  
10 Wisconsin law governing how to handle disabled voters.

11 It does get somewhat complicated because then we have to  
12 worry about, you know, ADA issues, and there are some provisions  
13 there that I think are favorable to disabled voting access being  
14 very good but maybe not 100 percent akin to nondisabled voters.  
15 It becomes a very difficult issue at that point --

16 THE COURT: So --

17 MR. LAWSON: -- (unintelligible) address it.

18 THE COURT: -- we've got a federal election that's  
19 about 40 days away, and at this point the Town doesn't have an  
20 alternative means of complying with the accessibility  
21 requirements of HAVA other than the Dominion machine that it has  
22 now and has used in the past, but it doesn't have an alternative  
23 ready to go at this point.

24 MR. LAWSON: We don't have one to present to the Court  
25 right now.

1 THE COURT: All right.

2 MR. LAWSON: I would -- if I could just mention one  
3 thing, you asked about the cost for the machines. It's my  
4 understanding that there is an annual cost even if the machines  
5 may have been provided by the county, but it does -- I think it  
6 runs in the range of 3- to \$5,000. I don't want to go down --  
7 too far down a path where we have to put witnesses on for an  
8 issue, but before the Court said, hey, look, there's no cost to  
9 the Town, there is a -- a not insubstantial sum for this tiny  
10 town.

11 And also one other point on the injunctive issue. It's a  
12 variation. Obviously our motion to dismiss, the argument we've  
13 had here, has all been focused on the reasonable likelihood of  
14 success on the merits, is it under HAVA or not. There is an  
15 issue we would invite the Court to consider about the  
16 irreparable harm. Obviously it's an affirmative injunction  
17 requiring us to change what we're doing, and so I think we would  
18 invite the Court to examine that analysis on the irreparable  
19 harm issue as to whether or not the pleadings submitted by the  
20 Department of Justice have hit that fully. Without any -- I  
21 don't recall seeing anything in there of actual disabled voters  
22 who have an issue. I know that may not be relevant towards an  
23 ultimate liability issue, but because we are in a preliminary  
24 affirmative injunction standard, I would invite the Court to  
25 look at that issue.

1 THE COURT: Well, I got nothing from the defendants on  
2 the subject.

3 MR. LAWSON: That's correct. We have nothing to offer  
4 as far as we have -- I mean, we could put a witness on, but  
5 we've had no real issues with any disabled voters in voting in  
6 Thornapple.

7 THE COURT: Well, and that actually is part of the  
8 government's submission. The response from the Town was  
9 nobody -- no disabled voter asked for anything, and so we're  
10 aware of no problems with any disabled voters. And so that  
11 actually came through the government's submission because it  
12 submitted the response from the elections supervisor in  
13 Thornapple, but let me touch on that.

14 Mr. Dellheim, so apparently Thornapple doesn't think it has  
15 any disabled voters.

16 MR. DELLHEIM: With due respect to Mr. Lawson, the  
17 position -- that argument is irrelevant under HAVA. I believe  
18 there's evidence in the legislative history that some  
19 disabled -- some voters with disabilities feel self-conscious  
20 asking for help. Moreover, as has often been said regarding  
21 disabled voters or people with disabilities, it's the one  
22 minority group any of us can become a part of today. So the  
23 fact that the Town is unaware of a voter with disabilities who  
24 may want or need to use an accessible machine is not a defense  
25 to HAVA's requirement that the Town provide an accessible voting



1 machine.

2 THE COURT: Two follow-up questions:

3 One, in your initial correspondence with the Court, I  
4 believe you reported to the Town that you had received reports  
5 or the United States had received reports of disabled voters not  
6 having an accessible machine.

7 What's the basis for that suggestion?

8 MR. DELLHEIM: The basis for that suggestion is the  
9 report we received, which we followed up on. The voter that we  
10 learned about was not, as it turned out, in fact, a voter with  
11 disabilities. So we did not allege that in our complaint.

12 THE COURT: And I'm basically sympathetic to your  
13 position about the harm from failing to comply with HAVA, but in  
14 a preliminary injunction context, despite the kind of harm that  
15 comes from the failure to comply with the law in the first  
16 instance, it matters whether this is really a critical,  
17 hot-button issue that's pressing right now that there are voters  
18 who are being disenfranchised by the failure to comply with  
19 HAVA. It's a factor that I would consider.

20 So at this point I don't have any evidence that anybody  
21 really has had their franchise burdened by the failure to have  
22 these machines.

23 MR. DELLHEIM: Your Honor, I would respond by saying,  
24 number one, that the Town of Thornapple may not know, in fact,  
25 every voter who may have a disability or may find the burden of

1 filling out a ballot to be eased by an accessible machine.

2 Moreover, we understand, and this is a different  
3 jurisdiction, but also a defendant before this court in the Town  
4 of Lawrence in the April federal election, Lawrence withheld its  
5 accessible machine. It restored it in the August election, and  
6 we understand that eight voters there used it. I, frankly,  
7 don't think it a relevant consideration for the Town to  
8 determine who's disabled and who is not. The law is very clear  
9 that these machines have to be available for anybody who needs  
10 it, particularly voters with disabilities, and that can  
11 happen -- a voter with a disability can appear at any time.  
12 People can have hand surgery. People -- there are any number of  
13 real-world, practical factors that can influence whether someone  
14 is -- needs to vote on an accessible machine. I, frankly, don't  
15 believe it is the Town of Thornapple -- I don't believe it's  
16 their prerogative to determine who is disabled, who is not, who  
17 should be able to use a machine, and who shouldn't.

18 I would also argue, Your Honor, that, if I understood  
19 Mr. Lawson's argument, that, you know, if, in fact, they are  
20 considered to be subject to HAVA, that they could comply with it  
21 by coming up with a non -- with some kind of voting system that  
22 does not involve electronics. I think it's very clear in  
23 subsection (a) (1) (3), the one entitled *Accessibility for*  
24 *Individuals With Disabilities*, and subsection (B) is the  
25 provision that really addresses what jurisdictions like

1 Thornapple, who at least use or want to use paper ballots, how  
2 they satisfy the accessibility requirement. And they can  
3 satisfy it by having at least one direct-recording electronic  
4 voting system, and that's -- it's like an ATM. It's a  
5 touch-screen system.

6 THE COURT: And they have -- that's what they have now?

7 MR. DELLHEIM: I believe that's -- no.

8 THE COURT: That is not what they have now?

9 MR. DELLHEIM: My colleague is correct. It is not a  
10 DRE. It's a different kind of ballot-marking device.

11 THE COURT: But it is one that's already been  
12 determined to --

13 MR. DELLHEIM: Yes.

14 THE COURT: -- meet the HAVA requirements for  
15 accessibility.

16 MR. DELLHEIM: Yes, sir. And --

17 THE COURT: So, in fact, that is an "other voting  
18 system equipped for individuals with disabilities."

19 MR. DELLHEIM: Yes, that's correct. And these voting  
20 systems are not only certified by the State of Wisconsin, and,  
21 again, I'm not going to speak to Wisconsin law, but they're also  
22 certified by the federal Election Assistance Commission, and if  
23 Your Honor would look at (a) (1) (C), there's a requirement that  
24 the other voting system equipped for individuals with  
25 disabilities at each polling place, if purchased with HAVA

1 money, with federal money, that they have to meet the voting  
2 systems standards for disability access, and those are  
3 electronic voting systems.

4 THE COURT: All right. Mr. Lawson, go ahead.

5 MR. LAWSON: Yes. I think the Court understands, and I  
6 just want to make it clear, when we're talking about the  
7 presence or not of disabled voters, we're strictly limiting that  
8 to the preliminary injunction issue. I think the Court  
9 understands that. I understand the government's position as to  
10 ultimate liability.

11 But I would point on that very last point where -- just the  
12 conversation about what the systems look like, if you look at  
13 (a) (3) (B), I concede that the government correctly read the  
14 first part of (3) (B), but there is an all-important remaining  
15 passage. It goes for -- (3) (A), "Accessibility for individuals  
16 with disabilities," and then, "The voting system shall," and  
17 then (B), "satisfy the requirement of subparagraph (A) through  
18 the use of at least one direct electronic voting system," yes,  
19 "or," and this is very important, "other voting system equipped  
20 for individuals with disabilities at each voting place." That's  
21 the other voting system. And other voting system, we're going  
22 to that definition of "voting system" here.

23 And so that becomes a pretty -- it can become a very  
24 intense factual inquiry as to what is an alternative voting  
25 system. I don't think it has to be electronic at all. If it



1 MR. MCLEOD: Your Honor, it's a financial burden. The  
2 precise amount we could get the details on.

3 THE COURT: And who is -- just for the record, who is  
4 the person you consulted with?

5 MR. MCLEOD: Suzanne Pinnow, who is the treasurer of  
6 the Town. She was subpoenaed by the government to testify, and  
7 we had intended to ask her some questions related to a number of  
8 these issues as well.

9 THE COURT: I'm open to receiving her testimony, if you  
10 want to put her on.

11 MR. MCLEOD: Okay.

12 THE COURT: Mr. Dellheim.

13 MR. DELLHEIM: I have no objection if that's the  
14 Court's desire. I would like the opportunity to respond to  
15 something that Mr. Lawson said at the appropriate moment.

16 THE COURT: Now is as good a time as any. Go ahead.

17 MR. DELLHEIM: Thank you, Your Honor.

18 Paper, pencil, and a lockbox is -- violates HAVA. It  
19 violates the "voting system" definition. It violates --

20 THE COURT: Be clear about this. It violates HAVA --

21 MR. DELLHEIM: Well, let me speak specifically on the  
22 issue we're talking about, which is accessibility.

23 THE COURT: Yes.

24 MR. DELLHEIM: Subsection (a)(1)(3), as Mr. Lawson  
25 pointed out, requires that every voting system used in the

1 federal election has to be accessible for individuals with  
2 disabilities in a manner that provides --

3 THE COURT: Oh, I understand that. I don't think a  
4 paper ballot with a pencil going into a locked box meets the  
5 accessibility requirements by a mile.

6 MR. DELLHEIM: Okay. I believe I heard Mr. Lawson  
7 arguing that, and I just wanted to be sure that the Court was  
8 clear --

9 THE COURT: Yeah. No, I'm not persuaded by that at  
10 all.

11 MR. DELLHEIM: -- that that is not a permissible remedy  
12 in this case.

13 MR. LAWSON: To clarify, I wasn't saying  
14 (unintelligible). I was simply saying it doesn't have to be --  
15 I heard the government -- maybe I misheard, but I heard the  
16 government when they were talking that through the use of at  
17 least one direct-recording electronic voting system and paused  
18 and did not continue with "or other voting system." All I was  
19 driving at is there may be another system that is not a  
20 direct --

21 THE COURT: I understand the parties' positions, yes.  
22 That other voting system has to be an accessible system --

23 MR. DELLHEIM: That's right.

24 THE COURT: -- and, in fact, the Town of Thornapple  
25 does not use the direct-recording electronic voting system. It

1 has another system that has already been certified as an  
2 accessible one. There are yet probably others that might  
3 qualify as accessible, but none of those have been conceived or  
4 presented to the Court.

5 MR. DELLHEIM: That is correct, Your Honor.

6 THE COURT: Okay.

7 MR. DELLHEIM: I have one other -- and I do appreciate  
8 the Court's patience. With respect to the PI, it is our  
9 position that the defendants have waived their arguments  
10 regarding the balance of harms and, in fact, all of the PI  
11 elements except perhaps the one they have brought in through the  
12 motion to dismiss.

13 THE COURT: Yes. I understand the government's  
14 position.

15 Okay. Mr. McLeod, just preview for me what is it that you  
16 would like the witness to address?

17 MR. MCLEOD: Principally, Your Honor, the issues  
18 related to the irreparable harm prong of a preliminary  
19 injunction, and if there's any ambiguity or uncertainty as to  
20 the proper construction of the statutory language here, the  
21 Court should place some significant emphasis on the balance of  
22 harms, the irreparable harm, and our position is that there have  
23 been no facts actually included in the proposed findings of fact  
24 that the government has submitted, so we didn't have anything to  
25 respond to. Our argument is they failed to satisfy that burden.



1           They subpoenaed Suzanne Pinnow to testify on we don't know  
2           what issues in particular, but we have -- would like to ask  
3           Mrs. Pinnow to address issues related to the history of disabled  
4           voters in the Town, her experience of 25 years conducting  
5           elections in the Town, and that all goes to the irreparable harm  
6           prong. We're not rebutting any fact that the government has  
7           offered because they've offered no facts on the irreparable harm  
8           prong. Their position is if they don't have the appropriate  
9           machine, then there's potentially --

10           THE COURT: I think I understand that.

11           MR. MCLEOD: Right.

12           THE COURT: So let's have her -- I understand we're  
13           talking about the balance of harms and the irreparable harm  
14           issues.

15           All right. Let's have Ms. Pinnow come on up.

16           MR. MCLEOD: Okay.

17           **SUZANNE PINNOW, DEFENDANTS' WITNESS, SWORN**

18           THE COURT: All right. Mr. McLeod, I'll have you  
19           start, and I'll give the government a chance for some cross.  
20           Go ahead.

21           MR. MCLEOD: Thank you, Your Honor.

22           DIRECT EXAMINATION

23           BY MR. MCLEOD:

24           Q       And it's still morning, so good morning, Mrs. Pinnow.

25           A       Morning.

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1 Q Could you state your full name for the record, please.

2 A Suzanne E. Pinnow.

3 Q And would you tell the Court what your role is with the  
4 Town of Thornapple.

5 A I am the treasurer, but I am also a deputy clerk and chief  
6 election inspector.

7 Q And how long have you been involved in the administration  
8 of elections within the Town of Thornapple?

9 A About 25 years, 10 of it being the chief election  
10 inspector.

11 Q And do you know what the population of the Town is?

12 A About 711.

13 Q And do you know the approximate number of registered voters  
14 in the Town?

15 A I think at the last election it was 424.

16 Q And where's the Town's polling place located?

17 A At our town hall on County Highway E.

18 Q And are you generally familiar with the state rules that  
19 apply to ensuring access for disabled voters?

20 A Yes.

21 Q In the past, have there been disabled voters who cast their  
22 ballots in person at the town hall?

23 A Yes.

24 Q And in a given year or in a given election, approximately  
25 how many disabled voters cast ballots at the town hall in

1 person?

2 A Zero to one.

3 Q And can you describe some of your experiences with disabled  
4 voters that you are aware of over the last several years?

5 A Okay. I had one blind lady that came in. Her daughter  
6 brought her in, and her daughter assisted her with voting.

7 I had another gentleman who had recently had a stroke. His  
8 wife brought him in. He was quite combative with his wife, and  
9 they weren't agreeing on things, just the nature of the stroke,  
10 and so she asked if I would help him.

11 So I took him off to the side in a spot that we have  
12 designated for handicapped voting, and I talked with him and  
13 worked with him. He told me who he wanted to vote for. I read  
14 it to -- the ballot to him. He told me who he wanted to vote  
15 for. I asked him to please put his pencil, if he could, on the  
16 spot that he wanted to vote. He couldn't physically mark it  
17 very well himself. I asked if he minded if I put my hand on his  
18 hand and helped him vote. Then I read who he voted for to make  
19 sure it was who he wanted to vote for, and then I announced that  
20 I was folding his ballot, and I put it in the ballot box. At  
21 that time his wife came to me nearly crying that I helped him,  
22 and he was not combative, and he gave me a hug, as well as she  
23 did.

24 I also had another person that does curbside voting, and  
25 there's a whole long process that goes along with the curbside



1 Q Ms. Pinnow, I handed you the declaration of Brian  
2 Remlinger, which was a filing in this case.

3 And do you need a copy of that?

4 MR. DELLHEIM: Thank you.

5 BY MR. MCLEOD:

6 Q And I want you to turn to what is Exhibit 2, an attachment  
7 to the Remlinger declaration, and let me know when you found  
8 Exhibit 2.

9 A I've got it.

10 Q And this is a letter addressed to you, Suzanne Pinnow,  
11 dated May 7th from the U.S. Department of Justice, Civil Rights  
12 Division, correct?

13 A Yes.

14 Q And do you recall having seen this letter before today?

15 A Yes.

16 Q And I would like you to take a look at the second sentence  
17 of the first paragraph, and I'll just read it for you. It says,  
18 "We have also received reports that some voters with  
19 disabilities in the Town of Thornapple requested to use an  
20 accessible voting machine but were not provided with that  
21 opportunity during the April 2, 2024, election for federal  
22 office."

23 Do you see that?

24 A I do.

25 Q Are you aware of any such reports?

1 A Absolutely not.

2 Q Have any such reports ever been provided to you?

3 A Never.

4 Q Do you have any reason to believe that that statement in  
5 the letter to you on May 7th is true?

6 A Do I have any reason to believe it? No.

7 Q I want to ask you about absentee voting. And you're  
8 familiar with absentee ballots, correct?

9 A Yes.

10 Q And do some voters in the Town request and vote by absentee  
11 ballot?

12 A Yes.

13 Q And do you know if some of those voters who vote absentee  
14 are disabled voters?

15 A They are.

16 Q And do you know if a voter who requests an absentee ballot  
17 must provide a reason for voting absentee?

18 A They do not need to supply a reason, no, but there is an  
19 "indefinitely confined" section that they do mark on their  
20 absentee ballot request, and so I presume that indefinitely  
21 confined would be they would be disabled.

22 Q Okay. And you may not have the specific statutory section,  
23 but that's Section 6.86(2)(a) of the Wisconsin Statutes that  
24 addresses indefinitely confined voters? Are you familiar with  
25 that generally --

1 A Generally, yes.

2 Q And what that provision allows is for a voter who is  
3 indefinitely confined to automatically receive an absentee  
4 ballot at each election?

5 A Yes.

6 Q And there are indefinitely confined absentee voters in the  
7 Town?

8 A Yes.

9 Q And do you know approximately how many there are?

10 A I would say around six, maybe eight.

11 MR. MCLEOD: I don't have any other questions at this  
12 time, Judge.

13 THE COURT: All right.

14 MS. OSWALD: No questions, Your Honor.

15 THE COURT: No questions? I have a couple.

16 THE WITNESS: Okay.

17 THE COURT: What does it take to get the voting machine  
18 that you have up and running?

19 THE WITNESS: We have to have the -- there's cartridges  
20 that go in it. We have to have that programmed. Then we do a  
21 PreLAT public test, which takes manpower to do that as well.

22 THE COURT: And what is that? PreLAP? You said  
23 PreLAP?

24 THE WITNESS: L-A-T, PreLAT. It's just when we get the  
25 cartridges programmed, when we get them, we have to do a test of

1 it to make sure the spelling on the ballot is correct, make sure  
2 everything is running kosher, as it should.

3 THE COURT: Okay. So financially what is that going to  
4 cost you?

5 THE WITNESS: I would say upwards of between 500 and  
6 \$1,000.

7 THE COURT: All right. And how long is that going to  
8 take?

9 THE WITNESS: How long would it take?

10 THE COURT: Yeah. To go through those steps.

11 THE WITNESS: I don't know how long it takes to program  
12 them. The county takes care of that.

13 THE COURT: Okay. And when you say "program," you've  
14 got to put the ballot stuff in there? They're being programmed  
15 for that election, to put the candidates, that type of thing?

16 THE WITNESS: Right. The --

17 THE COURT: That's kind of my assumption, but I want to  
18 make sure I'm not making incorrect assumptions.

19 THE WITNESS: Okay. The cartridges are programmed by  
20 an outside source and -- with all the ballot information, all  
21 the technical stuff for an election, and then the PreLAT test is  
22 simply to check to make sure, like I said, spelling and order on  
23 the ballot of the people, they're in the right places on the  
24 office, and then there's also a public test that follows that  
25 that we do that same test, but we can invite the public to

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1 witness it.

2 THE COURT: Okay. All right. And describe the voting  
3 process that you use now. What do the ballots look like? Do  
4 you just, like, run them off on a mimeo or --

5 THE WITNESS: No.

6 THE COURT: -- what are they -- how are they done?

7 THE WITNESS: They're supplied by the county.

8 THE COURT: Okay.

9 THE WITNESS: Because, like he said, all the county has  
10 the same voting machines, and so the county supplies us --  
11 charges us for them, but we get them from them.

12 You want to know the whole system that we use?

13 THE COURT: Yeah, yeah.

14 THE WITNESS: You come in. You register. You get your  
15 ballot, go to the voting booth, mark your circles, and you walk  
16 over and you put it into a ballot box.

17 THE COURT: Okay. And what does the ballot box look  
18 like?

19 THE WITNESS: It's just a wooden box with a slot on the  
20 top. It is -- does have a lock on it. It also has a  
21 tamperproof tag on it that's numbered, and I keep track of those  
22 numbers if they're taken off and when they're --

23 THE COURT: So if somebody --

24 THE WITNESS: -- put back on.

25 THE COURT: If somebody opened it or broke into it,

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1 you'd see the seal was broken and --

2 THE WITNESS: Right.

3 THE COURT: Okay. All right. So the ballots, you said  
4 you fill in the circles. So this is the same type of ballot  
5 that would be used at other municipalities where they tabulate  
6 them by machine; is that right?

7 THE WITNESS: Right.

8 THE COURT: Okay. Okay. One question about your  
9 letter response to the inquiry that you had received. You said  
10 that you followed the United States Constitution, Wisconsin  
11 Constitution. You listed a bunch of things, but you didn't  
12 mention federal statutes, and so I wondered if that was just an  
13 oversight because you listed a bunch -- do you know what I'm  
14 talking about?

15 THE WITNESS: I'm not sure, but it probably --

16 THE COURT: I think if you turn --

17 THE WITNESS: -- was just an oversight.

18 THE COURT: -- that exhibit a few times, a few pages --

19 THE WITNESS: Okay.

20 THE COURT: -- you'll see your response to the letter  
21 that you were just talking about.

22 THE WITNESS: Do you know what exhibit it was?

23 THE COURT: I think it's Exhibit 3.

24 THE WITNESS: Okay. All right.

25 THE COURT: Is that your letter?

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1 THE WITNESS: Yes.

2 THE COURT: And you wrote that one?

3 THE WITNESS: Yes.

4 THE COURT: Okay. And so in the second paragraph,  
5 that's where you list all the things that you followed, and  
6 there's quite a lot of them, but federal statute wasn't one of  
7 them.

8 THE WITNESS: It probably was just an oversight.

9 THE COURT: Okay. So you're not saying, like, we're --  
10 you're not refusing to follow federal law.

11 THE WITNESS: Absolutely not.

12 THE COURT: Okay. All right. Very good. That's all I  
13 have. Go ahead.

14 THE WITNESS: Can I say something?

15 THE COURT: By all means.

16 THE WITNESS: You asked about our voting system --

17 THE COURT: Yeah.

18 THE WITNESS: -- if someone were to come into the  
19 facility that is handicapped.

20 THE COURT: Uh-huh.

21 THE WITNESS: We are set up with a system to help them.  
22 They go through the same process as everyone else. We have a  
23 separate area for them to sit. It's private. It's wheelchair  
24 accessible. If they need help and they ask, I'm trained to do  
25 that. I'm a person of integrity. I do not blab how people

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1 vote. But we accommodate them. As I said, I go out to the  
2 curbside when people need it, or the gentleman with the stroke,  
3 I accommodated him. I would never turn anybody away from voting  
4 ever. I accommodate them, as I should, and I always have, and  
5 that's how we do it is we have -- we have a system in place. It  
6 doesn't include the electronic, but it is a system.

7 THE COURT: Okay. Thank you.

8 THE WITNESS: Uh-huh.

9 THE COURT: Before you jump off the witness stand --

10 THE WITNESS: Yes.

11 THE COURT: -- whenever I ask questions, I always give  
12 the parties a chance to follow up in case I kicked over any  
13 hornets' nests by my questions.

14 So anything for the government?

15 MR. DELLHEIM: No, Your Honor.

16 THE COURT: Mr. McLeod, anything else?

17 MR. MCLEOD: No, Your Honor. Thank you.

18 THE COURT: Thank you, Ms. Pinnow.

19 THE WITNESS: Thank you.

20 (Witness excused at 12:08 p.m.)

21 THE COURT: All right. Let's find out if there's  
22 anything else the parties want to tell me.

23 So I'll start with the government. Mr. Dellheim.

24 MR. DELLHEIM: Thank you, Your Honor.

25 I would just like to respond briefly to some of the

1 testimony we just heard. You know, we commend Ms. Pinnow, and  
2 all election officials are doing their best to help voters cast  
3 their ballots and make sure that they're counted, but her  
4 testimony, I think, shows the reason why HAVA exists. While she  
5 is -- and we have absolutely no reason to doubt her sincerity --  
6 she's eager to help voters. She talked about assisting a voter  
7 whose, I think, daughter needed assistance. She spoke about the  
8 voter who had a mental disability and she read him the ballot  
9 and guided his hand. She mentioned curbside voting. She said  
10 that she was very willing to give voters help, and that's  
11 commendable.

12 But the problem, and this goes to irreparable harm, the  
13 problem is that HAVA requires that the accessibility of the  
14 voting system be provided in the same -- with the same  
15 opportunity for access and participation, including privacy and  
16 independence, as for other voters. And while we appreciate that  
17 Ms. Pinnow does not blab, that is not private, it is not  
18 independent, and it is why HAVA requires that voting systems be  
19 accessible, so that voters who would otherwise need some help  
20 don't have to ask for it. They can just go up and vote.

21 THE COURT: Very good. Thank you.

22 Mr. Lawson?

23 MR. LAWSON: Your Honor, I think from the questions  
24 from the Court, I think you understand the issues and the  
25 respective positions of the parties. In some type of summing

1 up, I would just say that I think this issue really does --

2 (Video feed disconnects.)

3 THE COURT: It looks like we lost the connection there.

4 THE CLERK: I'll dial it back in.

5 Could we take a break? I'll need to get Scott back up  
6 here.

7 THE COURT: All right. We're going to stand in recess  
8 for five minutes or so while we reconnect the call.

9 (Recess at 12:10 p.m. until 12:13 p.m.)

10 THE COURT: All right. Mr. Lawson, we were able to put  
11 some more dimes in the phone there, so you can go ahead.

12 MR. LAWSON: I'll be very quick. I appreciate y'all's  
13 patience with coming back. I'm not sure it's needed, but I  
14 think the Court perfectly understands the issues here based on  
15 all the comments and questions.

16 So, again, our main argument on the reasonable likelihood  
17 of success on the merits is that it can't be reached. Whatever  
18 the requirements of HAVA for disabled access, it's all  
19 downstream. All of it is contingent on the definition of  
20 "voting systems." I think the Court is fully understanding our  
21 position on that.

22 Then, again, as to the irreparable harm issue, I think  
23 Ms. Pinnow's testimony has given some color to the immediate  
24 need on the preliminary injunction issue, whatever the ultimate  
25 liability may be on a judgment issue as to disabled access. So

1 that's all. I think the Court fully understands where we're  
2 coming from on this.

3 THE COURT: All right. Very good. Thank you, both.

4 I'm prepared to rule. I will say this, that the -- the  
5 centerpiece here really is the statutory interpretation about  
6 "voting system" in HAVA, and I think the defendants here are  
7 advancing an argument that's a restrictive definition that only  
8 applies to some methods of voting. I just don't think that is a  
9 very strong argument. I think the government's position on the  
10 merits is almost certainly the correct one, and I would say that  
11 there's practically no chance that the correct interpretation is  
12 the one advanced by the defendants.

13 I think that the Help America Vote Act, if it had meant to  
14 exempt from the -- accessibility to the disabled provisions only  
15 applied to certain more advanced mechanical, computerized  
16 systems, it would have said that very clearly. There's clearly  
17 a reference to paper ballot voting systems, and so there's an  
18 acknowledgment that that's true by the defendants but that --  
19 the argument that, well, that only makes it a voting system  
20 unless it's then tabulated by a machine. But the critical issue  
21 here for accessibility is the marking of the ballot, and I think  
22 HAVA just applies to whatever voting system a municipality uses.  
23 And I just am not at all persuaded by the defendants' argument  
24 about the scope of HAVA. It applies, and everybody has to  
25 comply with it.

1           The Town of Thornapple is entitled to opt out of the use of  
2           voting machines under Wisconsin law, so they're correct about  
3           that, but as the instructions from the Wisconsin Elections  
4           Commission make clear to municipalities, you can opt out of  
5           using the voting machines, but you still have to comply with  
6           HAVA. And at least with regard to the systems that are  
7           certified now, that means you can't completely untether yourself  
8           from voting machinery because the accessible systems are ones  
9           that are what we would think of as essentially an electronic  
10          machine here. And so, as the Wisconsin election system says,  
11          you can do your elections how you want, but you still have to  
12          comply with HAVA, and that really means you have to have at  
13          least one accessible voting machine in your polling place.

14          So as to the rest of the injunction analysis, I do find  
15          irreparable harm here because, as the examples that Ms. Pinnow  
16          described, the assistance that they provide to disabled  
17          voters -- and I appreciate her goodwill, and I find her a very  
18          credible witness -- but her examples really demonstrate that  
19          that method of assisting disabled voters doesn't provide the  
20          independence and privacy that HAVA is meant to deliver. And so  
21          no voter has asked to use that electronic system, but that  
22          doesn't mean that their rights aren't burdened. If the  
23          requirements of HAVA are complied with and notice is provided  
24          that there are accessible voting machines, people might use  
25          them.



1           It's clear that Thornapple has disabled voters that need  
2 assistance in voting. It's provided graciously, but it just  
3 simply doesn't achieve the goals that HAVA is intended to  
4 provide, specifically independence and privacy. And, again, I  
5 appreciate her goodwill, but the fact that a disabled voter has  
6 to tell Ms. Pinnow who he's going to vote for and have her  
7 actually execute the ballot I think really illustrates quite  
8 vividly how telling the election official who you're going to  
9 vote for is not private. So I do find that there is irreparable  
10 harm here. Voters are deprived of the opportunity to vote  
11 independently and privately.

12           As far as the balance of harms here goes, I think it's  
13 clear the United States has a very compelling interest in  
14 ensuring the compliance with HAVA and also the reason behind it,  
15 which is to protect the interests and the rights of disabled  
16 voters. The burden on the other side I think is really quite  
17 slight. There is some cost, perhaps 500 to \$1,000, in having  
18 the voting machine programmed, but they have the machine. It is  
19 available. They have to go through what is only the ordinary  
20 process that every polling place or the vast majority of polling  
21 places go through in the state, and that is to have their --  
22 even little towns have to have their voting machines programmed.  
23 So I don't really think that is a very substantial burden set  
24 against the compelling interest that the United States has in  
25 ensuring compliance with HAVA, so I really don't see much of a

1       burden.

2               There's talk about whether there's some alternative voting  
3       system. I think there are certainly other voting systems other  
4       than the one that the Town has accessible and available to it  
5       right now. There might be others, but I have no idea what those  
6       are. I'm confident that it wouldn't meet the requirements of  
7       HAVA to just have a bigger print on the ballot, something like  
8       that. Some sort of, you know, large-type edition of the ballot  
9       isn't going to do the job. And so I'm just not aware that  
10      there's any alternative other than the Dominion machine that the  
11      Town already has that can be deployed before the election, and  
12      so I don't see any alternative other than the machine that they  
13      already have at this point.

14             So I think the injunction really is well supported. I  
15      think there's not enough time, given that there has to be some  
16      steps in preparation to get that machine up and running for the  
17      next election, I don't see any alternative other than entering  
18      the injunction and requiring that the Town of Thornapple use  
19      that machine for this election. That's the only way that HAVA  
20      can be enforced and applied during this election, so I'm going  
21      to enter the injunction.

22             I have the form injunction from the government. I think  
23      it's generally acceptable, but I'm going to give the parties  
24      some time to negotiate over the exact form of the injunction.  
25      The one provision that I'm not sure is specifically required is

1 that the Town passed the -- I guess an ordinance that it  
2 basically disconnected from voting machines. I don't know that  
3 they have to rescind that. They obviously can't enforce it.  
4 They may be able to modify it because they're -- the Town is  
5 entitled to go to a paper ballots and hand-counted voting  
6 system. That's not a problem. Doing so without providing the  
7 method required under HAVA is the problem. So I don't know that  
8 they really have to rescind that law, but it can't be quite as  
9 absolute as they intended.

10 So I'm going to give the Town and the United States time to  
11 negotiate over the form of the injunction, and I'd like to --  
12 I'd like to see that by the end of the day Tuesday. So all the  
13 deadlines are going to be compressed here. There is no need to  
14 do any further briefing on the motion to dismiss. I'm denying  
15 the motion to dismiss. It's predicated on the statutory  
16 interpretation. I've given my reasons for that. I'm not going  
17 to take the time to write an opinion on it. The Court of  
18 Appeals, if they were to review it, would review it de novo  
19 anyway, and so my further contributions on the subject are  
20 really unwarranted. There's no need to put the government or  
21 the Town through further briefing on the issue.

22 The last question I have is what's left to do in this case,  
23 and so I'll take input from the parties on what we should do to  
24 bring the case to final resolution. So what's left?

25 MR. DELLHEIM: There is a motion -- a joint motion for

1 entry of a consent decree with the Town of Lawrence.

2 THE COURT: And I was waiting -- the only thing I was  
3 waiting on that was to hear from the State, and the State does  
4 not object to that, so I will enter the consent judgment with  
5 regard to the Town of Lawrence. I will enter that.

6 MR. DELLHEIM: Thank you, Your Honor.

7 THE COURT: That leaves the ultimate merits undecided  
8 here in this case. I've denied the motion to dismiss, but what  
9 else do we have to do to bring this to a conclusion? We've kind  
10 of bought ourselves some peace, I think, with the entry of the  
11 injunction, but that leaves the case unresolved.

12 MR. DELLHEIM: Yes, sir. It may be appropriate, if I  
13 may suggest, that the parties may submit summary judgment  
14 motions to bring this case to the softest landing possible.

15 THE COURT: All right. Mr. Lawson, Mr. McLeod?

16 MR. LAWSON: Something like that seems reasonable. I  
17 don't know if the Court wants to -- with the PI, I don't know if  
18 that needs to be on an expedited basis. Maybe we -- the court  
19 case will go a different path before we file motions for summary  
20 judgment, but I don't know if that's the issue for the Court as  
21 far as the timing of it. We might be able to narrow down issues  
22 between now and the Tuesday deadline the Court wanted for the  
23 scope of the order.

24 THE COURT: All right. Let's do this -- rather than  
25 saying, like, yeah, file motions for summary judgment, let's do

1 this: By Tuesday I want the injunction to be either negotiated,  
2 and if you can't agree to the form of the injunction, just  
3 highlight the points of disagreement in a succinct filing, and  
4 then I'll just rule on that. I doubt I'll need to hear further  
5 from you after that. I'll just rule. I'll enter the  
6 injunction. And then I will give you another ten days after  
7 that to make a joint submission to me on how we finally resolve  
8 the case, and if it's by cross-motions for summary judgment, a  
9 stipulation, whatever, however you want to do it, just tell me  
10 how you want to do it and propose a schedule for it. I would  
11 like to make it as efficient as possible because it seems to me  
12 that the core issues have substantially been fully heard here,  
13 and so I don't want to put you through an arduous summary  
14 judgment process, and, more to the point, I don't want to have  
15 to decide a big motion for summary judgment if we can resolve  
16 the case expeditiously.

17 So Tuesday you'll give me the form of the injunction. Ten  
18 days later you'll make a joint submission to me on how you think  
19 we should resolve the case with the schedule, and then I'll take  
20 action as appropriate. Maybe I'll have a scheduling conference  
21 or something like that, something like that.

22 MR. LAWSON: Sounds fine.

23 THE COURT: I think that covers everything that we need  
24 to cover today, but let's make sure I didn't skip anything.

25 Anything else for the government?

1 MR. DELLHEIM: Nothing else, Your Honor.

2 THE COURT: And for the defendant?

3 MR. LAWSON: No, Your Honor.

4 THE COURT: Thank you, all.

5 MR. DELLHEIM: Thank you.

6 MR. LAWSON: Thank you.

7 THE CLERK: All rise. This Honorable Court is in  
8 recess.

9 (Proceedings concluded at 12:26 p.m.)

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1 I, JENNIFER L. DOBBRATZ, Certified Realtime and Merit  
2 Reporter in and for the State of Wisconsin, certify that the  
3 foregoing is a true and accurate record of the proceedings held  
4 on the 27th day of September, 2024, before the Honorable  
5 James D. Peterson, Chief U.S. District Judge for the Western  
6 District of Wisconsin, in my presence and reduced to writing in  
7 accordance with my stenographic notes made at said time and  
8 place.

9 Dated this 30th day of September, 2024.

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\_\_\_\_\_/s/ Jennifer L. Dobbratz\_\_\_\_\_  
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Federal Court Reporter

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voting system, 52 U.S.C. § 21081(b), and therefore must comply with the requirements of Section 301.

Accordingly, it is ORDERED as follows:

(1) Thornapple Defendants, their employees, agents, and successors in office, and all persons acting in concert with them, shall ensure that during the November 5, 2024, federal general election, every polling place in Thornapple has available a voting system equipped for individuals with disabilities as required by Section 301 of HAVA, 52 U.S.C. § 21081(a)(3), and that that voting system is, for the full period that the polling place is required to be open under Wisconsin State law, plugged into a functioning electrical outlet, turned on, and readily visible and accessible to voters;

(2) Thornapple Defendants shall prominently post signage in every Thornapple polling place alerting voters that an accessible voting system is available for use;

(3) Thornapple Defendants shall ensure that all appropriate election officers and officials in Thornapple receive appropriate training on how to implement HAVA-compliant accessible voting systems, update any relevant materials within their control, monitor compliance with Section 301 requirements, and take any other steps necessary to ensure the availability of at least one required accessible voting system in every polling place in Thornapple;

(4) Thornapple Defendants shall permit representatives of the United States Department of Justice to enter any Thornapple polling place for the sole purpose of monitoring compliance with this Court's remedial order during the November 5, 2024, federal general election;

(5) Thornapple Defendants shall certify to this Court by filing, no later than close of

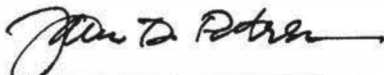
business on October 31, 2024, a statement that the HAVA-compliant voting system Thornapple will use for the November 5, 2024 election has undergone all pre-election testing required by state law, *see* Wisc. Stat. § 5.84(1), and is otherwise fully prepared for use on Election Day;

(6) Thornapple Defendants shall not enforce the Town Board of Thornapple's June 13, 2023, decision to "stop use of the electronic voting machine" to the extent it is inconsistent with this Order;

(7) Thornapple Defendants shall cooperate fully with the State of Wisconsin and any State agency's efforts to enforce federal law regarding the provision of accessible voting systems for use in elections; and

(8) The Court retains jurisdiction of this action to enter such further relief as may be necessary for the effectuation of the terms of this Order, and for the entry of such permanent relief as appropriate to ensure Thornapple Defendants' future HAVA compliance.

ORDERED this 4TH day of OCTOBER, 2024.

  
HON. JAMES P. PETERSON  
UNITED STATES DISTRICT JUDGE