

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

THE SANDUSKY COUNTY)	
DEMOCRATIC PARTY, <u>et al.</u> ,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 3:04CV7582
)	
J.KENNETH BLACKWELL,)	JUDGE CARR
Secretary of State,)	
)	
Defendant.)	

**INTERVENORS' MOTION TO DISMISS AND MEMORANDUM CONTRA
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Now come Intervenor, by and through undersigned counsel, and move the Court pursuant to Fed.R.Civ.P. 12(b)(6) to dismiss the above-referenced case. A memorandum in support is attached hereto.

Respectfully Submitted,

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
I. STATEMENT OF THE ISSUES TO BE DECIDED.....	1
SUMMARY OF THE ARGUMENT	1
II. APPLICABLE LEGAL STANDARDS	2
A. The Federal Rules of Civil Procedure Rule 12(b)(6) Standard.....	2
B. The Federal Rules of Civil Procedure Rule 65 Preliminary Injunction Standard.	3
III. LAW AND ARGUMENT	4
A. The Court Should Dismiss Plaintiffs' Complaint For Failure To State A Claim Upon Which Relief Can Be Granted Because HAVA Does Not Create A Right That Is Enforceable In A § 1983 Action.	4
1. HAVA does not create individual rights.	4
2. HAVA's provision of certain remedies suggests an absence of Congressional intent to create rights enforceable by individuals in § 1983 actions.	7
B. The Court Should Dismiss Plaintiffs' Complaint For Failure To State A Claim Upon Which Relief Can Be Granted Because HAVA Does Not Create A Private Right Of Action.	10
C. The Court Should Deny Plaintiffs Motion For Preliminary Injunction Because Plaintiffs Cannot Establish The Requisite Strong Or Substantial Likelihood Of Success On The Merits Due To The Fact That Directive 2004-33's Requirement For Precinct-Based Voter Eligibility And Vote- Counting Is Clearly Consistent With HAVA's Requirements.	11
1. HAVA's provisional voting requirements reserve to the states issues of voter eligibility and vote counting.	12
2. The legislative history of HAVA supports the statute's language that leaves the determination of voter eligibility and vote counting under HAVA to the states.	13

3.	HAVA is to be read consistently with the NVRA of 1993, and the latter statute authorizes state law to govern questions of voter eligibility and precinct-based voting requirements.	16
4.	The Election Assistance Commission's guidance documents support Ohio Election Law.	17
D.	Plaintiffs Cannot Establish A Strong or Substantial Likelihood Of Success On The Merits Because Ohio Election Law Is Consistent With HAVA Insofar As It Provides For Provisional Voting While Maintaining Ohio Voter Eligibility Requirements.	19
1.	Plaintiffs incorrectly claim that Directive 2004-33 is inconsistent with HAVA's requirements.	19
2.	Ohio law permits the casting of ballots by eligible voters in the precinct in which they reside.	19
3.	Ohio law permits boards of elections to correct mistaken registrations.	21
IV.	CONCLUSION.....	21
	CERTIFICATE OF SERVICE	22

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>31 Foster Children v. Bush</i> , 329 F.3d 1255 (11th Cir. 2003)	4
<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001).....	6, 11
<i>Ass'n. of Cmty. Orgs. for Reform Now v. Edgar</i> , 56 F.3d 791 (7th Cir. 1995).....	14
<i>Ass'n of Cmty. Orgs. for Reform Now v. Miller</i> , 912 F. Supp. 976 (W.D. Mich. 1995).....	16
<i>Blessing v. Freestone</i> , 520 U.S. 329 (1997)	4, 5, 6, 10
<i>California v. Sierra Club</i> , 415 U.S. 287 (1981).....	5
<i>Cannon v. Univ. of Chicago</i> , 441 U.S. 677 (1979).....	5
<i>Chapman v. Houston Welfare Rights Org.</i> , 441 U.S. 600 (1979).....	5
<i>Golden State Transit Corp. v. Los Angeles</i> , 493 U.S. 103 (1989)	5
<i>Golden v. Kelsey-Hayes Co.</i> , 73 F.3d 648, (6th Cir. 1996)	3
<i>Gonzaga University v. Doe</i> , 536 U.S. 273 (2002)	4, 5, 6, 7
<i>Gonzales v. National Bd. of Medical Examiners</i> , 225 F.3d 620 (6th Cir. 2000, cert. denied, 532 U.S. 1038 (2001)	3
<i>In re Delorean Motor Co.</i> , 755 F.2d 1223 (6th Cir. 1985)	3
<i>Karahalios v. Nat'l Fed. of Fed. Employees</i> , 489 U.S. 527 (1989)	11
<i>Mason County Medical Ass'n v. Knebel</i> , 563 F.2d 256 (6th Cir. 1977)	3
<i>Mason v. Missouri</i> , 179 U.S. 328 (1900).....	15
<i>Meador v. Cabinet for Human Resources</i> , 902 F.2d 474 (6th Cir.), cert. denied, 498 U.S. 867 (1990).....	3
<i>Misch v. Community Mutual Ins. Co.</i> , 896 F. Supp. 734 (S.D. Ohio 1994).....	2, 3
<i>Mobil Corp. v. Marathon Oil Co.</i> , 669 F.2d 366 (6th Cir. 1981)	3
<i>Smith v. Robinson</i> , 468 U.S. 992 (1984).....	10
<i>State ex rel McCaffery v. Mason</i> , 55 S.W. 636 (Mo. 1900).....	15

<i>Suter v. Arist M.</i> , 503 U.S. 348 (1992)	6
<i>Thompson v. Thompson</i> , 484 U.S. 174 (1989).....	11
<i>Windsor v. The Tennessean</i> , 719 F.2d 155 (6th Cir. 1983), <i>cert. denied</i> , 469 U.S. 826 (1984)	3
<i>Wright v. Roanoke Redevelopment and Housing Authority</i> , 479 U.S. 418 (1987).....	10
<i>Wyers v. Bannan</i> , 249 F.2d 136 (6th Cir., 1957)	15

Statutes

42 U.S.C. § 1983.....	passim
42 U.S.C. § 15301(c)(1).....	16
42 U.S.C. § 15321.....	17
42 U.S.C. § 15322.....	18
42 U.S.C. § 15381(a)	18
42 U.S.C. § 15381(b)(3)	18
42 U.S.C. § 15481.....	12, 13
42 U.S.C. § 15482(a)	6
42 U.S.C. § 15482(a)(4).....	2, 13
42 U.S.C. § 15483.....	13
42 U.S.C. § 15484.....	13
42 U.S.C. § 15485.....	12, 13
42 U.S.C. § 15511.....	7, 10
42 U.S.C. § 15512.....	10
42 U.S.C. § 15512(a).....	7
42 U.S.C. § 15512(a)(2)(A)	7
42 U.S.C. § 15512(a)(2)(B)	8
42 U.S.C. § 15512(a)(2)(E).....	8
42 U.S.C. § 15512(a)(2)(F).....	8

42 U.S.C. § 15512(a)(2)(H)	8
42 U.S.C. § 15512(a)(2)(I).....	8
42 U.S.C. § 15545.....	16, 17
42 U.S.C. § 1973gg-3(c)(2)(A).....	16
42 U.S.C. § 1973gg-3(c)(2)(B)	16
42 U.S.C. § 1973gg-3(c)(2)(C).....	16
42 U.S.C. § 1973gg-9	11
42 U.S.C. § 5482(a)(1).....	6
42 U.S.C. §15482(a)(2).....	6
42 U.S.C. §15482(a)(3).....	6
42 U.S.C. §15482(a)(5).....	6
42 U.S.C. 15301 et seq.....	1
R.C. 3503.01	2, 12, 20
R.C. 3503.16.....	20
R.C. 3503.16(B)(2)(a)–(d).....	20
R.C. 3503.30.....	21
<u>Rules</u>	
Fed.R.Civ.P. 12(b)(6).....	2
Fed.R.Civ.P. 65	3

I. STATEMENT OF THE ISSUES TO BE DECIDED

Does the Help America Vote Act of 2002 (42 U.S.C. 15301 et seq.) create a private right of action, enforceable in an action brought pursuant to 42 U.S.C. §1983, for a Plaintiff who has failed to follow the exclusive administrative procedures established by the Act for redress of alleged violations of the Act?

Does the Help America Vote Act of 2002 require a state to abandon its statutory system of precinct-based elections in favor of a system that uses counties as the applicable jurisdiction for determining the validity of a vote?

SUMMARY OF THE ARGUMENT

Plaintiffs ask this Court to grant a preliminary and permanent injunction and declare that a Directive issued by the Ohio Secretary of State violates provisions of the Help America Vote Act of 2002 (42 U.S.C. 15301 et seq.) ("HAVA"). As a procedural matter, Plaintiffs' Complaint must be dismissed because Plaintiffs have no cause of action under HAVA. HAVA does not create a private cause of action, and it is axiomatic that, where Congress does not confer individual, federally-protected rights in a particular statute, that statute cannot serve as the basis for a §1983 claim.

Instead of explicitly providing for private lawsuits, HAVA establishes two administrative vehicles for redressing alleged violations. First, the United States Attorney General may bring a federal civil suit against any state for failure to comply with HAVA's provisions. Second, states are required to develop and implement a state-based procedure for redressing HAVA violations. Plaintiffs did not, apparently, avail themselves of either procedure and thus cannot sustain the instant action.

Even if this Court determines that dismissal is not warranted, Plaintiffs fail to present a compelling case upon the merits. Among other things, Plaintiffs argue that HAVA requires states to utilize a county-wide system of casting and counting ballots. Accordingly, Plaintiffs

contend that any voter should be able to go into any polling place in an Ohio county and cast a provisional ballot, which must then be counted.

However, HAVA very clearly requires that a voter must be eligible to vote in the "jurisdiction" in which his vote is cast but does not define the term "jurisdiction." Rather, HAVA specifies that decisions on both voter eligibility and on whether or not a provisional vote should be counted are to be made "in accordance with State law." 42 U.S.C. § 15482(a)(4). In Ohio, state law establishes a precinct-based system. Therefore, Plaintiffs' arguments that HAVA requires county-wide voting are simply misplaced.

Ohio Revised Code §3503.01 sets forth the qualifications of eligible voters in the state and provides, in pertinent part, that: "Every citizen of the United States who is of the age of eighteen years or over and who has been a resident of the state thirty days immediately preceding the election...has the qualifications of an elector and may vote in all elections in the precinct in which the citizen resides." (emphasis added.) Thus, HAVA defers to state law, and state law establishes the applicable jurisdiction as a precinct, not a county.

For the reasons that are set forth more fully below, Intervenors respectfully urge this Court to dismiss the instant action. In the alternative, Intervenors ask this Court to find that Ohio law establishes a precinct-based elections system and that HAVA does not prohibit the State from continuing to utilize that system.

II. APPLICABLE LEGAL STANDARDS

A. The Federal Rules of Civil Procedure Rule 12(b)(6) Standard

As this Court is aware, dismissal under Rule 12(b)(6) is appropriate where a complaint lacks a cognizable claim. *Misch v. Community Mutual Ins. Co.*, 896 F. Supp. 734 (S.D. Ohio 1994). The complaint must be construed in the light most favorable to the plaintiff, and all factual allegations contained in the complaint must be treated as true. *Meador v. Cabinet for*

Human Resources, 902 F.2d 474 (6th Cir.), *cert. denied*, 498 U.S. 867 (1990); *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983), *cert. denied*, 469 U.S. 826 (1984). In practice, "a complaint ... must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Misch v. Community Mutual Ins. Co.*, 896 F. Supp. at 738.

As will be demonstrated below, Plaintiffs have failed to state a cognizable claim because HAVA speaks to election officials, not voters, and thus does not confer upon Plaintiffs the unambiguous individual rights needed to seek redress under 42 U.S.C. § 1983. Further, even if HAVA did create such rights, both the statutory text and the legislative history clearly establish that Congress foreclosed the avenue – a suit by a private litigant to enforce HAVA in federal court – that Plaintiffs seek to pursue.

B. The Federal Rules of Civil Procedure Rule 65 Preliminary Injunction Standard.

It is well established that in order for a preliminary injunction to be issued four criteria must be evaluated: (1) whether the plaintiff has shown a strong or substantial likelihood of success on the merits; (2) whether the plaintiff has shown irreparable injury; (3) whether the issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the preliminary injunction. *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 653 (6th Cir. 1996); *In re Delorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985); *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981); *Mason County Medical Ass'n v. Knebel*, 563 F.2d 256, 261 (6th Cir. 1977). "Although no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal." *Gonzales v. National Bd. of Medical Examiners*, 225 F.3d 620, 625 (6th Cir. 2000, *cert. denied*, 532 U.S. 1038 (2001)).

Here, Plaintiffs cannot establish a likelihood of success on the merits, much less a strong or substantial likelihood of success. HAVA clearly leaves voter eligibility issues to the states, and Ohio law concerning precinct-based voting is entirely consistent with and contemplated by HAVA.

III. LAW AND ARGUMENT

A. The Court Should Dismiss Plaintiffs' Complaint For Failure To State A Claim Upon Which Relief Can Be Granted Because HAVA Does Not Create A Right That Is Enforceable In A § 1983 Action.

Plaintiffs attempt to circumvent HAVA's enforcement scheme by incorporating alleged violations of HAVA into a claim for relief pursuant to 42 U.S.C. §1983. However, because Congress did not create a private right with respect to HAVA, Plaintiffs may not use the Act to support their § 1983 claims.

The United States Supreme Court emphasized that in order to seek redress under 42 U.S.C. § 1983, a plaintiff must assert a violation of a federal right, not merely a violation of federal law. *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). Nothing "short of an unambiguously conferred right [will] support a cause of action brought under §1983." *Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002). Furthermore, "if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms." *Id.* at 290. Consequently, if there is "some indication that Congress may have intended to create individual rights, and some indication that it may not have, that means Congress has not spoken with the requisite 'clear voice.'" *31 Foster Children v. Bush*, 329 F.3d 1255, 1270 (11th Cir. 2003). The ambiguity of the statutory language will be found to preclude enforceable rights. *Id.*

1. HAVA does not create individual rights.

A claim based on a statutory violation is enforceable under § 1983 only when the statute creates rights, privileges or immunities in the particular plaintiff. *Golden State Transit Corp. v.*

Los Angeles, 493 U.S. 103, 107-108 (1989). The question is not simply who would benefit from the federal law at issue, but whether Congress evidenced the intent to confer federal rights upon those beneficiaries. *California v. Sierra Club*, 415 U.S. 287, 294 (1981) (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690-693 (1979)). No such Congressional intent exists with respect to HAVA.

While the conduct mandated by the statute is the same whether phrased as an individual right or an election official's duty, the absence of Congressional intent to confer individual rights disposes of an individual's claimed ability to enforce the federal mandate. Thus, as *Gonzaga* made clear, Title VI and Title IX create individual causes of action because they provide that: "No person in the United States shall . . . be subjected to discrimination" on the basis of race or sex in any federally funded program. 536 U.S. at 287 (emphasis added). Precisely the same requirement, of course, would be imposed if the statute said that recipients of federal funds shall not discriminate on the basis of race or sex – in either instance, federally-funded programs could not discriminate. Focusing on whether the statute is phrased as protection for individuals, as opposed to a directive to government officials, is appropriate because the only question under § 1983 is whether individuals can enforce the law – not what standard is established by the law. *See Gonzaga*, 536 U.S. at 285 (42 U.S.C. § 1983 "merely provides a mechanism for enforcing individual rights 'secured' elsewhere, *i.e.*, rights independently 'secured by the Constitution and laws' of the United States."); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979) ("[O]ne cannot go into court and claim a 'violation of §1983' for § 1983 by itself does not protect anyone against anything").

The fact that a statute is phrased in mandatory ("shall") language says little about whether it creates a private cause of action. The requirements in *Gonzaga* and *Blessing* were "mandatory."

However, the requirements in those cases did not imply a cause of action because the mandate was expressed as a duty for public officials, rather than a right for individuals. *Gonzaga*, 536 U.S. at 287; *Blessing*, 503 U.S. at 358; *see also Suter v. Arist M.*, 503 U.S. 348, 358 (1992) (concluding that statute conferred no individual rights, even though "the Act is mandatory in its terms," and stating that "we must examine exactly what is required of States by the Act").

Applying the foregoing standards and closely examining the HAVA statute at issue, § 15482(a) is directed at the "person regulated" – i.e., the "election official" – and mandates that the election official "permit" a provisional ballot to be cast. It does not say that a "person" or "voter" has a "right" to cast the ballot. Thus, far from an "unmistakable focus" on the individual, this language "speaks only to" state election officials. *Gonzaga*, 536 U.S. at 287. Examining the statute clause by clause produces the same result. Section 15482(a)(1) directs the conduct of election officials. Section 15482(a)(2), while using the passive voice, directs election authorities to permit certain described events to occur. And, §15482(a)(3), (4) and (5) all speak directly to the conduct of election officials.

Section 15482(a) is directed entirely at election officials, as befits a statute designed to "establish minimum election administration standards," rather than creating individual voting rights. *Help America Vote Act 2002* Pub. L. No. 107-252, 116 Stat. 1666 (emphasis added). Because HAVA's provisional voting requirements directly regulate the conduct of elections officials and are not phrased in terms of individual beneficiaries, HAVA does not contain the "rights-creating" language critical to showing the requisite Congressional intent to create new rights." *Gonzaga Univ.*, 536 U.S. at 287, quoting *Alexander v. Sandoval*, 532 U.S. 275, 288-89 (2001). Because HAVA speaks to election officials, not voters, and creates no individual right enforceable under 42 U.S.C. § 1983, Plaintiffs Complaint should be dismissed.

2. HAVA's provision of certain remedies suggests an absence of Congressional intent to create rights enforceable by individuals in § 1983 actions.

HAVA's inclusion of enforcement procedures counsels against a finding of Congressional intent to create individually enforceable private rights, such as those Plaintiffs purport to pursue in this litigation. *Gonzaga* at 289-90 (holding that the fact that aggrieved person had review mechanism counsel[s] against "finding congressional intent to create individually enforceable private rights."). HAVA provides for two separate enforcement procedures through which complaints alleging HAVA violations must be raised. The first procedure permits the United States Attorney General to bring federal civil actions seeking any declaratory or injunctive relief necessary against any state for not complying with HAVA's provisions. The second procedure requires the states to develop and implement a state-based procedural process by which complaints may be brought for alleged HAVA violations.

With respect to the first procedure, HAVA's mechanism for federal adjudication, as found in 42 U.S.C. § 15511, provides that:

The Attorney General may bring a civil action against any state or jurisdiction in an appropriate United States District Court for such declaratory and injunctive relief (including a temporary restraining order, a permanent or temporary injunction, or other order) as may be necessary to carry out the . . . requirements under [§15481 - §15483].

Plaintiffs' Complaint does not indicate that they have contacted the U.S. Attorney General or made any attempt to seek the federal jurisdictional redress of their complaint as clearly set forth in the statute.

With respect to the second procedure, 42 U.S.C. § 15512(a) requires states to "establish and maintain state-based administrative complaint procedures which meet" an exhaustive list of requirements. *Id.* The procedures must:

1. Be uniform and nondiscriminatory, 42 U.S.C. § 15512(a)(2)(A);

2. Allow any person who believes that there is a violation of any provision of Title III (including a violation which has occurred, is occurring, or is about to occur) to file a complaint, 42 U.S.C. § 15512(a)(2)(B) (emphasis added);

3. Provide, on the request of the complainant, for a hearing on the record, 42 U.S.C. § 15512(a)(2)(E);

4. Provide for a final determination with respect to any complaint within 90 days of the filing of the complaint, unless the complainant agrees otherwise, 42 U.S.C. § 15512(a)(2)(H);

5. Provide an alternative dispute mechanism to resolve the complaint within 60 days, if the 90-day deadline is not met, 42 U.S.C. § 15512(a)(2)(I); and

6. Provide, if the State determines that there is a violation of any provision of Title III, an appropriate remedy, 42 U.S.C. § 15512(a)(2)(F).

Ohio has duly complied with these requirements, providing for the clear and comprehensive administrative procedure that HAVA requires. *See The Ohio State Plan, "A State Plan to implement the Help America Vote Act of 2002 in accordance with Public Law 107-252, §253(b)." Fed. Reg. Vol 69, No. 57, pp. 14879 – 14895. Wed. Mar. 24, 2004* (Hereinafter "The Ohio State Plan").

The Ohio State Plan prescribes its administrative process in Chapter XIII, discussing HAVA § 402 – Administrative Complaint Procedures and Grievances. *Id.* at 14896. The Ohio State Plan developed an administrative complaint procedure to address allegations by citizens who believe their voting rights have been violated under Title III of HAVA. *Id.* In summary, the complaint procedure adopted by the Secretary of State includes an alternative dispute resolution component that invites parties to seek equitable resolution in that venue. *Id.* The

procedure also provides for a formal hearing process. *Id.* When a valid complaint or grievance is filed as part of this process, it is ultimately the State of Ohio, and more specifically the Secretary of State, that must provide the appropriate remedy. *Id.* at 14897.

Plaintiffs have made no attempt to file their complaints through the administrative process required by HAVA. Instead of pursuing either of the two procedures provided under HAVA, Plaintiffs filed the instant suit.

HAVA's carefully tailored remedial scheme supports the contention that Congress did not intend for claimants to pursue private suits for HAVA violations in federal court. The legislative history of HAVA unequivocally establishes that Congress intended the two remedies discussed above to be the exclusive remedies for a HAVA violation. Upon the House of Representatives' passage of HAVA, Senator Christopher Dodd (D – Connecticut) openly lamented that HAVA has only limited enforcement avenues, but noted that the House of Representatives simply would not allow more stringent measures:

While I would have preferred that we extend [a] private right of action..., the House simply would not entertain such an enforcement provision. Nor would they accept federal judicial review of any adverse decision by a State administrative body. However, the state-based administrative procedure must meet basic due process requirements and afford an aggrieved party a hearing on the record if they so choose.

Cong. Rec. 510504 (Daily Ed. Oct. 16, 2000) (Statement of Senator Dodd). Similarly, the National Council of LaRaza, the nation's largest constituency-based Hispanic organization, opposed final passage of HAVA, complaining that it "[c]ontains weak enforcement provisions":

Voters who are denied their right to vote because of this law cannot turn to the federal courts for a remedy. Rather, disenfranchised voters must either wait for the Department of Justice to take action or ask the same state election system that disenfranchised them to determine that there is a violation and provide a remedy for the problem.

Cong. Rec. 510501 (Daily Ed. Oct. 16, 2002).

The existence of two specifically enumerated remedial avenues militates in favor of a finding that HAVA does not create an individual right enforceable in a § 1983 action. Because Plaintiffs have failed to state a claim upon which relief can be granted, Plaintiffs' Complaint should be dismissed

B. The Court Should Dismiss Plaintiffs' Complaint For Failure To State A Claim Upon Which Relief Can Be Granted Because HAVA Does Not Create A Private Right Of Action.

Even if Plaintiffs could successfully demonstrate that HAVA confers an individual right enforceable under 42 U.S.C. § 1983, Plaintiffs' claim would still be barred because Congress foreclosed individuals from pursuing private causes of action under HAVA. Where Congress excludes private enforcement either expressly, through the use of specific evidence from the statute itself, or impliedly, by the creation of a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983, Congress will be deemed to have "specifically foreclosed a remedy under section 1983." *Smith v. Robinson*, 468 U.S. 992, 1004-5 (1984); *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423 (1987); *Blessing* at 341.

As discussed above, Congress specifically outlined the enforcement mechanisms and remedies available for alleged violations of HAVA. In addition, the provisions of HAVA do not contemplate a private right of action for individuals. Instead, enforcement of HAVA is achieved exclusively through the United States Attorney General's use of injunctive and declaratory relief or the established state administrative procedure. 42 U.S.C. § 15511; 42 U.S.C. §15512.

Furthermore, as discussed in the previous section, to infer Congressional intent to provide a private right of action within HAVA is not consistent with the language contained in the Act or with its legislative history. Congressional intent must be inferred from statutory language, statutory structure, or some other source. *Karahalios v. Nat'l Fed. of Fed. Employees*, 489 U.S.

527, 532 (1989). Absent this inference, "the essential predicate for implication of an implied remedy simply does not exist." *Id.* at 532-533 (quoting *Thompson v. Thompson*, 484 U.S. 174 (1989)). Where Congress has provided a specific statutory remedy, "courts must be especially reluctant to provide additional remedies." *Karahalios*, 489 U.S. at 533. Indeed, courts should conclude that Congress provided by statute the remedies it considered appropriate. *Id.*

HAVA's statutory enforcement scheme, combined with the Act's legislative history, evidences Congress' intent to preclude individual plaintiffs from bringing an implied cause of action under HAVA.¹ Without Congressional intent to create a cause of action, "courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander v. Sandoval*, 532 U.S. 275, 286-287 (2001).

Because HAVA does not contain an explicit or implied right of private action and excludes private remedies from its enforcement scheme, it cannot support a claim pursuant to 42 U.S.C. § 1983. Therefore, because Plaintiffs have failed to state a claim, Plaintiffs' Complaint should be dismissed.

C. The Court Should Deny Plaintiffs Motion For Preliminary Injunction Because Plaintiffs Cannot Establish The Requisite Strong Or Substantial Likelihood Of Success On The Merits Due To The Fact That Directive 2004-33's Requirement For Precinct-Based Voter Eligibility And Vote-Counting Is Clearly Consistent With HAVA's Requirements.

Even if this Court determines that dismissal is not warranted, Plaintiffs fail to make a showing of a strong or substantial likelihood of success upon the merits. HAVA speaks to the states and leaves to them decisions of voter eligibility and vote-counting. Ohio's system of precinct-based voting does not violate HAVA. In fact, precinct-based voting is entirely consistent with and contemplated by HAVA.

¹ In contrast to HAVA, the National Voter Registration Act explicitly provides for a private right of action. 42 U.S.C. §1973gg-9. As such, it is reasonable to conclude that where Congress intends to provide voters with a private right of action for violations of federal statutes governing elections, it can and will do so explicitly.

In Plaintiffs' Motion for Preliminary Injunction, they argue that HAVA requires states to utilize a county-wide system of casting and counting ballots. Accordingly, Plaintiffs contend that any voter should be able to go into any polling place in an Ohio county and cast a provisional ballot, which must then be counted.

HAVA very clearly requires that, in order for her vote to count, a voter must be eligible to vote in the "jurisdiction" in which her vote is cast. However, HAVA does not define the term "jurisdiction." Rather, HAVA specifies that states should make decisions on both voter eligibility and on whether or not a provisional vote should be counted "in accordance with State law." 42 U.S.C. § 15482(a)(4). In Ohio, state law establishes a precinct-based system. Therefore, Plaintiffs' arguments that HAVA requires county-wide voting are simply misplaced.

Ohio Revised Code §3503.01 sets forth the qualifications of eligible voters in the state and provides, in pertinent part, that: "Every citizen of the United States who is of the age of eighteen years or over and who has been a resident of the state thirty days immediately preceding the election...has the qualifications of an elector and may vote in all elections in the precinct in which the citizen resides." (emphasis added.) Thus, HAVA defers to state law, and state law establishes the applicable jurisdiction as a precinct, not a county.

Plaintiffs' failure to demonstrate a strong or substantial likelihood of success on the merits is fatal to their claim for injunctive relief. For the reasons more fully discussed below, Plaintiffs' Motion for Preliminary Injunction should be denied.

1. HAVA's provisional voting requirements reserve to the states issues of voter eligibility and vote counting.

Title III of HAVA governs states' election technology and administration requirements for federal elections. *See* 42 U.S.C. §§ 15481 to 15485. Specifically, Title III provides standards for voting systems, provisional voting, and voter registration list requirements, among other

items. *See* 42 U.S.C. §§ 15481 to 15483. HAVA establishes minimum requirements and does not prevent states from establishing requirements, "more strict" than, but not "inconsistent with," HAVA requirements. 42 U.S.C. § 15484. "The specific choices on the methods of complying with the requirements of this title [Title III] shall be left to the discretion of the State." 42 U.S.C. §15485.

Consistent with the discretion Congress granted to the states on implementation of Title III's requirements, Congress specified that decisions on both voter eligibility and on whether or not a provisional vote should be counted are to be made "in accordance with State law." 42 U.S.C. § 15482(a)(4). First, a state or local election official makes a determination on whether or not the voter is "eligible under State law to vote." 42 U.S.C. §15482(a)(4) (emphasis added). Second, the state or local election official shall count that vote "in accordance with State law." *Id.* These provisions provide clear guidance that Congress intentionally left issues of voter eligibility and vote counting to the purview of the individual states.

2. The legislative history of HAVA supports the statute's language that leaves the determination of voter eligibility and vote counting under HAVA to the states.

The legislative history of the Act reflects HAVA's explicit directive that voter eligibility questions are to be determined according to state law. As Senator Dodd noted regarding HAVA's conference report:

[N]othing in this bill establishes a Federal definition of when a voter is registered or how a vote is counted. . . 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.

148 Cong. Rec. S1 0510 (Daily Ed. Oct. 16, 2002) (statement of Sen. Dodd). He further noted that "Nothing in this compromise [bill] 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.* This legislative history is consistent with the federal Constitution's directive that the qualifications of voters for federal Congressional office must be determined by the states. U.S. Const. art. I, §2 and amend. XVII; *see also Ass 'n. of Cmty. Orgs. for Reform Now v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995).

Not only does state law determine voter eligibility under HAVA, it also governs when and how votes will be cast and counted. Senator Dodd was not alone in his recognition that state law controls whether provisional ballots cast will be counted. *See, e.g.*, 148 Cong. Rec. Si 0491 (Daily Ed. Oct. 16, 2002) (statement of Sen. Christopher S. "Kit" Bond (R – Missouri), emphasis added) (noting that "ballots will be counted according to state law. . . . 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 to be counted."). Senator Bond posed an example:

If it is determined that the voter is registered in a neighboring jurisdiction and state law requires the voter to vote in the jurisdiction in which he is registered, meaning the vote was not cast in accordance with State law, the vote will not count. It was contemplated by the authors of the statute that under such circumstances, the vote will not count.

Id.

Senator Bond also predicted the scenario where an individual arrives to vote at the wrong polling place. *Id.* He stated:

Additionally, it is inevitable that voters will mistakenly arrive at the wrong polling place. If it is determined by the poll workers that the voter is registered but has been assigned to a different polling place, it is the intent of the authors of this bill that the poll worker can direct the voter to the correct polling place. In most States, the law is specific on the polling place where the voter is to cast his ballot. Again, this bill upholds state law on that subject.

Id. (emphasis added). In response to additional questioning from Senator McConnell on HAVA's provisional voting requirements, Senator Bond clarified that the provisional ballot

requirement "is in no way intended to require any State or locality to allow voters to vote from any place other than the polling site where the voter is registered." 148 Cong. Rec. Si 10493 (Daily Ed. Oct. 16,2002) (statement from Sen. Bond). This legislative history supports the conclusion that state laws that require a voter to vote at the correct polling location are not preempted by HAVA, but rather explicitly contemplated and provided for by HAVA.

Indeed, a similar argument was made in Missouri, where the precinct-based system of conducting an election was challenged as violating the 14th amendment right of equal protection. This challenge to voter registration and precinct voting was dismissed by both the Missouri and U.S. Supreme Courts. In *State ex rel McCaffery v. Mason*, 55 S.W. 636 (Mo. 1900) the Missouri Supreme Court examined that state's system of voting and the requirement that a voter be registered to vote by precinct and that they cast the ballot at a specific precinct. The Missouri Supreme Court looked to the laws of Ohio, Kentucky, Illinois and several other states, and upheld the constitutionality of Missouri's system of voter registration. The United States Supreme Court affirmed, holding:

The general right to vote in the state of Missouri is primarily derived from the state, and the elective franchise, if one of the fundamental privileges and immunities of the citizens of St. Louis, as citizens of Missouri and of the United States, is clearly such franchise 'as regulated and established by the laws or Constitution of the state in which it is to be exercised.

Mason v. Missouri, 179 U.S. 328, 355 (1900).

The Sixth Circuit echoes this holding, stating that "[t]he general right to vote in the states is primarily derived from the states." *Wyers v. Bannan*, 249 F.2d 136 (6th Cir., 1957), citing *Mason*, supra. Ohio's precinct-based voting system, like Missouri's, is a valid exercise of the state's authority to regulate the elective franchise. In as much as HAVA does not regulate this authority, Ohio must be allowed to continue relying upon its statutorily established system.

3. HAVA is to be read consistently with the NVRA of 1993, and the latter statute authorizes state law to govern questions of voter eligibility and precinct-based voting requirements.

HAVA must be read consistently with the National Voter Registration Act of 1993 (NVRA). 42 U.S.C. § 15545 (mandating that, except as specifically provided, HAVA does not "supersede, restrict, or limit the application of" the NVRA); *see also* 42 U.S.C. § 15301(c)(1) (requiring that states using funds under HAVA Title I may not use those funds in a manner inconsistent with the NVRA). Contrary to Plaintiffs' contention that the NVRA requires "county-based" jurisdiction, the NVRA supports states' rights to govern both voter eligibility and precinct-based voting requirements.

The NVRA supports every state's right to determine its own standards for voter eligibility. For instance, when describing the application process for voter registration in conjunction with a person's application for a driver's license, the voter registration application may only require the "minimum amount of information necessary to . . . enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 42 U.S.C. § 1973gg-3(c)(2)(B); *see also* §1973gg-3(c)(2)(C) (requiring that the application "state each eligibility requirement, including citizenship") and § 1973 gg-6(a)(5)(A) (requiring states to inform applicants of voter eligibility requirements). Notably, the NVRA does not attempt to federalize those criteria, other than citizenship, that would render a voter eligible; rather, this is left to state law. *See Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 912 F. Supp. 976, 985 (W.D. Mich. 1995) (noting that the NVRA "does not regulate the qualifications of voters.") *aff'd at* 129 F.3d 833 (6th Cir. 1997). Therefore, the precinct-based voting requirements in Directive 2004-33 violate neither HAVA nor the NVRA.

Even more significantly, the NVRA does not attempt to eliminate the principle that a person's eligibility to vote is inextricably intertwined with that person's eligibility to vote at a

particular location An individual is only eligible to vote at a particular location because, in many instances, candidates and issues are localized. The ballot found at a particular polling places brings together voters eligible to vote for particular candidates and issues with a ballot presenting those candidates and issues.

In fact, the following NVRA provisions provide an explicit Congressional endorsement of precinct-based voting procedures. If a registrant has moved from an address covered by one polling place to an address covered by a second polling place within the same registrar's jurisdiction and the same congressional district, and failed to notify the registrar of the change prior to election day, the NVRA gives the registrant three options: (1) vote at the registrant's former polling place, (2) vote at a central location within the registrar's jurisdiction; or (3) "if permitted by State law," vote at the polling place for the registrant's current address. These provisions of the NVRA clearly supports states' use of precinct-based voting requirements. Thus, the NVRA does not require states to allow voters to have unfettered discretion on where to vote within the jurisdiction of an election authority as Plaintiffs contend. HAVA should not be interpreted to have superseded the NVRA, 42 U.S.C. § 15545, and therefore HAVA also should not be interpreted to permit provisional voters to vote at any location within an election authority's jurisdiction and have those provisional ballots be counted. Thus, Directive 2004-33's reliance on precinct-based systems does not run afoul of the guidelines set forth in HAVA or the NVRA.

4. The Election Assistance Commission's guidance documents support Ohio Election Law.

HAVA created the Election Assistance Commission. 42 U.S.C. §15321. The Commission serves as a national resource for "the compilation of information and review of procedures with respect to the administration of Federal elections by . . . (3) carrying out the

duties described in Subtitle C (relating to conducting studies and carrying out other activities to promote the effective administration of Federal elections)." 42 U.S.C. § 15322. The Commission is given authority to address certain issues "with the goal of promoting methods of voting and administering elections which . . . (3) will be nondiscriminatory and afford each registered and eligible voter an equal opportunity to vote and have their vote counted." 42 U.S.C. §15381(a). One of the issues specifically dedicated to the Commission is "[m]ethods of conducting provisional voting." 42 U.S.C. § 15381(b)(3). The Election Assistance Commission has provided guidance documents to states on HAVA implementation. These guidance documents support Ohio's precinct-based voting requirements.

For example, in the EAC's "Best Practices Toolkit," there is a section entitled "Provisional Voting Challenges and Solutions." (See <http://www.eac.gov/bp/provisional.asp>, last visited on October 2, 2004). Under the heading "Ensuring Trouble-Free Implementation on Election Day," it suggests that election authorities "[e]stablish sound methods for directing voters to the correct polling place" and "[p]rovide resources to help the poll workers direct a voter to his/her correct voting place." *Id.* One suggestion is for states to [e]stablish sound methods for directing voters to the correct polling place (and correct precinct if there are multiple precincts within a polling place). Such methods might include voter notification cards, web-based poll site locators, automated phone systems, adjacent precinct maps, and street directories. The EAC's Toolkit documents provide implicit support for state directives designed to ensure that voters vote at their correct voting place.

D. Plaintiffs Cannot Establish A Strong or Substantial Likelihood Of Success On The Merits Because Ohio Election Law Is Consistent With HAVA Insofar As It Provides For Provisional Voting While Maintaining Ohio Voter Eligibility Requirements.

1. Plaintiffs incorrectly claim that Directive 2004-33 is inconsistent with HAVA's requirements.

HAVA requires states to establish a means to allow eligible voters to cast provisional ballots, and despite Plaintiffs' claims to the contrary, Directive 2004-33 meets HAVA's requirements. Plaintiffs claim five specific violations of HAVA, seeking declaratory judgments as to each alleged violation. *See* Complaint for Declaratory and Injunctive Relief at 14 – 17. Plaintiffs assert that Directive 2004-33 violates HAVA (1) by unlawfully limiting the right to cast provisional ballots by those Ohio voters who have moved from one Ohio precinct to another, (2) by depriving a voter who attempts to vote in the wrong precinct within his county of residence, (3) by requiring poll workers to notify voters of their right to cast a provisional ballot if they satisfy HAVA's affirmation requirement, (4) by unlawfully preventing the counting of provisional ballots by individuals who first attempt to vote in the wrong precinct, but then cast a ballot in the proper polling place, and (5) by requiring a poll worker, as a precondition to issuing a provisional ballot that satisfies HAVA's written-affirmation requirement, to confirm the individual's eligibility to vote. These specific claims and requests for relief fail because Directive 2004-33 and the Ohio Revised Code are consistent with HAVA.

2. Ohio law permits the casting of ballots by eligible voters in the precinct in which they reside.

Under HAVA, voter eligibility questions are left for state determination. Indeed, while HAVA imposes minimum requirements, it allows the states to develop their own laws and procedures to fulfill the requirements. The purpose and goal of the minimum standards "is to improve our election system without issuing dictates that would rob states of the ability to craft

their own solutions." *See House of Representatives' Report 107-329 Part I*, December 10, 2001, p.35 (from the Committee on House Administration).

In keeping with the spirit of HAVA and following the suggested advice of the Election Assistance Commission, Directive 2004-33 requires poll workers who determine that a voter's address is not within that precinct to contact the Board of Elections and advise the voter of: (1) the precinct in which the voter's address is located, and (2) the location of the polling place for that precinct. These procedures by the poll workers in a particular precinct provide an opportunity for the otherwise eligible voter to cast a ballot in the proper precinct pursuant to Ohio law. Directive 2004-33 furthers the Ohio General Assembly's clear intent that voters are to vote only in the precinct in which they reside. Ohio Revised Code § 3599.12(A)(1) specifically states that no person shall vote or attempt to vote in any primary, special, or general election in a precinct in which that person is not a legally qualified elector. Ohioans are considered qualified electors and entitled to vote in the precinct in which they have been a resident for at least thirty days prior to an election. O.R.C. 3503.01.

Ohio Revised Code 3503.16 provides that eligible voters who move from one Ohio precinct to another before an election may update that voter's existing registration to his or her new voting residence and vote a provisional ballot in the precinct in which the new person's residence is located. Directive 2004-33 simply reiterates the statutory intent of the General Assembly under O.R.C. 3503.16(B)(2)(a) – (d).

Ohio law anticipates provisional voting on the basis of precincts. This position is entirely in keeping with the framework of HAVA, which itself embraces or contemplates precinct voting as evidenced by the numerous references to in-precinct provisional voting in *House of Representatives' Report 107-329 Part I*, December 10, 2001, p.37 (from the Committee on House Administration).

3. Ohio law permits boards of elections to correct mistaken registrations.

Further, Plaintiffs first claim states that Directive 2004-33 unlawfully limits the right to cast a provisional ballot to those Ohio voters who have moved from one Ohio precinct to another, leaving no opportunity to cast a provisional ballot and to have that ballot counted if a non-moving voter's name is erroneously omitted from a precinct's voter-registration list. Ohio Revised Code § 3503.30 provides the flexibility for local boards of elections to remedy such situations. Section 3503.30 provides:

"[w]hen by mistake a qualified elector has caused himself to be registered in a precinct which was not his place of residence, the board of elections, on full and satisfactory proof that such error was committed by mistake, may, on his personal application and proof of his true residence, correct his registration form. The board may correct **all errors** occurring in the registration of electors when it finds that the errors subject to corrections were not of fraudulent intent."

The underlined portion of the statute plainly provides the ability and the authority for boards of elections to correct errors occurring in the registration of voters. Therefore, Plaintiff's claim that Directive 2004-33 violates HAVA has no merit.

IV. CONCLUSION

For the foregoing reasons, Intervenors respectfully request that this Court grant Intervenors' Motion to Dismiss and deny Plaintiffs' Motion for Preliminary Injunction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2004, a copy of the foregoing was filed electronically. 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 system.

/s/ Truman A. Greenwood