

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

THE SANDUSKY COUNTY
DEMOCRATIC PARTY, et. al.

Plaintiffs,

v.

J. KENNETH BLACKWELL,

Defendant.

) Case No. 3:04CV7582

) Hon. James G. Carr

) **REPLY MEMORANDUM IN SUPPORT OF
PLAINTIFFS' APPLICATION FOR
PRELIMINARY INJUNCTION**

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At this Court's direction, Plaintiffs hereby submit this brief in response to Defendant Blackwell's October 7, 2004 Motion to Dismiss and Brief in Opposition to Plaintiffs' Motion for Declaratory and Injunctive Relief, and in response to Intervenors' October 4, 2004 Motion to Dismiss and Memorandum Contra Plaintiffs' Motion for Preliminary Injunction.

INTRODUCTION

Secretary of State Blackwell's response to Plaintiffs' Application for Preliminary Injunction is, quite frankly, astonishing. Notwithstanding that Secretary Blackwell repeatedly has acknowledged that Ohio must take action to bring itself into compliance with the provisional-voting requirements of the Help America Vote Act of 2002 ("HAVA") – in the years since the Act's passage and as recently as last month, when his office assured the public that rules implementing HAVA would be forthcoming – he now argues that Directive 2004-33 presents no issue because it merely reaffirms existing Ohio law. Because that is the very same state law that the Secretary has recognized does not conform with HAVA, Defendant Blackwell has conceded that Directive 2004-33 does not comply with federal law.

Equally astonishing is Secretary Blackwell's argument that even if state law directly conflicts with HAVA's demands, that is of no moment, because state law controls. The Secretary's position turns the Supremacy Clause on its head and of course finds no support in HAVA. It must therefore be rejected.

Setting aside their flawed arguments on the merits, Defendant and Intervenors are left with repeated and exaggerated claims that if they are forced to implement HAVA, chaos and voting irregularities will abound in Ohio. These claims have no basis in fact and are mere excuses for the Secretary's refusal to do the work necessary to implement HAVA. For example, Secretary Blackwell and Intervenors repeatedly and erroneously suggest that, if Plaintiffs prevail here, individuals will be permitted to vote in *local* elections in precincts in which they do not reside; this is not the case, however, as HAVA applies only to *federal* elections. The simple fact is that chaos has not ensued in the many other States that have responded with action, not recalcitrance, in making the modifications to election administration that HAVA demands. There is still time for Ohio's voters to receive the protections guaranteed by HAVA. Because the Secretary has refused to perform his duty to conform Ohio's election rules to federal law, this Court must now order him to do so.

I. SECRETARY BLACKWELL HAS CONCEDED THAT DIRECTIVE 2004-33 DOES NOT COMPLY WITH HAVA.

Remarkably, Defendant Blackwell and Intervenors have painted Directive 2004-33 as nothing more than a reaffirmation of existing state law. Indeed, they appear to take pride in claiming that the Directive has changed *nothing*. See, e.g., Blackwell Br. at 7-8 ("Directive 2004-33 does little more than reiterate the existing law and long-standing procedure on provisional voting as set forth in the Ohio Revised Code."); Mot. to Intervene at 2 (stating that "the Directive focuses almost exclusively on state laws and the traditional method of

provisional balloting adopted in Ohio”). Yet Defendant Blackwell elsewhere has recognized, as he must, that existing state law does *not* comply with HAVA’s provisional-voting mandates. By claiming that Directive 2004-33 merely restates preexisting state law, Defendant Blackwell and Intervenors have *conceded* Plaintiffs’ primary claim: that Ohio law and Directive 2004-33 do not comply with HAVA.

As Plaintiffs explained in their initial Memorandum, prior to HAVA’s enactment in 2002, Ohio law allowed only limited provisional balloting for voters who had moved and thus did not appear on the voter rolls for their new place of residence. *See* Pls.’ PI Mem. at 10-11. Because its enactment predated HAVA, Ohio provisional-voting law – including the Secretary of State’s previous directives – understandably did not include all of the provisional-voting protections that HAVA later required. *See* Ohio Rev. Code § 3503.16. For example, in Ohio: (1) provisional voting is limited to voters who have moved (whereas HAVA requires States to allow provisional voting by individuals who do not appear on the voter rolls for *any* reason, including administrative errors by state or local election officials); and (2) provisional ballots for a federal election will not be provided to an individual voter in the “wrong” precinct, even if the voter is registered in the proper county and is eligible to vote in that federal election (in contrast to HAVA, which requires such votes to be counted). *See id.*

Because existing Ohio law and the Secretary of State’s previous guidance did not conform with HAVA’s provisional-voting protections, Defendant Blackwell expressly conceded in Ohio’s June 2003 HAVA State Plan that changes would need to be made. He promised to make those changes, recognizing that “provisional voting [is] a condition for receiving federal funding” under HAVA. State Plan at 34, 69 Fed. Reg. 14879, 14895 (2004).

For example, he acknowledged that Ohio provisional voting law “protects those who changed their residence,” but asked “what about those who, for example, were incorrectly purged from the voter registration list?” *Id.* at 33. Defendant Blackwell claimed to “embrac[e] the concept” of “accommodat[ing] every voter who, for whatever reason, does not appear on the certified list of registered voters in any jurisdiction of the state.” *Id.* at 34. Recognizing the need to bring Ohio into compliance with HAVA, Defendant Blackwell expressly promised to “continue to refine and expand the scope of provisional voting in the state to comply with the spirit, intent and letter of [HAVA],” because, according to him, implementing these provisional voting protections is “an essential component of election reform in Ohio.” *Id.*¹

Despite his explicit recognition that Ohio election procedures needed to change in order to comply with HAVA, and despite his explicit assurances in the State Plan that he would undertake to bring Ohio law into compliance, Defendant Blackwell did nothing to fulfill these promises in the subsequent months. No new directives were issued; no guidance was given to county boards of election; no information was posted on the Secretary’s website. Even Ohio’s Official 2004 Voter Information Guide told voters nothing about their provisional voting rights under HAVA. *See Ohio Secretary of State, Official Voter Information Guide, available at*

<http://www.sos.state.oh.us/sos/pubAffairs/elections/voteGuide.pdf>. It is thus unsurprising that county election officials have been “unhappy with the lack of direction from the Ohio secretary of state’s office,” in particular concerning “when to count provisional ballots.” *Campaign Notes*, Columbus Dispatch, Sept. 15, 2004. Finally, in late August 2004, Secretary

¹ Indeed, as recently as September 2004, a spokesman for Defendant Blackwell was quoted as saying, “It’s ridiculous to penalize a voter for election official error.” J. Becker & D. Keating, *Problems Abound in Election System*, Wash. Post, Sept. 5, 2004 (quoting Blackwell spokesperson Carlo Loparo).

Blackwell promised to issue a directive implementing HAVA's provisional-voting mandates. *See, e.g.,* G. Korte, *Election Offices Await Orders*, Cincinnati Enquirer, Aug. 30, 2004 (discussing Secretary Blackwell's plan to "issue a new directive" in order to "promulgat[e] new rules that he said would be in line with federal election reforms that followed the 2000 elections"); S. Hiaasen, *Blackwell Backs Down on Ballot Ruling*, Cleveland Plain Dealer, Aug. 28, 2004 (discussing Secretary Blackwell's intention to issue "revised orders" to comply with HAVA and Ohio's own State Plan). Directive 2004-33 was then issued on September 16, 2004.

Given Defendant Blackwell's assurances in the State Plan and in recent news reports that he would issue a directive implementing HAVA's provisional-voting requirements, it is ironic – at best – that Defendant Blackwell now claims that Directive 2004-33 is beyond criticism because it merely reaffirms preexisting State law. This is particularly so, given that Defendant Blackwell previously had indicated that this very directive would finally *revise* relevant state election procedures in order to implement HAVA's provisional-voting requirements.

Most important, however, is the consequence of Defendant Blackwell's position in this lawsuit that Directive 2004-33 does nothing to alter existing state election practice. Because he has previously recognized, in the State Plan and elsewhere, that preexisting State law does not conform to HAVA, his claim that Directive 2004-33 has done nothing but reiterate preexisting law is a *concession* that Directive 2004-33 does not comply with HAVA.

For their part, Intervenors also have conceded – perhaps even more explicitly – that Directive 2004-33 fails to conform with HAVA, which Intervenors concede contains "broader" protections than preexisting Ohio law. Mot. to Intervene at 3. According to

Intervenors, “Ohio law applies to a registered voter who *moves or changes name*.” *Id.* (emphasis in the original). In contrast, HAVA “applies *regardless of the reason* why the person’s name does not appear on the voter registration rolls.” *Id.* (emphasis in the original). As Intervenors bluntly concede, “nothing in state law or, to the best of Intervenors’ knowledge, any other directive, has ever addressed or defined *HAVA* provisional balloting.” *Id.* at 4 (emphasis in the original). **That is exactly Plaintiffs’ point:** Ohio law does not conform to HAVA, the Secretary of State has done nothing to fix the situation (despite promises to do so), and this Court therefore must grant relief.

To the extent that Secretary Blackwell suggests that the State Plan (or, even more strangely, HAVA itself), without more, has somehow implemented HAVA’s provisional-voting requirements, *see* Blackwell Br. at 7, he is flat wrong. As the above description of the State Plan makes clear, that document did not ***implement*** HAVA, but merely recognized that state procedures would need to be altered in the future to comply with HAVA. The State Plan expressly contemplated further action by Secretary Blackwell – by directive or otherwise – to implement HAVA’s provisional-voting framework. He has taken no such action. And he concedes that he has taken no such action. Absent such action, neither the State Plan nor HAVA itself provides Ohio’s election officials any guidance or authority for implementing HAVA. Relatedly, Secretary Blackwell makes the outrageous suggestion that Plaintiffs should have resorted to the “legislative process,” *id.* at 8, to ensure that state law complies with HAVA. But it is the State’s – not Plaintiffs’ – burden to bring state law into compliance with HAVA, by legislation or otherwise. In any event, such compliance could have – and

should have – been achieved by a proper and timely directive issued by Secretary Blackwell, which the Secretary repeatedly promised to do, but simply never did.²

Because Defendant Blackwell has conceded that Directive 2004-33 does not comply with HAVA, Plaintiffs must prevail.

II. DIRECTIVE 2004-33 VIOLATES HAVA.

As discussed, Secretary Blackwell’s concession that state law has never been conformed to HAVA – by Directive 2004-33 or otherwise – is dispositive of this case.

Below, Plaintiffs briefly reiterate how each challenged aspect of the Directive violates HAVA and demonstrate their entitlement to the requested relief.

A. Directive 2004-33 Violates HAVA by Limiting Provisional Voting to Individuals Who Have Moved from One Ohio Precinct to Another.

As Plaintiffs have explained, *see* Pls.’ PI Mem. at 14-16, by limiting provisional balloting to voters who have moved, Ohio law and Directive 2004-33 violate HAVA. Indeed, Intervenors have made this point in no uncertain terms: Ohio law applies to a voter “who *moves or changes name*,” whereas HAVA is “broader” and “applies *regardless of the reason* why the person’s name does not appear on the voter registration rolls.” Mot. to Intervene at 3

² Defendant Blackwell also repeats the meritless assertion that Plaintiffs’ request for relief is somehow untimely. But as the above description of the Secretary’s course of conduct makes obvious, it is the Secretary’s actions that are untimely, not Plaintiffs’ lawsuit. Plaintiffs – along with everyone else in Ohio – have long awaited the Secretary’s issuance of the promised directive implementing HAVA. Defendant Blackwell, however, did not act until less than seven weeks before Election Day. As soon as Directive 2004-33 was issued and it became clear that Secretary Blackwell had abdicated his responsibility to conform Ohio’s system to HAVA, Plaintiffs filed this lawsuit.

Even more irrelevant and far-fetched is Secretary Blackwell’s “conspiracy theory” concerning the genesis of the instant lawsuit. *See* Blackwell Br. at 2-8. Plaintiffs bring this suit to vindicate the federal rights of Ohio voters. Given the substantiality of these rights, and given that courts are the proper fora for enforcing such rights (particularly where, as here, the responsible state officials refuse to do so), the Secretary’s “leverage the judicial system to achieve their political ends” argument, *id.* at 4, falls flat.

(emphasis in the original). For his part, Secretary Blackwell's 2003 HAVA State Plan recognized both that provisional voting in Ohio was limited to movers, and that this aspect of state law would have to be modified to allow provisional voting for "every voter who, *for whatever reason*, does not appear on the certified list of registered voters." State Plan at 34, 69 Fed. Reg. at 14895 (emphasis added).

Defendant Blackwell offers absolutely *no* justification for Directive 2004-33's limitation of provisional voting to those who have moved. Indeed, Secretary Blackwell has completely failed to respond to Plaintiffs' claim in this regard, thereby effectively conceding that Ohio law (including the challenged Directive) does not conform to HAVA. It is true that the Secretary does, at an extreme level of generality, assert that "*both* Directive 2004-33 *and* the Ohio Revised Code are consistent with HAVA's provisional voting section," Blackwell Br. at 19, and that he has "complied with the requirements of HAVA as Ohio's chief election official," *id.* at 24. Yet he makes absolutely no argument that Ohio law or any directive of his (including Directive 2004-33) permits provisional voting for non-movers. And he cannot, because, as both he and the Intervenors concede, state election procedures have not been modified to comply with HAVA. Because Directive 2004-33 limits provisional voting to individuals who have recently moved, and because Secretary Blackwell has provided no defense to this charge, Plaintiffs must prevail on this challenge.

Although the Secretary offers no defense on the merits of the "movers only" rule, Intervenors offer a half-baked defense that a provision of the Ohio Code unrelated to HAVA or provisional voting allegedly allows non-movers to vote provisionally. According to Intervenors, because Ohio Rev. Code § 3503.30 states that a county elections board "*may correct all errors occurring in the registration of electors*," Intervenors' Mot. to Dismiss at

21 (emphasis in the original), non-movers have an avenue for having their votes counted. However, the cited provision is completely inapposite and does not satisfy HAVA, for two reasons. *First*, Section 3503.30 indicates that the available procedures for correcting registration are extremely limited and apply only where an elector “has caused himself to be registered in a precinct which was not his place of residence.” Ohio Rev. Code § 3503.30. Absent a voter’s improper registration in another precinct, Section 3503.30 simply does not apply. The provision thus would not protect, as HAVA mandates, a voter whose name is erroneously purged from his precinct’s registration list. *Second*, Section 3503.30 does not provide for immediate provisional voting at the polling place – as required by HAVA – but rather sets forth a complicated process that a voter must follow to “correct his registration form.” *Id.* Thus, even if this provision could be read to apply to all voters whose names are omitted from the election rolls (which, by its terms, it cannot), it does not provide for the immediate Election Day provisional voting that HAVA requires.

Given that state law plainly allows provisional voting *only* for voters who have moved, the only conceivable defense that Secretary Blackwell raises to his patent failure to conform Directive 2004-33 to HAVA is the absurd claim that *Ohio* law must control over *federal* law. Indeed, the Secretary derides Plaintiffs for “suggest[ing] that Ohio’s laws are or should be preempted by HAVA.” *Id.* But that is the entire point of the Supremacy Clause of the United States Constitution: To the extent that state law fails to conform with or conflicts with federal law, federal law must prevail. *See* U.S. CONST. art. VI, cl. 2 (the “Laws of the United States . . . shall be the supreme Law of the Land,” the “Laws of any State to the Contrary notwithstanding”); *see also, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000); *Wisconsin Pub. Interv. v. Mortier*, 501 U.S. 597, 604 (1991); Pls.’ PI

Mem. at 20-21 (citing cases). Thus, because Directive 2004-33 (and preexisting Ohio law) limits provisional voting to movers, in conflict with HAVA's broader protection of voters left off the election rolls for whatever reason, federal law trumps and the Secretary must conduct the November election in compliance with HAVA.³

B. Directive 2004-33 Violates HAVA by Denying Provisional Ballots to Voters Who Attempt to Vote at the "Wrong" Polling Place.

As Plaintiffs demonstrated in their opening brief, HAVA requires Ohio election officials and poll workers to allow individuals who appear on Election Day in the county of their residence, albeit at the "wrong" polling place, to cast provisional ballots and to have those ballots counted. *See* Pls.' PI Mem. at 16-21. Defendant's and Intervenors' arguments to the contrary are unavailing, as they would practically render HAVA's provisional-voting protections a nullity.

1. Defendant and Intervenors err in suggesting that state law trumps all of HAVA's provisions.

Defendant and Intervenors suggest that HAVA defers entirely to state law in all respects. Were this true, HAVA would be a seventy-odd page statute that says and does absolutely nothing. But as Plaintiffs have shown, HAVA imposes numerous affirmative obligations on the States in the context of provisional balloting in federal elections.⁴

³ For their part, Intervenors rely on HAVA's references to "state law" – rather than the Secretary's novel theory of state-federal preemption – in claiming that Plaintiffs' challenges pertain to issues that HAVA left to state discretion. *See, e.g.*, Intervenors' Mot. to Dismiss at 12. But if HAVA's references to "State law" were enough to permit Ohio to restrict provisional voting to movers (or to any particular subset of voters), HAVA could be rendered meaningless. HAVA plainly states that provisional voting is required if a voter's name "does not appear on the official list of eligible voters for the polling place" – regardless of reason. 42 U.S.C. § 15482(a). Any references to "State law" elsewhere in HAVA certainly cannot be read to allow a State to shrink the class of voters that HAVA plainly covers and thereby deny whole classes of voters their federally protected rights.

⁴ In their repeated insinuations that Plaintiffs seek to establish voting rights by individuals not qualified to vote in a particular *local* election, Defendant and Intervenors are stubbornly turning a blind eye to HAVA's clear language (and to Plaintiffs' actual claims). HAVA's

As noted, HAVA requires States to ensure that individuals entitled to cast a provisional ballot “in an election for Federal office,” 42 U.S.C. § 15482(a), are issued such a ballot, and that qualified provisional ballots cast will be counted. First, an election official must notify the individual of his option to cast a provisional ballot. *See id.* § 15482(a)(1). Second, the individual executes a written affirmation that he is registered to vote in that “jurisdiction,” and that he is eligible to vote in that federal election; upon doing so, he receives a provisional ballot. *See id.* at § 15482(a)(2). Third, an election official transmits the information in that affirmation, typically written on the provisional-ballot envelope, to the appropriate state or local election official. *See id.* at § 15482(a)(3). Fourth, if the State official later determines that the individual is “eligible under State law to vote,” the provisional ballot must be counted “in accordance with State law.” *See id.* at § 15482(a)(4). Fifth and finally, the State must inform the individual that he will later be able to ascertain whether his vote was counted, and if not, why it was rejected. *See id.* at §§ 15482(a)(5) and 15482(B).

At the fulcrum of Defendant’s fundamental misunderstanding of HAVA is the term “jurisdiction.” Although HAVA does not define the term “jurisdiction,” in Ohio it clearly refers to a county. In this, HAVA takes up the definition of “jurisdiction” that Congress established in federal election law a decade earlier by the National Voter Registration Act of 1993 (the “NVRA”). *See* 42 U.S.C. § 15545(a)(4).⁵ The NVRA expressly defines the term provisional-balloting requirements apply only in elections for *federal* office. *See* 42 U.S.C. § 15482(a). HAVA does not mandate provisional balloting in, for example, elections for state offices, local offices, school levies, bond issues, ballot initiatives, or any other kind of nonfederal election. In keeping with this clear language, nowhere have Plaintiffs suggested that HAVA requires provisional voting in *local* elections.

⁵ As discussed, *see infra* Part II.B.2, HAVA is clear on its face, and the Court therefore should not rely on legislative history to interpret the statute. Nonetheless, Plaintiffs note that the statute's legislative history fully supports the view that the term "jurisdiction" in HAVA was meant to mirror the term "registrar's jurisdiction" in the NVRA. *See* 148 Cong. Rec. S2535

“registrar’s jurisdiction” as the geographic reach of the unit of government that maintains the voter-registration rolls.⁶ *See* 42 U.S.C. § 1973gg-6(j). In Ohio, voter-registration rolls are maintained by *county* boards of elections. *See* Ohio Rev. Code §§ 3501.11(T), (U).

“Precincts” are not jurisdictional units in Ohio; they are merely smaller units into which counties are divided for the convenience of county boards of elections. *See id.* at § 3501.18(A) (“The board of elections may divide a political subdivision *within its jurisdiction* into precincts, establish, define, divide, rearrange, and combine the several election precincts *within its jurisdiction.*”) (emphasis added).

That HAVA is to be harmonized with the NVRA was expressly dictated by Congress, *see* 42 U.S.C. § 15545(a)(4), and follows from accepted modes of statutory interpretation. *See* Pls.’ PI Mem. at 17 and n. 4 (citing cases). Furthermore, construing HAVA to require the issuance of a provisional ballot to any qualified voter registered in the county, even though he has appeared at the “wrong” polling place within that county, makes sense. Ohio’s voter rolls are maintained on a countywide basis; election officials, therefore, can easily verify the eligibility of a voter who casts a ballot at any polling place in the county. And precinct lines are largely irrelevant to the *federal* elections to which HAVA’s provisional-balloting requirements apply.⁷ *See* 42 U.S.C. § 15482(a). Thus, for HAVA’s purposes in Ohio,

(daily ed. Apr. 11, 2002) (statement of Sen. Dodd) (“It is our intent that the word ‘jurisdiction’ . . . has the same meaning as the term ‘registrar’s jurisdiction’ in section 8(j) of the National Voter Registration Act.”).

⁶ Intervenors’ discussion of the NVRA, *see* Mot. to Intervene at 16-17, is beside the point. As noted, the NVRA expressly defines the term “jurisdiction.” Whether the NVRA defers to state law regarding procedures for registering voters by local departments of motor vehicles is irrelevant here.

⁷ *See supra* note 4.

“jurisdiction” means “county,” and HAVA thus plainly gives Ohio voters the right to cast a provisional ballot anywhere in the county of their residence.⁸

Defendant and Intervenors seize on HAVA’s two references to “State law,” *see id.* § 15482(a)(4), to argue that States enjoy unbridled discretion to implement HAVA’s mandate. *See Blackwell Br.* at 17; Intervenors’ Mot. to Dismiss at 13.⁹ First, Defendant and Intervenors rely on HAVA’s statement that, as a prerequisite to counting provisional ballots, state officials must determine that an individual is “eligible under State law to vote.” Defendant and Intervenors, however, take an unduly expansive view of this provision, a view that would render HAVA essentially meaningless.

At bottom, their argument seems to rest on the premise that if an individual attempts to cast a provisional ballot in a time, place, or manner that is different from the provisional-ballot procedure set forth in state law, then he is not “eligible” under state law to vote for HAVA purposes. But that reading would give States limitless power simply to write themselves out of HAVA’s provisional-voting requirements. HAVA’s plain text avoids that result by speaking of “eligibility to vote *in [that federal] election*,” 42 U.S.C. § 15482(a)

⁸ It is clear that Plaintiffs’ position here is fully consistent with *Bell v. Marinko*, 367 F.3d 588 (6th Cir. 2004) – a case cited by neither Defendant nor Intervenors. The relevant question in *Bell* was whether voters were bona fide residents of a precinct for purposes of voter registration. Plaintiffs do not contend that someone who does not reside in a precinct should be registered as if he were, nor even that his vote should count as if he were. Rather, HAVA gives a properly registered voter the right to cast a federal provisional ballot in his own county, regardless of his precinct assignment. If he is indeed an eligible voter, his votes for President, Vice President, and U.S. Senator should not be rejected, and his vote for Representative in Congress should be rejected only if he cast a ballot in a congressional district where he does not in fact reside. In any event, *Bell* does not disturb the express definition of “jurisdiction” found in the NVRA and applicable to HAVA.

⁹ At the outset, it is worth noting that both of those references relate only to Plaintiffs’ claims regarding the refusal to *count* “wrong precinct” provisional ballots. HAVA’s provisions establishing the rights to *cast* a provisional ballot and to be notified of that right contain no “in accordance with State law” language. *See* 42 U.S.C. § 15482(a)(1), (2).

(emphasis added), rather than eligibility to vote at any particular polling place. Although HAVA allows state law to determine basic eligibility requirements – e.g., age, residency in the State for 30 days, and registration for 30 days preceding an election, *see* OHIO CONST. art. V, § 1; Ohio Rev. Code § 3503.01 – the only *geographic* restriction permitted by HAVA is the requirement that voters be registered “in the *jurisdiction* in which the individual desires to vote.” 42 U.S.C. §§ 15482(a), (a)(2)(A) (emphasis added).

Second, Defendant and Intervenors contend that Ohio’s refusal to count provisional ballots cast in the “wrong” precinct is authorized by HAVA’s directive that provisional ballots be counted “in accordance with State law.” 42 U.S.C. § 15482(a)(4). Defendant and Intervenors read that language as broadly authorizing States to refuse to submit to the ordinary vote-counting process any class of provisional ballots a State’s legislature wishes to define. That reading is inconsistent with HAVA’s plain text.

HAVA provides that once an individual’s eligibility to vote in the specific federal election has been verified, “the individual’s provisional ballot shall be counted as a vote in that election in accordance with State law.” 42 U.S.C. § 15482(a)(4). Although this provision is plainly mandatory in its terms, Defendant and Intervenors would read the phrase “in accordance with State law” as rendering the decision to count provisional ballots entirely optional with the State. If a State believes it not worth the trouble to count provisional ballots (or some classes of provisional ballots), all it must do is pass a law providing that such ballots shall not be counted. That is an implausible reading. HAVA does not say that a provisional ballot shall be counted “*if State law permits.*” Rather, the statute sets forth a clear and mandatory federal-law duty (“the individual’s provisional ballot shall be counted as a vote in that election”) and then leaves it to state law to determine the precise means by which the

duty is to be accomplished (“in accordance with State law”). States remain free to apply to provisional ballots the same rules governing the counting of votes that apply to all other ballots – for example, how to interpret a dimpled or hanging “chad” on a punch-card ballot. *See, e.g.*, Ohio Rev. Code § 3505.27 (“Counting of votes”). But a state law that categorically refuses to submit provisional ballots for which voter eligibility has been verified to the ordinary vote-counting process is a state law that flatly contradicts the federal requirement that any such ballot “shall be counted as a vote in that election.” *Id.* § 15482(a)(4).

In the end, Defendant and Intervenors cannot escape the plain text of HAVA, which unequivocally requires States like Ohio to collect and count provisional ballots from voters who are “eligible to vote in an election for Federal office,” *id.* § 15482(a); *see also id.* § 15482(a)(2)(B) (discussing voters’ “eligib[ility] to vote in that election”), and who are registered “in the jurisdiction,” *id.* §§ 15482(a), 15482(a)(2)(A) – in Ohio, the county – in which they seek to vote. Any contrary reading would eviscerate the core purposes and clear language of the statute.

2. HAVA’s ambiguous legislative history does not contradict the statute’s plain text.

In defending Directive 2004-33, Defendant and Intervenors rely heavily on their reading of HAVA’s legislative history. *See* Blackwell Br. at 20-23; Intervenors’ Mot. to Dismiss at 13-15. But because Directive 2004-33 contravenes HAVA’s plain text, it is inappropriate to look to legislative history. *See, e.g., Saylor v. United States*, 315 F.3d 664, 670 (6th Cir. 2003) (finding “no reason to engage in an examination of [a federal statute’s] legislative history or policy preferences when the plain text of the Act clearly limits its scope”).

In any event, Defendant's one-sided account of HAVA's floor debates is a classic example of using "legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment). Defendant and Intervenors point to seven passages in the floor debates. Not one of the seven states that HAVA permits election officials to refuse to count provisional ballots cast at the "wrong" polling place in the "right" county. Three do nothing more than restate, in general terms, the statutory language providing that state law governs voter eligibility and the vote-counting process.¹⁰ Those passages do not even purport to speak to the steps prescribed by HAVA before those state-law questions come into play, *see supra* Part II.B.1, and obviously cannot overcome the statute's plain text. Two others simply assert that States may refuse to count provisional ballots cast in the wrong "jurisdiction."¹¹ But neither a polling place nor a precinct is a "jurisdiction," *see id.*; Pls.' PI Mot. at 17-18, so those statements are irrelevant to the issue here.

Only two of the statements that Defendant cites actually support Directive 2004-33; however, given HAVA's plain text and other statements in the legislative history, neither

¹⁰ *See* 148 Cong. Rec. S10510 (daily ed. Oct. 16, 2002) (statement of Sen. Dodd) ("Whether a provisional ballot is counted or not depends solely on State law, and the conferees clarified this by adding language in section 302(a)(4) stating that a voter's eligibility to vote is determined under state law."); *id.* (statement of Sen. Dodd) ("Nothing in this compromise usurps the state or local election official's sole authority to make the final determination with respect to whether or not an applicant is duly registered, whether the voter can cast a regular vote, or whether that vote is duly counted."); *id.* at S10508 (statement of Sen. Dodd) ("Once a provisional ballot is cast, it is within the sole authority of the State or local election official to determine whether or not that ballot should be counted, according to State law.").

¹¹ *See* 148 Cong. Rec. S10491 (daily ed. Oct. 16, 2002) (statement of Sen. Bond) ("It is not the intent of the authors to overturn State laws regarding registration or State laws regarding the jurisdiction in which a ballot must be cast and counted."); *id.* (statement of Sen. Bond) ("If it is determined that the voter is registered in a neighboring jurisdiction and the state law requires the voter to vote in the jurisdiction in which he is registered, ... the vote will not count.").

suffices to mend the Directive's fundamental flaw – namely, its refusal to allow voters to cast provisional ballots at the “wrong” polling place in the “right” county. Those floor statements – both from the same member of the then-minority political party in the Senate – assert that poll workers may “direct the voter to the correct polling place,” 148 Cong. Rec. S10491 (daily ed. Oct. 16, 2002) (statement of Sen. Bond), and refuse “to allow voters to vote from any place other than the polling site where the voter is registered,” *id.* at S10493 (statement of Sen. Bond). These statements conflict with HAVA's text. *See* 42 U.S.C. § 15545(a) (“If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, ***such individual shall be permitted to cast a provisional ballot . . .***”) (emphasis added). They also conflict with other statements in the legislative history. Senator Dodd – HAVA's chief sponsor – stated that the statute's provisional-balloting section would “ensure[] that ***never again*** can a person who appears at the polls in order to vote and desires to vote [be] turned away, ***for any reason.***” 148 Cong. Rec. S10508 (daily ed. Oct. 16, 2002) (emphasis added). And Senator Durbin, one of the bill's conferees, applauded the statute for guaranteeing the rights of voters “to cast a provisional ballot ***at their chosen polling place*** if the voter's name isn't on the list of eligible voters.” *Id.* at S10496 (emphasis added). Because the legislative history on this point is conflicting, it cannot possibly prevail over HAVA's plain text.¹²

¹² In addition to their fruitless arguments based on legislative history, Intervenors implausibly contend that Directive 2004-33 is supported by a “Best Practices Toolkit,” recently posted by the Election Assistance Commission on its website. *See* Intervenors' Mot. to Dismiss at 17-18. Even were there any truth to the assertion that the “toolkit” “provide[s] implicit support” for Intervenors' position, *see id.* at 18, “implicit support” from what is at most a set of Internet guidelines propounded by an entity with no rulemaking authority whatsoever, *see* 42 U.S.C. § 15329, is hardly enough to overcome the plain text of a congressional mandate.

3. Defendant's arguments as to the "impracticality" of Plaintiffs' proposed remedy are flatly contradicted by the examples of other States and the plans of one of Ohio's most populous counties.

Recent developments in election administration, both in Ohio and elsewhere, belie any suggestion that it would be prohibitively difficult for Defendant to issue and implement a new directive requiring the casting and counting of provisional ballots by voters who appear in the "right" county but in the "wrong" polling place.

Just to take one example, the State of New Mexico has managed to implement HAVA to the letter. Specifically, New Mexico's law contemplates that a ballot cast at the "wrong" polling place will be counted for the federal election as long as the provisional voter is an otherwise eligible voter residing in the county where he voted. *See* N.M. Stat. Ann. §§ 1-5-12, 1-12-8, 1-12-25.4. New Mexico recently used these provisional-voting procedures during its 2004 primary elections. Under that State's law, an individual may cast a provisional ballot in his county of residence even if his name does not appear on the voter list at the particular polling place where he arrives to vote. N.M. Stat. Ann. §§ 1-5-12, 1-12-8. Such provisional ballots are to be counted in the following circumstances: "If the voter is a registered voter in the county, but has voted on a provisional paper ballot at a polling place other than the voter's designated polling place, the county canvassing board shall ensure that only those votes for the positions or measures for which the voter was eligible to vote are counted." *Id.* at § 1-12-25.4(F). In a recent memorandum, New Mexico's Secretary of State summarized the law:

Only those votes the voter is legally qualified to cast are counted. If a voter has appeared in the wrong precinct and voted, they may not be qualified to vote on some of the "down ballot" races. For example, perhaps the voter is in the wrong legislative or county commission district. If that is the case, all other votes (federal offices, statewide offices, judicial, and other larger districted offices) are legally cast and counted, but the voters' choices for offices they are not qualified to vote for are not counted.

New Mexico Secretary of State, *Recent Changes To New Mexico Election Law*, available at <http://web.state.nm.us/Election/04Primary/ElectionChanges.htm>. To ensure compliance with the new election laws, the Secretary also promulgated a regulation enumerating the procedures that precinct boards and county clerks must follow regarding provisional ballots. See N.M. Admin. Code tit. 1, § 10.22 (effective Aug. 15, 2003).

In view of the ease with which HAVA's provisional-balloting requirements have been met in States such as New Mexico, it is not surprising that one of Ohio's most populous counties – Cuyahoga County – has announced plans to provide provisional ballots to Cuyahoga voters who appear on Election Day at the “wrong” polling place within the County.¹³ See Scott Hiaasen & Robert L. Smith, *Cuyahoga County Officials to Defy Blackwell's Provisional-Ballot Order*, THE PLAIN DEALER, Oct. 5, 2004, available at <http://www.cleveland.com/politics/index.ssf?/base/cuyahoga/1096968623232520>. These plans clearly undercut Defendant's self-serving assertions of impracticality.

4. Because HAVA requires Ohio to provide a provisional ballot to a would-be voter in the county of his residence – but his “wrong” polling place – Directive 2004-33 also is flawed in its lack of a notification requirement and in its insistence on pre-approval.

Because HAVA requires Ohio to provide for the casting and counting of provisional ballots by individuals who appear in the “right” county but at the “wrong” polling place, Directive 2004-33 is flawed in two further respects. *First*, HAVA requires poll workers to notify such a voter of his right to cast a provisional ballot at the initial polling place where he appears. See 42 U.S.C. § 15482(a)(1). Directive 2004-33, in blatant disregard of the federal law, instructs poll workers to turn such a voter away. *Second*, HAVA mandates that a voter

¹³ The County subsequently put these plans on hold pending the outcome of this litigation.

may cast a provisional ballot if he is prepared to affirm his qualifications, *see* 42 U.S.C. § 15482(a)(2). Directive 2004-33, in violation of this provision, requires poll workers to confirm the residence of even those few voters covered by its terms before issuing them a provisional ballot. Absent on-the-spot confirmation, no provisional ballot will be provided.

Neither Defendant nor Intervenors has advanced any argument against these two points, independent of their misguided insistence that state law trumps HAVA in all particulars. This is unsurprising, because there is no defense available. Both conclusions flow inevitably from HAVA's clear purpose to allow meaningful provisional voting by individuals appearing in their county of residence, albeit at the "wrong" polling place.

C. Directive 2004-33 Unlawfully Prohibits the Counting of Provisional Ballots Cast by an Individual Who Arrives at the "Proper" Polling Place After First Having Attempted to Vote at Another Precinct.

Directive 2004-33 bars the counting of a provisional ballot unless the county board of elections "confirms that the person ... did not vote *or attempt to vote* in that election using the person's former voting residence address." Directive 2004-33, at 1 (emphasis added). This unwarranted prohibition contravenes HAVA and may result in the invalidation of many properly cast provisional ballots on November 2. For example, this Election Day, a voter who has recently moved from one precinct to another may, understandably, go to his old polling place out of force of habit. Not finding his name on that polling place's list of registered voters, poll workers will turn him away, pursuant to Directive 2004-33 itself, and "advise" him of the location of his "proper" polling place. *Id.* at 2. Ideally, the voter will obediently go to the new polling place and – time permitting – cast a provisional ballot there. But once cast, that ballot will never be counted, because the voter had "attempt[ed] to vote in that election using [his] former voting residence address." *Id.* at 1.

This flaw in Directive 2004-33 is independent of the “wrong-precinct” violation addressed above. Indeed, Ohio law on this point would make absolutely no sense even if HAVA did not oblige the State to amend its provisional-balloting procedures, because the directive both comprehends the situation outlined above, in which poll workers send the recently relocated voter from one polling place to another, and rejects that very situation, by barring the counting of such a voter’s ballot. Defendant and Intervenors have offered no explanation for this absurd internal contradiction, let alone any argument that it passes muster under HAVA. In short, even if the Court determines that there is any merit to Defendant’s position on the “wrong” polling-place question, Directive 2004-33 still cannot stand insofar as it prohibits the counting of a provisional ballot cast by an individual who first attempted to vote at another location.

III. PLAINTIFFS’ RIGHTS ARE ENFORCEABLE UNDER SECTION 1983.

As Plaintiffs established in their previous filings, HAVA’s provisional-voting rights are enforceable under 42 U.S.C. § 1983 because (1) HAVA confers individual rights with respect to provisional voting, and (2) Congress did not intend to foreclose private enforcement of those rights. *See, e.g., Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). *See* Pls.’ PI Mem. at 24-28. Defendant and Intervenors offer nothing to suggest a contrary result.

As an initial matter, Secretary Blackwell and Intervenors blur Plaintiffs’ argument – that they have rights enforceable through Section 1983 – with another, distinct argument that Plaintiffs do *not* make – that HAVA itself creates a private right of action. This distinction is a critical one, because it is much more difficult to establish a private right of action than to establish the existence of a right enforceable through Section 1983. *See Gonzaga*, 536 U.S. at 284 (“Plaintiffs suing under § 1983 do not have the burden of showing an intent to create a

private remedy.”). It is thus understandable that Defendant and Intervenors wish to conflate the inquiries. *See, e.g.*, Blackwell Br. at 13 (citing legislative history concerning HAVA’s failure to create a private right of action); *id.* at 14-15 (claiming that “intent to provide a private right of action within HAVA” is the standard for the Section 1983 enforceability inquiry); Intervenors’ Mot. to Dismiss at 10-11 (claiming that “HAVA Does Not Create A Private Right Of Action”). Whether a private right of action exists under HAVA, however, is irrelevant to the question here – the enforceability of HAVA rights under Section 1983.

On the merits of the two-pronged Section 1983 inquiry, Secretary Blackwell distorts HAVA’s terms to claim that the statute does not provide for individual provisional-voting rights. For example, he makes the audacious claim that HAVA’s provisional-voting sections focus solely on the duties of election officials and “do not say that a ‘person’ or ‘voter’ has a ‘right’ to cast the ballot.” Blackwell Br. at 10. This is simply wrong. Plaintiffs have pointed to numerous ways in which the relevant statutory provision is “phrased in terms of the persons benefited,” *Gonzaga*, 536 U.S. at 284, including, most strikingly, HAVA’s reference to the “*right of an individual* to cast a provisional ballot.” 42 U.S.C. § 15482(b)(2)(E) (emphasis added). That statutory language (unaddressed by Defendant Blackwell), as well as the other language discussed in Plaintiffs’ previous filings, makes clear that HAVA has conferred individual rights. Secretary Blackwell’s misreading of HAVA, as well as his two inconclusive snippets of legislative history, do nothing to rebut Plaintiffs’ clear showing.¹⁴

¹⁴ Like Secretary Blackwell, Intervenors assiduously avoid confronting both the express language in HAVA describing provisional voting as an “individual right,” as well as HAVA’s other individual-voter-centered provisions. *See* Intervenors’ Mot. to Dismiss at 4-6. Given these provisions, which Intervenors decline to address, their claim that HAVA’s provisional-voting mandates are “directed entirely at election officials,” *id.* at 6, is manifestly wrong.

As Secretary Blackwell concedes, once Plaintiffs have established that HAVA creates a private right, such a right “is presumptively enforceable by Section 1983,” and it is Defendant’s burden to rebut that presumption of enforceability by showing that Congress specifically foreclosed private enforcement. Blackwell Br. at 14.¹⁵ Secretary Blackwell cannot meet this burden. He points to no statutory language expressly foreclosing Section 1983 enforcement – because there is none. Thus, he is left to make the meritless claim that HAVA establishes a “comprehensive enforcement scheme that is incompatible with individual enforcement under Section 1983.” *Id.* (citing, *inter alia*, *Wright v. Roanoke Redevel. & Hous. Auth.*, 479 U.S. 418, 423 (1987)). In so doing, Defendant Blackwell relies entirely upon inapposite cases concerning whether a statute establishes a *private right of action*. See Blackwell Br. 14-15. As discussed above, these cases have nothing to do with the Section 1983 enforceability inquiry, and, in particular, Defendant’s burden to show that HAVA’s enforcement scheme is so comprehensive that Section 1983 actions should be foreclosed. Rather, as Plaintiffs explained at length in their previous filings, HAVA does not provide anywhere near a comprehensive enforcement system, but rather merely permits the Attorney General to bring a civil action and authorizes – but does not require – States to adopt an administrative complaint process. See Pls.’ PI Mem. at 26-27. These features of HAVA are insufficient to constitute the “difficult showing,” *Blessing v. Freestone*, 520 U.S. 329, 346 (1997), required to demonstrate that Congress has intended to preclude enforcement. See Pls.’ PI Mem. at 26-28. Accordingly, Section 1983 enforcement is appropriate, not foreclosed.

¹⁵ In contrast, Intervenor’s fail to recognize that they bear the burden to show that Congress has foreclosed judicial enforcement once (as here) an individual right has been shown to exist. Otherwise, their arguments concerning the “comprehensive enforcement scheme” allegedly established by HAVA are the same as Defendant Blackwell’s – and equally meritless.

IV. THIS CASE IS JUSTICIABLE.

For all the reasons discussed in Plaintiffs' previous filings, this case is justiciable, both because Plaintiffs have standing to sue and the issues presented are ripe for decision. Intervenors apparently have conceded justiciability, and Secretary Blackwell hardly contests the point, making only a brief and conclusory claim that Plaintiffs lack standing to sue. *See* Blackwell Br. at 15-16. Though couched as a "standing" claim, Defendant's objection appears to be just a rehash of his meritless Section 1983 argument. In any event, Secretary Blackwell does nothing more than cite the legal standard for standing and state that Plaintiffs fail to meet that standard. Such barebones "argument" effectively concedes Plaintiffs' standing.

CONCLUSION

For these reasons, as well as those described in their previous filings, Plaintiffs respectfully ask this Court to enjoin the enforcement of Directive 2004-33 and to order Defendant to instruct Ohio's county elections boards to comply fully with HAVA's provisional-voting requirements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing was filed electronically on the 11th day of October, 2004 in accordance with the Court's Electronic Filing Guidelines. Notice of this filing will be sent to all parties by operation of the Court's Electronic Filing System. Parties may access this filing through the Court's Filing System.

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