



## MEMORANDUM IN SUPPORT

### I. INTRODUCTION

The state court complaint in this case cites a federal statute—the Help America Vote Act, 42 U.S.C. § 15481 *et seq.* (“HAVA”)—no fewer than *sixteen times* in a document that runs a mere eleven pages. That fact alone shows that the complaint sounds in federal law, and that this Court has jurisdiction over this removed action.

Just weeks before Election Day, the Ohio Republican Party (“ORP”) filed suit in this Court asking, among other things, for a ruling that the statewide voter registration database maintained by Ohio Secretary of State Jennifer Brunner does not comply with Section 303 of the Help America Vote Act, 42 U.S.C. § 15481 *et seq.* (“HAVA”). *ORP v. Brunner*, S.D. Ohio No. 2:08-CV-913. Following proceedings in the Sixth Circuit, the U.S. Supreme issued a unanimous per curiam decision on October 17, 2008, granting Secretary of State Brunner’s application for a stay and vacating the district court’s temporary restraining order (“TRO”) imposed against the Secretary on the grounds that the ORP is unlikely to prevail on its contention that section 303 of HAVA confers a private right of action that the ORP can enforce. *Brunner v. ORP*, No. 08A332, 555 U.S. \_\_\_\_ (2008) (per curiam) (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002); *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001)).

Having litigated its HAVA claims all the way to the U.S. Supreme Court, ORP now seeks a second bite at the apple by filing a new lawsuit in the Ohio Supreme Court in the name of David Myhal, a member of the Republican Party. Although styled as a “petition for writ of mandamus” based on both state and federal law, even a cursory and preliminary review of the petition seeking a writ of mandamus clearly reveals that Myhal seeks relief based on the precise HAVA claims that were considered by the highest court in the federal judiciary.

Defendant therefore seeks removal to this Court because Plaintiff's mandamus petition on its face asserts federal claims that arise under the jurisdiction of this Court. To the extent that the complaint raises claims arising under the law of the State of Ohio, the adjudication of Plaintiff's state law claims necessarily requires resolution of substantial, disputed issues of federal law under HAVA such that jurisdiction properly lies with this Court.

## **II. LAW AND ARGUMENT**

### **A. Plaintiff's Complaint on its Face Affirmatively Alleges a Federal Claim Under HAVA.**

28 U.S.C. § 1441(b) provides in relevant part, "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties." Thus, a civil action filed in a state court may be removed to federal court if the claim is one "arising under" federal law based on the "well pleaded allegations of the complaint." 28 U.S.C. § 1441(b). *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6 (2003). In other words, the court looks to the allegations of the complaint to determine if a claim could have been brought in federal district court originally as a civil action "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

Plaintiff's action may be removed to this court because the complaint on its face unambiguously asserts claims arising under Section 303 of the Help America Vote Act ("HAVA) and seeks relief squarely on the ground that the Secretary has violated the statute. The complaint is replete with allegations that the relief sought is predicated on his purported rights under HAVA. Plaintiff alleges, for example, that "the right to vote is protected by federal and state statutes, including the federal Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15301." Compl., ¶ 2. Plaintiff further alleges that his right to vote is diluted by granting

fraudulent ballot access to unqualified voters, and that HAVA vindicates that right by “requir[ing] each State to establish a statewide voter registration database listing the names of registered voters and to ‘verify the accuracy of the information provided on applications for voter registration.’” Compl. ¶ 3, citing HAVA, 42 U.S.C. § 15483.

Plaintiff also contends that he is obligated to the relief requested because of the Secretary’s duties under HAVA. For example, Plaintiff cites to the following provisions of HAVA:

- “Section 303 of the Help America Vote Act (“HAVA”) requires that Ohio create a computerized statewide voter registration list that contains the name and registration information of every legally registered voter. 42 U.S.C. § 15483(a).” Compl., Prayer for Relief, ¶ 12.
- “HAVA also requires that Ohio verify a prospective voter’s registration information. Under HAVA, ‘an application for voter registration for an election for Federal office may not be accepted or processed by a State unless the application includes the applicant’s driver license number or the last four digits of the applicant’s social security number.’ Ohio must also ‘determine whether the information provided by an individual is sufficient to meet the requirements of [HAVA], in accordance with State law.’” Compl., Prayer for Relief, ¶ 13, citing 42 U.S.C. § 15482(a)(5).

Relying on these provisions in HAVA, Plaintiff requests a writ of mandamus compelling the Secretary of State “to direct all Ohio county boards of election not to remove any absentee ballot from its identifying envelope and not to count any absentee ballot from voters registered after January 1, 2008 (i) without first accessing the [database] to ensure there is no mismatch between the registration information provided by the voter and the data available, and (ii) if there is a mismatch, such ballot shall not be removed from its identifying outer envelope or counted unless and until the county board has determined the person to be an eligible voter.” Compl., pp. 10-11. And the complaint asks the Ohio Supreme Court “to examine and construe applicable federal law”—HAVA—by looking to the now-overturned Sixth Circuit en banc opinion for guidance on

HAVA's meaning. Compl., ¶ 5. Therefore, the Complaint as a whole unambiguously contains allegations based on federal law that bring this action within the original jurisdiction of this court.

Although the U.S. Supreme Court recently ruled in *ORP v. Brunner*, Case No. 08A332, 555 U.S. \_\_\_\_ (2008), that issuance of a TRO was improper because HAVA likely does not provide a private right of action, the court may still properly exercise jurisdiction over Plaintiff's HAVA claims to determine whether Plaintiff has brought a proper action under the statute. *In re General Motors Corp.*, 3 F.3d 980, 983 (6th Cir. 1993). Citing the well-settled rule "that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction," *Bell v. Hood*, 327 U.S. 678, 682 (1945), the Sixth Circuit held that a case is properly removed to district court until the court decides that the federal statute relied upon by plaintiff provides no private right of action and dismisses the action. *In re General Motors*, 3 F.3d at 983.

Therefore, because the complaint states a federal claim under HAVA, the court may properly exercise jurisdiction over this action based on the HAVA claims asserted by Plaintiff. Furthermore, to the extent the complaint also states a claim under Ohio law, the federal court has supplemental jurisdiction over that state law claim. 28 U.S.C. § 1367.

**B. The State Law Claims in Plaintiff's Complaint Raise Substantial, Disputed Questions of Federal Law.**

Even if the court finds that Plaintiff's complaint does not on its face state a claim arising under federal law, the court may exercise jurisdiction over Plaintiff's state law claims because they require resolution of substantial, disputed issues of federal law under HAVA. The U.S. Supreme Court affirmed that it had "recognized for nearly 100 years that in certain cases federal question jurisdiction will lie over state-law claims that implicate significant federal issues."

*Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). Looking to precedent, the *Grable* Court shied away from stating a “single, precise, all-embracing test for jurisdiction over federal issues embedded in state-law claims between non-diverse parties.” *Id.* at 314 (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 821 (1988) (Steven, J., concurring)). Rather, jurisdiction lies with the federal court when the state law claims in Plaintiff’s complaint “necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.” *Id.* at 314. As explained in *Grable*, this rule “captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial question of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.” *Id.* at 312.

**1. Resolution of Plaintiff’s state law claims requires interpretation of HAVA.**

By Plaintiff’s own admission, the interpretation of HAVA is a significant, disputed issue in this litigation. While Plaintiff cites Ohio Revised Code 3503.15 as the basis of his state law claims, Plaintiff concedes that resolution of the state law claims necessarily requires interpretation of the Secretary of State’s obligations under HAVA: “The Secretary’s compliance with her obligations under HAVA, as clarified by the federal courts that have examined the issue, is a *necessary predicate* to the fulfillment of her obligations under the state law.” Compl. ¶ 6 (emphasis added); *see also id.* (“[T]he Secretary’s obligations under *federal* law to provide county boards of elections with meaningful access to ‘mismatches’ identified by the SWVRD are linked directly to the Secretary's obligations under *state* law . . .”).

Indeed, R.C. 3503.15 is relatively sparse in comparison with HAVA. The state law in general terms requires the Secretary of State to “establish and maintain a statewide voter registration database that shall be continuously available to each board of elections and to other agencies as authorized by law.” R.C. 3503.15(A). It is HAVA, however, that fleshes out exactly what the Secretary is required to do to establish, maintain, and implement the database. Similarly, the state law does not explain how the voter information in the database is verified. That procedure is instead set forth only in HAVA, which provides that information submitted by voter registrants is compared to the existing databases of the state Bureau of Motor Vehicles (“BMV”) and the federal Social Security Administration (“SSA”). HAVA requires the Secretary to enter into an agreement with the state BMV to “match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.” 42 U.S.C. § 15483(a)(5)(B)(i). And in turn, HAVA requires the BMV to enter into an agreement with the SSA to “develop methods to verify the accuracy of information provided by the agency with respect to applications for voter registration, for whom the last 4 digits of a social security number are provided instead of a driver's license number.” 42 U.S.C. 405(r)(8)(C); 42 U.S.C. § 15483(a)(5)(B)(ii). Therefore, Plaintiff’s claim for relief with regard to the verification of voter information in the database is necessarily controlled by federal law, as acknowledged by the Plaintiff. See Compl., Claim for Relief, ¶¶ 13 and 14 (alleging that HAVA “requires that Ohio create a computerized statewide voter registration list” and also requires Ohio to “verify a prospective voter’s registration information.”).

The state law also generally provides that the voter registration database shall include “safeguards and components to ensure that the integrity, security, and confidentiality of the voter registration information is maintained.” R.C. 3503.15(C)(5). Once again, however, it is federal law that provides the substantive duties and obligations of state officials accessing and implementing the voter registration database. The Social Security Act expressly provides that any information provided by the Social Security Administration for the purposes of HAVA verification “shall be considered as strictly confidential and shall be used only for the purposes described in this paragraph and for carrying out an agreement under this paragraph.” 42 U.S.C. 405(r)(3)(F). The Social Security Act further provides that any state employee or officer who discloses such confidential information without prior authorization “shall be guilty of a felony and upon conviction thereof shall be fined or imprisoned, or both, as described in section 408 of this title.” *Id.*

Read as a whole, it is clear that R.C. 3505.13 alone does not provide resolution of the plaintiff’s claims against the Secretary of State. The determination of the Secretary’s duties under HAVA is a necessary antecedent to determining her obligations under state law. Furthermore, the meaning of HAVA is “an important issue of federal law that sensibly belongs in a federal court.” *Grable*, 545 U.S. at 315. Just as the *Grable* Court found that there was a substantial federal interest in the tax code warranting federal jurisdiction, equally, if not more, substantial is the federal interest in the manner in which an election for president of the United States is conducted.

Therefore, even if the court were to find that Plaintiff’s complaint does not allege any federal claims, the court may exercise jurisdiction under the substantial federal question doctrine because adjudication of the Plaintiff’s state law claims necessarily requires an adjudication of the

Secretary of State's obligations under federal law. No amount of artful pleading can disguise the substantial federal questions under HAVA embedded throughout Plaintiff's complaint.

**2. The exercise of federal jurisdiction does not disturb the division of labor between state and federal courts.**


Finally, the court may exercise jurisdiction over Plaintiff's claims without disturbing the division of labor between state and federal courts. In *Grable*, the Court saw little danger in accepting jurisdiction of the title dispute in that case because "it will be the rare state title case that raises a contested matter of federal law" and taking jurisdiction because of the genuine disagreement over federal tax provisions "will portend only a microscopic effect on the federal-state division of labor." 545 U.S. at 315. Likewise, it is the rare elections case that questions the duties of state officials under HAVA with respect to the statewide voter registration database. The provisions of HAVA implicate a quintessential federal interest – the manner in which federal elections are run – that will not "materially affect, or threaten to affect, the normal currents" of state election litigation. *Id.* at 319.

### III. CONCLUSION

For these reasons, Defendant Secretary of State Jennifer Brunner asks this court to find that removal of this action is proper under 28 U.S.C. § 1441(a) and (b).

Respectfully submitted,

NANCY H. ROGERS  
ATTORNEY GENERAL

  
/s Richard N. Coglianes  
Richard N. Coglianes (0066830) Trial Attorney  
Damian W. Sikora (0075224)  
Pearl M. Chin (0078810)  
Assistant Attorneys General  
Constitutional Offices  
30 East Broad Street, 16<sup>th</sup> Floor  
Columbus, Ohio 43215-3400  
rcoglianes@ag.state.oh.us  
(614) 466-2872 – phone  
(614) 728-7592 – fax  
*Attorneys for Defendant*

### CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 20<sup>th</sup> day of October, 2008.

  
/s Richard N. Coglianes