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October 22, 2004

VIA HAND DELIVERY

Leonard Green, Clerk
Office of the Clerk
United States Court of Appeals for the Sixth Circuit
532 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, OH 45202-3988

Re: *Sandusky County Democratic Party, et al. v. Blackwell*, Nos. 04-4265, 04-4266

Dear Mr. Green:

Enclosed please find one original and three copies of the United States' Motion for Leave to File Oversized Amicus Brief Supporting Appellant and Urging Reversal, and one original and six copies of the United States' Amicus Brief Supporting Appellant and Urging Reversal, in the above-referenced case. Thank you for your attention to this matter.

Sincerely,

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Chief

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Encl.

cc: Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 04-4265, 04-4266

THE SANDUSKY COUNTY DEMOCRATIC PARTY, *et al.*,

Plaintiffs-Appellees

v.

J. KENNETH BLACKWELL,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

MOTION OF THE UNITED STATES FOR LEAVE TO FILE
OVERSIZED AMICUS CURIAE BRIEF SUPPORTING
APPELLANT AND URGING REVERSAL

The United States respectfully moves this Court for leave to file an oversized *amicus curiae* brief supporting Appellant and urging reversal. In support of this motion, the United States declares as follows:

1. Federal Rule of Appellate Procedure 29(a) provides the United States with the unconditional right to file an *amicus curiae* brief expressing its views in a case in the federal court of appeals without need to gain consent of the parties or leave of court.

2. Federal Rule of Appellate Procedure 29(d) and Federal Rule of Appellate Procedure 32(a)(7) together establish a maximum length for an amicus brief of 15 pages or 7,000 words, which an amici may not exceed “[e]xcept by the court’s permission.”

3. The Help America Vote Act of 2002 (HAVA), 42 U.S.C. 15301 *et seq.*, was enacted by Congress in the aftermath of voting problems in the 2000 presidential election to improve the administration of federal elections throughout the United States. At issue in this case is how HAVA is to be interpreted and enforced. The United States's unique perspective on these questions warrant this Court granting it permission to exceed the page and word limits set forth in the Federal Rules of Appellate Procedure for its *amicus curiae* brief.

4. First, HAVA expressly vests in the United States, through the Attorney General, the right to seek declaratory and injunctive relief in federal court to redress violations of HAVA by any State or jurisdiction. 42 U.S.C. 15511. As the federal governmental entity responsible for enforcing HAVA, the Department of Justice has an interest in explaining in detail to this Court its views on whether the statute allows enforcement of its provisions by private plaintiffs.

5. Second, the district court's interpretation of HAVA threatens to undermine the precinct-based voting systems of many States. In light of HAVA's purpose, the United States has a significant interest in spelling out to the Court Congress's intent in leaving "the specific choices on the methods of complying with the requirements of this title * * * to the discretion of the State." 42 U.S.C. 15485.

For the foregoing reasons, the United States respectfully requests that the Court grant it an extension of 3,949 words for its *amicus curiae* brief supporting Appellant and urging reversal, for a total of 10,949 words.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2004, a copy of the foregoing MOTION FOR LEAVE TO FILE OVERSIZED AMICUS BRIEF SUPPORTING APPELLANT AND URGING REVERSAL was served by electronic mail or facsimile transmission, in accordance with the Court's briefing schedule, to the following counsel of record:

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INTEREST OF THE UNITED STATES

The United States in this amicus brief takes no position regarding whether traditional precinct-based voting is to be preferred, from a policy perspective, over a system offering the kind of statewide provisional balloting demanded by the plaintiffs. As was demonstrated during the extensive floor debates on the Help America Vote Act of 2002 (HAVA), 42 U.S.C. 15301 *et seq.*, there are policy arguments supporting each approach, but that policy decision was left by Congress to the individual States, some of which have decided one way, some the other.

The United States submits this brief, as *amicus curiae* pursuant to Federal Rule of Appellate Procedure 29(a), for two purposes. First, it is clear that Congress did not intend to authorize private enforcement, via litigation, of the requirements

of HAVA, but instead intended to channel private complaints into state administrative processes, and to reserve judicial enforcement to the United States Department of Justice. Second, it is equally clear that Congress did not intend through HAVA to preclude States from choosing precinct-based voting systems. Granting the relief sought by plaintiff here would offend both of these congressional policy judgments.

Had Congress intended to make HAVA privately enforceable via litigation, it could have done so explicitly, as it did in the National Voter Registration Act (NVRA), 42 U.S.C. 1973gg *et seq.* Congress's intent not to do so is made clear by HAVA's text and reinforced by its legislative history. Indeed, Senator Dodd of Connecticut – a HAVA conferee and sponsor – openly lamented the fact that HAVA did not create a private right of action:

While I would have preferred that we extend [a] private right of action * * * , the House simply would not entertain such an enforcement provision.

148 Cong. Rec. S10488-02, S10512 (daily ed. Oct. 16, 2002). Congress, having made an explicit decision not to create a private right of action, clearly did not intend to create a right enforceable through 42 U.S.C. 1983.

Congress, similarly, could have chosen to set a uniform federal standard with respect to what is a “jurisdiction” for purposes of provisional balloting, precluding the States from operating precinct-based electoral systems. Yet, it plainly did not do so. Indeed, HAVA explicitly commands that “the specific choices on the methods of complying with the requirements of this title shall be left to the discretion of the State.” 42 U.S.C. 15485. Senator Bond acknowledged this as well:

Congress has said only that voters in Federal elections should be given a provisional ballot if they claim to be registered in a particular jurisdiction and that jurisdiction does not have the voter's name on the list of registered voters. * * * This provision 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. at S10493.

STATEMENT OF THE ISSUES

1. Whether HAVA may be enforced privately under 42 U.S.C. 1983.
2. Whether HAVA precludes States from choosing precinct-based voting systems.

STATEMENT OF THE CASE

In response to shortcomings in the nation's electoral systems revealed by the 2000 election, Congress enacted the Help America Vote Act of 2002 (HAVA), 42 U.S.C. 15301 *et seq.* Among its many provisions, HAVA requires that state and local election officials permit any individual whose name does not appear on the official registration list for the polling place or whose eligibility to vote is called into question to cast a provisional ballot if such individual declares that he "is a registered voter in the jurisdiction in which [he] desires to vote and that [he] is eligible to vote in an election for Federal office." 42 U.S.C. 15482(a). HAVA further provides that "[a]n election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation * * * to an appropriate State or local election official for prompt verification." 42 U.S.C. 15482(a)(3). If such official "determines that the individual is eligible under State law to vote, 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).

HAVA requires each State receiving federal funds under the statute to establish a state-based administrative complaint procedure for private citizens to air grievances. 42 U.S.C. 15512. This procedure must permit an individual who believes that a violation has occurred, is occurring, or is about to occur, to file a written and notarized complaint with the State and request a hearing on the record. 42 U.S.C. 15512(a)(2). Under HAVA, if the State determines under these procedures that a violation of any of HAVA’s uniform and nondiscriminatory election technology and administration provisions has occurred, the State must provide an appropriate remedy; if the State determines that no violation has occurred, it may dismiss the complaint, but the State is required to publish the results of the administrative process. *Ibid.*

Moreover, HAVA expressly vests authority to seek equitable judicial relief to redress violations of HAVA with the United States:

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 uniform and nondiscriminatory election technology and administration requirements under sections 15481, 15482, and 15483 of this title.

42 U.S.C. 15511.

On September 16, 2004, defendant Ohio Secretary of State J. Kenneth Blackwell issued Ohio Secretary of State Directive 2004-33 (Directive 2004-33) to all Ohio County Board of Elections. Directive 2004-33 provides, in relevant part,

that

[o]nly after the precinct pollworkers have confirmed that the person is eligible to vote in that precinct shall the pollworkers issue a provisional ballot to that person. Under no circumstances shall precinct pollworkers issue a provisional ballot to a person whose address is not located in the precinct, or portion of the precinct, in which the person desire[s] to vote. However, no provisional ballot will be disallowed because of pollworker error in a split precinct.

Sandusky County Democratic Party v. Blackwell, No. 04 civ. 7582, 2004 WL 2308862 (N.D. Ohio Oct. 14, 2004) (quoting Directive 2004-33).

Plaintiffs – the Sandusky County Democratic Party, the Ohio Democratic Party, and three labor organizations – sued defendant in Ohio district court under 42 U.S.C. 1983 contending that Directive 2004-33 violates HAVA in several respects. Among plaintiffs’ claims is an assertion that Ohio may not prevent a voter from casting a provisional ballot at a precinct other than the one in which he resides. Plaintiffs also moved for a preliminary injunction enjoining defendant from applying the provisions of Directive 2004-33 that violate HAVA and requiring prompt issuance of a new directive instructing county election boards to issue and count provisional ballots in accordance with HAVA. Defendant filed an opposition to plaintiffs’ motion for a preliminary injunction and a motion to dismiss that argued, *inter alia*, that plaintiff possessed no individual right of action to enforce HAVA via Section 1983 and that Directive 2004-33 conformed to HAVA’s requirements.

On October 14, 2004, the district court issued an order denying defendant’s motion to dismiss and granting plaintiff’s motion for a preliminary injunction.

Sandusky County Democratic Party v. Blackwell, No. 04 civ. 7582, 2004 WL

2308862 (N.D. Ohio). The district court concluded, in relevant part, that HAVA created individual rights enforceable in a Section 1983 action and that HAVA's remedial scheme was not sufficiently comprehensive to preclude resort to Section 1983. The court also held that HAVA precludes States from counting only provisional ballots cast in the precinct in which the voter resides. Defendant filed a notice of appeal with the Sixth Circuit, and filed its appellate brief on October 21, 2004.

SUMMARY OF ARGUMENT

In order to bring suit in federal court under 42 U.S.C. 1983 to enforce HAVA, plaintiffs must show that Congress (i) unambiguously manifested its intent to create an individual right, and (ii) did not intend for that right to be enforced through one or more specific means other than Section 1983. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280, 283-285 (2002). Plaintiffs fail on both counts. First, HAVA's terms relating to provisional voting are phrased in terms of the duties and obligations of state and local election officials responsible for administering federal elections rather than the rights of individual voters, thus failing to demonstrate a "clear and unambiguous" intent to confer individual rights. Second, HAVA's enforcement scheme, which authorizes the Attorney General to bring civil actions for declaratory and injunctive relief to enforce its provisions and requires States to establish detailed administrative schemes to entertain complaints of private plaintiffs, is sufficiently comprehensive to preclude resort to Section 1983.

HAVA also neither conflicts with, nor preempts, precinct-based electoral systems such as Ohio's. HAVA requires that a voter attest in writing that he is "a

registered voter in the jurisdiction in which the individual desires to vote” before receiving a provisional ballot. 42 U.S.C. 15482(a). Because HAVA does not define the term “jurisdiction” in the statute, but rather left that term for the States to define, HAVA is completely consistent with Ohio’s requirement that a voter cast a provisional ballot at the polling place to which he is assigned.

ARGUMENT

The district court erred in ruling that Title III of the Help America Vote Act of 2002 (HAVA), 42 U.S.C. 15301 *et seq.*, created an individual right enforceable in a Section 1983 action. Title III of HAVA, which the United States Department of Justice is explicitly charged with enforcing, see 42 U.S.C. 15511, was enacted pursuant to Congress’s constitutional authority to alter state laws governing the administration of federal elections. See U.S. Const. Art. I, § 4, cl. 1. Not surprisingly, therefore, Title III’s text unmistakably speaks not to the rights of individual voters (as does the Voting Rights Act of 1965, which, unlike HAVA, was enacted pursuant to Congress’s authority to enforce the Fifteenth Amendment), but rather to the state and local election officials responsible for administering federal elections. See pp. 12-15, *infra*. Indeed, as HAVA’s preamble makes clear, the purpose of Title III was to “establish minimum election administration standards for States and units of local government * * * responsibl[e] for the administration of Federal elections.” Pub. L. No. 107-252, 116 Stat. 1666. Consistent with its preamble, the numerous provisions contained in Title III, including the provision creating the provisional balloting scheme at issue here, uniformly focus on the administration of federal elections rather than on the individuals who participate in

them. By declining to employ words well understood to create privately enforceable rights, Congress did not unambiguously create individual rights enforceable by Section 1983.

The district court also erred in ruling that the portion of Ohio Directive 2004-33 dealing with provisional balloting conflicts with the requirements of HAVA. In enacting Title III of HAVA, Congress intentionally looked to state law to define the terms of voter eligibility and the counting of provisional ballots. As set forth in greater detail below, HAVA commands specifically that provisional ballots may be cast only in the jurisdiction in which the “individual is a registered voter” and that provisional ballots will be counted “in accordance with state law.” 42 U.S.C. 15482. Indeed, HAVA explicitly provides that “the specific choices on the methods of complying with the requirements of this title shall be left to the discretion of the State.” 42 U.S.C. 15485. HAVA’s legislative history is perfectly consistent with the Act’s unambiguous language. As Senator Bond of Missouri – one of HAVA’s floor managers – specifically acknowledged, “[t]his provision 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. S10488-02, S10493 (daily ed. Oct. 16, 2002).

Because HAVA is not amenable to private enforcement and, alternatively, because Congress did not intend through HAVA to preclude States from choosing precinct-based voting systems, this Court should reverse the judgment of the district court and remand the case to the district court with instructions to vacate the preliminary injunction and dismiss all of the plaintiffs’ HAVA related claims.

I

**NEITHER HAVA IN GENERAL NOR THE PROVISIONAL BALLOT
PROVISION IN PARTICULAR MAY BE ENFORCED THROUGH
PRIVATE LITIGATION**

On its face, HAVA does not contain a private right of action, nor have any of the parties suggested that it contains a so-called “implied right of action.” The inquiry, therefore, is whether HAVA may be enforced through 42 U.S.C. 1983, which imposes liability on anyone who, under color of state law, deprives a person “of any rights, privileges, or immunities secured by the Constitution and laws” of the United States.

Not every violation of a federal statute, however, constitutes a deprivation of “rights” within the meaning of Section 1983. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989). For a statute to be so enforced, Congress must have (i) unambiguously manifested its intent to create an individual right, and (ii) not intended for that right to be enforced exclusively through one or more specific means other than Section 1983. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280, 283-285 (2002). HAVA satisfies neither condition. First, Congress nowhere manifested an unambiguous intent to create individual rights. Second, HAVA expressly sets forth Congress’s intended enforcement mechanism. Accordingly, HAVA may not be enforced privately through Section 1983.

A. HAVA Does Not Confer Individual Rights

A statute may be enforced through Section 1983 only if it contains an “unambiguously conferred right.” *Gonzaga*, 536 U.S. at 283. The mere fact that a

statute benefits an individual, even intentionally, does not trigger Section 1983.¹ *Ibid.*; see also *Blessing v. Freestone*, 520 U.S. 329, 340 (1997); accord *Suter v. Artist M.*, 503 U.S. 347, 357 (1992) (noting that Section 1983 speaks in terms of “rights, privileges or immunities,” not violations of federal law that merely provide benefits).

Whether a statute confers a right “require[s] a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries.” *Gonzaga*, 536 U.S. at 285. This inquiry begins with “the text and structure of the statute,” and if these “provide no indication that Congress intends to create new

¹Prior to its decision in *Gonzaga*, the Supreme Court had used various formulations to discuss the level of legislative precision necessary to confer an individual right that might be enforced through Section 1983. For instance, in *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 509 (1990), the Court cast the inquiry in terms of “whether the provision in question was intended to *benefit* the putative plaintiff” (emphasis added) (quotations and internal alterations omitted). In other cases, however, the Court has recognized that a statute may well benefit a third party, intentionally or otherwise, without conferring a right on that individual. See, e.g., *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (“In order to seek redress through § 1983 * * * a plaintiff must assert a violation of a federal *right*, not merely a violation of federal *law*,” and that the conferring of a benefit is but one part of this inquiry.); *Suter v. Artist M.*, 503 U.S. 347, 357 (1992) (noting that Section 1983 speaks in terms of “‘rights, privileges or immunities,’ not violations of federal law”). In *Gonzaga*, however, the Supreme Court ended any such debate. “We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983. * * * [I]t is *rights*, not the broader or vaguer ‘benefits’ or ‘interests’ that may be enforced under the authority of that Section.” 536 U.S. at 283 (emphasis added). Therefore, the mere fact that a statute benefits an individual, even intentionally, does not trigger Section 1983. It is also worth noting that the Court’s decision in *Gonzaga* predated HAVA’s enactment. Thus, Congress was well aware that nothing short of an unambiguously conferred right would be sufficient to create a cause of action brought under Section 1983. See *Cannon v. University of Chicago*, 441 U.S. 677, 696-697 (1979) (“It is always appropriate to assume that our elected representatives, like other citizens, know the law.”).

individual rights, there is no basis for a private suit.” *Id.* at 286. Further, the statutory language cannot be considered in isolation. It must be considered in context and in light of the statute’s overall structure. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 18-20 (1981) (references to rights and patient “bill of rights” do not create individually enforceable rights when read in the context of the statute as a whole).

In addition, the determination whether a statute creates individual rights cannot be wholly divorced from consideration of the enforcement mechanisms statutorily prescribed by Congress. Where, as here, Congress creates specialized enforcement procedures that envision uniform and centralized enforcement of the law, and/or ongoing interaction and cooperation between the federal and state governments, the operation of the statute as a whole weighs against concluding that Congress simultaneously intended to confer individual rights to be enforced through broad and dispersed litigation in state and federal courts across the country. *Gonzaga*, 536 U.S. at 289 (“Our conclusion that FERPA’s nondisclosure provisions fail to confer enforceable rights is buttressed by the mechanism that Congress chose to provide for enforcing those provisions.”). Indeed, inherent in the question of whether a particular statute creates a new substantive federal right is what the scope of that right is – a question that necessarily imports considerations of remedy and relief.

As set forth in greater detail below, an examination of the text and structure of HAVA, along with a consideration of the enforcement mechanisms statutorily prescribed by Congress, reveal that Congress did not intend to confer individual

rights upon a class of beneficiaries. As a result, there is no basis for plaintiffs' private HAVA suit.

1. HAVA Contains No Rights-Creating Language

The touchstone of a rights-conferring statute is “rights-creating” language, of which Title VI of the 1964 Civil Rights Act, 42 U.S.C. 2000d, and Title IX of the Higher Education Amendments, 20 U.S.C. 1681(a), provide the paradigmatic examples. See *Cannon v. University of Chicago*, 441 U.S. 677, 693 n.13 (1979) (“[T]he right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action.”). Both Title VI and Title IX speak directly to the putative plaintiff: “*No person * * * shall * * ** be subjected to discrimination.” 42 U.S.C. 2000d; 20 U.S.C. 1681(a) (emphasis added). Indeed, the overriding – even sole – purpose of those two Titles was to confer an enforceable right on the class of individuals who had been victimized by the statutorily targeted forms of discrimination. Each thus has been recognized as creating a privately enforceable right.

But the Supreme Court made definitively clear that, had those statutes been drafted not “with an unmistakable focus on the benefitted class,” but rather as a limitation on federally funded programs, or as an instruction to the federal employees charged with implementing them, “there would have been far less reason to infer a private remedy in favor of individual persons.” *Cannon*, 441 U.S. at 690-692. Statutes that “focus on the *person regulated* rather than the *individuals protected* create ‘no implication of an intent to confer rights on a particular class of persons.’” *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (emphasis added)

(quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981)).

In sharp contrast to Title VI and Title IX, Title III of HAVA unmistakably focuses on the “person regulated,” *i.e.*, States and state and local election officials charged with running federal elections, *not* on the “individuals protected,” *i.e.*, individual voters. As HAVA’s preamble makes clear, Title III “establish[es] minimum election administration standards for States and units of local government * * * responsibl[e] for the administration of Federal elections.” Pub. L. No. 107-252, 116 Stat. 1666. Consistent with its preamble, the standards established by Title III focus on the administration of federal elections rather than on the individuals who would benefit from the administration of well-run elections. Section 301, for example, requires the States to use voting systems that meet certain specified standards. See 42 U.S.C. 15481. Section 302(a) and (c) require the States to use provisional ballots in certain specified situations. See 42 U.S.C. 15482. Section 302(b) requires States to post certain voter information at each polling place used for a federal election. *Ibid.* Section 303(a) requires States to create a single, uniform, centralized, and interactive computerized statewide voter registration list and to maintain that list according to certain standards. See 42 U.S.C. 15483. Section 303(a) also requires States to obtain certain identification numbers from applicants (such as drivers license numbers) who register to vote. *Ibid.* Section 303(b) requires the States to obtain specific identification documents or verifying information from individuals who register to vote by mail for the first time for federal elections. *Ibid.* Section 304 notes that Title III sets “minimum requirements” that the States may exceed, and Section 305 provides that the specific

choices on the “methods of complying” with Title III “shall be left to the discretion of the State.” 42 U.S.C. 15484, 15485.

Viewed in context, it is clear that the provisions of Title III focus on the administration of federal elections and the duties and obligations of the States and state and local election officials in administering them, not on individual voters (although individual voters will certainly benefit from improved administration). See *Pennhurst*, 451 U.S. at 18-20 (holding that provision in question did not create individually enforceable rights when read in the context of the statute as a whole). Indeed, the overall structure of Title III focuses broadly and structurally on voting mechanisms, procedures, and systems designed to benefit the voting populace as a whole, rather than the interests of any individual voter. *Gonzaga* made clear that statutes that speak to macro, institutional policies and programs and have such an “aggregate” focus “are not concerned with whether the needs of any particular person have been satisfied, and they cannot give rise to individual rights.” 536 U.S. at 288.

Even if Section 302(a) were viewed in total isolation, rather than as part of the comprehensive scheme that Congress created, it still lacks the unambiguous and clear “rights-creating” language necessary to create an individual right that may be privately enforced. Section 302(a) merely instructs that, once certain circumstances are met, state election officials shall permit individuals to cast a provisional ballot. Section 302(a)(1) states that “[a]n election official at the polling place shall notify the individual that the individual may cast a provisional ballot.” 42 U.S.C. 15482 (emphasis added). Section 302(a)(2) instructs *election officials* that “individual[s]

shall be permitted” to vote provisionally “upon the execution of a written affirmation * * * before an election official.” *Ibid.* (emphasis added). Section 302(a)(3) requires that “*an election official * * * shall transmit* the ballot cast * * * to an appropriate State or local election official.” *Ibid.* (emphasis added). Section 302(a)(4) provides that “*if the appropriate State or local election official * * * determines* that the individual is eligible under State law to vote, the ballot shall be counted as a vote in that election in accordance with state law.” *Ibid.* (emphasis added). Section 302(a)(5)(A) commands that “*the appropriate State or local election official shall give* the individual written information” regarding how to check whether the provisional ballot was counted. *Ibid.* (emphasis added). Section 302(a)(5)(B) further requires that “*the appropriate State or local election official shall*” establish a system allowing individuals to check whether a provisional ballot was counted. *Ibid.* (emphasis added). Section 302(a) also mandates that “*the appropriate state or local election official shall establish and maintain* reasonable procedures necessary to protect the security, confidentiality and integrity of the personal information collected pursuant to the system established under (5)(B).” *Ibid.* (emphasis added). And, Section 302(b) commands that the “*appropriate State or local election official shall cause* voting information to be publicly posted at each polling place on the day of each election for federal office.” *Ibid.* (emphasis added).

It is clear that Section 302, like the other provisions of Title III, focuses on the duties and obligations of state and local election officials in administering federal elections. Because Section 302 was not drafted “with an unmistakable

focus” on voters, but was instead drafted with a focus on the state actors charged with overseeing voting, there is “far less reason to infer a private remedy in favor of individual persons.” *Cannon*, 441 U.S. at 690-692. Moreover, while making provisional balloting easier may benefit individual voters, that alone is insufficient to create an individual right.² See *Gonzaga*, 536 U.S. at 283. As a result, Section 302 simply does not unambiguously confer individual rights.

Of course, as the district court noted, Title III, including Section 302, references “individuals” and “voters.” This fact, however, is particularly unilluminating. Indeed, it is difficult to conceive how a statute directing election officials to permit provisional balloting could be drafted *without* mentioning the voters who will cast those ballots. The terms “individual” and “voters,” therefore, are necessary terms in a statute that is addressed to the activities of state and local election officials, and provide little, if any, insight into whether or not Congress intended to create an individual right.

Similarly, the fact that HAVA, in one subclause, requires election officials to post information regarding “the right of an individual to cast a provisional ballot,” 42 U.S.C. 15482(b)(2)(E), does not create a privately enforceable right. The central flaw in the district court’s analysis is that it focuses narrowly upon this one isolated subclause. *Sandusky County Democratic Party v. Blackwell*, No. 04 civ. 7582, 2004 WL 2308862, at *6 (N.D. Ohio Oct. 14, 2004). As noted above, however, it is

² Indeed, HAVA merely strengthens and reinforces a person’s pre-existing right to vote. Section 302(a)’s provisional ballot provisions merely complement this extant right; they do not create new ones.

simply not enough to identify statutory language that, considered in total isolation, could be read to create an individual right. Moreover, Congress's description of a statutory directive as a "right" is not enough because it does not answer the controlling question of whether Congress intended to "secure" those "rights" in the specific sense in which the term is used in Section 1983. Indeed, in *Gonzaga* the Court rejected the argument that, because other parts of the statute employed the term "rights" to describe obligations imposed on a state or federally funded actors, the obligation *itself* must be an individual and enforceable right. 536 U.S. at 289 n.7; see also *Pennhurst*, 451 U.S. at 18-20 (rejecting presumption of private right of action because a statute uses the term "rights"). Similarly, that Congress in this one instance employed the term "right" to describe the obligations imposed on States and state and local officials under HAVA does not convert the obligations themselves into personal rights.

Moreover, that HAVA regulates an area traditionally left to the States – voting – also counsels against a finding that HAVA may be enforced privately through Section 1983. Indeed, control over voting procedures, locations, and qualifications resides largely in the hands of the State not merely as a product of tradition and practice, but as a matter of constitutional design.³ The Supreme Court has noted that it is reluctant to read private remedies into a statute where Congress is regulating an area of "traditional state functions" and the statute itself does not unambiguously provide for such remedies. See *Gonzaga*, 536 U.S. 273 at 286 n.5

³ Administering federal elections, including voting, is an area that was specifically reserved to the States by the United States Constitution. See Art. I, § 4, cl. 1.

(noting that to infer private remedy under statute regulating education would require “judicial assumption, with no basis in statutory text, that Congress intended to set itself resolutely against a tradition of deference to state and local school officials”); cf. *Owasso Ind. Sch. Dist. v. Falvo*, 534 U.S. 426, 435 (2002) (refusing to adopt proposed interpretation of statute regulating education as Supreme Court “doubt[ed] Congress intended to intervene in this drastic fashion with traditional state functions”). Like *Gonzaga*, finding a private remedy under HAVA would entail not only a “judicial assumption, with no basis in statutory text,” but also would drastically interfere with an area of “traditional state function.” 536 U.S. at 286 n.5. This Court, like the Supreme Court in *Gonzaga*, should reject any such interpretation.

Hence, it is hardly surprising that Senator Dodd (D-Ct.), a Senate conferee and sponsor of HAVA, openly lamented HAVA’s limited enforcement provisions:

While I would have preferred that we extend [a] private right of action * * * , the House simply would not entertain such an enforcement provision.

148 Cong. Rec. S10488-02, S10512 (daily ed. Oct. 16, 2002). As the Conference Report confirmed, the enforcement provision only “[a]llows for civil action by the Attorney General to carry out the requirements under Section 301-303.”⁴ H.R.

⁴ Representatives of the National Council of LaRaza, which opposed HAVA’s enactment, also commented on what it considered “weak enforcement provisions,” noting that under HAVA

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

(continued...)

Conf. Rep. No. 730, 107th Cong., 2d Sess. 76 (2002). The district court brushed this evidence aside, concluding that it evidenced only Congress's plain intent not to create an express private right of action, and therefore that it has no bearing on whether HAVA permits private enforcement through Section 1983. *Sandusky County*, 2004 WL 2308862, at *9-*10. But, the touchstone of this analysis is Congress's intent, *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981), and it is manifestly implausible that having explicitly rejected efforts to include an express private right of action, Congress yet intended to create a right enforceable through Section 1983. *Gonzaga*, 536 U.S. at 290 ("It is implausible to presume that the same Congress nonetheless intended private suits to be brought before thousands of federal- and state-court judges."); cf. *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001) (Court may look to legislative context to the extent that context clarifies the text).

As the Supreme Court has made clear, a privately enforceable right may be conferred only with text that is "clear and unambiguous." HAVA comes nowhere near that high mark.

2. *HAVA's Comprehensive Remedial Scheme Also Supports The Conclusion That HAVA Does Not Confer Individual Rights*

In addition, HAVA's remedial scheme also supports the conclusion that

⁴(...continued)

ask the same state election system that disenfranchised them to determine that there is a violation and provide a remedy for the problem.

148 Cong. Rec. at S10501 (emphasis added).

HAVA does not confer individual rights. See *Gonzaga*, 536 U.S. at 289 (noting that the Court’s conclusion that the statute under review “fail[ed] to confer enforceable rights is buttressed by the mechanism that Congress chose to provide for enforcing those rights”).

Congress carefully considered and delineated precisely what enforcement mechanisms would be available under HAVA. Indeed, it devoted an entire title of the law to “ENFORCEMENT.” See Title IV. In Title IV, Congress crafted two mutually reinforcing remedial schemes that ensure compliance with federal law, while respecting traditional state discretion and autonomy in this area. First, HAVA requires States to establish a state-based administrative complaint procedure for private citizens to air grievances. 42 U.S.C. 15512. This procedure, which applies to all States receiving federal funds under HAVA,⁵ permits an individual who believes that a violation has occurred, is occurring, or is about to occur, to file a written and notarized complaint with the State. 42 U.S.C. 15512(a)(2). Section 15512 sets out nine specific requirements for the administrative complaint procedures, including that they be “uniform and nondiscriminatory,” that similar complaints be consolidated, that a hearing be held upon request of the complainant, and that a final determination be made within 90 days unless the complainant

⁵ According to the Election Assistance Commission, all 55 of the covered States and territories have received federal funds under HAVA. See Election Assistance Commission, HAVA Title II Requirements Payments Processed By The EAC As Of September 29, 2004, *available at* <http://www.eac.gov/docs/HAVA%20Req.%20Paymts.%209-29-04.pdf>; see also Election Assistance Commission, Funding For States: Early Money Distributed to States *available at* http://www.eac.gov/early_money.asp?format=none. Moreover, Ohio has received over \$130 million in HAVA funding. *Ibid.*

consents to a longer period. *Ibid.* If the State determines that a violation of any of HAVA's uniform and nondiscriminatory election technology and administration provisions has occurred, the State *must provide* an appropriate remedy; if the State determines that there is no violation, it may dismiss the complaint, but the State is required to publish the results of the administrative process. *Ibid.* If the State fails to meet the deadline for a determination, the complaint must be resolved within 60 days under alternative dispute resolution procedures. *Ibid.*

Second, Congress authorized the Attorney General to bring civil actions for declaratory and injunctive relief to enforce HAVA's provisions; thus, the United States ensures that States abide by HAVA's mandates. HAVA states 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 uniform and nondiscriminatory election technology and administration requirements under sections 15481, 15482, and 15483 of this title.

42 U.S.C. 15511. Indeed, during this first year of HAVA's operation, the Attorney General has already exercised this authority, having filed the Department's first enforcement action against San Benito County, California, for violations of Section 302. *United States v. San Benito County*, No. C04-02056 (N.D. Cal., San Jose Division).

Thus, each State is required by HAVA to formally adopt a comprehensive administrative process for individual complaints that provides appropriate relief.⁶

⁶ These processes, moreover, are required to be published, are subject to notice and
(continued...)

Courts must assume that state officials, acting through such formalized procedures, will comply with and adhere to federal law. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 223-224 (1997) (Court presumes that state actors will comply with federal restrictions). Of particular importance, Congress required that any decision adverse to the individual be published. That requirement ensures that any erroneous applications or interpretations of HAVA can be brought to the attention of the Attorney General, who can then decide whether federal enforcement action is warranted or whether the problem can better be addressed through inter-governmental discussion and cooperative remedial efforts. It is unlikely that Congress intended that carefully crafted remedial scheme in an area of sensitive federal-state relations to be supplemented by the heavy remedial hammer of Section 1983 action. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 75 (1996).

At the same time, HAVA's state/federal enforcement scheme serves two valuable purposes. First, Congress was intentionally deferential to the fact that States have traditionally, and still do, direct the operation of federal elections. Congress, therefore, left the primary policing of those systems to the individual States. Second, Congress sought to impose uniform national standards in several discrete areas. Congress, therefore, vested enforcement authority in the Attorney General. Allowing individual voters to judicially enforce HAVA's requirements would undermine each of these important purposes. Indeed, it is implausible to

⁶(...continued)
comment, and must be filed with the Election Assistance Commission. See 42 U.S.C. 15512.

suppose that the same Congress that sought to obtain uniformity, stability, and certainty in voting procedures for federal elections simultaneously intended to consign control over HAVA's interpretation to thousands of federal and state court judges and juries across the country. See *Gonzaga* 536 U.S. at 290.

“Where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it,” *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979), or finding them elsewhere. Here, HAVA's comprehensive remedial scheme supports the conclusion that Congress did not intend to create privately enforceable rights.

B. Even If HAVA Confers An Individual Right, Congress Foreclosed Use Of Section 1983 As A Remedy

Even if HAVA confers an individual right, that right may not be enforced through Section 1983 where “[a]llowing a plaintiff’ to bring a § 1983 action ‘would be inconsistent with Congress’ carefully tailored scheme.” *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989) (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984)).

Although “[p]laintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes,” the availability of a private remedy under Section 1983 is a *rebuttable* presumption.⁷ *Gonzaga*, 536 U.S. at 284. That presumption is rebutted – and a plaintiff may not rely upon Section 1983

⁷ By contrast, a plaintiff suing under an implied right of action has the burden of showing that the statute demonstrates “an intent to create not just a private right but also a private remedy.” *Alexander*, 532 U.S. at 286.

to enforce rights created by statute – where “Congress specifically foreclosed a remedy under § 1983.” *Smith*, 468 U.S. at 1005 n.9. Congress’s intent to foreclose use of Section 1983 can be manifested in one of two ways, either “expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.” *Blessing*, 520 U.S. at 341; see also *Sea Clammers*, 453 U.S. at 20 (“When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.”).

As with the inquiry into whether a private right exists at all, the question whether Congress foreclosed recourse to the remedies available through Section 1983 is at core an inquiry into “the intent of the Legislature.” *Sea Clammers*, 453 U.S. at 13; see also *Smith*, 468 U.S. at 1012. This inquiry should not be wholly divorced from the question of whether the statute creates individually enforceable rights. The less clear the evidence that Congress intended to create private rights, the more carefully the court should scrutinize the impact of a Section 1983 action on the enforcement mechanisms that Congress expressly provided.

Thus, the relevant question is not whether any particular remedy, such as judicial review for private litigants, is available, but rather whether taken as a whole,⁸ the statute evidences Congress’s desire to have its handiwork be the only

⁸ The district court erred in decoupling HAVA’s governmental enforcement section from its private enforcement section to determine whether HAVA’s remedial scheme was sufficiently comprehensive to preclude Section 1983 suits by private

means by which to enforce the statute. Here, HAVA clearly evidences that desire.

As described *supra*, Congress created a detailed and comprehensive remedial scheme. Congress required States to establish comprehensive administrative procedures to entertain individual HAVA complaints, 42 U.S.C. 15512, and authorized the Attorney General to bring civil actions for declaratory and injunctive relief to enforce HAVA's provisions in the event States or state and local election officials fail to implement HAVA properly, 42 U.S.C. 15511. Congress also specifically declined to provide an express private right of action. Finally, HAVA's legislative history indicates that Congress did not contemplate private parties being able to go into federal court to enforce HAVA's provisions. 148 Cong. Rec. at S10512 (statement of Sen. Dodd) ("While I would have preferred that we extend the private right of action afforded private parties under [the National Voter Registration Act], the House simply would not entertain such an enforcement provisions [sic].").

HAVA's enforcement scheme is closely akin to the scheme the Supreme Court found precluded private suits under Section 1983 in *Smith*. In *Smith*, the Court held that the Education of the Handicapped Act established a "carefully tailored" enforcement scheme for aggrieved persons. There, the statute provided a local administrative remedy for individual claimants that included fair and adequate

⁸(...continued)
individuals. When these provisions are correctly viewed as a coherent whole, they clearly evince Congress's intent to foreclose recourse to this remedy. See, *e.g.*, *Sea Clammers*, 453 U.S. at 20 (reviewing entire remedial scheme in determining congressional intent to preclude suits under Section 1983).

hearings, procedural protections, and parental involvement. 468 U.S. at 1009-1011.

In light of the comprehensive nature of the procedures and guarantees set out in the EHA and Congress' express efforts to place on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child, we find it difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go directly to court with an equal protection claim.

Smith, 468 U.S. at 1011. Such recourse would “render superfluous most of the detailed procedural protections outlined in the statute.” *Ibid*. Similarly here, Congress set forth a “carefully tailored” enforcement scheme which would be “render[ed] superfluous” if private suits were permitted pursuant to Section 1983.

The statutory remedial scheme Congress established under HAVA differs significantly from those schemes that the Supreme Court found lacking in *Wright*, *Wilder*, and *Blessing*. In *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 427-428 (1987), the Court held that the availability of limited local grievance procedures to tenants living in local public housing authorities, and the Secretary of Housing and Urban Development's “generalized powers” to audit those authorities, to enforce annual contributions contracts, and to cut off federal funds, were “insufficient to indicate a congressional intention to foreclose § 1983 remedies.” The Court reached the same conclusion in *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 521-523 (1990), where the Medicaid Act authorized the Secretary of Health and Human Services to reject state Medicaid plans or to withhold federal funding to States whose plans did not comply with federal law, and health care providers to obtain administrative review of individual claims for payment. And in *Blessing*, the Court concluded that the remedial

scheme's lack of a "private remedy – either judicial or administrative – through which aggrieved persons [could] seek redress," and its reliance upon the limited power of the Secretary of Health and Human Services to audit and cut federal funding to ensure that States lived up to their child support plans, made the case more like *Wright* and *Wilder* than *Sea Clammers* and *Smith*. 520 U.S. at 348.

Here, by contrast, HAVA contains a private remedy through which aggrieved persons can seek redress. As discussed in detail on pages 19 to 21, HAVA requires that States establish comprehensive administrative procedures to entertain *individual* HAVA complaints. 42 U.S.C. 15512. Significantly, Section 402 does not impose the sort of limitations on the administrative procedure that the Court found, in *Wright* and *Wilder*, permitted the use of Section 1983. See *Wright*, 479 U.S. at 427; *Wilder*, 496 U.S. at 523.

Second, HAVA authorized the Attorney General to bring civil actions for declaratory and injunctive relief to enforce HAVA's provisions. 42 U.S.C. 15511. This authority is substantially greater than that of the federal agencies in *Blessing*, *Wilder*, and *Wright*. In those cases, the only remedial powers expressly conferred on the agencies by the statutes were the power to audit and to terminate federal funds. Here, by contrast, the Attorney General "may bring a civil action against any State or jurisdiction" in federal court and may seek any declaratory and injunctive relief that is necessary, including a temporary restraining order or a permanent or temporary injunction. 42 U.S.C. 15511. This authority is significant and ensures federal judicial review, an element that was lacking in *Blessing*, *Wilder*, and *Wright*. In fact, Section 401 is more comparable to the provisions of the Federal

Water Pollution Control Act that entitled government officials to sue to implement the Act, which the Supreme Court deemed sufficiently comprehensive to preclude use of Section 1983 in *Sea Clammers*.

Although Section 402 does not require judicial review of the state administrative decision, this omission is not dispositive. First, the lack of mandatory judicial review is consistent with the informal and expedited nature of Section 402's administrative complaint procedure. Second, and more importantly, even if an individual cannot seek judicial review of the State's administrative decision, Congress's decision to permit the Attorney General to seek equitable relief in a United States District Court to redress HAVA violations provides an alternative means for federal judicial review of violations of the Act.

Indeed, the existence of a private right of action in the National Voter Registration Act, 42 U.S.C. 1973gg-9(b), attests to Congress's ability explicitly to provide voters with a private right of action to seek relief for violations of federal statutes governing elections when it intends to do so. In HAVA, the absence of that provision speaks volumes. As was the case in *Gonzaga*, "[i]t is implausible to presume that the same Congress [as crafted the precise statutory remedies] nonetheless intended private suits to be brought before thousands of federal- and state-court judges." 536 U.S. at 290.

In sum, HAVA clearly delineated the respective roles of the States and the federal government on one hand, and individual voters on the other, in its enforcement. Indeed, Congress's scheme serves a clear purpose. The United States Constitution itself provides that States, not federal courts, are to establish rules for

voting. See U.S. Const., Art. I, § 4, cl. 1. While Congress is authorized to modify those rules, it has always recognized the States' historic (and constitutional) role in administering federal elections. HAVA's enforcement scheme demonstrates that Congress intended election mechanisms to remain largely the province of the States, requiring individual citizens to seek redress within those state systems. At the same time, by requiring each State to provide an administrative enforcement process for individual complaints that provides real relief, and by authorizing the Attorney General to seek judicial relief, HAVA makes certain that State and local election officials comply with its requirements. Recognizing a private cause of action to enforce HAVA would duplicate and frustrate the thorough enforcement scheme that Congress expressly put in place. Indeed, this carefully and deferentially crafted scheme clearly evidences Congress's intention to foreclose resort to Section 1983.

II

HAVA DOES NOT PREEMPT PRECINCT-BASED ELECTION SYSTEMS

HAVA was designed to supplement and improve States' voting systems for federal elections. It was not designed to supplant or to dramatically restructure them. The Constitution, practice, and tradition have long left the definition of voting jurisdictions and the establishment of voting locations to the States. When Congress has intended to alter that longstanding practice, such as by requiring preclearance under the Voting Rights Act, it has said so explicitly and not elliptically.

American elections have long been precinct based – prospective voters are registered by their home address and assigned to a precinct where they may vote a

ballot containing all of the candidates whose offices cover the area of the voter's residence. A well-understood premise of such a system is that a voter must appear at the correct polling place – the one to which the voter was assigned, and on whose rolls the voter appears – or else the voter will not be able to vote. HAVA neither requires nor preempts such a precinct-based system and its text (along with its legislative history) is clear on this issue.⁹ Yet that is the upshot of the district court's ruling and plaintiffs' arguments. They read Section 302(a) as creating a right to vote in any precinct an individual "desires to vote" as long as the individual is otherwise qualified to vote in the State's election for Federal offices.

HAVA's provisional ballot provisions are designed to permit certain voters whose eligibility to vote is in question to cast a ballot, leaving the confirmation of their eligibility until later. Specifically, these provisions look to assist those who believe that they are at the correct polling place yet who do not appear on the registrar's rolls, or who are otherwise informed by election officials that they cannot vote. Under 42 U.S.C. 15482(a), HAVA operates in the following manner:

- First, a prospective voter must declare that "such individual is a registered voter in the jurisdiction in which the individual wishes to vote and that the individual is eligible to vote in an election for federal office";

⁹ We would note that there is currently a split in the lower federal courts on whether HAVA precludes a State from requiring that a voter cast a provisional ballot at the polling place the voter is registered in order for that ballot to be counted. Compare *Hawkins v. Blunt*, No. 04 civ. 4177 (W.D. Mo. Oct. 12, 2004) (unpublished) (attached as an addendum), and *Florida Democratic Party v. Hood*, No. 04 civ. 395 (N.D. Fla. Oct. 21, 2004) (unpublished) (attached as an addendum), with *Sandusky County Democratic Party v. Blackwell*, No. 04 civ. 7582, 2004 WL 2308862 (N.D. Ohio Oct. 14, 2004), and *Bay County Democratic Party v. Land*, No. 04 civ. 10257, 2004 WL 2345560 (E.D. Mich. Oct. 19, 2004).

- Election workers must be unable to locate the individual on the precinct rolls, or must otherwise assert that the individual is not eligible to vote;
- Election workers then inform the voter of his or her ability to cast a provisional ballot;
- Before doing so, the voter must attest in writing that the individual is “(A) a registered voter in the jurisdiction in which the individual desires to vote; and (B) eligible to vote in that election”;
- The voter may then vote a provisional ballot, which election officials “shall transmit * * * to an appropriate State or local election official for prompt verification”;
- If such official “determines that the individual is eligible under State law to vote, 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).

The key to understanding HAVA’s requirements in this regard lies in the term “jurisdiction.” A prospective provisional ballot voter must attest to being a registered voter in the jurisdiction in which the individual desires to vote (Section 302(a)(2)(A)), and it is that attestation to which election officials subsequently look in determining whether to count the provisional ballot (Section 302(a)(4)).

Congress did not define the term “jurisdiction” in the statute. The better reading of the statutory text – one that both respects the important interests served by precinct-based voting and that advances the purposes that animated HAVA – is that Section 302(a) permits persons who, in good faith, have attempted to vote at their designated polling place but whose names do not appear on the rolls to cast a provisional ballot that protects their interests pending resolution of their entitlement to vote in the federal election. Under that reading of the statute, the term “jurisdiction” refers to the voting location identified by state law in which the

particular voter may lawfully cast a ballot under state law. Congress chose a flexible term like voting “jurisdiction” because it recognized that the delineation of the appropriate locale for casting a lawful vote will vary depending on state law. See *Storer v. Brown*, 415 U.S. 724, 730 (1974) (“[T]he States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates.”). Congress was well aware that election laws differ widely from State to State, and rather than preempt the field, Congress respected the State’s traditional role in this area and looked to state law to determine the appropriate jurisdiction under HAVA. See 42 U.S.C. 15485 (commanding that “the specific choices on the methods of complying with the requirements of [Title III] shall be left to the discretion of the State”).

Further, the Supreme Court has made clear that statutory terms should be interpreted in light of the context of the overall statutory scheme and in light of nearby statutory provisions that reflect similar concerns. See, e.g., *Christensen v. Harris County*, 529 U.S. 576, 583-584 (2000); see also *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809 (1989) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”). Here, Section 302(a)(4) of HAVA clearly provides that determinations of whether an individual is eligible to vote and whether a provisional ballot should be counted are to be made *under and*

in accordance with State law, thereby reflecting Congress's concern that State law in this area be respected. 42 U.S.C. 15482(a)(4).

In its ruling below, the district court, however, concluded that "jurisdiction" must mean "county." *Sandusky County Democratic Party v. Blackwell*, No. 04 civ. 7582, 2004 WL 2308862, at *14 (N.D. Ohio Oct. 14, 2004). Yet, the term "jurisdiction," as employed in HAVA, lends itself as easily to a specific precinct or polling place in which the voter is permitted under state law to vote, as it does to whatever wider jurisdiction a State might want to define. Had Congress meant "county," it would have said "county." Had it meant "the unit of government that maintains the voter-registration rolls," it would have used those words. But it did not. Congress simply chose not to define the term "jurisdiction" in HAVA. Instead, as noted above, Congress decided to leave the definition of "jurisdiction" up to the States, just as it did voter eligibility. Cf. *Oneida Tribe of Indians v. Wisconsin*, 951 F.2d 757 (7th Cir. 1991) (noting that Congress would have used the term "lottery" in the Indian Gaming Regulatory Act had it so intended. That it chose instead to use the term "lotto" demonstrates it did not intend "lotto" to mean "lottery").

The lynchpin of the district court's contrary holding was its conclusory assertion that the term "jurisdiction" in HAVA has the same meaning as the term "registrar's jurisdiction" in the National Voter Registration Act (NVRA), 42 U.S.C. 1973gg *et seq.* *Sandusky County*, 2004 WL 2308862, at *14. The NVRA defines the term "registrar's jurisdiction" as the geographic reach of the unit of government that maintains the voter-registration rolls. See 42 U.S.C. 1973gg-6(j). Under that

definition, the court concluded that, at least for purposes of Ohio law, the term “jurisdiction” means county, rather than precinct, as voter-registration rolls in Ohio are maintained by the county. For the reasons that follow, the district court erred by reading into HAVA the NVRA’s definition of “registrar’s jurisdiction.”

First, the NVRA doesn’t even define the word “jurisdiction.” Rather, the NVRA defines the phrase “registrar’s jurisdiction,” a term that is both unique to the NVRA, which specifically deals with registration issues, and completely foreign to HAVA, which includes absolutely no references to the term “registrar” much less the phrase “registrar’s jurisdiction.” As such, the NVRA definition is simply inapplicable to HAVA.

Second, while Section 906 of HAVA explicitly provides that it should not be construed to supersede, restrict, or limit a number of other statutes, including the NVRA, failing to apply the NVRA’s definition of “registrar’s jurisdiction” to HAVA would neither supersede, restrict, nor limit the NVRA. Indeed, the NVRA did not disturb the long-held right of States to determine in which precinct or other jurisdiction a voter must cast his or her ballot. Rather, the NVRA regulates certain registration issues not at issue here and, with the exception of citizenship, simply does not address voter eligibility, which, under the NVRA, is explicitly left to state law.¹⁰ See 42 U.S.C. 1973gg-3(c)(2)(B); *ACORN v. Miller*, 912 F. Supp. 976, 985 (W.D. Mich. 1995) (explaining that the NVRA “does not regulate the qualification

¹⁰ As another example of how the NVRA did not disturb States’ precinct-based voting system, the NVRA explicitly allows removal of an ineligible voter from the registration rolls due to “a change in the residence of the registrant.” 42 U.S.C. 1973gg-6(a)(4)(B).

of voters”), aff’d, 129 F.3d 833 (6th Cir. 1997).

Third, if Congress had wanted to borrow a definition from the NVRA, it could have done so. Congress knows how to borrow definitions from other statutes when it wants to, see, *e.g.*, 42 U.S.C. 12114 (definition section of Americans with Disabilities Act using or incorporating by reference definitions in Title VII), and, if it so desired, could easily have done so here. That it did not is telling. See *Christensen*, 529 U.S. at 585 (finding that “[b]ecause the statute is silent on th[e] issue and because [Respondent’s] policy is entirely compatible with” the statutory provision, petitioners cannot prove violation of statute).

Fourth, as the Supreme Court noted twice last Term, the word “jurisdiction” is susceptible of different meanings. See *Kontrick v. Ryan*, 124 S. Ct. 906, 915 (2004); *Scarborough v. Principi*, 124 S. Ct. 1856, 1864-1865 (2004); see also *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 90 (1998) (“‘Jurisdiction,’ it has been observed, is a word of many, too many, meanings.”) (internal quotation marks omitted). If there is any ambiguity in the meaning of “jurisdiction” such that it could be read to dispense with precinct-based voting or preserve the States’ ability to maintain precinct-based voting, it is well settled that the term should not be interpreted to override a traditional state practice. See *United States v. Bass*, 404 U.S. 336, 349 (1971) (“[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.”); see also *Penn Dairies, Inc. v. Milk Control Comm’n*, 318 U.S. 261, 275 (1943) (“An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative

command, read in the light of its history, remains ambiguous.”). Applying the NVRA’s definition of jurisdiction would eviscerate the considered judgment of the States that require precinct-based voting, thereby eliminating a long-standing tradition in United States election law. See, e.g., *AFL-CIO v. Hood*, No. SC04-1921, slip op. 5 (Fla. S. Ct. Oct. 18, 2004) (noting tradition of precinct-based elections in holding that precinct-specific provisional balloting law does not violate the Florida Constitution). Put simply, “[a]n inroad upon [State laws and standards] of such far-reaching import as is involved here, ought to await a clearer mandate from Congress.” *Federal Trade Comm’n v. Bunte Bros., Inc.*, 312 U.S. 349, 354-55 (1941). Indeed, before discarding so core an element of so many States’ voting systems, Congress certainly would have afforded it more discussion. It may well be the case that on balance precinct voting should be discarded – the United States does not take a position – but that particular policy matter was not for the district court to decide. See *Owasso Ind. Sch. Dist. v. Falvo*, 534 U.S. 426, 432 (2002) (“We would hesitate before interpreting the statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation.”).

Fifth, importing the NVRA’s definition of “registrar’s jurisdiction” into HAVA – which would have the effect of prohibiting precinct-based election systems – is inconsistent with guidance recently issued by the United States Election Assistance Commission (EAC). The EAC, a federal agency established by Section 201 of HAVA, see 42 U.S.C. 15321, is charged with assisting the States in meeting the requirements of Title III by adopting “voluntary guidance consistent with such

requirements,” 42 U.S.C. 15501. On October 12, 2004, the EAC adopted Resolution 2004-02. In this resolution, the EAC encourages States to take all actions necessary to make certain that provisional balloting is administered effectively and with clarity and “[i]n States where a provisional ballot is validly cast only when cast at the voter’s assigned polling place or precinct, that these States make information available to poll workers at all precincts and/or polling places that will allow the poll workers to determine the voter’s assigned precinct and polling place.” U.S. Election Assistance Commission, Resolution 2004-02 Provisional Voting, *available at* <http://www.eac.gov/docs/Resolution%20-%20Provisional%20Voting.pdf>. Clearly, the EAC explicitly recognizes that HAVA does not preempt precinct-based elections systems.

Finally, HAVA’s legislative history supports, if not demands, this reading. As Senator Bond – one of HAVA’s floor managers – stated, provisional ballots are meant to allow an individual who registered to vote, but whose name, because of administrative or other clerical errors by election officials, does not appear on a voter registration list at the voter’s assigned precinct, to vote a provisional ballot:

Congress has said only that voters in Federal elections should be given a provisional ballot if they claim to be registered in a particular jurisdiction and that jurisdiction does not have the voter’s name on the list of registered voters. The voter’s ballot will be counted only if it is subsequently determined that the voter was in fact properly registered and eligible to vote in that jurisdiction. In other words, the provisional ballot will be counted only if it is determined that the voter was properly registered, but the voter’s name was erroneously absent from the list of registered voters. *This provision 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. S10488-02, S10493 (daily ed. Oct. 16, 2002) (emphasis added). In

fact, Senator Bond spoke to the very scenario at issue in this case:

Additionally, it is inevitable that voters will mistakenly arrive at the wrong polling place. If it is determined by the poll worker 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.*

148 Cong. Rec. at S10491 (emphasis added).

The Senate's discussion of Section 302(a)(4), which requires that votes be counted in accordance with state law, is equally illuminating. First, Senator Bond stated 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." 148 Cong. Rec. at S10491. Senator Dodd also noted:

[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. at S10510. Moreover, "[n]othing 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 ballot, or whether that vote is duly counted." *Ibid.* See also *id.* at S10504 (noting that HAVA does not establish "a Federal definition of when a voter is registered or how a vote is counted").

The district court dismissed this history in a footnote, *Sandusky County*, 2004 WL 2308862, at *15 n.7, finding it "not pertinent" because the court had already

concluded that “‘jurisdiction’ means county.” As discussed above, though, the court chose to define what Congress had intentionally left undefined. Election laws differ widely from State to State. Congress recognized that variety, and rather than preempt the field, Congress in HAVA looked to state law to determine the appropriate jurisdiction for purposes of voter registration and eligibility.

At the very least, HAVA evidences no hostility to the traditional precinct-based electoral system still followed by many states. Indeed, Senator Bond expressly noted 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.” See 148 Cong. Rec. at S10493. HAVA made clear that States possess significant discretion in determining whether an individual whose right to vote was in question was eligible under state law to vote, and that provisional ballots should only be “counted as a vote” in accordance with each State’s individual laws.

CONCLUSION

HAVA’s text unmistakably speaks not to the rights of individual voters, but rather to the state and local election officials responsible for administering federal elections. Nowhere does it contain a “clear and unambiguous” statement to the contrary. That, coupled with HAVA’s remedial scheme, which includes both individual and governmental enforcement mechanisms, demonstrates Congress’s intent to preclude resort to Section 1983 as a means to carry out its provisions. In any event, plaintiffs fail to show any conflict between HAVA and Ohio law. This Court should reverse the judgment of the district court and remand the case to the

district court with instructions to vacate the preliminary injunction and dismiss all of the HAVA related claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains no more than 10,949 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

SHELDON T. BRADSHAW
Attorney

Date: October 22, 2004

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2004, a copy of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT AND URGING REVERSAL was served by electronic mail or facsimile transmission, in accordance with the Court's briefing schedule, to the following counsel of record:

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ADDENDUM A

Supreme Court of Florida

No. SC04-1921

**AMERICAN FEDERATION OF LABOR AND CONGRESS OF
INDUSTRIAL ORGANIZATIONS, et al.,**

Appellants,

vs.

GLEND A. HOOD, etc., et al.,

Appellees.

[October 18, 2004]

PER CURIAM.

We have on appeal a trial court judgment certified by the district court of appeal to be of great public importance and to require immediate resolution by this Court. We have jurisdiction. See art. V, § 3(b)(5), Fla. Const.

1. Facts

In 2001, the Florida Legislature enacted legislation allowing voters to cast provisional ballots. See § 101.048, Fla. Stat. (2004). Under this legislation, a voter whose eligibility cannot be readily determined can cast a ballot, but officials will not count the ballot until the voter's eligibility is confirmed. See id. Before the ballot will be counted, officials must confirm (1) that the voter is registered and (2) that the voter is eligible to vote at the precinct where the ballot was cast. See § 101.048(2), Fla. Stat. (2004).

On August 17, 2004, four registered voters and several labor organizations filed a petition for writ of mandamus in this Court, alleging that the precinct-specific requirement in section 101.048 violates the Florida Constitution. The Court transferred the petition to circuit court. The circuit court dismissed the petition for failing to state a prima facie case. Petitioners then filed a motion to amend the judgment and filed an amended complaint seeking declaratory and injunctive relief. The circuit court denied relief. The plaintiffs appealed and the district court certified the matter to this Court. The plaintiffs now claim that the precinct-specific provision is facially unconstitutional in that it operates as an unnecessary restriction on the right to vote, in violation of article VI, section 1, Florida Constitution, and imposes an additional qualification on the right of suffrage, in violation of article VI, section 2.

2. The Applicable Law

The plaintiffs' facial challenge to the constitutionality of the precinct-specific provision in section 101.048, Florida Statutes (2004), is a pure question of law, subject to de novo review. See, e.g., City of Miami v. McGrath, 824 So. 2d 143, 146 (Fla. 2002) (holding that the facial constitutionality of a statute is a pure question of law, subject to de novo review).

Article VI, section 1, Florida Constitution, entitled "Regulation of elections," provides as follows in full:

All elections by the people shall be by direct and secret vote. General elections shall be determined by a plurality of votes cast. Registration and elections shall, and political party functions may, be regulated by law; however, the requirements for a candidate with no party affiliation or for a candidate of a minor party for placement of the candidate's name on the ballot shall be no greater than the requirements for a candidate of the party having the largest number of registered voters.

Art. VI, § 1, Fla. Const. (emphasis added). Article VI, section 2, Florida Constitution, entitled "Electors," discusses voter qualifications and provides as follows in full:

Every citizen of the United States who is at least eighteen years of age and who is a permanent resident of the state, if registered as provided by law, shall be an elector of the county where registered.

Art. VI, § 2, Fla. Const.

Section 101.045, Florida Statutes (2004), addresses general voter precinct requirements and provides as follows in relevant part:

No person shall be permitted to vote in any election precinct or district other than the one in which the person has his or her legal residence and in which the person is registered.

§ 101.045(1), Fla. Stat. (2004) (emphasis added). Section 101.048, Florida Statutes (2004), addresses provisional ballots and provides as follows in relevant part:

101.048 Provisional ballots.—

(1) At all elections, a voter claiming to be properly registered in the county and eligible to vote at the precinct in the election, but whose eligibility cannot be determined . . . shall be entitled to vote a provisional ballot. Once voted, the provisional ballot shall be placed in a secrecy envelope and thereafter sealed in a provisional ballot envelope. The provisional ballot shall be deposited in a ballot box. All provisional ballots shall remain sealed in their envelopes for return to the supervisor of elections. The department shall prescribe the form of the provisional ballot envelope.

(2)(a) The county canvassing board shall examine each provisional ballot envelope to determine if the person voting that ballot was entitled to vote at the precinct where the person cast a vote in the election and that the person had not already cast a ballot in the election.

(b)(1) If it is determined that the person was registered and entitled to vote at the precinct where the person cast a vote in the election, the canvassing board shall compare the signature on the provisional ballot envelope with the signature on the voter's registration and, if it matches, shall count the ballot.

(2) If it is determined that the person voting the provisional ballot was not registered or entitled to vote at the precinct where the person cast a vote in the election, the provisional ballot shall not be counted and the ballot shall remain in the envelope . . . and the envelope shall be marked "Rejected as Illegal."

§ 101.048, Fla. Stat. (2004) (emphasis added).

As noted above, article VI, section 1, Florida Constitution, provides that “elections shall . . . be regulated by law.” Under this provision, the Legislature is directed to enact laws regulating the election process. The voter must “comply with such . . . requirements of law as may be imposed upon him as a matter of policing the process by which he is authorized to cast his vote at a place and within the time, and subject to the regulations, provided by law to govern the elections themselves.” State ex rel. Gandy v. Page, 169 So. 854, 858 (Fla. 1936) (emphasis added). The constitutional directive, however, is not plenary: legislative acts that impose “[u]nreasonable or unnecessary restraints on the elective process are prohibited.” Treiman v. Malmquist, 342 So. 2d 972, 975 (Fla. 1977).

3. The Present Case

As noted above, the Legislature is authorized to impose reasonable and necessary regulations on the “place” at which an elector may cast his or her vote. The traditional precinct-specific provision that applies to all voters is codified in section 101.045 and has been a feature of Florida election law for decades. See § 101.045, Fla. Stat. (2004). The plaintiffs do not challenge the validity of that provision. Rather, they challenge only the precinct-specific provision in section 101.048. Yet, the plaintiffs fail to show how section 101.048 is distinguishable from section 101.045 in this regard. Under their reasoning, if the precinct-specific

provision in section 101.048 were to be held invalid, then the traditional precinct-specific provision in section 101.045 also would be infirm.

We conclude that the precinct-specific provision in section 101.048 is a regulation of the voting process, not a qualification placed on the voter, and is no more unreasonable or unnecessary than the comparable provision in section 101.045, which has been operative for decades. The Legislature reasonably may have determined that both regulations are necessary to ensure the integrity of the election process. We hold that the plaintiffs have failed to show that the precinct-specific provision in section 101.048 imposes an “[u]nreasonable or unnecessary restraint[] on the elective process.” See Treiman, 342 So. 2d at 975. We affirm the trial court’s ruling upholding the facial constitutionality of section 101.048, Florida Statutes (2004), in this regard.

It is so ordered.

PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO and BELL, JJ., concur.

NO MOTION FOR REHEARING WILL BE ALLOWED.

Certified Judgments of Trial Courts in and for Leon County – L. Ralph Smith, Judge, Case No. 2004-CA-2104 – An Appeal from the District Court of Appeal, First District, Case No. 1D04-4304

Ben R. Patterson and Jerry G. Traynham of Patterson & Traynham, Tallahassee, Florida, and Stephen P. Berzon, Jonathan Weissglass, Linda Lye and Danielle E. Leonard of Altshuler, Berzon, Nussbaum, Rubin & Demain, San Francisco, California, on behalf of American Federation of Labor and Congress of Industrial

Organizations, et al.; Alma Gonzalez, Tallahassee, Florida, on behalf of Florida Public Employees Council 79, Tallahassee, Florida; Jill Hanson, West Palm Beach, Florida, and Jonathan P. Hiatt and Laurence E. Gold, Washington, D.C., on behalf of AFL-CIO; and Judith A. Scott and John J. Sullivan, Washington, D.C., on behalf of SEIU and SEIU 1199Florida,

for Appellants

Honorable Charles J. Crist, Jr., Attorney General, Christopher M. Kise, Solicitor General, Gerald B. Curington, Assistant Deputy and Jonathan A. Glogau, Chief, Complex Litigation, Tallahassee, Florida, on behalf of the Honorable Glenda Hood; and Herbert W.A. Thiele, County Attorney and Patrick T. Kinni, Assistant County Attorney, Tallahassee, Florida, on behalf of Jane Sauls,

for Appellees

Ronald A. Labasky of Landers & Parsons, P.A., Tallahassee, Florida, on behalf of Bill Cowles and the Supervisor of Elections of Orange County, Florida and President of the Florida State Association of Supervisors of Elections, Inc.; and D. Andrew Byrne, Darren A. Schwartz, Jackson W. Maynard, Jr., D. Christine Thurman of Cooper, Byrne, Blue & Schwartz, PLLC, Tallahassee, Florida, on behalf of Cecilia Rush,

for Intervenors

ADDENDUM B

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

THE FLORIDA DEMOCRATIC PARTY,

Plaintiff,

v.

CASE NO. 4:04cv395-RH/WCS

GLEND A. HOOD, etc., et al.,

Defendants.

_____ /

ORDER GRANTING PRELIMINARY INJUNCTION

In this action plaintiff asserts that a prospective voter in a federal election has a right under federal law (1) to cast a provisional ballot at a polling place even if local officials assert that the voter is at the wrong polling place, and (2) to have that ballot counted, even if the voter is in fact at the wrong polling place, if the voter meets all requirements of state law other than the requirement to vote at the proper polling place. Plaintiff has moved for a preliminary injunction requiring the defendant election officials of the State of Florida to afford voters these rights in the November 2004 election. I conclude that plaintiff is likely to prevail on the merits with respect to the first claimed right but unlikely to prevail with respect to

the second. I conclude further that plaintiff has met the other prerequisites to issuance of a preliminary injunction. I thus grant the motion for preliminary injunction in part.¹

I Background

The Florida Democratic Party brought this action against the Florida Secretary of State and Director of the Division of Elections in their official capacities. These are the state officials with ultimate responsibility for conducting the November 2004 election in Florida. On the ballot will be elections for President, United States Senate, and United States House of Representatives, as well as numerous state and local offices and proposed constitutional amendments.

Plaintiff seeks relief under a section of the Help America Vote Act (“HAVA”), 42 U.S.C. §15482, that gives voters in federal elections a right to cast “provisional” ballots. Provisional ballots are cast by persons who assert they are eligible to vote but who are determined on the spot by election workers to be ineligible. Each provisional ballot is kept in a separate envelope and counted only if it is ultimately determined that the voter was in fact eligible to vote. What it means to be “eligible” for these purposes is one of the issues in this litigation.

¹ This order confirms rulings announced on the record and summarizes, without in all instances repeating, the grounds for the rulings.

As required by §15482, as well as by Florida Statutes §§101.048 and 101.049 (2003), defendants have established a system for provisional voting. Plaintiff asserts, however, that defendants' system violates HAVA because it does not allow provisional voting other than in the voter's assigned precinct.²

Under long-established Florida law, each voter is assigned to a precinct and may vote on election day only at the polling place for that precinct.³ Defendants have announced that a provisional vote will be counted only if the voter casts the ballot at the proper polling place.⁴ Further, defendants have issued an instructional manual telling poll workers not to allow a voter to cast a provisional ballot if the

² Plaintiff also asserts this violates state law, but that is not a claim properly presented here, *see, e.g., Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 121, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (holding that the Eleventh Amendment bars any claim for injunctive relief based on state law against a state or against a state officer in his or her official capacity), and in any event the Florida Supreme Court has definitively rejected plaintiff's reading of Florida law. *See AFL-CIO v. Hood*, No. SC 04-1921 (Fla. Oct. 18, 2004).

³ Voters may vote during the two weeks prior to election day at one or more common locations and may cast absentee ballots without regard to precincts. Those options are not involved in the case at bar. On election day, a voter may vote only at the polling place for his or her assigned precinct.

⁴ This is confirmed, for example, by the certificate a voter will be required to sign in order to cast a provisional ballot. That certificate—a form promulgated by defendants—tells voters: “Your ballot will not count if you do not vote in the correct precinct.” Complaint (document 1), ex. B, “Provisional Ballot Voter’s Certificate.”

poll workers determine that the voter is at the *wrong* polling place.⁵

By its complaint in this action, plaintiff seeks declaratory and injunctive relief. Plaintiff asserts that a prospective voter in a federal election has a right under federal law to cast a provisional ballot, and to have that ballot counted, without regard to state law requiring that votes be cast only at an assigned polling place. Plaintiff has moved for a preliminary injunction.

Defendants initially contested both a voter's right to cast a ballot at a polling place believed by election workers to be the wrong polling place, and a voter's right to have such a ballot counted. During the hearing on plaintiff's motion for preliminary injunction and in response to questioning by the court, however, defendants withdrew their assertion that a voter cannot properly cast a provisional ballot if election workers conclude at that time that the voter is at the wrong polling place. Instead, defendants now concede that a voter must be allowed to cast a provisional ballot if the voter makes the declaration and written attestation required by federal law, even if election workers conclude the voter is at the wrong polling

⁵ Defendants' "Polling Place Procedures Manual" tells poll workers:

Do not allow a voter to vote a provisional ballot if you have determined the voter is registered in another precinct.

Direct the voter to the proper precinct.

Complaint (document 1), ex. A, "Polling Place Procedures Manual" at 7.

place. Defendants now have so advised the various county supervisors of elections by means of a memorandum explicitly supplementing the relevant provisions of the instructional manual. Defendants remain adamant, however, that a provisional ballot cannot properly be counted unless the voter was, in fact, at the correct polling place.

Defendants also defend this action, and resist issuance of a preliminary injunction, on the ground that HAVA's section on provisional voting creates no federal "right" and thus cannot be enforced in a private action under §1983, and on the ground that plaintiff lacks standing to assert the rights of anyone to whom injury resulting from the actions at issue is more than a speculative possibility.

II Preliminary Injunction Standards

As both sides agree, issuance of a preliminary injunction is governed by a familiar four-part test. The proponent must establish (1) a substantial likelihood of success on the merits; (2) that the proponent will suffer irreparable injury unless the injunction issues; (3) that the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that the injunction would not be adverse to the public interest. *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998); *U.S. v. Lambert*, 695 F.2d 536 (11th Cir. 1983).

Likelihood of success on the merits, in the context of this case, refers both to the substantive issues under HAVA and also to the questions of whether plaintiff has standing and may maintain a private right of action for enforcement of HAVA under §1983.

III The Statute

Congress enacted HAVA at least partly in response to perceived voting irregularities in the State of Florida during the November 2000 presidential election. *See* 148 Cong. Rec. S10488-02 (2002) (discussing the “flaws and failures of our election machinery” as showcased in the 2000 election). Among the perceived irregularities was that eligible voters had been removed from Florida voting rolls in the erroneous belief that they were convicted felons whose right to vote had not been restored. At the time of the November 2000 election, Florida law did not allow the casting of a ballot by a person who presented at a polling place on election day but who was determined by election officials at that time not to be eligible to vote. If the determination that the voter was not eligible later turned out to be erroneous, the problem could not be cured. Those turned away from the polls during the November 2000 election, even erroneously, thus had no opportunity to vote. Many other states also made no provision for the casting of a

ballot by a person determined on the spot to be ineligible to vote.

HAVA dealt with this problem by creating a system for provisional balloting, that is, a system under which a ballot would be submitted on election day but counted if and only if the person was later determined to have been entitled to vote. The statute provides in relevant part:

(a) Provisional voting requirements

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 as follows:

(1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.

(2) The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is –

(A) a registered voter in the jurisdiction in which the individual desire to vote; and

(B) eligible to vote in that election.

(3) An election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual under paragraph (2) to an appropriate State or local election

official for prompt verification under paragraph (4).

(4) If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that *the individual is eligible under State law to vote*, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law.

42 U.S.C. §15482 (emphasis added).

HAVA also requires state or local elections officials to post specified information at each polling place, including “information on the right of an individual to cast a provisional ballot and instructions on how to contact the appropriate officials if these rights are alleged to have been violated.” 42 U.S.C. §15482(b)(2)(E).

IV Enforcement under §1983

HAVA does not itself create a private right of action. Plaintiff claims, however, that HAVA creates a federal “right,” and that that right may be enforced against state officials under 42 U.S.C. §1983. I agree.

The law applicable to this issue is set forth in a line of cases recently summarized in *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003). *See, e.g., Gonzaga University v. Doe*, 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002); *Blessing v. Freestone*, 520 U.S. 329, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997);

Wilder v. Virginia Hospital Assn., 496 U.S. 498, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990). The inquiry begins with the question whether “Congress intended to create a federal right,” *Schwier*, 340 F.3d at 1290, *quoting Gonzaga*, 536 U.S. at 283, because §1983 creates a cause of action for deprivation of “rights” (as well as “privileges” and “immunities”) arising under federal law.

The relevant section of HAVA clearly evinces a congressional intention to create a federal right. Indeed, that is the whole point of the provision. And the various factors courts have cited as aids in analyzing this issue all cut in favor of recognizing a federal right. Thus HAVA speaks directly of individual voters, not just of actions required of elections officials, and HAVA even refers explicitly to the “right” of voters to cast a provisional ballot. *See* 42 U.S.C. §15482(b)(2)(E). There is nothing precatory about the statute; Congress clearly imposed a mandate. And the mandate is one that is readily subject to judicial interpretation and enforcement, much like the many other rights that are the subject of litigation in federal courts every day. Finally, although HAVA has other enforcement mechanisms, they are not inconsistent in any respect with the availability of relief under §1983. In sum, under *Schwier* and the line of cases it interpreted, this statute clearly creates a federal right enforceable under §1983.

That this is correct becomes even more clear when one steps back from the doctrinal wrangling and precise language of the cases and takes a longer view.

Protecting federal rights of this type from state interference is very close to the core of §1983 and indeed very close to one of the most critical components of federal jurisdiction. But for the ability to enforce federal rights against state interference in actions under §1983, the schools might still be segregated. *See generally Monell v. Dep't of Social Servs.*, 436 U.S. 658, 685, 98 S. Ct. 2018, 2033, 56 L. Ed. 2d 611 (1978) (summarizing Congress's lengthy discussion before passing §1983 of intent “to give a broad remedy for violations of federally protected civil liberties”). Congress sought to protect the right to vote by adopting the provisional voting section of HAVA.⁶

V Standing

Plaintiff is a political party. It claims standing to assert its own rights as a political party and also the rights of its candidates and voters. In appropriate circumstances, an association or organization has standing to assert claims based on injuries to itself *or* its members. *See United Food and Commercial Workers v.*

⁶ The reference to the old segregation cases is not entirely off the mark. There were claims that the disenfranchisement of voters in the 2000 election in Florida had a disparate racial impact, if it did not also arise from a racial animus. One need not assume those claims were well founded to recognize the appropriateness of providing a federal forum for a fair adjudication of such claims—or for enforcement of a statute designed in part to prevent the recurrence of circumstances that allowed such claims (well founded or not) to go unresolved.

Brown Group, 517 U.S. 544, 116 S. Ct. 1529, 134 L. Ed. 2d 758(1996). In either case, the organization or the members must be affected in a tangible way. *See id.*

Thus, for example, an organization has standing to challenge conduct that impedes its ability to attract members, to raise revenues, or to fulfill its purposes. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S. Ct. 1114, 1124, 71 L. Ed. 2d 214(1982). And, in appropriate circumstances, an organization can challenge conduct that injures its members. *See, e.g., Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977) (“we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit”); *International Union, UAW v. Brock*, 477 U.S. 274, 289, 106 S. Ct. 2523, 91 L. Ed. 2d 228 (1986); *Doe v. Stincer*, 175 F.3d 879 (11th Cir. 1999).

Under these principles, plaintiff has standing to assert, at least, the rights of its members who will vote in the November 2004 election. Plaintiff has not identified specific voters who will seek to vote at a polling place that will be deemed wrong by election workers, but this is understandable; by their nature, mistakes cannot be specifically identified in advance. Thus a voter cannot know in

advance that his or her name will be dropped from the rolls, or listed in an incorrect precinct, or listed correctly but subject to a human error by an election worker who mistakenly believes the voter is at the wrong polling place. It is inevitable, however, that there will be such mistakes. The issues plaintiff raises are not speculative or remote; they are real and imminent. *See White's Place, Inc. v. Glover*, 222 F.3d 1327 (11th Cir. 2000) (citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)). Plaintiff has standing to pursue this litigation.

VI

Merits: Counting Votes Cast at the Wrong Polling Place

Plaintiff does not fare as well, however, on the merits. Florida law has long required voting at the proper polling place, and nothing in HAVA invalidates that approach. The purpose of HAVA's provisional voting section is not to eliminate precinct voting, but instead to ensure that voters are allowed to vote (and to have their votes counted) when they appear at the proper polling place and are otherwise eligible to vote. In the November 2000 election, this did not always occur, because voters who appeared at the proper polling place were sometimes turned away in error, including, for example, as a result of the removal of an eligible voter from the voting rolls based on a mistaken determination that he or she was a convicted

felon whose rights had not been restored.

HAVA's provisional voting section in effect adopts a "perfect knowledge" approach. If a person presents at a polling place and seeks to vote, and if that person would be allowed to vote by an honest election worker with perfect knowledge of the facts and law, then the person's vote should count. The difficulty, of course, is that when the person presents, the election worker may not have perfect knowledge; the facts are not always at hand. It is this difficulty that provisional voting seeks to address. The person who claims eligibility to vote, but whose eligibility to vote at that time and place cannot be verified, is entitled under HAVA to cast a provisional ballot. On further review—when, one hopes, perfect or at least more perfect knowledge will be available—the vote will be counted or not, depending on whether the person was indeed entitled to vote at that time and place. It is as simple as that.

This reading is consistent in all respects with the language of the statute. One and only one subsection of the statute addresses the issue of whether a provisional ballot will be counted. That subsection provides:

If the appropriate State or local election official . . . [ultimately] determines that *the individual is eligible under State law to vote*, 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) (emphasis added). The emphasized language could mean the vote counts if “the individual is eligible under State law to vote *in this election at some polling place*,” or the language could mean the vote counts only if “the individual is eligible under State law to vote *in this election at this polling place*.” Either reading is consistent with the language of the statute, but the latter reading is more appropriate because it requires the vote to be counted “in accordance with State law,” words that Congress chose to include in the statute, perhaps in recognition of this very issue. Moreover, only this reading comports with the statute’s purpose, as set forth above. And finally, only this reading comports with the statute’s remarkably clear and consistent legislative history.⁷

⁷ For example, a sponsor of the legislation said:

[I]t 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.

148 Cong. Rec. S10488-02 at S10491 (daily e. Oct. 16, 2002) (statement of Senator Dodd). Later, a senator repeated the point:

This provision 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.

at S10493 (statement of Senator Bond). Plaintiff has cited nothing in the legislative history inconsistent with this analysis.

In asserting the contrary, plaintiff says “eligible to vote” can only mean eligible to vote in this election, without regard to any specific polling place, because, plaintiff says, this is the plain meaning of “eligible.” But there is nothing plain or unambiguous about this use of the word “eligible.” To the contrary, “eligible” could mean any of several things. In one sense, any 18-year-old citizen of Florida is “eligible” to vote in the state’s elections. As even plaintiff admits, however, such a person cannot vote unless he or she has duly registered to vote, and has done so at least 30 days in advance, as required by Florida law. HAVA certainly does *not* require the counting of the vote of an unregistered voter, or one who registers too late. So “eligible” as used in this subsection necessarily includes at least some element of compliance with applicable state procedures. Nothing in the “plain language” of the term “eligible” answers the question whether the term means eligible to vote at the particular polling place, or only eligible to vote somewhere.

Plaintiff also emphasizes references in other parts of the statute to whether the provisional voter is a “registered voter in the jurisdiction,” “eligible to vote in an election for Federal office,” or “eligible to vote in that election.” 42 U.S.C. §15482(a) & (a)(2)(B). As plaintiff notes, these phrases do not seem to include any restriction based on polling place. These phrases do not, however, appear in the subsection that addresses whether a vote will count. Instead, these phrases

appear in the subsections addressing whether a voter may submit a provisional ballot at all—a ballot that might or might not be counted, depending only on whether the voter is “eligible under State law to vote.” 42 U.S.C. §15482(a)(4). Plaintiff’s assertion that there can be no difference between who may submit a provisional ballot, on the one hand, and whose ballot will count, on the other hand, is incorrect; the whole point of provisional balloting is that the vote may be cast but ultimately may or may not count. It is entirely reasonable to attribute to Congress a determination to make it easy to submit a provisional ballot to safeguard whatever right the voter had, but to leave to preexisting state law the question of whether the ballot should count, based on whatever the facts might ultimately turn out to be. That is what Congress did.

Defendants thus are correct when they assert HAVA does not require the counting of provisional ballots (or any other ballots) cast at the wrong polling place.⁸

⁸ Since this ruling was announced at the preliminary injunction hearing, other district courts sitting in other states have reached conflicting results on essentially this same issue. *Compare Hawkins v. Blunt*, No: 04-4177-CV-C-RED (W.D. Mo. Oct. 12, 2004) (concluding that HAVA does not require states to count provisional ballots cast at the wrong polling place); *and Colorado Commission Cause v. Davidson*, No: 04cv7709 (D.C. Co. Oct. 20, 2004) (same); *with Sadowsky County Democratic Party v. Blackwell*, No: 304cv7582 (N.D. Ohio Oct. 14, 2004) (concluding that provisional ballots must be counted even if cast in improper precinct); *and Bay County Democratic Party v. Land*, No: 04-10257-BC consolidated with *Michigan State Conference of NAACP v. Land*, No: 04-10267-BC (E.D. Mich. Oct. 19, 2004) (same).

VII

Merits: Casting a Provisional Ballot

Defendants are incorrect, however, in asserting that a person can be denied the right to cast a provisional ballot based on an on-the-spot determination by election workers that the person is at the wrong polling place. Election workers, like all of us, make mistakes, and the voting rolls are not infallible. That is why provisional balloting exists. The assumption implicit in defendants' original instructional manual—that election workers could never make a mistake when they conclude a voter is at the wrong polling place—cannot be squared with HAVA's provisional voting mandate. As defendants now concede, a person who meets the statutory prerequisites to casting a provisional ballot, by making the required declaration and executing the required affirmation, must be allowed to cast a provisional ballot. The ballot will count only if the person was indeed “eligible under State law to vote” in this election at this polling place.⁹

⁹ On this narrow issue—the right of a person to cast a provisional ballot even when determined by poll workers to be at the wrong polling place—plaintiff's standing is at its lowest point. Plaintiff's standing to assert the rights of voters, *see supra* section V, extends only as far as the standing of the voters themselves. It is virtually certain that some voters will appear at the wrong polling place. It is considerably less certain that any voter will be *wrongly determined* to be at the wrong polling place. As a matter of common sense and human experience, it seems likely that such mistakes will occur. I conclude that plaintiff is likely to prevail even on this narrow segment of the standing issue. Before this case is finally addressed on the merits, the actual experience during the November

VIII Remaining Prerequisites to Preliminary Injunction

Beyond a substantial likelihood of success on the merits, the proponent of a preliminary injunction must establish that the proponent will suffer irreparable injury unless the injunction issues; that the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; and that the injunction would not be adverse to the public interest. Plaintiff easily meets these requirements in the case at bar.

A person who is denied the right to vote suffers irreparable injury. One need look no further than the 2000 election to confirm that that is so. There was post-election litigation seeking to reopen the polls or otherwise allow further voting by those who had been turned away, but that litigation went nowhere. The problem was irremediable. *See, e.g., Nat'l Coalition for Students with Disabilities v. Bush*, No: 4:00cv442 (Docket) (N.D.Fla. Nov. 29, 2000) (denying motion for order requiring state elections officials to allow voting in November 2000 election, after polls had closed, by persons who claimed they were prevented from voting by violations of federal law); *Dickens v. Florida*, No: 4:00cv420 (Docket) (N.D. Fla. Nov. 9, 2000) (same).

2004 election may make clear the appropriate resolution of this issue, one way or the other.

This irreparable injury to a voter is easily sufficient to outweigh any harm defendants may suffer from a narrow preliminary injunction requiring them to allow a person who asserts he or she is at the correct polling place to cast a provisional ballot. Indeed, such a preliminary injunction will injure defendants not at all; they already have acquiesced in the assertion that any such person is entitled to cast a provisional ballot, and already have taken steps to ensure that that will occur.¹⁰

And finally, the public interest favors issuance of such an injunction. It is in the public interest that each voter's right to vote be protected against administrative errors. That is why HAVA created a right to cast a provisional ballot. With one caveat, addressed below, it is in the public interest to allow a voter to cast a provisional ballot, so that if it ultimately is determined that the voter was indeed entitled to vote as he or she asserted, the vote will count, and the right to vote will not be lost.

¹⁰ Defendants make no claim that their voluntary compliance with plaintiff's request on this issue renders the matter moot. *See Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). A "claim for injunctive relief may become moot if: (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violations." *Dow Jones & Co., Inc. v. Kaye*, 256 F.3d 1251, 1254 (11th Cir. 2001). Defendants have distributed a memorandum that, if heeded, will cure the effects of the original instructions prohibiting election workers from allowing the casting of a provisional ballot in these circumstances, but it cannot be said that events have completely and irrevocably eradicated the effects of the original instructions.

The caveat is this. In their manual, defendants first instruct election workers who determine that a voter is at the wrong polling place to direct the voter to the correct polling place. That is not only proper but affirmatively commendable and far superior to simply allowing the voter to cast a provisional ballot. In most instances, the election workers will be correct that the voter is at the wrong polling place, and the vote thus will count only if the voter goes to the proper polling place. Simply accepting provisional ballots from such voters would itself raise grave concerns, of fairness if not also of legality. Nothing in the preliminary injunction that will be issued should be read to restrict in any way the authority of election workers to tell a voter he or she is at the wrong polling place and to direct the voter to the proper polling place. It is only if the voter disagrees—in effect, if the voter insists that he or she is at the correct polling place—that an election worker must allow the voter to cast a provisional ballot.

The revised instructions defendants now have sent to election workers clearly set forth the proper approach, under which poll workers will diligently attempt to determine the correct situation, and, if they determine the voter is at the wrong polling place, will direct the voter to the proper polling place, accepting a provisional ballot only if the fully-informed voter still asserts he or she is in the right place. The preliminary injunction requiring that a voter be allowed to cast a provisional ballot when he or she meets the statutory requirements for doing so,

coupled with defendants' instructions setting forth the appropriate handling of the matter by poll workers on the scene, will not disserve the public interest.

IX Security

Federal Rule of Civil Procedure 65(c) states that no preliminary injunction shall issue

except upon the giving of security by the applicant in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined

At the hearings in the case at bar, defendants made no claim they will incur costs or damages as a result of this preliminary injunction, and defendants did not ask that plaintiff be required to post security.

Such costs or damages, if any, would be nominal. The mechanism for accepting provisional ballots is already in place, and defendants can comply (indeed, already have complied) with the preliminary injunction simply by issuing a memorandum.

If defendants assert plaintiff should be required to give security, defendants may file a motion to require the giving of security, including argument and any evidence deemed appropriate on the issue of the amount of security that should be

required. Unless and until defendants file such a motion, defendants will be deemed fully secured, without the filing of security.

Conclusion

Federal law does not invalidate the long-standing requirement in the State of Florida that a voter must vote on election day only at the voter's assigned polling place. Federal law does, however, mandate that any voter who makes a required declaration and written affirmation—essentially asserting the voter's eligibility to vote in the election at issue—must be allowed to cast a provisional ballot. Such a ballot must be counted if and only if the voter was eligible under state law to vote in that election at that polling place. For these reasons,

IT IS ORDERED:

1. Plaintiff's motion for preliminary injunction (document 4) is **GRANTED IN PART**. Defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, shall not refuse to allow the casting of a provisional ballot by any person who presents at a polling place on November 2, 2004, but is determined by election workers to be at the wrong polling place, if the person makes an appropriate declaration and written affirmation in accordance with 42 U.S.C. §15482(a) & (a)(2). This order does not

restrict in any way the authority of election workers to direct such a person to the polling place deemed appropriate; to advise such a person that a provisional ballot cast at the wrong polling place will not be counted; and otherwise to investigate and advise the person with respect to his or her status as a voter.

2. Defendants' motion for judgment on the pleadings (documents 21 and 22) is DENIED.

SO ORDERED this 21st day of October, 2004.

s/Robert L. Hinkle
Chief United States District Judge

ADDENDUM C

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

CLAUDE HAWKINS, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 04-4177-CV-C-RED
)	
MATT BLUNT, Secretary of State, in his official capacity, et al.,)	
)	
Defendants.)	

ORDER

Now before the Court are the Motion for Summary Judgment filed by Plaintiffs Hawkins, Morahan, and Schilling (“Individual Plaintiffs”) and Plaintiff Missouri Democratic Party (Doc. 45) and Defendants Blunt, Byers, and Vandelicht’s Motion for Summary Judgment (Doc. 47). Both of the Motions have been fully briefed, including a brief filed by Jon Brax, Gerald Barker, Mary Ellen Young, Gayle Morris, and Kimberleigh McArthur-Fernandez as *amicus curie*. This case presents an issue of first impression, that is, whether the provisional voting requirements of Missouri’s state provisional voting law, Missouri Revised Statute section 115.430, conflicts with and is preempted by the Help America Vote Act (“HAVA”), Pub. L. No. 107-252, 116 Stat. 1666 (2002). For the reasons below, the Court **DENIES** Plaintiffs’ Motion and **GRANTS** Defendants’ Motion.

I. Factual Background and Procedural Posture

This case raises the question of whether the Missouri state provisional voting procedure meets the requirements of federal law. In Missouri, a provisional ballot is limited to federal and statewide office and issue elections. In its simplest form a provisional ballot is cast by an individual who arrives at a polling place

and discovers that he or she is not on the official list of eligible voters for the polling place, or an election official asserts that the individual is not eligible to vote. The individual is required to affirm that the individual is a registered voter and is eligible to vote in the election. The individual then casts a provisional ballot, which is sealed and kept separate from the rest of the ballots. Later, the election authority examines each of the provisional ballots cast in the election to determine whether each vote should be counted. If the election authority determines that the person was eligible under state law to vote, then the provisional ballot will be counted. If not, then the ballot will not be counted and the information must be made available to the voter as to why the vote was not counted.

The controversy over Missouri's provisional ballot system arises out of events during the August 3, 2004, Missouri state primary election. On the statewide ballot were primary elections for federal and state offices and statewide constitutional amendment questions. The rest of the ballot, known as "down the ballot," varied throughout the state with local issues and primary elections.

Individual Plaintiffs are Kansas City residents who each discovered that they were not on the official list of eligible voters when they arrived at their selected polling place for the August 3 election. In each case they were not referred to the polling place for the precinct where they resided, although Plaintiff Hawkins was directed to other polling places. Ultimately, they each cast provisional ballots. Initially, Plaintiffs believed that there was a "significant and imminent risk" that the Kansas City Election Board, a Defendant that has previously been dismissed, would refuse to count their provisional ballots because they were not cast at the polling place for the precinct where they resided. Although this Court had temporarily enjoined the Kansas City Board from certifying the results of the election, the Board did meet to consider whether

provisional ballots casts in the Board’s jurisdiction would be counted. The Board determined that all three of the Individual Plaintiffs’ ballots should be counted, and that the

provisional ballots of other voters, who were registered within the jurisdiction of the Kansas City Election Board, who voted a provisional ballot in a polling place where they did not reside, and where there was no evidence that the voters were directed to the polling place where they reside or to a central location, should be counted.

Aff. of David Raymond, ex. 1 to Memo. in Support of the Kansas City Board of Election Commissioners’ and Individual Commissioners’ Mot. to Vacate T.R.O. and for Dismissal (Doc. 30) at 2 ¶ 6.

This Court found that, because the Kansas City Board was going to count Individual Plaintiffs’ votes, “the only thing preventing Plaintiffs from receiving their requested relief (having their votes counted) is the injunction currently in place.” *Order* (Doc. 44). Thus, Plaintiffs’ claims against the Kansas City Board and its individual members were moot, the Temporary Restraining Order was lifted, and the Kansas City Board was allowed to certify its results to the state officials. The Kansas City Election Board, and the individual board members, were thereafter dismissed as Defendants herein.

Individual Plaintiffs’ remaining claims are identical to the claims of Plaintiff Missouri Democratic Party—that is, that the Missouri law is in conflict with HAVA because it allows the election authority to direct the voter to his correct polling place in lieu of providing a federal provisional ballot, it requires voter affirmation that he is eligible to vote at the polling place at which his ballot is cast, and it has a requirement that provisional ballots cast at the wrong polling place will not be counted.

A group of Missouri residents filed a Motion to Intervene (Doc. 15) on the grounds that Plaintiffs’ requested relief would violate their equal protection rights. This Court denied the Motion (Doc. 33),

holding that the State Defendants would adequately represent the putative intervenors' interests, but allowed the group to file a brief on dispositive motions as *amicus curie*. The parties filed Motions for Summary Judgment, the putative intervenors filed a brief supporting the State Defendants, and the parties have responded to the motions as provided by the Federal Rules of Civil Procedure and the relevant Local Rules.

II. Standard of Review

Rule 56(c) Federal Rules of Civil Procedure provides that summary judgment shall be rendered if the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Fry v. Holmes Freight Lines, Inc.*, 72 F. Supp. 2d 1074, 1075 (W.D. Mo. 1999). When ruling on a motion for summary judgment, the court should view the facts in the light most favorable to the adverse party and allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence. *See id.* (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Reed v. ULS Corp.*, 178 F.3d 988, 900 (8th Cir. 1999)).

Summary judgment is appropriate against a party who fails to make a showing sufficient to establish that there is a genuine issue for trial about an element essential to that party's case, and on which that party will bear the burden of proof at trial. *See Cunningham v. Kansas City Star Co.*, 995 F. Supp. 1010, 1014 (W.D. Mo. 1988) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

In the case where both parties have filed cross-motions for summary judgment, the legal standard does not change. Each motion must be evaluated independently, with facts viewed in a light most favorable

to the nonmoving party. *See, e.g., St. Luke's Methodist Hosp. v. Thompson*, 182 F. Supp. 2d 765, 769 (N.D. Iowa 2001).

III. Discussion

A. Background and Challenged Statutes

After the presidential election of 2000, Congress passed the “Help America Vote Act,” or “HAVA,” Pub. L. No. 107-252, 116 Stat. 1666 (2002) in October 2002. *See Leonard M. Shambon, Implementing the Help America Vote Act*, 3 Election L.J. 424, 424 (2004). As stated by Senator Bond, HAVA was enacted to “make it easier to vote and tougher to cheat.” 149 Cong. Rec. S10,488 (Oct. 16, 2002) (statement of Sen. Bond). HAVA provided funds to improve election administration and created a federal Election Assistance Commission to oversee the implementation of HAVA. *See Shambon, supra* at 428-29. HAVA also established requirements that states must adhere to for all federal elections.

Section 302 of HAVA, the section most relevant to this action, requires states to provide voters with the opportunity to cast a provisional ballot, to post certain voting information at the polling places on election day, and to cast provisional ballots if a court orders polls to remain open. HAVA § 302, 42 U.S.C. § 15482. The section’s requirements relating to the casting of provisional ballots are as follows:

a) Provisional voting requirements

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 as follows:

- (1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.

(2) The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is--

(A) a registered voter in the jurisdiction in which the individual desires to vote; and

(B) eligible to vote in that election.

(3) An election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual under paragraph (2) to an appropriate State or local election official for prompt verification under paragraph (4).

(4) If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law.

...

42 U.S.C. § 15482 (2000 & Supp. 2004).

The State of Missouri has implemented provisional voting laws, pursuant to HAVA. The relevant parts of Missouri Revised Statute section 115.430, state as follows:

1. This section shall apply to primary and general elections where candidates for federal or statewide offices are nominated or elected and any election where statewide issue or issues are submitted to the voters.

2. A voter claiming to be properly registered in the jurisdiction of the election authority and eligible to vote in an election, but whose eligibility cannot be immediately established upon examination of the precinct register or upon examination of the records on file with the election authority, shall be entitled to vote a provisional ballot after providing a form of personal identification required pursuant to section 115.427, or may vote at a central polling place as established in section 115.115 where they may vote their appropriate ballot upon verification of eligibility or vote a provisional ballot if eligibility cannot be determined. The provisional ballot contained in this section shall contain the statewide candidates and issues, and federal candidates. The congressional district on the provisional ballot shall be for the address contained on the affidavit provided for in this section. If the voter declares that the voter is eligible to vote and the election authority determines that the voter is eligible to vote at another polling place, the voter shall be directed to the correct polling place or a central polling place as established by the election authority pursuant to subsection 5 of section 115.115. If the voter refuses to go to the correct polling place or a central polling place, the voter shall be permitted to vote a provisional ballot at the incorrect polling place, but such ballot shall not be counted.

3. . . .The provisional ballot envelope specified in this section shall contain a voter’s certificate which shall be in substantially the following form:

. . .
I so solemnly swear (or affirm)
. . .
that I am registered to vote in _____ County or City. . .
that I am a qualified voter of said County (or City). . .
that I am eligible to vote at this polling place. . .
that I have not voted in this election.

. . .
4. Prior to certification of the election, the election authority shall determine if the voter is registered and entitled to vote and if the vote was properly cast. The provisional ballot shall be counted only if the election authority determines that the voter is registered and entitled to vote. Provisional ballots voted in the wrong polling place shall not be counted. If the voter is not registered but is qualified to register for future elections, the affidavit shall be considered a mail application to register to vote pursuant to this chapter.

. . .
Mo. Rev. Stat. § 115.430 (2000 & Supp. 2004).

Finally, the section provides that the Secretary of State may promulgate rules to ensure the uniform application of the section. *Id.* § 115.430.6.

Plaintiffs claim that the Missouri state statute violates HAVA.

B. Statutory Construction

The United States Constitution mandates that the Constitution and “the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. Art. VI cl. 2. Thus, a state law that conflicts with an act of Congress, which is validly enacted pursuant to the Constitution, is a nullity. *See M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427, 4 L. Ed. 579 (1819). Congress can preempt state action in a particular area if it expressly does so in a statute, if Congress “occupies the field” through a deep and broad congressional

scheme, or by implication if a state action conflicts with congressional action. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540-41, 121 S. Ct. 2404, 2414, 150 L. Ed. 2d 532 (2001). HAVA does not contain an express preemption clause, and there is no evidence that Congress attempted to “occupy the field” of federal election requirements. *See, e.g.*, HAVA §§ 304, 305, 42 U.S.C. §§ 15484, 15485 (allowing the states to establish election technology and administration requirements that are more strict than set forth in HAVA, so long as they are not inconsistent with HAVA’s requirements, and leaving the methods of implementing Title III of HAVA to each state’s discretion). Thus, the ultimate question before the Court is whether the mandates in Missouri Revised Statute section 115.430 are in conflict with the requirements in § 302 of HAVA, 42 U.S.C. § 15482.

An actual conflict between state and federal law occurs when “it is impossible to comply with both state and federal law, or the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.” *Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987) (quotations and citations omitted). “The purpose of Congress is the ultimate touchstone of pre-emption analysis.” *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)) (further quotation and citations omitted).

When attempting to determine Congress’s intent through a statutory enactment, the plain language of the statute should first be examined. *See, e.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). Statutes should be read as a whole, giving effect to the plain meaning of the words, while reading the provisions of the statute in context. *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993). Additionally, if there are ambiguities in the text or if the text would lead to an illogical result, the legislative history of a particular act may also be used in a “good-faith effort to discern legislative intent.” *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 610 n.4 (1991).

1. Statutory Requirements to Count Provisional Ballots

The Missouri statute was written to comply with the requirements of HAVA. Thus it is not surprising that the procedural requirements for casting a provisional ballot are quite similar as illustrated below.

<u>HAVA § 302(a) (42 U.S.C. § 15482(a))</u>	<u>Mo. Rev. Stat. § 115.430</u>
1. Voter declares he is registered to vote in the jurisdiction and eligible to vote in an election.	1. Voter claims to be registered to vote in the jurisdiction and eligible to vote in an election. <i>1A. If election official determines that the voter is eligible to vote at another polling place, the voter shall be directed to the correct polling place or the central polling place.</i>
2. Voter is not on the official list of eligible voters for the polling place, or election official asserts voter is not eligible.	2. Voter's eligibility cannot be immediately established upon examination of the precinct register or records on file with the election authority.
3. Voter shall be entitled to cast provisional ballot at that polling place upon execution of written affirmation.	3. Voter shall be entitled to (1) cast provisional ballot upon execution of written affirmation, or (2) go to central polling place, where, if eligible, the voter can vote a full ballot, or if eligibility cannot be verified, voter may cast a provisional ballot, upon execution of written affirmation.
4. Affirmation required to cast a provisional ballot includes declarations that the voter is: a. Registered to vote in the jurisdiction; and b. Eligible to vote in the election.	4. Affirmation required to cast a provisional ballot includes declarations that the voter is: a. Registered to vote in the particular county or city; b. Qualified voter of said county or city; <i>c. Eligible to vote at this polling place; and</i> d. Has not voted in this election.

2. Additional Missouri Provisions

Missouri's provisional voting statute contains two provisions in addition to the requirements delineated in HAVA that appear to automatically disqualify a provisional ballot. The interpretations of these provisions are central to the issues in this case. In paragraph 2 of section 115.430, immediately after the sentence that provides that if the election authority determines that the voter is eligible to vote at another polling place he shall direct the voter to the correct polling place or a central polling place, it is provided that "[i]f the voter refuses to go to the correct polling place or a central polling place, the voter shall be permitted to vote a provisional ballot at the incorrect polling place, but such ballot shall not be counted." In paragraph 4 of section 115.430, it is provided, among other things, that "[p]rovisional ballots voted in the wrong polling place shall not be counted."

3. Claimed Conflicts

Individual Plaintiffs originally were concerned that their provisional ballots would not be counted by the Kansas City Election Board because of the provision in paragraph 4 of section 115.430 that, "[p]rovisional ballots voted in the wrong polling place shall not be counted." The Individual Plaintiffs did not cast their provisional ballots at their assigned polling places, which would be the precinct for their residence. The Kansas City Election Board, however, counted all of Plaintiffs' provisional ballots on the basis that section 115.430.4 was not applicable. The Election Board further stated that since there was not evidence that any of these Plaintiffs had been directed to the polling place for the precincts where they resided (i.e., their "correct" polling place under section 115.430.2), they were entitled to vote their provisional ballot at a polling place where they did not reside (i.e., outside their precinct). The Defendant Secretary of State has concurred in this interpretation of Missouri's provisional voting statute. The Court agrees with this interpretation and, therefore, considers this potential conflict as resolved. Individual

Plaintiffs' § 1983 claim summarized in paragraph 47, Count II, of their complaint, is based on said Plaintiffs perceived "real and imminent threat that Defendants will refuse to count the provisional votes" of Plaintiffs. Said votes have now been counted, thus, the issues raised in Count II are moot and will not be considered in this Order.

The second claimed conflict raised by Plaintiffs is that HAVA provides that once an individual declares that he is a registered voter in the jurisdiction where he desires to vote and is eligible to vote in that federal election, but the individual's name does not appear on the list of eligible voters for that polling place, or an election official has asserted that the individual is not eligible to vote,

an election official at the polling place *shall notify* the individual that the individual may cast a provisional ballot in that election.

HAVA § 302(a)(1), 42 U.S.C. § 15481(a)(1) (emphasis added).

Plaintiffs claim that this is a federal mandate that a voter in this situation must be immediately allowed to have the option of either voting a federal provisional ballot at that polling place or, if the voter's correct polling place can be determined, going to the correct polling place to vote a full ballot. In other words, Plaintiffs are claiming that in so far as a federal provisional ballot is concerned, the voter should have the option of whether or not to comply with Missouri's precinct voting requirements.

Plaintiffs claim that the Missouri statute violates the "mandate" of HAVA because the Missouri law provides that if you have a similarly situated individual in Missouri and the *election authority is able to determine the correct polling place for the individual*, the election authority shall direct the individual to the individual's correct polling place or a central polling place, rather than allowing the individual to cast a viable federal provisional ballot. Missouri further provides that if the voter has been directed to the

voter's correct polling place or a central polling place, but the voter refuses to go to his correct polling place or the central polling place, a provisional ballot cast by that voter will not be counted. Plaintiffs contend it is a violation of HAVA for individuals to be referred to their correct polling places or a central polling place in lieu of getting the option of voting a viable federal provisional ballot at the known incorrect polling place.

The third claimed conflict arises out of the additional matter required to be included in the Missouri provisional voter certification versus the HAVA affirmation. HAVA basically requires an individual requesting a provisional ballot to execute a written affirmation that the individual is (a) a registered voter in the jurisdiction and (b) eligible to vote in that election. Missouri requires an individual requesting a provisional ballot to execute a written certificate that the voter (a) is registered to vote in the jurisdiction, (b) is a qualified voter of said jurisdiction, (c) *is eligible to vote at this polling place*, and (d) has not voted in this election. The Missouri certificate further requires that the voter affirm that he or she understands that knowingly providing false information is a violation of law that subjects the voter to possible criminal prosecution.

Plaintiffs contend it is a violation of HAVA to require a voter to swear or affirm that he or she is "eligible to vote at this polling place" under penalty of criminal prosecution when the circumstances necessitating the provisional ballot are such that there is necessarily some doubt about the individual's eligibility at the particular polling place. Plaintiffs claim this provision runs counter to the purpose of provisional voting and could have a chilling effect on voters' desire to cast provisional ballots.

4. Respective Interests

In determining whether the Missouri statute frustrates the intent of HAVA, the Court must consider the interests of the various parties and interested entities. First, there is Congress's interest in making sure that voting is easier, but that fraudulent voting is tougher. The State of Missouri has, in addition to the federal interests, the interests of ensuring that every registered, eligible voter can cast a ballot that includes to the fullest extent possible all of the offices and issues for which the voter is eligible to vote, that the election is conducted in an efficient and orderly manner, and that the votes are counted accurately. Individual voters have an interest in the reasonable exercise of their constitutionally protected voting rights. That includes the right to cast a ballot, the right to vote on all issues and for all offices for which they are legally entitled to vote, and the right not to have their votes offset or diluted by fraudulently cast votes. Individual candidates, like those represented by *amicus* candidate Jon Calvin Brax, have an interest in the fair and accurate counting of votes. However, "down-the-ballot" candidates, such as Mr. Brax, also have an interest in maximizing voters' ability to vote a full ballot, including all regional and local races, rather than a provisional ballot limited to federal and statewide contests. Finally, political parties, such as Plaintiff Missouri Democratic Party, have an interest in full and fair voting. Especially in primary elections, political parties must ensure that their nominees most closely represent the views of a majority of their party's voters, which necessitates the encouragement of full ballot voting.

5. Discussion

Of the claimed conflicts noted above, the one that presents the core issue of this case resides in Missouri Revised Statute section 115.430.2, which provides if "the election authority determines that the voter is eligible to vote at another polling place, the voter shall be directed to the correct polling place or

a central polling place” in lieu of being given a provisional ballot. This is Step 1A in the chart in Section III.B.1, *supra*. This step essentially preserves precinct voting as it relates to the provisional balloting procedure. In other words, it provides a “weeding out” process to determine whether voters really need a provisional ballot or simply need guidance to their correct polling place. As noted in the chart, this step does appear to be a requirement in addition to those required in HAVA for voting a provisional ballot. Thus, to determine whether the procedure amounts to “an impermissible obstacle to the accomplishment of the full purposes and objectives of Congress,” *Cal. Coastal Comm’n*, 480 U.S. at 581, two questions must be asked. First: Can HAVA be read to include reasonable accommodations of state precinct voting practices in implementing provisional voting requirements? Second: If so, are Missouri’s practices reasonable?

a. HAVA’s Accommodation of Precinct Voting

The text of HAVA, as well as HAVA’s legislative history, convincingly prove that the answer to the first question is yes. First, the text of HAVA indicates that Congress intended that states be given flexibility when implementing the provisional balloting requirement. *See, e.g.*, HAVA § 302(a)(4), 42 U.S.C. § 15482(a)(4) (requiring states to count a provisional ballot if the person was “eligible under state law to vote”); *id.* § 304, 42 U.S.C. § 15484 (allowing states to establish “election technology and administration requirements that are more strict than the requirements established under” HAVA); *id.* § 305, 42 U.S.C. § 15485 (“The specific choice on the methods of complying with the requirements of this subchapter shall be left to the discretion of the state.”).

The word “eligible” is used in a number of ways in the relevant statutes. HAVA refers to the voter being “eligible to vote in an election for Federal office,” HAVA § 302(a), 42 U.S.C. § 15482(a), as part

of the threshold requirement for casting a provisional ballot. Later, as a prerequisite to counting the provisional ballot, HAVA requires that the state determine that the individual is “eligible under State law to vote.” HAVA § 302(a)(4), 42 U.S.C. § 15482(a). Missouri state law adds an additional dimension to “eligible” in the certificate on the envelope containing the provisional ballot wherein the voter is required to affirm that he is “eligible to vote at this polling place.”

“Eligible” means “qualified or entitled to be chosen.” *American Heritage Dictionary of the English Language* (4th ed. 2000); accord *Oxford English Dictionary* (2d ed. 1989); *Webster’s Revised Unabridged Dictionary* (1998). Thus, a potential voter must be qualified to cast a ballot in a federal election, and such person also must be qualified under state law to cast the ballot in order for the ballot to be counted. When referring to state law in HAVA, Congress evidenced its intent to rely on states to define voter qualifications, including where a voter could cast a provisional ballot for it to be legally counted.

The intent of Congress is clearly demonstrated in the legislative history of HAVA. Statements of Senators Kit Bond, a Republican from Missouri, and Christopher Dodd, a Democrat from Connecticut, clearly indicate that Congress did not intend to overturn a state’s precinct system or to prevent states from directing voters to their correct polling place. *See* 148 Cong. Rec. S10,491 (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 to be counted. 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.*

at 10,493 (statement of Sen. Bond) (“This provision 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.”); *id.* at S10,508 (statement of Sen. Dodd) (“Any provisional ballot must be promptly verified and counted if the individual is eligible under State law to vote in the jurisdiction. Nothing in this conference report establishes a rule for when a provisional ballot is counted or not counted. 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.”).

Other evidence exists demonstrating that the states have discretion to implement the provisional voting provisions of HAVA, including requiring potential voters to be at their correct polling place. For example, in floor debates, Senator Susan Collins of Maine confirmed that her state’s system of same-day registration, automatic counting of provisional ballots, and exclusion of improperly filed ballots upon a recount if the provisional ballots would make a difference in the outcome of the election, would be consistent with the provisions of HAVA. *Id.* at S10,494 (statement of Sen. Collins). The District of Columbia’s election authority has stated that it will require voters to cast provisional ballots at the proper polling place. *Moving Elections Forward in the District of Columbia: A Plan for Implementing the Help America Vote Act in the District of Columbia* (Aug. 2003) at 13, reprinted in 69 Fed. Reg. 14,180, 14,186 (Mar. 24, 2004) (stating that “[s]ince voters casting special [provisional] ballots in the District of Columbia are required to cast these ballots in their assigned precinct, the Board will act to inform all voters of their assigned precinct in an election mailing prior to Election Day. As in the past, a trained poll worker will be designated to help a voter determine his or her assigned precinct and direct them to the appropriate polling place.”). The District of Columbia’s provisional balloting requirement is a direct

example of Congressional intent — if Congress had intended to require precinct-less provisional balloting, they certainly would have required the election board in the District directly under their control to allow provisional ballots throughout the city without regard to precinct boundaries. Just the opposite, however, was done.

Finally, Missouri is not alone in interpreting HAVA in this way. A significant number of states' provisional ballot statutes also specifically include a polling place requirement.¹

These examples are not examples of “entering a crowded cocktail party and looking over the heads of the guests for one’s friends,” as Plaintiff asserts. *Pls.’ Suggestions in Opp. to Defs.’ Mot. for Summ. J.* at 18 (quoting *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993)). Rather, the overwhelming tenor of the legislative history is supportive of Defendants’ position.

The position espoused by Plaintiffs does not accommodate the application of precinct voting to provisional ballots at all. Plaintiffs’ position requires a purely literal interpretation of HAVA § 302(a)(1) and a total disregard for the well-documented legislative intent. The Court finds the intent of HAVA is better served by reading the federal provisional voting procedure in conjunction with the recognition of the state’s right to determine the individual’s eligibility to vote under state law.

¹ See, e.g., Ala. Code § 17-10A-2(b) (1975 & Supp. 2003); Ariz. Rev. Stat. § 16-584C (2004); Colo. Rev. Stat. § 1-9-304.5 (2004); Fla. Stat. Ann. § 101.048 (West 2004); Mass. Gen. Laws ch. 54, § 76C (2004); Mich. Comp. Laws § 168.523a (2004); Mont. Code Ann. § 13-13-601 (2003); Neb. Rev. Stat. § 32-915 (2003); Nev. Rev. Stat. 293.3082 (2003); N.J. Stat. Ann. § 19:53C-20 (West 2003); Ohio Rev. Code Ann. § 3599.12 (West 2004); Okla. Stat. tit. 26 § 16-203 (2003); S.C. Code Ann. § 7-13-820 (Law. Co-op. 2003); S.D. Codified Laws § 12-18-40 (Michie 2003); Tenn. Code Ann. § 2-7-112 (2003); Tex. Elec. Code Ann. § 63.011 (2004); Va. Code Ann. § 24.2-653 (Michie 2002); W. Va. Code § 3-2-1 (2004); Wyo. Stat. Ann. § 22-15-105 (Michie 2002).

b. The Reasonableness of the Missouri Practices

Because this Court holds that HAVA contemplated that the implementation of its provisional voting requirements would be compatible with the states' interest in enforcing their precinct voting systems, and, given that Missouri's provisional voting statute incorporated provisions to allow election officials to try to get voters to their correct precinct before voters were allowed to cast provisional ballots, the remaining question is whether Missouri's statutory requirements are reasonable. The answer must be yes.

Any registered voter eligible to vote in an election who arrives at a polling place outside of the voter's assigned precinct will most certainly not appear on the list of eligible voters for that polling place. By Plaintiffs' contention, this voter, after declaring that the voter is eligible to vote and registered in the jurisdiction, must immediately be allowed to vote a federal provisional ballot with no additional requirements. The long and short of Missouri's statute (section 115.430.2) as applied to this same voter is that if the election official can determine the voter's correct polling place, the voter will be directed to the correct polling place or a central polling place to cast his ballot which, presumably, in most instances, will be a full ballot. On the other hand, if the election official is not able to determine the voter's correct polling place, the voter will then be allowed to cast both a state and federal provisional ballot at that polling place. It is clear to this Court that Plaintiffs' proposed interpretation of the law is the least satisfactory result for the above scenario. HAVA was intended to assist voters in exercising their right to vote in the fullest extent possible. As noted above, all parties have a strong interest in not only ensuring that ballots are cast, but that full ballots are cast. To effectuate HAVA's intent, and to protect that interest, it cannot be unreasonable to direct a voter to his correct polling place where a full ballot is likely to be cast. It is important to note that the alternative direction to a central polling place is still predicated on the ability of

the election authority to determine that the voter is eligible to vote at another polling place. The Court interprets this part of paragraph 2 of section 115.430 to mean that the direction to a central polling place pursuant to this provision shall always be coupled with a direction to the voter's correct polling place and not as a sole alternative to be selected by the election authority in lieu of directing the voter to his correct polling place. In other words, the voter shall have the option of going to the correct polling place or the central polling place.

Upon examination of HAVA's plain text, its legislative history, and other evidence, it appears clear that Congress did not intend to override states' abilities to enforce a precinct-based voting system or to require that any person residing within one congressional district be allowed to cast a provisional ballot at any polling place within that district. To read in such a requirement would be to ignore the important interest of the voters to vote a full ballot, the interests of candidates and political parties to have *all* issues resolved by the maximum number of eligible voters who cast ballots, and the interest of the state in conducting an orderly election.

c. Remaining Provisions

In light of the above finding, the remaining contested provisions of Missouri's state statute become non-issues. The provision in Missouri Revised Statute section 115.430.2, which provides that a provisional ballot will not be counted if voted at the incorrect polling place by a voter who refuses to go to his correct polling place or a central polling place after being directed to do so, is consistent with and necessary for the enforcement of precinct voting. The requirements in paragraph 3 of section 115.430, which require the voter to affirm in his certificate for the provisional ballot that he is "eligible to vote at this polling place," will not create a chilling effect or obstacle to that person's desire to vote as claimed by Plaintiff. In that

instance, a voter will either be (1) at the correct polling place, (2) a central polling place, or (3) at a polling place that the voter thinks is correct and one at which the election officials are unable to determine otherwise. In all three of these instances, assuming that the voter is able to declare he is registered and otherwise eligible to vote in the election, he is, in fact, eligible under Missouri law to vote a state and federal provisional ballot at that polling place.

The final contested provision, Missouri Revised Statute section 115.430.4, is certainly troublesome when interpreted literally and not in context with the other provisions. Taken literally, paragraph 4's requirement that "[p]rovisional ballots cast at the wrong polling place shall not be counted" would totally negate the provisional balloting procedure set forth in the first three paragraphs of section 115.430. Such an illogical result is not compatible with established statutory construction. This Court finds that this paragraph's reference to the "wrong polling place" must be construed to be a polling place that is "wrong" after giving effect to the provisional voting rights set forth in the first three paragraphs of the same section. In other words, a provisional ballot cast in accordance with the provisions of paragraphs 1, 2, and 3 of section 115.430 will be considered to have been cast at the right polling place. Such a construction gives effect to all the provisions of section 115.430 and avoids direct conflict with the federal statute. A purely literal reading of paragraph 4 – that is interpreting the "wrong" polling place to be any polling place other than the precinct in which the voter resides – would be an incorrect application of the law.

The Court finds that, subject to the interpretation of section 115.430 set forth in this order and affirmed by Defendants in their briefing herein, the Missouri state statute is a reasonable application of HAVA.

The events surrounding individual Plaintiffs' voting in Kansas City do not require a different result. First of all, the provisional ballots of Individual Plaintiffs and others similarly situated have now been counted. Any violations by local election officials in future elections can be reported and processed through the normal administrative grievance proceedings to the Secretary of State. *See* Mo. Code Regs. Ann. tit. 15 § 30-12.010 (2004) (defining the grievance procedure). The purpose of this opinion is to clarify the interpretation of the Missouri provisional ballot law. State and local election officials, with guidance from Defendants, will be expected to follow the law as set forth herein.

C. Equal Protection

Plaintiffs also argue in their brief that Missouri's law violates the Equal Protection Clause of the Fourteenth Amendment, in that the refusal to count provisional ballots cast at a (knowingly) incorrect polling place is an arbitrary and unconstitutional distinction. Most, if not all, of Individual Plaintiffs' equal protection complaints, grounded in the fact that their votes would not be counted, are moot because the Kansas City Election Board did, in fact, count their votes. However, to the extent that Plaintiffs' complaint can be read to argue that the Missouri provisional ballot law itself is an equal protection violation, Plaintiffs' claim fails.

“The right to vote *as the legislature has prescribed* is fundamental.” *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) (emphasis added). That means that a state shoulders the burden to provide “sufficient guarantees of equal treatment” when allowing citizens to cast and count votes. *Id.* at 107. Such a responsibility includes not only assurances that qualified voters be able to cast their votes and have them counted, but also that other proper votes are not diluted by improperly cast votes. *Id.* at 105. *Bush v. Gore* is a prime example. In that case, the State of Florida's recount procedure allowed each individual election board to use different standards to define what constituted the “intent of the voter” when

determining whether a vote was cast. *Id.* at 106. It was this standardless, post-vote determination that the Supreme Court found to deny individual voters guarantees of equal treatment. No such concerns exist here.

Unlike the situation in *Bush v. Gore*, the standards set by the Missouri state law, as implemented and interpreted by the Secretary of State, are definitive and related to legitimate state objectives. Missouri has a precinct-based voting system. Such a system guarantees that those entitled to vote on specific national, state, and local issues may do so. The standards set forth in the Missouri statute, as interpreted herein, are rationally related to the goals of ensuring a fair, and complete election. Because the State of Missouri, voters, parties, and candidates have an interest in ensuring that voters cast a full ballot, and because it is rational to require voters to go to a specific place to do so, Plaintiffs' equal protection rights are not violated by the simple requirement that before a voter will be allowed to cast a viable provisional ballot, the voter, provided the election official is able to determine the voter's correct polling place, will first be directed to his proper polling place. Plaintiffs' equal protection claim does not survive.

IV. Conclusion

While legislative history is not the "end all" analysis, the legislative history of HAVA, and HAVA's open-ended implementation provisions, clearly establish that the intent of Congress was not to abolish or impinge on the states' rights to enforce a precinct voting structure. The text and legislative history of HAVA demonstrate Congress's intent to provide the states flexibility in implementing provisional balloting. Congress clearly expected that provisional balloting would be effectuated through the framework of a precinct-based voting structure. The Missouri state statute, as construed herein and agreed to by Defendants, is a reasonable application of HAVA's requirements in this state. It balances the interests of all parties to ensure that it is easier to vote but harder to cheat, that all issues—both at the top of the ballot

and “down ballot”—are decided by as many voters as possible, and that the election is run in an orderly and reasonable manner.

In this case, we have two motions for summary judgment. Plaintiff requests a judgment that paragraphs 2, 3, and 4 of Missouri Revised Statute section 115.430 violate the provisions of HAVA. Defendant requests a judgment that those paragraphs are consistent with HAVA. It is clear to this Court that section 115.430 could have been written better—especially the seemingly blanket refusal to count provisional ballots cast at the wrong polling place in paragraph 4—to avoid the concerns and confusion that gave rise to this lawsuit. The Defendants, however, have cleared much of the confusion by their stated interpretation of the Missouri statute as expressed in their brief.

The Court finds these interpretations to be correct interpretations and is rendering this judgment with the expectation that Defendant Secretary of State will give instructions to the election authorities within the state to ensure that provisional voting in future elections will be processed in a uniform manner consistent with this opinion. Accordingly, it is hereby

ORDERED that Plaintiffs’ Motion for Summary Judgment (Doc. 45) is **DENIED** and Defendants Blunt, Byers, and Vandelicht’s Motion for Summary Judgment (Doc. 47) is **GRANTED**.

IT IS SO ORDERED.

DATE: October 12, 2004

/s/ Richard E. Dorr
RICHARD E. DORR, JUDGE
UNITED STATES DISTRICT COURT