

J.B. VAN HOLLEN,

Plaintiff,

vs.

Case No. 08CV4085

Petition for Writ of Mandamus 30952

GOVERNMENT ACCOUNTABILITY
BOARD et al.,

Defendant

DEMOCRATIC PARTY OF WISCONSIN,
MADISON TEACHERS, INC., AMERICAN
FEDERATION OF TEACHERS-WISCONSIN,
MADISON FIREFIGHTERS LOCAL 311, THE
MILWAUKEE CHAPTER OF THE NAACP, and
THE MILWAUKEE TEACHERS' EDUCATION
ASSOCIATION,

Intervening Defendants, and

REPUBLICAN PARTY OF WISCONSIN,

Intervenor.

BRIEF IN SUPPORT OF MOTION TO DISMISS OF INTERVENING
DEFENDANTS MADISON TEACHERS, INC., AMERICAN FEDERATION OF
TEACHERS-WISCONSIN, AND MADISON FIREFIGHTERS LOCAL 311

Madison Teachers, Inc., American Federation of Teachers-Wisconsin, and
Firefighters Local 311 (collectively, "MTI"), by their attorneys, Garvey McNeil &
McGillivray, S.C., respectfully submit this memorandum in support of their motion
to dismiss pursuant to Wis. Stat. §§ 802.01, .06. Plaintiff Van Hollen's Complaint
makes claims for which no relief can be granted, for which he lacks standing to sue,

and which fails to join indispensable parties, all founded on a faulty legal theory that he can sue a fellow state actor for failing to enforce a federal law. Plaintiff's Complaint must be dismissed.

FACTS

This is a case brought primarily under the federal Help America Vote Act of 2002, 42 U.S.C. § 15301 *et seq.* ("HAVA"). (Complaint, 9/10/08.) HAVA was enacted in the wake of the 2000 presidential election "in large part to ensure that eligible voters would not be left off the voting rosters or turned away from the polls." *Wash. Assoc. of Churches v. Reed*, 492 F. Supp. 2d 1264, 1268 (W.D.Wash. 2006). Title III of HAVA accordingly contains three requirements: § 301 mandates that states employ certain voting systems, including those for persons with disabilities; § 302 requires states to allow persons not on the official voter registration list to cast a provisional ballot; and § 303 requires states to maintain a "single, uniform, official, centralized, interactive computerized statewide voter registration list" containing the name and registration information of every legally registered voter in the state. 42 U.S.C. §§ 15481-15483.

HAVA's requirements, including its voting list requirements under § 303, are imposed on states through Congress' spending power. 42 U.S.C. § 15301(b)(1). Wisconsin has received federal funds to implement HAVA. (Compl. ¶ 6); *see also* Wis. Stat. § 5.05(10) (authorizing GAB to assemble plan for implementing HAVA that will make state eligible to receive federal funding). Using these federal funds, Wisconsin has assembled its HAVA-mandated, computerized statewide voter

registration list ("SVRS"), which got "up and running" on August 6, 2008. (Compl. ¶¶ 6, 32.)

Acting in his official capacity as Attorney General of the State of Wisconsin, Plaintiff John B. Van Hollen has filed this suit against the agency Wisconsin has charged with implementing HAVA's SVRS requirements: the Government Accountability Board and individuals on, or employed by, that Board (collectively "GAB" or "Board"). (Compl. ¶¶ 8-12.) Plaintiff seeks to force the Board to "take all steps necessary to insure that, prior to the November 4, 2008, the statewide, computerized voter registration list is brought into compliance with HAVA" under § 303. (Compl. ¶ 46.) Mr. Van Hollen primarily contends that Wisconsin's SVRS is not "in compliance" with HAVA because people who registered to vote between January 1, 2006 (the date Plaintiff contends Wisconsin's list should have been functional) and August 6, 2008, did not undergo a "HAVA check." (*Id.* ¶ 30.) Plaintiff does not define the term "HAVA check" but uses the phrase to refer to the practice of "coordinat[ing]" the SVRS list with other databases, such as those maintained by the Wisconsin Department of Transportation and the Social Security Administration. *See* 42 U.S.C. §§ 15483(a)(1)(A)(iv). In short, Plaintiff's claim is premised on his assertion that the GAB had a clear, mandatory duty to implement "HAVA checks" for all voters who registered between January 1, 2006 and August 6, 2008.

The "HAVA check" requirement Plaintiff relies upon is not contained in state law and Wisconsin statutes contain no reference to it. HAVA provides for coordination between statewide voter lists and other statewide databases. 42 U.S.C.

§ 15483(a)(1)(A)(iv), (a)(5). However, HAVA leaves it up to states to determine when to remove someone from the SVRS if their registration information does not match up with these other databases. *Id.* § 15483(a)(5)(A)(iii). Wisconsin law provides no mandate regarding when, or in what form, coordination must occur.

Despite the fact that HAVA does not state what should happen if a person's name is flagged by a "HAVA check," *see* 42 U.S.C. § 15483, and despite the fact that HAVA explicitly provides states discretion to make "the specific choices on the methods of complying with the requirements of this title," 42 U.S.C. § 15485, Plaintiff invents a mandatory duty for the GAB and requests the Court to impose it by ordering that "for individuals who registered [to vote] on or after January 1, 2006, and prior to August 6, 2008, their eligibility to vote must be verified by the same steps as applied to individuals registering on or after August 6, 2008, including HAVA checks where applicable." (Compl. ¶ 46.) Because such checks have not been done, says Plaintiff, "it is virtually certain that Wisconsin's official list of registered voters currently includes the names of individuals who are not eligible to vote in the upcoming presidential election." (*Id.* ¶ 5.)

Plaintiff fails to identify a single ineligible individual on the current list, nor does Plaintiff claim to have any personal knowledge that such person exists. Indeed, the Complaint admits that removing people who fail a HAVA check – up to twenty-two percent (22%) of all voters on the list, by the GAB's estimate – will not necessarily remove ineligible voters. (Compl. ¶ 35 ("not all of the discrepancies will lead to a determination that a voter is ineligible").) Mr. Van Hollen nevertheless suggests that even eligible voters, identified in a "HAVA check" due to insignificant

differences between databases, such as punctuation or capitalizations, must “verify certain information establishing a right to vote or, in some cases, cast a provisional ballot under state law.” (Compl. ¶ 44.) Although Plaintiff identifies no legal basis for imposing this verification obligation, and despite his admission that it would pose an “inconvenience” for voters, Plaintiff nevertheless seeks an order that he admits will present a burden to voters. (*Id.*) Whether such burden takes the form of needlessly presenting a driver’s license at the polls, confirming registration at the clerk’s office the day after the election, casting a provisional ballot, being forced to wait in long lines on election day, or any number of other measures, the result is potential disenfranchisement of thousands of voters.

ARGUMENT

I. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED.

Plaintiff Van Hollen has taken the unusual step in this case of suing a fellow state entity to compel action he contends the GAB should take relative to voter registrations. This Cain and Abel approach is for naught here, however: Plaintiff cannot recover any relief because he is not afforded a private right of action under HAVA, and his suit attempting to enforce HAVA is preempted by the statute’s explicit terms. Additionally, Plaintiff does not allege any violations of state law, and certainly no violations for which he can obtain relief. The suit should be dismissed.

A. *Motions to Dismiss for Failure to State a Claim.*

“The purpose of a motion to dismiss pursuant to Wis. Stat. § 802.06(2) for failure to state a claim upon which relief can be granted, is to test the legal

sufficiency of the complaint.” *Meyers v. Bayer AG*, 2006 WI App 102, ¶ 7, 293 Wis.2d 770, 718 N.W.2d 251 (citations omitted). When it is clear that the plaintiffs cannot recover under any conditions, a motion to dismiss should be granted. *Ramsden v. Farm Credit Servs.*, 223 Wis.2d 704, 711, 590 N.W.2d 1 (Ct.App. 1998). When ruling on a motion to dismiss for failure to state a claim, the general rule is that the court should accept the facts as pleaded and all reasonable inferences to be drawn from them as true. *Id.* However, legal conclusions and unreasonable inferences need not be accepted. *Bartley v. Thompson*, 198 Wis. 2d 323, 332, 542 N.W.2d 227 (Ct. App. 1995).

B. *HAVA Does Not Provide a Private Right of Action for Violations of § 303 of the Act.*

As noted above, Title III of HAVA §§ 301-303 contain many of the law’s requirements for making voting more accessible. But, as previous courts have ruled, private rights of action are not available under Title III except those filed by plaintiffs seeking to cast a provisional ballot under § 302. That section is not at issue here, and Plaintiff has no right to pursue this case. This case must be dismissed.

“HAVA does not itself create a private right of action.” *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir. 2004); 42 U.S.C. § 15301 *et seq.* Those filing suits seeking to enforce the provisions of HAVA’s Title III have done so through 42 U.S.C. § 1983, which provides a cause of action against any person who, acting under color of state law, abridges the rights created by the U.S. Constitution or the laws of the United States. *Sandusky*, 387 F.3d at 572. Plaintiff has not alleged violations of HAVA through 42 U.S.C. § 1983 or any law providing a private cause

of action for violations of federal statutes. (Compl., ¶¶ 39-55.) Even claims for violations of HAVA Title III brought under 42 U.S.C. § 1983 are rarely successful. Only plaintiffs alleging causes of action under § 302, regarding provisional ballots, have been allowed to raise claims, because only § 302 contains right-creating language. *E.g., Sandusky*, 387 F.3d at 572. As explained by the *Sandusky* court, and pursuant to the test identified in *Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002), Congress has intended to create a right only when 1) Congress intended that the provision in question benefit the plaintiff, 2) the plaintiff demonstrates that the right protected by statute is not so “vague and amorphous” that its enforcement would strain judicial competence; and 3) the statute unambiguously imposes a binding obligation on the States. *Id.* (quoting *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997)). HAVA § 302 does this by stating that an “individual shall be permitted to cast a provisional ballot.” *Id.* (emphasis in case) (quoting HAVA § 302(a)(2)). The *Sandusky* court found that the right to cast a provisional ballot under § 302 was neither vague nor amorphous, and was comparable to other rights-creating statutes, so it accordingly recognized plaintiffs’ rights to bring the case before it. *Id.*

By contrast, attempts to bring suit under §§ 301 and 303, as is the case here, are based on vague and amorphous duties, would strain judicial competence, and lack unambiguous binding obligations upon which to rest. Thus, attempts to bring such suits have not been successful. In *Taylor v. Onorato*, plaintiffs seeking an injunction against the use of touchscreen voting machines were dismissed because the court found § 301 only imposed an obligation on states and local jurisdictions to put in place voting systems that met certain criteria and did not create an individual

right. 428 F. Supp. 2d 384, 387 (W.D.Pa. 2006). In doing so, it noted that as legislation enacted pursuant to Congress' spending power, the typical remedy for HAVA non-compliance was an action by the federal government to discontinue funds to the jurisdiction, not a private right of action. *Id.* at 386-87; *see also* 42 U.S.C. § 15542(c) (providing for repayment of funds); 42 U.S.C. § 15511 (providing that Attorney General of the United States may seek declaratory and injunctive relief for states violating HAVA Title III). Another court interpreting § 301 agreed and dismissed the claims of plaintiffs in that case under Fed. R. Civ. P. 12(b)(6). *Paralyzed Veterans of Am. v. McPherson*, 2006 WL 3462780, *7 (N.D.Cal. Nov. 28, 2006) (dismissing claims of disabled plaintiffs regarding voting accommodations for handicapped).

As for HAVA § 303, in *United States v. State of Alabama*, the court denied motions to intervene filed by officials of the Alabama Democratic Party in an enforcement case brought by the federal government under this section. 2006 WL 2290726, *4 (M.D.Ala. Aug. 8, 2006). Said the court:

Congress granted explicitly to the Attorney General of the United States the right of enforcement of Sections 301, 302, and 303 of HAVA. *See* 42 U.S.C. § 15511. The Supreme Court has "recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). This case is no different.

Id. (footnote omitted).

The *Alabama* court's decision is supported by the language of § 303. The section provides that each State "shall implement" a SVRS and lists the information the SVRS should contain. 42 U.S.C. § 15483(a)(1)(A). It generally states the

conditions under which an individual may be removed from the SVRS, but does not give a right to other persons on the list to demand that someone be removed. To the contrary, it simply states that only voters who are not registered or not eligible¹ to vote can be removed from the list. *Id.* § 15483(a)(2)(B). Similarly, § 303 does not contain any language suggesting an individual can demand the voter list, or any particular voter, gets a HAVA check, but merely provides that the state SVRS be “coordinated” with certain other databases. *Id.* § 15483(a)(1)(A)(iv), (a)(5). In short, no language in HAVA § 303 remotely suggests it was intended to create a private right of action.

Finally, unlike some other plaintiffs who have made claims that their state implementing statutes violate HAVA § 303, Plaintiff Van Hollen makes no such claim. *E.g., Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008) (considering whether state statutes violated § 303); *Wash. Assoc. of Churches v. Reed*, 492 F. Supp. 2d 1268 (W.D.Wash. 2006) (granting injunction because state implementation statutes violated § 303). In fact, Mr. Van Hollen could not make this allegation since, by virtue of his office, he must defend state statutes and not attack them. *See State v. City of Oak Creek*, 2000 WI 9, ¶ 35, 232 Wis. 2d 612, 605 N.W.2d 526. Mr. Van Hollen, thus, cannot attempt to bootstrap his way into this case through *Browning*, *Reed*, and similar cases.

¹ While HAVA does not define an “ineligible” voter, context suggests the term refers to felons, deceased persons, and those who have not responded to a notice and who have not voted in two consecutive general elections for Federal office. 42 U.S.C. §§ 15483(a)(2)(A)(ii), 15483(a)(4)(A). Notably, contrary to Plaintiff’s interpretation, HAVA does not state that any name identified in a “HAVA check” flags an ineligible voter who may then be removed from the voter list.

Plaintiff lacks a private right of action to bring this case, which should accordingly be dismissed.

C. *Plaintiff is Preempted from Enforcing § 303 of HAVA.*

In addition to denying a private right of action under § 303, the terms of HAVA preempt Plaintiff's claims in this case. This is because under HAVA § 401 the exclusive means for enforcement of Title III against a state is via a lawsuit brought by the U.S. Attorney General in federal court. 42 U.S.C. § 15511.

Section 401 of HAVA directs as follows:

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 . . . as may be necessary to carry out the uniform and nondiscriminatory election technology and administration requirements under sections 301, 302, and 303.

Id. Pursuant to this provision, the U.S. Attorney General has in fact brought lawsuits against states for failing to implement HAVA § 303. *E.g., United States v. State of Alabama*, 2006 WL 1598839 (M.D.Ala. June 7, 2006) (granting declaratory and injunctive relief against Alabama secretary of state for failing to implement SVRS requirement of HAVA § 303) ("HAVA gives enforcement authority to the United States Attorney General for the . . . requirements that apply to States under Title III"); *United States v. Maine*, 2007 WL 1059565 (D.Me. April 4, 2007) (similar). The United States has clearly shown that if it wishes to enforce HAVA against a state, it will.

Notably, while HAVA does provide for some state enforcement of Title III, it does not provide for a lawsuit filed by a state attorney general. Rather, HAVA § 402 requires states receiving funding for HAVA activities to create an *administrative*

complaint procedure for individuals alleging a violation of Title III. 42 U.S.C. § 15512(a). The minimum requirements of this procedure are set forth in HAVA and include a written complaint, opportunity for a hearing, and the provision for an appropriate remedy. *Id.* Wisconsin has accordingly created this procedure, which is set forth in Wis. Stat. § 5.061, entitled "Compliance with federal Help America Vote Act." It provides for GAB review of complaints, and for those complaints it deems valid, it "shall order appropriate relief." Wis. Stat. § 5.061(4). It does not provide for enforcement by the attorney general.

"The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander v. Sandoval*, 532 U.S. 275 (2001). This is particularly true where, as here, Congress has provided specific procedures to pursue relief as part of a "package deal" piece of legislation. *Hinck v. U.S.*, ___ U.S. ___, 127 S.Ct. 2011, 2015-16 (2007). Moreover, mandamus does not lie where an administrative remedy is provided by law. *State ex rel. Madison Airport Co. v. Wrabet*, 231 Wis. 147, 285 N.W. 504 (1939).

Because federal law sets forth a specific administrative review procedure, and the state legislature followed by enacting a specific process for determining compliance with HAVA, that procedure is the exclusive means of enforcement of HAVA Title III. Plaintiff Van Hollen is preempted from bringing this lawsuit and therefore fails to state a claim for which relief can be granted.

D. Plaintiff Alleges No Violation of State Law for which Relief Can Be Granted.

Likely realizing that he lacks a private right of action under HAVA, Plaintiff claims he is seeking enforcement of state statutes in addition to federal law.

(Compl., 9/10/08.) Yet he does not identify any specific section of the Wisconsin Statutes that has been violated.

Despite many vague references to violations of Wisconsin statute in the Complaint, the only substantive Wisconsin laws Plaintiff's Complaint identifies are as follows:

- Wis. Stat. § 5.05(1), stating that GAB has responsibility for the administration of Wis. Stat. chs. 5 to 12, other laws relating to elections and election campaigns, subch. III of Wis. Stat. ch. 13, and subch. III of Wis. Stat. ch. 19. (Compl. ¶ 13.)
- Wis. Stat. § 5.05(10), stating that the GAB shall adopt and modify a plan for implementing HAVA that will enable the state to receive federal funding under HAVA. (Compl. ¶ 15.)
- Wis. Stat. § 6.36(1)(a), stating that GAB must "compile and maintain electronically an official voter registration list" (Compl. ¶ 17.)

Where these sections are cited in the Complaint, there is no allegation that GAB has failed to comply with these statutes. Meanwhile, the Complaint repeatedly cites specific sections and violations of HAVA, clearly the gravamen of Plaintiff's Complaint. (*E.g., id.* ¶¶ 14, 18-23, 25-26, 44.)

Plaintiff does not say if or how the GAB has violated the three substantive provisions of Wisconsin Statute identified above. It is hard to imagine a violation of Wis. Stat. § 5.01(1), which merely sets forth the GAB's general authority, especially since the Plaintiff does not identify any specific section of Wis. Stat. chs. 5-12 the GAB is alleged to have violated. Additionally, the Complaint does not allege the GAB has failed to adopt a plan for implementing HAVA that will enable the state to receive federal funding, per Wis. Stat. § 5.05(10). Indeed, given that the Complaint acknowledges Wisconsin has received federal funding (Compl. ¶ 6), the Complaint

confirms that this section has been satisfied. And finally, while the Complaint takes issue with the manner in which the GAB is *reviewing* registration information in Wisconsin's SVRS, it does not contend the GAB has failed to create a list as required by Wis. Stat. § 6.35(1)(a).

Furthermore, to the extent the Complaint identifies the specific relief it seeks, the Court cannot grant this relief. For example, Plaintiff asks that "a writ of mandamus should be immediately issued directing GAB and GAB Members to take all steps necessary to ensure that prior to November 4, 2008, the [SVRS] is brought into compliance with HAVA." (Compl. ¶ 46.) The Complaint continues, "[a]t a minimum, this requires that ineligible voters be identified and removed and, that for individuals who registered on or after January 1, 2006, and prior to August 6, 2008, their eligibility to vote must be verified by the same steps as applied to individuals registering on or after August 6, 2008, including HAVA checks where applicable." (*Id.*) But the GAB does not have authority to modify voter registrations, which is essentially what Plaintiff seeks. Rather, specific statutory processes exist for these purposes, and they vest municipal clerks and other local officials with authority to, once the proper showing is made, modify a person's registration. See Section III, *infra*.

Thus, not only is Plaintiff's Complaint precluded by the specific and exclusive procedures established by Congress, it fails utterly to state a claim for which relief can be granted under Wisconsin statutes. The Complaint should be dismissed.

II. PLAINTIFF LACKS STANDING TO BRING THIS SUIT.

Assuming, *arguendo*, that a private right of action existed under HAVA, and

that he alleged violations of state law, Plaintiff would lack standing to pursue those violations through the present lawsuit. Mr. Van Hollen relies on Wis. Stat. § 5.07 for authority to bring this case. (Compl. ¶ 1.) Considering Wisconsin's tradition of narrowly interpreting the attorney general's authority, and considering the statute's text, context, and history, Wis. Stat. § 5.07 does not permit the Attorney General to sue the GAB for alleged violations of HAVA. This suit must be dismissed.

A. *The Wisconsin Attorney General's Authority is Strictly Construed.*

The Wisconsin Attorney General is a Constitutional officer, separate from the executive branch. Wis. Const. art. VI, § 3. Fatefully, the Wisconsin Constitution says nothing of the Attorney General's powers, except that they shall be "prescribed by law." *Id.* A long line of cases has interpreted this provision narrowly, providing that "law" means "statute" and not common law. *E.g., State v. City of Oak Creek*, 2000 WI 9, ¶ 19, 232 Wis. 2d 612, 605 N.W.2d 526 (describing the powers of the Attorney General as "strictly limited"); *Estate of Sharp v. State*, 63 Wis. 2d 254, 261, 217 N.W.2d 258 (1974); *State v. Snyder*, 172 Wis. 415, 179 N.W. 579 (1920) (a/k/a *State v. Industrial Commission*); *State v. Milwaukee Elec. Ry. & Light Co.*, 136 Wis. 179, 190, 116 N.W.2d 900 (1908). Thus, "[u]nless the power to prosecute a specific action is granted by [the legislature], the office of the Attorney General is powerless to act." *Estate of Sharp*, 63 Wis. 2d at 261. This rule holds true whether he sues in the name of the state or in his official capacity, as is the case here. *Snyder*, 179 N.W. at 580.

The limitations on the Attorney General's authority extend to his ability to initiate civil litigation, which must be authorized by the governor or legislature or by a separate, specific statute. Wis. Stat. § 165.25(1m); Arlen C. Christenson, *The State*

Attorney General, 1970 Wis. L. Rev. 298, 301. This is because “[t]he attorney general is devoid of the inherent power to initiate and prosecute litigation intended to protect or promote the interests of the state or its citizens and cannot act for the state as *parens patriae*.” *Oak Creek*, 232 Wis. 2d 612, ¶ 22 (quoting *Estate of Sharp*, 63 Wis. 2d at 261). But even where a specific statute does authorize a particular act, “courts have limited the substantive scope of the [attorney general’s] existing powers through narrow statutory construction.” Scott Van Alstyne & Larry J. Roberts, *The Powers of the Attorney General in Wisconsin*, 1974 Wis. L. Rev. 721, 744; see also *id.* at 746 (citing cases). Thus, the backdrop for this case is a plaintiff who has historically be given limited authority to bring civil suits, and when that authority is granted, it is strictly construed.

B. Wis. Stat. § 5.07 Does Not Authorize the Attorney General to Bring this Suit.

In the instant case, Plaintiff Van Hollen relies Wis. Stat. § 5.07 to bring this suit (Compl. ¶ 1), but that statute – a remnant of a statute originally passed over thirty years ago – does not give Mr. Van Hollen the extraordinary authority to sue another state entity over alleged violations of HAVA.

1. Statutory Construction

Because the Attorney General relies on a statute for his authority, this Court must necessarily interpret that statute. “[T]he purposes of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.” *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Accordingly, “if the words chosen for the statute exhibit a plain, clear statutory meaning, without ambiguity, the statute is applied

according to the plain meaning.” *Watton v. Hegerty*, 2008 WI 74, ¶ 15, __ Wis. 2d __, 751 N.W.2d 369 (internal quotation marks and citation omitted). If the Court requires any aid in construing a statute, it can turn to its textually manifest scope, context, and purpose without having to declare an ambiguity in the statute. *Kalal*, 271 Wis. 2d 633, ¶ 49 & n.8. “A statute’s purpose or scope may be readily apparent from its plain language or its relationship to surrounding or closely-related statutes – that is, from its context or the structure of the statute as a coherent whole.” *Id.* ¶ 49. In addition to considering context to interpret a statute, a court may also employ canons of statutory construction to determine a statute’s meaning. *State v. Popenhagen*, 2008 WI 55, ¶ 42, __ Wis. 2d __, 749 N.W.2d 611. “[L]egislative history need not be . . . consulted except to resolve an ambiguity in the statutory language, although legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation.” *Kalal*, 217 Wis. 2d 633, ¶ 51.

2. Plaintiff Lacks Authority to Sue the GAB under Wis. Stat. § 5.07.

Wis. Stat. § 5.07, in its entirety, provides as follows:

Action to compel compliance. Whenever a violation of the laws regulating the conduct of elections or election campaigns occurs or is proposed to occur, the attorney general or the district attorney of the county where the violation occurs or is proposed to occur may sue for injunctive relief, a writ of mandamus or prohibition, or other such legal or equitable relief as may be appropriate to compel compliance with the law. No bond is required in such actions.

Wis. Stat. § 5.07. Read alone, the statute’s text does not indicate who the attorney general is empowered to sue under the section, and it does not define “laws regulating the conduct of elections or election campaigns.” No state or federal cases interpret the statute or its predecessor, Wis. Stat. § 12.66 (1973-74), and it is unclear if

the attorney general's office has ever even used the statute to initiate civil litigation before.

Fortunately, the statute's context resolves many of these issues. Wis. Stat. § 5.07 follows a string of statutes that describe the powers and duties of the GAB. Wis. Stat. § 5.05 lists the GAB's powers; namely, its authority to administer Wis. Stat. chs. 5-12 and some sections of chs. 13 and 19. Chapter 5 elsewhere uses the term "law[s] regulating the conduct of elections or election campaigns," *e.g., id.* § 5.05(1)(d), suggesting this phrase is meant to refer to Wis. Stat. chs. 5-12 and other laws the GAB is empowered to administer.² Wis. Stat. § 5.05(2m) provides that the Board may investigate complaints that chs. 5-12 have been violated and may enforce elections laws directly or "through its agents under this subsection." Wis. Stat. § 5.05(2m). Persons authorized in subsection (2m) to assist "prosecut[ion]" of elections law violations, and who presumably are the GAB's "agents," include special investigators hired by the Board, the administrator of the ethics and accountability division of the GAB, special counsel, district attorneys, and the attorney general. *Id.* These agents are authorized by various provisions of Wis. Stat.

² This interpretation is supported by the statute's legislative history. Wis. Stat. § 5.07 (then Wis. Stat. § 12.66) was originally enacted in 1974, and gave the attorney general and district attorneys authority to compel compliance of Chapter 12. 1973 Wis. Ch. 334, § 35. Chapter 12 outlawed such practices as electioneering, election threats, bribery, and fraud. Wis. Stat. ch. 12 (1973-74). Wis. Stat. § 12.66 was moved to Chapter 5 in 1983, when the state's elections laws were renumbered. 1983 Wis. Act. 484, § 136m. Chapter 5 established the powers and duties of the elections board—like the GAB today, the elections board was empowered to administer Wis. Stat. chs. 5-12. Wis. Stat. § 5.05(1) (1983-84). Wis. Stat. § 12.66 was renumbered to Wis. Stat. § 5.07, and the language of the statute was modified to allow enforcement of "the laws regulating the conduct of elections or elections campaigns" and not simply "this chapter." 1983 Wis. Act. 484, § 136m. The Legislature thus clearly intended for Wis. Stat. § 5.07 to relate to more than just Chapter 12, and since the new Chapter 5 related to the election board's powers under Chapters 5-12, it is reasonable to infer that "the laws regulating the conduct of elections or elections campaigns" meant Chapters 5-12.

§ 5.05(2m) to file complaints in circuit court if the Board finds probable cause of a violation. *E.g.*, Wis. Stat. § 5.05(2m)(c)16.

Wis. Stat. § 5.06 additionally permits electors to file complaints with the Board against an election official. Wis. Stat. § 5.06(1). The rest of the section sets forth a procedure for investigation of such complaints, and specifically provides that “[n]o person who is authorized to file a complaint under sub. (1), other than the attorney general or a district attorney, may commence an action or proceeding to test the validity of any decision, action or failure of any election official” without first filing a complaint with the Board and prior to resolution of that complaint with the Board. Wis. Stat. § 5.06(2). Persons aggrieved by decisions of the Board under Wis. Stat. § 5.06 may file a petition for review in circuit court. Wis. Stat. § 5.06(8).

Wis. Stat. § 5.07 must be read in context with Wis. Stat. §§ 5.05 and 5.06. Given the references to the attorney general in these latter two statutes, and the reference to the attorney general as an “agent” of the GAB, it is apparent that the attorney general can act under Wis. Stat. § 5.07 only in coordination with the GAB under Wis. Stat. §§ 5.05 and 5.06. Under this statutory scheme, Wis. Stat. §§ 5.05 and 5.06 empower the attorney general to assist with prosecution of complaints received by the Board, and Wis. Stat. § 5.07 provides additional authority for the attorney general to immediately go to court to compel compliance with an elections law violation. For example, if a poll worker were electioneering on election day in violation of Wis. Stat. § 12.03(1), the GAB could ask the attorney general to immediately go to court to enjoin that poll worker’s activities before any further harm to voting rights occurs.

This interpretation gives effect to every section of §§ 5.05-5.07 and avoids surplusage. *Barth v. Bd. of Ed., Sch. Dist. of Monroe*, 108 Wis. 2d 511, 517, 322 N.W.2d 694 (Ct. App. 1983) (“The primary goal in statutory construction is to give effect to the legislative intent. Rules of statutory construction disfavor constructions that cause some language to be surplusage.”) (footnotes omitted). If the attorney general could use Wis. Stat. § 5.07 to file suit pell-mell against anyone he chose for violating elections laws, the Legislature’s carefully crafted scheme for enforcement of elections laws in Wis. Stat. §§ 5.05 and 5.06, such as requiring a finding of probable cause prior to enforcement, would be meaningless. But if Wis. Stat. § 5.07 is read with these other provisions, necessitating that the attorney general work with the GAB, the orderly enforcement of Wis. Stat chs. 5-12 that the Legislature intended is given effect.

There is no indication in Wis. Stat. §§ 5.05-.07 that the attorney general may direct his authority under Wis. Stat. § 5.07 against the GAB itself. Wis. Stat. § 5.07 does not identify the persons who can be sued under that section, but again reading this section with Wis. Stat. §§ 5.05 and 5.06, it is apparent that the targets are local election officials, bodies, and other individuals. *E.g.*, Wis. Stat. §§ 5.05(1)(c), 5.06(1). Furthermore, prior case law interpreting the attorney general’s powers strictly construes the situations where he may file suit against a fellow state agency, especially where he normally has a duty to assist or defend the agency. To wit:

If he is to defend the actions of the Industrial Commission as a general proposition and assail them when the state is adversely interested, he may easily find himself embarrassed by being forced into inconsistent positions. . . . Such a situation would be embarrassing to the Attorney General and detract from the value of his services to the commission.

Snyder, 172 Wis. at 580 (prohibiting attorney general suit challenging an award of the state industrial commission). In this situation, “[t]he action of the Attorney General was no more an action of the state than if any other unauthorized officer or employé had caused the bringing of the action.” *Id.* at 581. Thus, while the attorney general may have no ethical bar on suing another state agency as the Court ruled in the hearing on September 24, the attorney general may be otherwise prohibited by statute and case law. Such is the case here.

Because the Wisconsin Statutes clearly set forth a scheme where the attorney general must work *with*, and not *against*, the GAB, Plaintiff Van Hollen lacks standing to file the instant suit under Wis. Stat. § 5.07, which must be dismissed.

3. Plaintiff Lacks Authority to Enforce HAVA or Challenge the GAB’s Implementation of HAVA Under Wis. Stat. § 5.07.

Even if the attorney general could sua sponte file a civil action under Wis. Stat. § 5.07 against the Board or anyone else, he could not file an action for a violation of HAVA or challenging the GAB’s implementation of HAVA.

As noted above, HAVA § 402 requires states to establish an administrative complaint process for persons who feel HAVA has been violated. 42 U.S.C. § 15512. Wisconsin has done so in Wis. Stat. § 5.061. This section provides a process for GAB review of complaints, and for those complaints it deems valid, it “shall order appropriate relief.” Wis. Stat. § 5.061(4). Thus, it leaves discretion with the Board as to what remedy to offer, and, unlike many other sections in Chapter 5 noted above, it does not provide for enforcement by the attorney general or district attorneys. No other section in Wis. Stat. ch. 5 indicates the attorney general has any role in

enforcing HAVA, including Wis. Stat. § 5.07. Thus, in accordance with HAVA, the Legislature has limited enforcement of HAVA in Wisconsin to the administrative complaint procedure specified in Wis. Stat. § 5.061.

Anticipating the problem Wis. Stat. § 5.061 presents for him, Plaintiff claims that the process set forth in this section does not apply to him since he is bringing his action under Wis. Stat. § 5.07, and because proceeding under Wis. Stat. § 5.061 would be “futile” in any case. (Compl. ¶ 1.) But under well-accepted canons of statutory construction, the specific authority for HAVA enforcement detailed in Wis. Stat. § 5.061 trumps the more general provisions of Wis. Stat. § 5.07. *State v. Larson*, 2003 WI App 235, ¶ 6, 268 Wis. 2d 162, 672 N.W.2d 322 (“Where two statutes relate to the same subject matter, the specific statute controls the general statute.”) (finding more specific statute limited general statute in order to avoid rendering the more specific statute surplusage); see also *State ex rel. Harris v. Larson*, 64 Wis. 2d 521, 527, 219 N.W.2d 335, 339 (1974) (stating, in discussion of *expressio unius est exclusio alterius*, “if the legislature did not specifically confer a power, it is evidence of legislative intent not to permit the exercise of that power”). Moreover, where a conflict exists between a new statutory provision and prior statutes relating to the same subject matter, “the new provision will control as it is the later expression of the legislature.” *Racine Educ. Ass’n v. WERC*, 2000 WI App 149, ¶ 50, 238 Wis. 2d 33, 616 N.W.2d 504 (quoting *Nat’l Exch. Bank v. Mann*, 81 Wis. 2d 352, 361, 260 N.W.2d 716 (1978)). Wis. Stat. § 5.061 is the more recent provision regarding enforcement of elections laws; Wis. Stat. § 5.07 has not been modified since 1985. 1985 Wis. Act. 304.

The more specific provisions of Wis. Stat. § 5.061 thereby trump Wis. Stat. § 5.07 for this reason as well.

As to Plaintiff Van Hollen's claim that filing a claim with the GAB would be "futile," presumably because he believes the GAB would not investigate a claim against itself, Plaintiff's complaint is with the Legislature and not the GAB or this Court. The HAVA complaint process was established by the Legislature and any changes to it should also be made by the Legislature.

Plaintiff's suit is also barred because it does not allege "a violation of the laws regulating the conduct of elections or election campaigns" as set forth in Wis. Stat. § 5.07. As noted above, "the laws regulating the conduct of elections or election campaigns" appears to refer to those statutes the Board has authority to administer, primarily Wis. Stat. ch. 5-12. Section II.B.2 & n.2, *supra*. Wis. Stat. chs. 5-12 are not the same as, and do not include, HAVA. Furthermore, Wis. Stat. § 5.07 was passed in its current form in 1983, with an inconsequential modification in 1985. 1983 Wis. Act. 484, § 136m, 1985 Wis. Act. 304. The Legislature could not have then anticipated what federal laws would be passed in the future, including HAVA. Plaintiff thus cannot use Wis. Stat. § 5.07 to enforce HAVA. Similarly, and as noted above, Plaintiff does not squarely allege any violations of state law. Section I.D., *supra*. Instead, he challenges the way the GAB is implementing HAVA. But the GAB's discretionary decisions implementing a federal law do not constitute not "a violation of the laws regulating the conduct of elections or election campaigns" under Wis. Stat. § 5.07, and Plaintiff lacks standing under Wis. Stat. § 5.07 for this reason as well.

Thus, as explained above, Plaintiff Van Hollen lacks standing under Wis. Stat. § 5.07 to sue the GAB, enforce HAVA, and to challenge the GAB's implementation of HAVA. The Complaint must be dismissed.

III. THE COURT CANNOT ORDER REMOVAL OF NAMES FROM VOTER REGISTRATION LISTS IN THIS LAWSUIT BECAUSE PLAINTIFF FAILED TO JOIN THE LOCAL CLERKS OR BOARDS OF ELECTION COMMISSIONERS THAT ARE AUTHORIZED TO DO SO.

Plaintiff purports to seek an order resulting in removal of voters' names from the statewide voter registration database. (Compl. ¶¶ 47, 55.) However, Plaintiff identifies no basis for doing so. Merely creating a statewide database and conducting "HAVA checks" – which are the duties Plaintiff claims the GAB has (Compl. ¶¶ 17-18, 21-22, 25, 28, 49-50, 52) – does not result in removal of voters from the registration list. Even the identification of voters whose information in the statewide voter conflicts with information in one or more other statewide databases (i.e., identified in a so-called "HAVA check") has no independent significance. Nothing in existing state law requires all such individuals to be deleted from the voter registration lists, nor should it.

There is a specific process for removing voters from the voter registration lists, and the duty and authority to do so rests primarily with local officials, and not the GAB. Wis. Stat. §§ 6.48, 6.50(3), (4). The only authority the GAB has to remove names from the registration list is if the election authority in another state, territory or possession notifies the GAB, or the GAB is otherwise informed, after an election, that a voter's address was incorrect at the time of the election. Wis. Stat. §§ 6.36(1)(d), 6.56(3).

Therefore, to the extent that the Plaintiff seeks an order from this Court addressing (by injunction or declaratory relief) the removal of names from the statewide voter registration database due to any reason other than notification from another state or territory that a voter has moved, or a post-election determination of an erroneous address, the local elections officials would need to take action. Plaintiff has not joined the local municipal clerks and boards of election commissioners, who are the only authorities authorized by statute to remove names from the registration lists, and, therefore, cannot obtain the relief requested. *See List v. Festge*, 9 Wis. 2d 297, 300-01, 101 N.W.2d 51 (1960) (holding that the trial court lacked jurisdiction to order government officials to act where the officials had not been made parties). Put another way, even if the Court finds that Plaintiff can bring this suit, and that the GAB is required to comply with HAVA by undertaking "HAVA checks," there is no duty by the GAB to remove voters from the statewide registration list and the Court cannot order it to do so.

Plaintiff's Complaint should be dismissed.

IV. PLAINTIFFS OTHER THAN THE ATTORNEY GENERAL MUST BE DISMISSED.

Aside from Mr. Van Hollen, no other party has, to date, filed a complaint in this matter. MTI anticipates that Intervenor Republican Party of Wisconsin ("RPW") will file a Complaint on this date, October 6, 2008. (RPW Mot. to Intervene, 9/22/08, at 2 (expressing preference to intervene as plaintiff).) If and when it does, MTI reserves the right to file a motion dismissing RPW's Complaint.

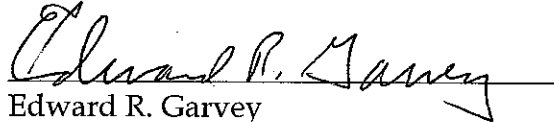
For the moment, however, MTI notes that many of the arguments outlined above can be employed against future plaintiffs. *E.g.*, Section I, *supra*. Furthermore, if Plaintiff J.B. Van Hollen is dismissed, the entire suit must still be dismissed because intervening plaintiffs, absent their own showing of jurisdiction, cannot carry the suit by themselves. *Fox v. DHSS*, 112 Wis. 2d 514, 543, 334 N.W.2d 532 (1983) (“intervention will not be permitted to ‘breathe life’ into a ‘nonexistent’ lawsuit”) (quoting *Fuller v. Volk*, 351 F.2d 323 (3rd Cir. 1965).)

CONCLUSION

For the reasons stated above, MTI respectfully requests that the Plaintiff's Complaint be dismissed.

Dated this 6th day of October, 2008.

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