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Delivered By Messenger

October, 6, 2008

Hon. Maryann Sumi
Dane County Circuit Court, Branch 2
215 South Hamilton Street
Madison, WI 53703

Re: ***Van Hollen v. GAB, et al.***
Case No. 08-CV-4085

Dear Judge Sumi:

Please find enclosed for filing the following document submitted by intervenor defendants the Milwaukee Branch of the NAACP and the Milwaukee Teachers' Education Association: Brief in Support of the Motion to Dismiss.

Kindly have your clerk conform the enclosed copies of the documents and return them to counsel. By copy of this letter, counsel of record have been served a copy of all documents.

Thank you.

Sincerely,

Richard Saks
William E. Parsons

Enc.
Cc: Steven P. Means
Charles Hoornstra
Lester A. Pines
Robert G. Friebert
Matthew O'Neil
Ed Garvey
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Jerry Ann Hamilton, President, Milwaukee Branch, NAACP
Tom Morgan, Executive Director, MTEA

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STATE OF WISCONSIN | CIRCUIT COURT BRANCH 2 | DANE COUNTY

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DANE CO. CIRCUIT COURT

J.B. VAN HOLLEN,
Plaintiff, and
REPUBLICAN PARTY OF WISCONSIN,
Intervenor Plaintiff,
v.

GOVERNMENT ACCOUNTABILITY BOARD, et al.,
Defendants,
DEMOCRATIC PARTY OF WISCONSIN,
Intervenor Defendant,
MADISON TEACHERS INC., AMERICAN FEDERATION OF TEACHERS-WISCONSIN, AND MADISON FIREFIGHTERS LOCAL 311,
Intervenor Defendants, and
MILWAUKEE BRANCH OF THE NAACP and MILWAUKEE TEACHERS' EDUCATION ASSOCIATION,
Intervenor Defendants.

Case No. 08-CV-4085
Petition for Writ of Mandamus 30952

BRIEF IN SUPPORT OF THE MOTION TO DISMISS BY INTERVENOR DEFENDANTS MILWAUKEE BRANCH OF THE NAACP AND MILWAUKEE TEACHERS' EDUCATION ASSOCIATION

October 6, 2008

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Intervenor defendants The Milwaukee Branch of the NAACP and the Milwaukee Teachers' Education Association (MTEA) submit this brief in support of their Motion to Dismiss.

STATEMENT OF THE CASE

Consistent with the requirements of the Help America Vote Act (HAVA), 42 U.S.C. §15301 et seq., Pub. L. 107-252, Wisconsin constructed a Statewide Voter Registration System (SVRS) which has been in use since the 2006 fall elections. Upon obtaining the requisite technical capability on August 6, 2008, the SVRS began cross-checking its database of newly-registered voters with government databases maintained by the state's Department of Transportation for driver's license numbers and the federal Social Security Administration for the last four digits of a voter's social security number. At its August 27-28, 2008 meeting, the Government Accountability Board (GAB) declined a request by the Republican Party of Wisconsin to conduct a retrospective cross-check of the driver's license numbers or final four social security digits of all voters who registered between January 1, 2006 and August 6, 2008.

On September 10, 2008, J.B. Van Hollen, in his official capacity as Wisconsin Attorney General, filed a petition for a writ of mandamus to compel the GAB to cross-check the SVRS database for all voters who registered after January 1, 2006. Seven parties timely moved and were granted by the court the right to intervene, including the Democratic Party of Wisconsin, Republican Party of Wisconsin, Madison Teachers' Inc., AFT-Wisconsin, Madison Firefighters Local 311, the Milwaukee Branch of the NAACP, and the MTEA.

On September 26, the NAACP and MTEA filed a motion to dismiss Mr. Van Hollen's petition, pursuant to Wis. Stat. §802.06(2)(a)(6), on the grounds that it fails to state a claim upon which relief can be granted and, if granted, is legally insufficient to compel the GAB or any other State of Wisconsin agency to conduct the requested "HAVA check."

Mr. Van Hollen's petition does not sufficiently state a claim to support a writ of mandamus. It is not predicated upon any duty that must be performed by the GAB. Rather, Mr. Van Hollen simply disagrees with the GAB's judgment as to how to manage the statewide voter database, while disregarding the impact of potential disenfranchisement on eligible voters who would inevitably be caught up in the dragnet he seeks. (Complaint ¶ 45). What he seeks is not merely a HAVA check, but a draconian HAVA sweep "to ensure that ineligible voters are removed from the State's official list of registered voters before the November election." (Complaint ¶ 6).

UNDISPUTED FACTS

The following undisputed facts, gleaned from Mr. Van Hollen's petition, are pertinent to his mandamus request:

1. Title III of the federal Help America Vote Act (HAVA) required Wisconsin to "implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State," which list was to be "coordinated with other agency databases within the State." *See* 42 U.S.C. §15483(a)(1)(A). (Complaint ¶¶ 18-21).

2. Wisconsin was required to comply with the requirements described in paragraph 1, above, by January 1, 2006. *See* 42 U.S.C. §15483(d)(1)(B). (Complaint ¶ 16).

3. The Government Accountability Board (GAB) is the agency responsible for ensuring Wisconsin's compliance with HAVA. (Complaint ¶¶ 13-16).

4. The GAB did not develop a functioning computerized voter registration system until August 6, 2008. (Complaint ¶ 24).

5. The GAB's plan is to conduct and provide "HAVA checks" on all new voter registrations entered after August 6, 2008. However, prior to the general election on November 4, 2008, the GAB does not intend to run HAVA checks or coordinate information with "other agency databases" on the voter registration applications received between January 1, 2006 and August 6, 2008. (Complaint ¶¶ 32-34).

6. The GAB based its decision not to run HAVA checks on pre-August 6, 2008 registrants prior to November 4, 2008 on its determination that "more than 20,000 Wisconsin voters could be wrongfully disenfranchised or forced to cast provisional ballots" as a result of such last-minute checks. (Complaint ¶ 45).

ARGUMENT

I. Mandamus Is Only Available to Compel Performance of a Mandatory, Non-Discretionary Act.

Mandamus is an extraordinary legal remedy, available only to parties who meet its exacting requirements. Chief among these is the requirement that the writ be based on a "clear, specific legal right which is free from substantial doubt." *Lake Bluff Partners v. City of South Milwaukee,* 197 Wis. 2d 157, 170, 540 N.W.2d 189 (1995) (internal quotation and citations omitted). The petitioner for the writ must also show a plain and positive duty; substantial damage if the duty is not performed; and the absence of any other adequate remedy at law. *Id.*

The purpose of mandamus is "to compel a private or municipal corporation or an inferior court to perform a particular act." *State ex rel. J. H. Findorff & Sons, Inc. v. Circuit Court,* 2000 WI 30 ¶ 8 n. 5, 233 Wis. 2d 428, 608 N.W.2d 679 (2000). The responsibility to perform the particular act must be imperative or ministerial. If the act lies entirely within the officer's or respondent's discretion, however, it may not be compelled by mandamus. *See State ex rel. Kurkierewicz v.*

Cannon, 42 Wis. 2d 368, 376, 166 N.W.2d 255 (1968); *Cartwright v. Sharpe,* 40 Wis. 2d 494, 503, 162 N.W.2d 5 (1968).

II. HAVA Vests States With Discretion In Implementing the Statewide Voter Database and Does Not Compel States to Remove or Burden Voters Due to Driver's License or Social Security Mismatches.

Mr. Van Hollen's mandamus claim is insufficient as a matter of law for two fundamental reasons: first, the State of Wisconsin is under no legal obligation under HAVA, or any other law, to remove or declare ineligible voters whose driver's license numbers or social security numbers do not match government databases; and second, HAVA explicitly grants the states discretion in determining how to create and utilize the centralized database mandated by Title III of HAVA.

There is no dispute that HAVA compels states to create a statewide voter database including either a new voter registrant's driver's license, final four social security digits, or a given unique identifier. Failure to do so subjects states to loss of federal funds and an enforcement claim under Title IV of HAVA. *See U.S. v. Alabama*, 2006 WL 1598839 (MD. Ala. 2006) (U.S. Attorney General sought federal injunctive relief to compel Alabama to create statewide voter database mandated under Title III that matched with Social Security Administration database); *see also U.S. v. Maine*, 2007 WL 1059565 (D. Me. 2007).

While Mr. Van Hollen's complaint may, at first blush, appear to contain a fairly exhaustive recitation of HAVA's provisions, it fails to cite a single statutory provision which mandates that a state must remove from its statewide voter list a registrant whose driver's license number or final four social security digits fails to match those respective agencies' databases. To the contrary, the substantive provisions of Title III regarding the use of driver's license numbers and the final four social security digits nowhere compel a state to remove from its voter rolls a voter registrant whose information provided does not match those in the government databases. HAVA clearly provides

that the state – not HAVA – decides what happens when a motor vehicle or social security database fails to match the number provided by a voter registrant:

> The state shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with state law.

42 U.S.C. §15483(a)(5)(A)(iii).

Such absence of any formal requirement under HAVA to remove non-matches from the voter database was addressed by the federal district court which invalidated a state of Washington statute barring registrants whose driver's license or social security numbers failed to match government databases. *Washington Ass'n. of Churches v. Reed*, 492 F.Supp.2d 1264, 1268-69 (W.D. Wash. 2006). In analyzing whether HAVA imposed such a requirement, the court looked at the explicit language and legislative history of HAVA, and rejected the notion that HAVA imposes such a requirement:

> It is clear from the language of the statute and by looking at legislative history that HAVA's matching requirement was intended as an administrative safeguard for "storing and managing the official list of registered voters," and not as a restriction on voter eligibility. *See* 42 U.S.C. § 15483(a)(1)(A)(i). This is evidenced by the requirement that a person who has no driver's license or social security number be given a unique identifying number, but not be matched, prior to registering to vote. § 15483(a)(1)(A)(ii). Legislative history confirms that it is the assignment of some kind of unique identifying number to the voter that is the requirement of § 15483(a)(1)(A)(i), not the "match." 148 Cong. Rec. S10488-02, S10490 (daily ed. Oct. 16, 2002); *see also* H.R. Rep. 107-329(Pt. 1) at 36 (2001).

Washington Ass'n. of Churches v. Reed, 492 F.Supp. at 1268-69.

Mr. Van Hollen seeks a judicially-created and imposed requirement that is not mandated by Title III or any other provision of HAVA. Because of the balancing that must be done to protect the franchise while preventing voter fraud, HAVA invests in the states substantial discretion in how the statewide voter database required under Title III is created and maintained.

Florida State Conf. of NAACP v. Browning, 522 F.3d 1153, 1168 (11th Cir. 2008) ("HAVA represents Congress's attempt to strike a balance between promoting voter access to ballots on the one hand and preventing voter impersonation fraud on the other.") Such discretion is fatal to the mandamus relief sought here by Mr. Van Hollen. Section 305 of HAVA leaves little doubt about the discretion accorded to the states under HAVA. Its plainly-stated title and terse textual command is explicit:

> **Methods of implementation left to discretion of states.**
> The specific choices on the methods of complying with the requirements of this subchapter [Title III] shall be left to the *discretion* of the State.

42 U.S.C. Sec. 15485(emphasis added).

The Eleventh Circuit Court of Appeals has construed the above-quoted HAVA language similarly and concluded that HAVA affords discretion to the states to determine whether the driver's license numbers and four social security digits provided by a voter registrant are valid:

> To be sure, HAVA also does not require that states authenticate these numbers by matching them against existing databases. It is explicit that states are to make determinations of validity in accordance with state law. States are therefore free to accept the numbers provided on application form, which at least in Florida are completed with an oath or affirmation under penalty of perjury, as self-authenticating.

Florida State Conf. of NAACP v. Browning, 522 F.3d at 1174 n. 21. Of course, if states are free to decide whether to match the driver's license and social security numbers against existing government databases, they are free to determine the scope of such matches. Wisconsin and its citizens have a compelling interest in ensuring that all eligible voters are able to cast their vote. The GAB's reasonable decision to only cross-check prospectively from August 6, 2008 – rather

than retrospectively – is a rational means, wholly within the discretion of the GAB to ensure a fair and orderly election on November 4, 2008.

III. Mr. Van Hollen's Petition Is Not Predicated Upon Any Affirmative GAB Obligation, But Upon a Disagreement With How the GAB Has Balanced the Competing Interests of Preventing Fraud Versus Guaranteeing Voting Rights for Eligible Voters.

Mr. Van Hollen's complaint concedes that the GAB has chosen a method of complying with the requirements of Title III that, in its judgment, balances the competing interests served by HAVA: the need to prevent fraud, by ensuring that only eligible voters are registered, against the compelling need to guarantee eligible citizens the right to vote. While Mr. Van Hollen may disagree with the GAB's decision, nothing in HAVA mandates a different conclusion. In fact, Mr. Van Hollen does not dispute the GAB's reasonable conclusion that a computerized motor vehicle and social security database sweep of voter registrants from January 1, 2006 to August 6, 2008, would merely identify scores of thousands of mismatches of otherwise eligible voters. Such a result would leave local election officials with an organizational nightmare that will at best delay and burden exercise of the franchise on November 5th, and at worst disenfranchise thousands of otherwise eligible voters.

The GAB, in its discretion, reasonably determined that such a hurried sweep would needlessly jeopardize the voting rights of scores of thousands of Wisconsin citizens for whom no independent basis exists to question their eligibility to vote. To prevent such a catastrophe, the GAB reasonably decided to conduct HAVA checks only prospectively from August 6, 2008. HAVA, of course, requires that state voter registration records include "safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters." 42 U.S.C. §15483(a)(4)(B). The GAB properly concluded that the sort of sweep that Mr. Van Hollen seeks

would create too great a risk that an enormous number of "eligible voters are . . . removed in error," in derogation of this command. This would be precisely the sort of "chaos" that state election officials are entitled to guard against in structuring elections and administering election laws. *See Burdick v. Takushi,* 504 U.S. 428, 433 (1992).

HAVA was the result of a carefully balanced, bipartisan effort to improve the conduct of our national elections. In particular, Congress sought to balance the concerns that too many eligible voters were regularly denied the right to vote because of irregularities in the administration of federal elections as well as competing concerns that additional measures were necessary to protect against voter fraud. First and foremost, the goal was to protect the franchise – to make it easier, not harder, for every eligible citizen to vote, and to have his or her vote counted. *See* H.R. REP. NO. 107-329(Part 1), at 38 (2001) ("Studies of the nation's election system find that a significant problem voters experience is to arrive at the polling place believing that they are eligible to vote, and then to be turned away because the election workers cannot find their names on the list of qualified voters.") available at http://frwebgate.access.gpo.gov/cgi-in/getdoc.cgi?dbname=107_cong_reports&docid=f:hr329p1.107.pdf; *see also Florida State Conf. of NAACP v. Browning*, 522 F.3d at 1168. Here, the GAB balanced such concerns and reasonably concluded that guaranteeing the right to vote of scores of thousands of voters far outweighed the minimal protection from fraud that such a retrospective database check would produce.

Because HAVA does not require states to remove voters from its statewide voter database, but rather grants discretion to the states to determine how to create, maintain, and utilize the centralized statewide voter database mandated by Title III, Mr. Van Hollen's mandamus action is insufficient as a matter of law and should be dismissed.

IV. Mr. Van Hollen's Mandamus Petition Should Be Dismissed Because It Seeks Relief That Unlawfully Contravenes HAVA and the Voting Rights Act.

HAVA expressly provides that nothing in HAVA "may be construed to authorize or require conduct prohibited under . . . the Voting Rights Act of 1965 (42 U.S.C. §1973 et seq.)." 42 U.S.C. §15545(a)(1). The Voting Rights Act provides that:

> **(2)** No person acting under color of law shall—
>
> . . .
>
> **(B)** deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election;

42 U.S.C. §1971(a)(2)(B).

The Voting Rights Act did not simply target facially discriminatory registration requirements seeking irrelevant information, but also "requirements that ask for relevant information but disproportionately penalize applicants for trivial mistakes." *Florida State Conf. of NAACP v. Browning*, 522 F.3d at 1181 (Barkett, C.J., dissenting); *see also*, *Condon v. Reno*, 913 F.Supp. 946, 950 (D.S.C. 1995) ("the 1964 Civil Rights Act provided that no one could be denied registration because of errors that were not material in determining eligibility. 42 U.S.C. §1971(a)(2)(B). This was necessary to sweep away such tactics as disqualifying an applicant who failed to list the exact number of months and days in his age.").

In *Washington Assn. of Churches v. Reed*, the federal district court found a voting rights violation precisely because the state's HAVA matching of driver's license and social security numbers was not found to be material to determine the eligibility of voters under Washington law. The court concluded that:

> defendant has failed to demonstrate how an error or omission that prevents Washington State from matching an applicant's information is material in

> determining whether that person is qualified to vote under Washington law. Thus, at this time, the Court finds that plaintiffs have demonstrated a strong likelihood of success on the merits of their claim that RCW 29A.08.107 is in direct conflict with the "materiality" provision of section 1971 of the Voting Rights Act.

Washington Ass'n of Churches v. Reed, 492 F.Supp.2d at 1270-71.

Likewise, in *Schwier v. Cox*, the Eleventh Circuit found that the materiality provision of sec.1971(a)(2)(B) of the Voting Rights Act prohibited the state of Georgia from mandating disclosure of social security numbers. *Schwier*, 439 F.3d 1285, 1286 (11th Cir. 2006), *aff'g Schwier v. Cox*, 412 F.Supp.2d 1266, 1276 (D.Ga. 2005) ("disclosing one's SSN cannot be material in determining whether that person is qualified to vote under Georgia law"). In *Browning*, Judge Barkett's dissent provided a detailed analysis consistent with the holdings in *Washington Ass'n of Churches* and in *Schwier* as to why database matches with driver's licenses and social security numbers are not material under state law to voter eligibility:

> [A]n applicant with a hyphenated last name would have her application denied if the databases did not include the hyphen; similarly, an applicant who failed to include a suffix such as "Jr." or "Sr." would have his application denied. Even though the information sought is clearly relevant, these small inconsistencies would not preclude a reasonable election official from identifying the applicant and, thus, should not be considered either a material error or omission. Similarly, the accidental transposition of two numbers from a driver's license or social security number is not a material error under the VRA. These are the very mistakes that Congress intended to prevent states from using as "burdensome" barriers to registration.

Id. at 1182-1183 (citations omitted).

Mr. Van Hollen's requested remedy would undoubtedly unfairly and disproportionately penalize African American voters. More than one-half of all African American adults in Milwaukee County do not have valid driver's licenses. *See* John Pawasarat, "The Driver License Status of the Voting Age Population in Wisconsin" (University of Wisconsin-Milwaukee

Employment and Training Institute, www.eti.uwm.edu, June 2005). Pawasarat explained the phenomenon of driver's license difficulties facing minority populations:

> Minorities and poor populations are the most likely to have drivers license problems. Less than half (47 percent) of Milwaukee County African American adults and 43 percent of Hispanic adults have a valid driver's license compared to 85 percent of white adults in the Balance of State (BOS, i.e., outside Milwaukee County).

Pawasarat at pp. 1-2 (emphasis added).

The Pawasarat study found even greater driver's license problems among young minority adults, the precise demographic group that has been a central target of recent voter registration drives:

> The situation for young adults ages 18-24 is even worse, with only 26 percent of African Americans and 34 percent of Hispanics in Milwaukee County with a valid license compared to 71 percent of young white adults in the Balance of State.

Pawasarat at p. 2.

The failure of tens of thousands of new African American registrants to provide or match a Wisconsin Department of Motor Vehicle driver's license number compels African American registrants to provide the far more unreliable and limited identifier of a voter's last four digits of the social security number. Peter Monaghan, SSA Director of Information Exchange, reported on audits performed by the SSA relating to its matching of voter registration information. In a February 6, 2006 report, Mr. Monaghan stated that no match was found in 28.5% of 143,000 queries submitted. Mr. Monaghan subsequently reported in 2007 that of 2.6 million queries submitted, no match was found in 46.2% of the queries. *See* "SSA's HAVA Verification," Feb. 6, 2006 and Feb. 12, 2007, attached as Exhibits D and E to the "Declaration of Andrew Borthwick in Support of Plaintiff's' Motion for a Preliminary Injunction" in *Florida NAACP v. Browning*, Case No. 4:07cv402 (N.D. Fla) (available at:

http://brennan.3cdn.net/00b1ba6f5b0a62283b_mlbrwdcc3.pdf.)

The relief sought by Mr. Van Hollen will visit upon African American registrants the type of disproportionate penalty that the materiality provision of the Voting Rights Act sought to prohibit. As such, Mr. Van Hollen's requested relief is insufficient as a matter of law because it violates HAVA and the Voting Rights Act.

V. The GAB Has Established Its Statewide Voter Database in a Uniform and Non-Discriminatory Manner, Creating Rational Distinctions Among Voter Registrants in Order to Conduct an Orderly Election and Guarantee Eligible Citizens the Right to Vote.

Mr. Van Hollen advances the odd argument that the GAB's decision somehow violates HAVA's requirement that the computerized system be implemented "in a uniform and nondiscriminatory manner," *see* 42 U.S.C. §15483(a)(1), because, he claims, it "will not treat all voter registrations received after the HAVA effective date in a uniform and non-discriminatory manner and will not conduct, nor require HAVA checks on any voter registration applications received prior to August 6, 2008." That, however, is not what the "uniform and nondiscriminatory" requirement means.

"Uniform" does not mean "identical," under either federal or state law. Constitutional requirements that federal tax, bankruptcy and naturalization laws be "uniform" mean that the same laws are "to operate generally throughout the United States," even though the burden of their application may vary depending on differences in state law and other contingencies. *See Knowlton v. Moore,* 178 U.S. 41, 96 (1900) (federal taxes); *see also Nehme v. INS,* 252 F.3d 415, 428 (5th Cir. 2001) (naturalization laws). A law may be "uniform," even though it distinguishes among different classes, such as a bankruptcy law's creation of classes of debtors and creditors. *See, e.g., Railway Labor Executives' Ass'n v. Gibbons,* 455 U.S. 457, 469 (1982) (bankruptcy). Where a classification

"has a rational basis and is not unreasonable," the law is "uniform" "as long as all those in the same class bear an equal burden." *See Monllor & Boscio v. Sancho,* 136 F.2d 114, 116 (1st Cir. 1943).

Similarly, in Wisconsin, the Legislature's creation of a separate class of counties having a population of 500,000 does not violate the command of Art. IV § 23 of the Wisconsin Constitution that county government throughout the State be "as nearly uniform as practicable," even though Milwaukee County was the only member of the class, in view of its unique problems owing to its size. *State ex rel. Milwaukee County v. Boos,* 8 Wis. 2d 215, 221, 99 N.W.2d 139 (1959); *see also Vincent v. Voight,* 2000 WI 93, ¶¶ 31, 39, 236 Wis. 2d 588, 614 N.W.2d 388 (Art. X §3's requirement that school districts be "as nearly uniform as practicable" refers to "character of instruction;" it "does not require educational opportunity to be absolutely uniform.")

Nor does anything in HAVA's uniformity requirement preclude the creation of separate classes, based on reasonable distinctions. The GAB has simply created two separate classes, owing to the special problems that a hurried, retroactive HAVA sweep would present. The first class, consisting of those who registered between January 1, 2006 and August 6, 2008, would not be retrospectively checked prior to the 2008 general election. The second class consists of new registrants after August 6, 2008, who are subject to prospective HAVA checking as part of their registration process. Within each of the classes the same treatment is applied across the board, i.e., "uniformly."

The GAB's creation of the two classes is also "nondiscriminatory." "Nondiscrimination" means the absence of a discriminatory purpose, that is, a purpose to place a protected group at a disadvantage. Thus, a state law that seeks to achieve a lawful end by explicitly "discriminating against articles of commerce coming from outside the State . . . violates [the Commerce Clause's] principle of nondiscrimination." *Chemical Waste Mgt., Inc. v. Hunt,* 504 U.S. 334, 341 (1992).

"'Discriminatory purpose' implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r v. Feeney,* 442 U.S. 256, 279 (1979). The same standard applies in challenges to laws or classifications impacting on the electoral franchise. *See Miller v. Johnson,* 515 U.S. 900, 916 (1995).

Nothing in Mr. Van Hollen's complaint even hints that the GAB's decision to perform HAVA checks only prospectively was, in any way, aimed at diluting anyone's vote. Its action, instead, was predicated on the chaotic effect that a hasty, last-minute HAVA sweep would have on thousands of voters who registered in good faith before the computerized system was in place, but whose registrations might now be spat out because of some technical discrepancy, with no opportunity to correct it prior to the election.

It is no answer to say, as Mr. Van Hollen does, that such potential voters can cast provisional ballots. A provisional ballot is a second-class vote. The voter leaves the polling place not knowing whether his or her vote will count. He or she will only find out by calling a toll-free number or checking a website. If the answer is that the vote was not counted, the voter will be given a reason, but by then it will be too late to correct. That voter will have been directly and absolutely deprived of the right to vote without a meaningful remedy.

VI. The Right-to-Sue to Enforce HAVA Rests with the United States Attorney General, not State or Local Authorities.

Title IV of HAVA contains the enforcement provisions for a state's failure to implement the statewide voter database and other administration requirements set forth in Title III of HAVA. Specifically, Section 401 of HAVA provides:

> 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.

Section 402 of HAVA provides that states must establish an administrative complaint procedure to hear and remedy grievances that "any person" may bring who believes that there has been a violation of Title III. HAVA does not provide a right to sue for Mr. Van Hollen prior to exercising his rights under Section 402. Congress vested in the Unites States Attorney General the right to bring actions in federal district court to enforce Title III of HAVA. Accordingly, the instant petition should be dismissed.

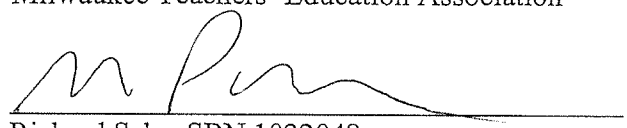
CONCLUSION

Based upon the foregoing facts and arguments, the NAACP and MTEA respectfully request that, pursuant to Wis. Stat. §802.06(2)(a)(6), the court order dismissal of plaintiff's petition for a writ of mandamus on the grounds that it fails to state a claim upon which relief can be granted and is legally insufficient to compel the GAB or any other State of Wisconsin agency to conduct a putative "HAVA check" retrospectively of all Wisconsin voters who submitted voter registration applications between January 1, 2006 and August 6, 2008.

October 6, 2008

Respectfully submitted,

HAWKS QUINDEL EHLKE & PERRY, S.C.
Attorneys for Intervenor Defendants the
Milwaukee Branch of the NAACP and the
Milwaukee Teachers' Education Association

By 

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