

J.B. VAN HOLLEN,

Plaintiff,

THE REPUBLICAN PARTY OF WISCONSIN,

Plaintiff-Intervenor,

vs.

CASE NO. 08-CV-4085

GOVERNMENT ACCOUNTABILITY
BOARD, et al.,

Defendants,

THE DEMOCRATIC PARTY OF WISCONSIN, et al.,

Defendant-Intervenors.

**REPLY BRIEF OF THE GOVERNMENT ACCOUNTABILITY BOARD TO THE
INTERVENOR-PLAINTIFF, THE REPUBLICAN PARTY OF WISCONSIN'S
OMNIBUS REPLY TO MOTIONS TO DISMISS**

**I. THE REPUBLICAN PARTY OF WISCONSIN HAS NO STANDING TO
BRING THIS LAWSUIT AND HAS NOT STATED A CLAIM UPON WHICH
RELIEF MAY BE GRANTED.**

The Republican Party of Wisconsin ("the Republican Party") starts its brief by stating the two questions that it contends are before the Court. They are:

1. pursuant to HAVA § 303, is it permissible for the Government Accountability Board to conduct, prior to the upcoming election, HAVA checks only on registration activity occurring after August 6, 2008; and
2. pursuant to HAVA § 303, is it permissible for the GAB to do nothing with a registration that produces a non-match during the HAVA check?

(Republican Party Brief, p. 1).

Thus, unquestionably the Republican Party is seeking to have the Court interpret § 303 of the Help America Vote Act, Public Law 107-252.

The United States Supreme Court stated in *Brunner v. Ohio Republican Party*, 555 U.S. ____, 2008, that the Republican Party of Ohio was “not sufficiently likely to prevail on the question whether Congress has authorized the District Court to enforce § 303 in an action brought by a private litigant to justify the issuance of a TRO.” (*Republican Party Brief, p. 8*) Simply put, the United States Supreme Court determined that there is no private right of action to enforce the provisions of § 303 of HAVA, as has every other court to have considered that issue. *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir.2004); *Taylor v Onorato*, 428 F. Supp. 384, 386 (W.D. Pa 2006); *Florida Democratic Party v. Hood*, 342 F.Supp.2d 1073, 1077 (N.D.Fla.2004).

The Republican Party characterizes the Supreme Court’s holding by stating: “that Per Curiam opinion is properly consistent with a narrow view of federal jurisdiction. A federal court has only that power to review matters to which it is explicitly granted authority.” (*Republican Party Brief, p. 8*) *Brunner v. Ohio Republican Party* was not about federal jurisdiction. It was about whether or not Congress had created a private right of action to allow lawsuits regarding § 303 of HAVA. If Congress did not create such a private right of action, no private party may litigate that issue in federal or state court because no cause of action exists.

The assertion that the Republican Party has a private right of action to ask for an order of mandamus in state court to enforce the provisions of § 303 of HAVA has no merit because the federal statute determines if a private right of action exists. Although the Republican Party waxes eloquently about the beauty of the venerable writ of mandamus, it provides no citation to any state law that would allow it to enforce § 303 of HAVA through a state court mandamus proceeding. If it has no private right of action regarding § 303, it does not matter what type of relief it seeks to enforce § 303.¹

Wis. Stat. § 5.061 provides the exclusive method by which “any person who believes that a violation of Title III of PL 107-252 has occurred, is occurring, or is proposed to occur with respect to an election for national office in this state, that person may file a written verified complaint with the Board.” The State was required by 42 U.S.C. § 15512 to enact such a remedy for § 303 complaints. Thus, the Legislature adopted § 5.061: it is the only remedy available under state law to resolve complaints about § 303 of HAVA.

As to the claim that administrative proceedings before the Board would have been futile, that argument was addressed in the Government Accountability Board Brief in Support of Its Motion To Dismiss the Attorney General’s Complaint at pages 12-14 which is incorporated herein by reference. Suffice it to say, however, that the

¹ The Republican Party, like the Attorney General, claims that the adoption of a plan pursuant to Wis. Stat. § 5.05(10) makes the provisions of HAVA state law. That is wrong. The elements of the plan that are adopted as an administrative rule have the force of law. Nowhere does the Republican Party (or the Attorney General) specify what ministerial parts, if any, of the plan have been violated. In fact, neither of them has ever put the plan in the record of this case.

Republican Party cannot legitimately claim that the administrative proceedings before the Board could not have been timely completed. It made no attempt to invoke the Board process so it never sought an expedited hearing.

As to the notion that the Board, having first made a decision, could not reasonably review its own decision based on a complaint under § 5.061, the Court need only look to the case of *Hortonville Ed. Ass'n v. Hortonville Joint School Dist. No. 1*, 66 Wis.2d 469, 225 N.W.2d 658 (1975) which held that due process was not denied to school teachers discharged by a school board that then heard the teachers' appeal from that discharge. Moreover, § 5.05(6a) provides for the Board's formal and informal opinions to be reviewed by the Board if the official who requested the opinion requests a hearing.

And, of course, if the Republican Party was dissatisfied with the Board's determination or had the Board refused to hold a hearing that was timely enough to provide meaningful relief, then the Republican Party could have sought a supervisory writ to get a timely hearing. Merely asserting that the administrative procedure set out in § 5.061 would not have worked is an insufficient predicate to a futility claim.

The Republican Party had one other available remedy: it could have asked the Attorney General of the United States, acting through the United States Attorney for the Western District of Wisconsin, to have brought a complaint in federal court to enforce § 303 of HAVA. Had the United States Attorney General agreed with the Republican Party, that the State of Wisconsin was violating § 303 of HAVA, surely he would have


brought such a lawsuit. Apparently, either the Republican Party contacted the United States Attorney and was refused or decided to bypass that opportunity and try to convince this Court that it had the standing to privately enforce § 303 of HAVA.

II. CONCLUSION.

Because it is unassailable that there is no private right of action to enforce § 303 of HAVA, and the Republican Party seeks to do precisely that, its Complaint must be dismissed because it has no standing and has failed to state a claim upon which relief may be granted.

Dated this 22nd day of October 2008.

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