IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 04-4265, 04-4266

SANDUSKY COUNTY DEMOCRATIC PARTY, *et al.*,
Plaintiffs-Appellees,

v.

J. KENNETH BLACKWELL,
Defendant-Appellant,

and

GREGORY L. ARNOLD, *et al.*,
Intervenors.

On Appeal from the United States District Court
For the Northern District of Ohio

BRIEF OF PLAINTIFFS-APPELLEES

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Dated: October 23, 2004

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SANDUSKY COUNTY DEMOCRATIC PARTY, *et al.*,	)	
Plaintiffs-Appellees,	)	
v.	)	**Nos. 04-4265, 04-4266**
J. KENNETH BLACKWELL,	)	
Defendant-Appellant,	)	
and	)	
GREGORY L. ARNOLD, *et al.*,	)	
Intervenors.	)	

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Plaintiff-Appellee Sandusky County Democratic Party makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? NO

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? NO

FRITZ BYERS _____ Date

IN THE
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Intervenors.	)	

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Plaintiff-Appellee The Ohio Democratic Party makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? NO

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? NO

SAMUEL R. BAGENSTOS _____ Date

IN THE
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GREGORY L. ARNOLD, *et al.*,	)	
Intervenors.	)	

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Plaintiff-Appellee Farm Labor Organizing Committee makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? NO

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? NO

SAMUEL R. BAGENSTOS _____ Date

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Intervenors.	)	

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Plaintiff-Appellee North Central Ohio Building and Construction Trades Council makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? NO

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? NO

SAMUEL R. BAGENSTOS _____ Date

IN THE
UNITED STATES COURT OF APPEALS
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SANDUSKY COUNTY DEMOCRATIC PARTY, *et al.*,	)	
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and	)	
GREGORY L. ARNOLD, *et al.*,	)	
Intervenors.	)	

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Plaintiff-Appellee Local 245 International Brotherhood of Electrical Workers makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? NO

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? NO

SAMUEL R. BAGENSTOS _____ Date

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INTRODUCTORY STATEMENT

This case involves the Ohio Secretary of State's defiance of the federal law that governs federal elections. After the disputed 2000 presidential election made the ubiquity of errors in election administration plain for all the world to see, Congress enacted the Help America Vote Act ("HAVA"), 42 U.S.C. §§ 15301 *et seq.* That statute provides that a voter whose name does not appear on the precinct rolls, or who a poll worker believes is not eligible to vote, may nonetheless cast a provisional ballot – limited to elections for federal office – which will be counted if election officials subsequently determine that he was in fact eligible to vote. 42 U.S.C. § 15482(a). This procedure responds to the experience of the 2000 election, when upwards of a million eligible voters lost their opportunity to cast ballots because of errors in election administration. *See* Caltech/MIT Voting Technology Project, *Voting: What Is, What Could Be* 30 (2001) (estimating that roughly 3 million votes in the 2000 federal election were lost due to election administration errors, and that about half of those votes could have been saved by using provisional ballots).

Although HAVA was enacted on October 29, 2002, and Secretary Blackwell acknowledged in June 2003 that Ohio law did not satisfy HAVA's provisional-ballot requirements, the Secretary "did not issue[] any regulations or directives relating to provisional voting in light of HAVA until September 16, 2004." Inj.

Order at 4.[1] When he finally did act, Secretary Blackwell issued Directive 2004-33, which added nothing to existing state law – the same state law he had already acknowledged did not comply with HAVA. Directive 2004-33 eviscerates the federal provisional-voting rights guaranteed by HAVA, denying those rights to all but a small class of individuals: namely, those who have previously moved from one Ohio precinct to another Ohio precinct; ***and*** seek to cast provisional ballots in the precinct in which they now reside; ***and*** have not attempted to vote at their former polling place; ***and*** can convince the poll workers that they are eligible to vote in the new precinct. HAVA places ***none*** of these conditions on the right to vote provisionally. Secretary Blackwell's actions thus flouted the clear commands of HAVA. And when the District Court issued a preliminary injunction to enforce the clear federal command, Secretary Blackwell defied that order as well. *See* October 20, 2004 Order at 7.

On appeal, Secretary Blackwell simply ***makes no effort to defend*** many of the aspects of Directive 2004-33 that the District Court held to violate HAVA. He does not defend the Directive's limitation of provisional voting to those who have moved; he does not defend the Directive's prohibition of provisional voting by

[1] "Inj. Order" refers to the District Court's October 14, 2004 Order granting Plaintiffs-Appellees' Motion for Preliminary Injunction. "Sec'y Br." refers to the Brief of Appellant J. Kenneth Blackwell, Secretary of State of Ohio. "Intervenors' Br." refers to the Brief of Intervenors Noe, Wolfe, and Arnold. "DOJ Br." refers to the Brief for the United States as *Amicus Curiae*.

those who attempted to – but did not – cast ballots at another polling place; and he does not defend the Directive's requirement that poll workers verify a voter's eligibility ***before*** a provisional ballot is cast. The aspects of the preliminary injunction that address these uncontested issues must be affirmed, regardless whether the Court agrees with Secretary Blackwell's interpretation of HAVA.

Secretary Blackwell limits his challenge on the merits to one aspect of the District Court's order, which requires the State to permit voters to cast provisional ballots and have those ballots counted when they present themselves to vote in their county of residence, but at a different polling place than the one assigned to their address. The Secretary contends that this aspect of the District Court's order improperly requires Ohio "to abandon residency-based precinct voting." Sec'y Br. at 12. The order does nothing of the sort. It simply requires the State to permit a voter who arrives at the "wrong" precinct (whether because of administrative error, because the voter was maliciously directed to the wrong polling place,[2] or for other reasons) to cast a limited ballot, for the federal contests only, that will be counted if election officials later verify the voter's eligibility. Experience in jurisdictions that have implemented such out-of-precinct provisional balloting shows that only a

[2] Some Ohio voters have recently reported receiving calls from individuals pretending to be affiliated with local boards of elections who informed them, incorrectly, that their polling places had changed. *See* S. Hoholik, *Voters Report Fake Calls: Instructions to Change Polling Place Don't Come from Board of Elections*, Columbus Dispatch, Oct. 22, 2004.

small fraction of voters will cast ballots at the "wrong" polling place. Indeed, voters have a strong incentive to vote at the "right" polling place to assure that they will have a voice in state and local elections, which are not covered by HAVA's provisional-ballot procedure. But experience also teaches that many voters will, despite their best efforts and through no fault of their own, arrive at the "wrong" polling place – a phenomenon that is likely to be particularly widespread in Ohio this year given the innumerable and widely reported problems in the State's election administration. Provisional balloting – as required by HAVA's plain text – provides the only means of saving these voters from utter disenfranchisement.

In the end, however, this case is not about what is the best election-administration policy. It is about vindicating the federal law that governs federal elections. In his refusal to comply with HAVA, compounded by his defiance of the District Court's order, Secretary Blackwell has made clear that he believes that state law trumps federal law. He made that point clear just this week, when he compared his refusal to comply with a federal-court order to the civil disobedience of Dr. King, Gandhi, and the apostle Paul:

> Ohio Secretary of State J. Kenneth Blackwell said Thursday that he would rather go to jail than rewrite his guidelines on out-of-precinct voters – even when ordered to by a federal judge.
>
> "Some of the best writing in history has been done from jail," Blackwell said, invoking the names of Mohandas K. Gandhi, the Rev. Martin Luther King Jr., and the apostle Paul. "I wasn't going to write a directive that I believe violates Ohio law."

G. Korte & J. Siegel, *Blackwell Rips Judge*, Cincinnati Enquirer, Oct. 22, 2004. The District Court's preliminary injunction decisively rejects that upside-down view of the Supremacy Clause. It should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

This case concerns a matter of national importance – the rights of voters to have their ballots cast and counted in the upcoming general election on November 2, 2004, and the implementation of the provisional-balloting framework mandated by Congress. Because this appeal seeks to reverse an injunction entered by the District Court to protect these fundamental rights and ensure that Ohio's upcoming election comports with federal law, Plaintiffs-Appellees respectfully request the opportunity to present oral argument in this case. *See* 6th Cir. R. 34(a).

JURISIDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343, and was authorized to order the relief granted pursuant to 28 U.S.C. §§ 2201 and 2202. The District Court's order is properly appealed to this Court under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE PRESENTED

Whether the District Court abused its discretion in granting a preliminary injunction against the Secretary of State's enforcement of Directive 2004-33, the implementation of which would directly violate the federal provisional-voting

rights of Ohio citizens, as guaranteed by the Help America Vote Act of 2002, 42 U.S.C. § 15301 *et seq*.

STATEMENT OF THE CASE

A. The Help America Vote Act of 2002

In the 2000 presidential election, in almost every State – including Ohio – thousands of voters were turned away from the polls without having cast a ballot because poll workers could not find their names on the official list of eligible voters for the polling place. Sometimes, the names were missing because the voters recently moved; others were missing due to election officials' failures to maintain accurate voter rolls or to inform registrants of their correct polling-place locations. Based in part on the findings of the Caltech/MIT Voting Technology Project, *supra*, the National Commission on Federal Election Reform – chaired by former Presidents Ford and Carter – and a host of other commissions and organizations proposed nationwide use of provisional ballots. *See, e.g.*, National Commission on Federal Election Reform (the "Ford-Carter Commission"), *To Assure Pride and Confidence in the Electoral Process* 6, 35-37 (2001).

Congress responded by enacting HAVA. Section 302 of the statute addresses provisional voting. It requires that all States permit provisional voting by *any* individual whose name does not appear on the official list of eligible voters for the polling place (or whose eligibility to vote is otherwise challenged), but who

completes a written affirmation that he is (1) "a registered voter in the jurisdiction in which [he] desires to vote" and is (2) "eligible to vote in an election for Federal office." 42 U.S.C. § 15482(a). Under the federal statute, any individual who so affirms "***shall be permitted*** to cast a provisional ballot." *Id.* (emphasis added). In addition, HAVA specifically requires that instead of turning away voters who "do[] not appear on the official list . . . for the polling place," *id.*, election officials "shall notify" those voters that they "may cast a provisional ballot in that election," *id.* § 15482(a)(1).

After the polls close, HAVA requires the election officials at the polling place to transmit the provisional ballot and written affirmation to the appropriate state or local election officials for prompt verification of the individual's eligibility to vote. *Id.* § 15482(a)(3). Then, "[i]f the appropriate State or local election official to whom the ballot or voter information is transmitted . . . determines that the individual is eligible under State law to vote, the individual's provisional ballot ***shall be counted*** as a vote in that election in accordance with State law." *Id.* § 15482(a)(4) (emphasis added).

B. Provisional Voting in Ohio and the Issuance of Directive 2004-33

Prior to HAVA's enactment in 2002, Ohio provided only limited provisional balloting, applicable to voters who had moved or had changed their names and thus did not appear on the voter rolls. Furthermore, before HAVA, voters who

attempted to vote within their county of residence, but not in their "home" precinct, were generally not permitted to cast a vote or to have that vote counted. Although HAVA guarantees much broader provisional voting rights – including the right to cast a provisional ballot if a voter's name does not appear on the rolls for ***any*** reason, and the right to cast and have counted a "wrong precinct" ballot – Secretary Blackwell has entirely failed to bring Ohio into compliance with HAVA, despite having publicly promised for months to do so.

Under the Ohio elections code, which for all relevant purposes has remained the same since well before HAVA's enactment, qualified and registered voters are permitted to cast provisional ballots only in a very narrow set of circumstances. *See* Ohio Rev. Code § 3503.16. First of all, provisional voting under Ohio law covers only those voters who have moved within the State or have changed their names. *See id.* Even then, such voters may cast provisional ballots at their new polling places only after fulfilling certain conditions. *See id.* Specifically, before casting a provisional ballot, a voter who has moved ***between precincts within a county*** must sign a notice of change in residence and attest that he will not attempt to vote at any other location in that election. *Id.* § 3503.16(B)(2). A voter who has moved ***between counties*** must first appear at the county board of elections, or another designated location, prior to or on the day of the election. *Id.* § 3503.16(C).

Because existing Ohio law and the Secretary of State's previous guidance did not conform with HAVA's provisional-voting protections, Secretary Blackwell expressly conceded in Ohio's "State Plan," submitted to the federal Election Assistance Commission in June 2003, that changes would need to be made. *See A State Plan to Implement the Help America Vote Act of 2002 in accordance with Public Law 107-252, § 253(b)* (June 16, 2003), 69 Fed. Reg. 14879 (2004). And the Secretary promised to make those changes, recognizing that "provisional voting [is] a condition for receiving federal funding" under HAVA. *Id.* at 34, 69 Fed. Reg. at 14895. For example, while acknowledging that Ohio provisional-voting law "protects those who changed their residence," Secretary Blackwell asked, "[W]hat about those who, for example, were incorrectly purged from the voter registration list?" *Id.* at 33. Given the narrowness of Ohio's existing law, Secretary Blackwell promised to make the necessary changes to "accommodate every voter who, ***for whatever reason***, does not appear on the certified list of registered voters in any jurisdiction of the state." *Id.* at 34 (emphasis added). Similarly, he promised to require local boards of elections to "adopt provisional voting policies that are weighted more toward inclusion in the voting process than challenges and exclusion in the ballot process." *Id.* To bring Ohio into compliance with HAVA, Secretary Blackwell offered assurances that he would "continue to refine and expand the scope of provisional voting in the state to

comply with the spirit, intent, and letter of the law in the Help America Vote Act," *id.*, and stated his "commit[ment] to making sure every voter and every vote counts," *id.* at 33. Explicitly recognizing "[t]he critical role of provisional voting in election reform," Secretary Blackwell called provisional voting "a way to ensure every eligible voter who shows up at the polls on Election Day can cast a ballot." *Id.* at 33.

But Secretary Blackwell did ***nothing*** to fulfill these promises in the subsequent months. No new directives were issued; no guidance was given to the county boards of election; no information about the implementation of the State Plan was posted on the Secretary's website. Even Ohio's official 2004 Voter Information Guide told voters nothing about their provisional-voting rights under HAVA. *See* Ohio Secretary of State, *Official Voter Information Guide, available at* http://www.sos.state.oh.us/sos/pubAffairs/elections/voteGuide.pdf. It is thus unsurprising that election officials grew "unhappy with the lack of direction from the Ohio secretary of state's office," particularly concerning "when to count provisional ballots." *Campaign Notes*, Columbus Dispatch, Sept. 15, 2004.

Finally, in late August 2004, the Secretary of State's office promised to issue a directive implementing HAVA's provisional-voting mandate immediately. *See, e.g.*, G. Korte, *Election Offices Await Order*, Cincinnati Enquirer, Aug. 30, 2004 (discussing Secretary Blackwell's plan to "issue a new directive" promulgating

"new rules that he said would be in line with federal election reforms that followed the 2000 election"); S. Hiassen, *Blackwell Backs Down on Ballot Ruling*, Cleveland Plain Dealer, Aug. 28, 2004 (discussing the Secretary's promise to issue "revised orders" to comply with HAVA sometime during the week of August 30). Referring to Ohio's obligations under HAVA, a spokesman for the Secretary of State stated: "The intent of the federal law is not only to provide provisional ballots, but that those ballots be counted regardless of any error." Hiassan, *supra*; *see, e.g.*, J. Becker & D. Keating, *Problems Abound in Election System*, Wash. Post, Sept. 4, 2004 (discussing the Secretary's decision to "allow provisional ballots cast in the wrong precinct to be counted" because "'[i]t's ridiculous to penalize a voter for an election official error'" (quoting the Secretary's spokesperson)).

But the State never met its professed goal to comply with HAVA. Instead, on September 16, 2004, Secretary Blackwell sent to all Ohio county boards of elections Directive 2004-33, entitled "Issuing and Processing Provisional Ballots." Far from satisfying HAVA's requirements, that Directive merely reiterates – and in some respects further limits – Ohio's already narrow pre-HAVA provisional-voting scheme.

C. Proceedings Below

Eleven days after Directive 2004-33 made clear that Secretary Blackwell had abdicated his promise to bring Ohio into compliance with HAVA, Plaintiffs brought suit in the Northern District of Ohio, seeking declaratory and injunctive relief. Plaintiffs claimed that Directive 2004-33 directly conflicted with HAVA, and they sought a preliminary injunction requiring the Secretary to administer the November 2004 election in compliance with HAVA.

The Secretary's response below, and that of individual Intervenors, was astonishing: Both claimed that Directive 2004-33 presents no federal issue because it merely reaffirms existing Ohio law. Despite his recognition that preexisting state law did not conform to HAVA, and despite his promise to implement HAVA by directive, the Secretary claimed that Directive 2004-33 was intended merely "to remind Ohio election officials of Ohio Statutory Provisional voting statutes which supplement and complement the HAVA Provisional Voting Standards." Sec'y Mot. to Dismiss at 19 (emphasis in original). Given his public recognition that preexisting Ohio procedures did not comply with HAVA, this response was a ***concession*** that Directive 2004-33 does not comply with HAVA. For their part, Intervenors explicitly conceded that "nothing in state law or, to the best of Intervenors' knowledge, any other Directive, has ever addressed or defined ***HAVA*** provisional balloting." Mot. to Intervene at 4 (emphasis in original).

Given the Secretary's complete failure to implement HAVA, the District Court issued a preliminary injunction, which both prohibited the Secretary from enforcing Directive 2004-33 and required him to prepare and submit to the court, by 4:00 p.m. (later extended by separate order to 8:00 p.m.) on Monday, October 18, 2004, a HAVA-compliant directive. *See* Inj. Order at 37. *First,* the District Court concluded that Plaintiffs are likely to succeed on the merits of their provisional-voting claim under HAVA, because the "defects in Directive 2004-33 are many and manifest," *id.* at 31, and the conflict between the Directive and the requirements of HAVA is "clear and stark," *id.* at 32.[3] *Second,* the court determined that the equities weighed heavily in favor of granting the injunction that is now in place. As Judge Carr explained, absent an injunction compelling Secretary Blackwell to generate a HAVA-compliant directive – after nearly two years of promising but failing to do so, *see id.* at 18 – the "potential harm to citizens and society alike [would be] irreparable," *id.* at 33. In contrast, the court determined that Secretary Blackwell had not proved any harm that would result

[3] The District Court rejected not only the Secretary's arguments concerning HAVA, but also his claims that Plaintiffs lacked standing to sue and could not enforce HAVA provisional-voting rights through 42 U.S.C. § 1983. *See id.* at 8-18. The Court also flatly rejected the Secretary's claim that the present suit is untimely, explaining that "it was [the Secretary] who allowed nearly twenty-three months to pass after HAVA's enactment before issuing Directive 2004-33, which merely recites pre-existing Ohio law, and which was issued less than two months before the deadline for bringing Ohio's provisional voting regulations in line with the statute." *Id.* at 18.

from bringing Ohio into compliance with HAVA. *See id.* at 33-35. To the contrary, the court deemed the Secretary's litany of alleged harms concerning voter confusion and chaos entirely speculative and unfounded. *See id.*

Upon issuance of the preliminary injunction, both Secretary Blackwell and Intervenors sought a stay pending appeal from the District Court, which was denied. October 16, 2004 Order [hereinafter "Stay Order"]. Although the District Court ***denied*** the stay, and although its Injunction Order ***required*** Secretary Blackwell to submit a new directive consistent with that Order, the Secretary submitted a proposed directive that did ***not*** comply with HAVA. To minimize delay, and given the Secretary's concession that the "wrong precinct" issue was the only remaining dispute in the case, *see id.* at 6 n.2, Judge Carr gave the Secretary the option of "submitting alternative versions of a properly revised directive: one version can be based on the assumption that my decision on the question of county-wide provisional voting will be upheld, while the other can be based on the assumption that that aspect of my decision will be reversed." *Id.* at 6. Yet, even though the District Court made these express accommodations based on the Secretary's likely appeal, the Secretary responded, once again, with recalcitrance. When the Secretary failed to supply the court with two alternative directives, the court ordered him to do so, to preserve the various "outcomes that are most likely" on appeal. October 18, 2004 Order at 2.

But even when ***ordered*** to submit HAVA-compliant alternative directives, Secretary Blackwell failed to do so. Recognizing the Secretary's "inexplicable" and "thoroughgoing failure . . . to comply with my order" or to "fulfill his obligation to this court," the District Court granted further injunctive relief to the Plaintiffs. October 20 Order at 10, 12. The District Judge explained that he had been "doing all I can to get the text of proposed HAVA-compliant directives before the reviewing court," and "[i]f such directives are not filed ***now*** in this Court, but are filed here only after final adjudication of that appeal, it may well be too late to prepare and file such directives and have them reviewed by a higher court." *Id.* at 11-12. Accordingly, the court proposed text for HAVA-compliant directives to the parties, and stated its intent to order the distribution of those directives to the county boards of elections, along with a cover memo explaining the status of this case, once the parties had a chance for review and comment. *Id.* at 14-15.

Finally, the Secretary submitted proposed directives to the District Court. The parties then offered their comments on these directives and the proposed cover memo. Meanwhile, the Secretary has been making public statements touting his failure to comply with the Court's direct orders. For example, Secretary Blackwell has stated that "'I wasn't going to write a directive that I believe violates Ohio law,'" and that it cannot be "'underestimate[d] what I'm prepared to do.'" G.

Korte & J. Siegel, *Defiant Blackwell Rips Judge*, Cincinnati Enquirer, Oct. 22, 2004 (quoting Blackwell). According to the Secretary, he has no duty to follow court orders because he alleges that the District Judge is "'legislating from the bench,'" "'has a political agenda,'" and "'is in cahoots with those with a political agenda.'" J. Drew & M. Reiter, *Blackwell blasts judge on decision*, Toledo Blade, Oct. 22, 2004 (quoting Blackwell).

On October 22, 2004, the District Court ordered Secretary Blackwell to distribute to the county boards of elections copies of the proposed new directives and cover memo described above.[4]

SUMMARY OF ARGUMENT

The District Court plainly acted within its discretion in granting a preliminary injunction against Secretary Blackwell's defiance of HAVA's provisional-voting requirements. The balance of hardships weighs overwhelmingly in Plaintiffs' favor. The injunction imposes comparatively minor burdens on Defendant Blackwell, but it is essential to assuring that thousands of Ohio voters will receive the protections of HAVA's provisional-ballot requirements – and in many cases the chance to vote at all – in the coming election.

The District Court properly concluded that Plaintiffs are likely to succeed on the merits. Defendant and Intervenors no longer even attempt to defend significant

[4] A copy of the October 22, 2004 Order, the two proposed new directives, and the cover memo are included in the Addendum to this brief.

aspects of the Secretary's provisional-ballot directive. Most important, they do not challenge the District Court's conclusion that the Directive was fatally flawed because, in clear conflict with HAVA, it limited provisional balloting to individuals who changed their address.

Defendant and Intervenors challenge on the merits only one aspect of the District Court's preliminary injunction: the portion that requires the State to permit a voter to cast a provisional ballot, and have that ballot counted, when the voter presents himself at a polling place that lies within his county of residence but outside of his precinct of residence. Defendant's and Intervenors' challenge lacks merit.

First, the District Court properly concluded that HAVA's provisional-voting rights can be enforced under Section 1983 and that Plaintiffs have standing to bring this suit. The statute is clearly phrased in terms of individual rights, and the limited remedies provided in the statute do not come close to establishing the kind of comprehensive remedial scheme that the Supreme Court has held to be necessary to foreclose a Section 1983 remedy. Moreover, the organizational plaintiffs plainly have standing to assert their own interests, the interests of their members, and the interests of voters.

Second, the Secretary's "wrong precinct" rule plainly violates HAVA. The statute provides that any qualified voter whose name "does not appear on the

official list of eligible voters ***for the polling place***" nonetheless "shall be permitted to cast a provisional ballot ***at that polling place***" upon making the statutorily required affirmations. 42 U.S.C. § 15482(a), (a)(2) (emphasis added). Neither the statutory requirement that a provisional voter be "registered . . . in the jurisdiction" where he seeks to vote, 42 U.S.C. § 15482(a), nor the requirement that such a voter be "eligible to vote in [the] election" in which he seeks to vote, *id.*, undercuts that point. A polling precinct is not a "jurisdiction," and a rule that an individual must cast his ballot at his "home" precinct is a voting procedure, not a condition of eligibility to vote in an election.

ARGUMENT

In reviewing a preliminary injunction, this Court applies an abuse-of-discretion standard and "accords great deference to the decision of the district court." *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1480 (6th Cir. 1995). The District Court must consider four factors: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff will suffer irreparable harm absent the injunction; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by issuance of the injunction. *See, e.g., Rock & Roll Hall of Fame & Museum, Inc. v. Gentile Prods.*, 134 F.3d 749, 753 (6th Cir. 1998); *Washington v. Reno*, 35 F.3d 1093, 1099 (6th Cir. 1994); *In re DeLorean Motor Co.*, 755 F.2d

1223, 1228 (6th Cir. 1985). As we demonstrate below, ***all*** of these factors weigh heavily in favor of the injunction that is now in place.

I. THE EQUITIES OVERWHELMINGLY SUPPORT THE PRELIMINARY INJUNCTION ORDERED BY THE DISTRICT COURT, PARTICULARLY GIVEN THE IRREPARABLE HARM FACING PLAINTIFFS.

In evaluating competing claims of harm on a motion for preliminary injunction, this Court considers "(1) the substantiality of the injury alleged, (2) the likelihood of its occurrence, and (3) the adequacy of the proof provided." *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987) (evaluating a request for a stay pending appeal, but explaining that the inquiry involves the same factors as a motion for preliminary injunction). Critically, "the harm alleged must be both ***certain and great***, rather than ***speculative or theoretical***." *Id.* (emphasis added). These controlling standards reveal both the substantial and irreparable harm that Plaintiffs would suffer absent the injunction that is now in place, as well as the Secretary's patent lack of legally cognizable harm.

A. Reversal of the Preliminary Injunction Would Cause Significant, Irreparable Harm to Plaintiffs and the Public Interest.

Plaintiffs in this case seek to vindicate voting rights – rights that rank among the most fundamental in our Republic. *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969);

Reynolds v. Sims, 377 U.S. 533, 562 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

As the District Court recognized, if the myriad legal flaws in Directive 2004-33 are not corrected – and corrected promptly, given that Election Day is only ten days away – many Ohio voters risk losing the federal voting rights guaranteed by HAVA. *See* Inj. Order at 36-37. The voting rights of tens of thousands of Ohioans are at stake. *See, e.g.*, M. Niquette, *Provisional Balloting Broadened by Judge*, Columbus Dispatch, Oct. 15, 2004.

Recognizing the grave threat of irreparable harm absent quick action,[5] the District Court has ordered Secretary Blackwell to distribute two alternative provisional-voting directives to county election officials, with a cover memo explaining them. *See* October 20, 2004 Order at 14-15; October 22, 2004 Order at 1; Cover Memorandum to County Boards of Elections, with proposed Directive Nos. 1 & 2 (included in the Addendum to this brief). The boards of elections stand ready and able to implement provisional voting consistent with HAVA's federal mandate. *See* Aff. of Michael R. Hackett, Deputy Director of the Franklin

[5] "Unless Ohio's election officials receive accurate guidance on how to implement HAVA," the District Court concluded, "the risk is great, indeed certain, that persons entitled to vote provisionally will not be given that opportunity, and they will lose their franchise despite the safeguards of HAVA. The harm to such persons is truly irreparable: once they are wrongly turned away from the polls, they cannot return or regain their voice in the election of those who make the laws under which, as good citizens, we must live." Inj. Order at 33 (internal quotation marks omitted).

County Board of Elections ("Hackett Aff.") (attached as Ex. A to Appellees' Opp. to Appellants' Mot. to Stay); Aff. of Susan Gwinn, Chair of the Athens County Board of Elections ("Gwinn Aff.") (attached as Ex. B to Appellees' Opp. to Appellants' Mot. to Stay). If this Court reverses the injunction, however, it will effectively slam shut the present window of opportunity to ensure implementation of the court-ordered directives. Absent the injunction now in place, Plaintiffs and their members risk forever losing the right to full participation in the November 2004 general election.

Thus, Directive 2004-33 threatens Plaintiffs with a quintessential form of irreparable harm. *See, e.g., Suster v. Marshall*, 149 F.3d 523, 533 (6th Cir. 1998) (approving preliminary injunction preventing enforcement of judicial canon setting spending limits in judicial elections); *see also Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001) (per curiam) (granting injunction pending appeal where mayoral candidate challenged constitutionality of municipal campaign-finance law, noting that "only a short time remain[ed]" before the election); *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 883 (3d Cir. 1997) (reversing denial of preliminary injunction in constitutional challenge to state statute governing nominating petitions by candidates seeking placement on ballot, because "[i]f the plaintiffs lack an adequate opportunity to gain placement on the ballot in this year's election, this infringement on their rights cannot be alleviated

after the election"); *Puerto Rican Organization for Political Action v. Kusper*, 490 F.2d 575, 580 (7th Cir. 1973) ("The preliminary injunction properly protected [Spanish-speaking plaintiffs'] rights in the 1972 general election by requiring the election commissioners to provide voting assistance in Spanish.").

The harm faced by Plaintiffs is greatly compounded by the innumerable and widely-reported administrative problems in Ohio this election cycle (many of which themselves have originated in Secretary Blackwell's office), which are certain to increase the demand for provisional ballots in the November election, compared to past elections. For example, Secretary Blackwell apparently has applied non-uniform standards for verifying voter-registration forms, based on whether those forms are received by mail or submitted in person. *See* J. Drew, *Lucas County and State Sue Blackwell over Voter Registrations*, Toledo Blade, Oct. 16, 2004. As a result of those varying standards, there will no doubt be confusion on Election Day as to whether certain voters have been properly registered, and provisional ballots may be required to accommodate many of those voters. As another example, Secretary Blackwell recently rejected thousands of voter registration forms that had been submitted on newspaper (after the forms had been printed in newspapers), and issued a directive insisting that voter-registration forms be printed on eighty-pound weight paper. *See* J. Martin, *Democrats Call for Blackwell to Resign*, Univ. of Dayton Flyer News, Oct. 5, 2004. Although the

Secretary's office now appears to have backed away from enforcing the infamous "Paper Weight Directive," that Directive has not been officially rescinded. As a result, voters who have registered by "newspaper-grade" or other such registration forms may be improperly excluded from the voter rolls on Election Day, and may therefore require provisional ballots. Further still, according to public interest groups, officials from Secretary Blackwell's office have disseminated misleading information about registration to ex-felons. *See Lawsuit: Ohio Wrongly Bars Voting for Released Felons*, Ohio News Network, Oct. 18, 2004. Whatever the source of the information, it will surely cause even more confusion about who is properly registered to vote and who is not.

Even aside from these administrative problems, a national focus on the presidential election in Ohio this year has led to an unprecedented attempt to bring new voters to the polls. Many of these new voters will surely need provisional ballots. As a result of major voter-registration drives and "get-out-the-vote" efforts by partisan and nonpartisan organizations, approximately ***one million*** newly registered voters will show up at the polls in Ohio on November 2. *See* D. Rowland, *Punch Cards May Hurt Blacks*, Columbus Dispatch, Oct. 17, 2004. Faced with an unfamiliar process, many of these new voters may very well end up at the "wrong" polling place even if they have been properly registered. What is more, because Ohio's electoral votes are so hotly contested this season, poll

workers are expecting an unprecedented number of "challengers" at polling sites who will call into question (pursuant to Ohio Rev. Code § 3504.20) would-be voters' qualifications. *See* S. Hoholik, *Election Workers Prepare for Worst,* Columbus Dispatch, Oct. 18, 2004. Such challenges are properly addressed by issuing a provisional ballot. *See* 42 U.S.C. § 15482(a).

Finally, some eligible voters likely will not arrive at the proper polling place on Election Day because of ***deliberate*** efforts to send voters to the wrong location. *See* S. Hoholik, *Voters Report Fake Calls: Instructions to Change Polling Place Don't Come From Board of Elections,* Columbus Dispatch, Oct. 22, 2004.

In sum, whereas about 100,000 provisional ballots were cast in Ohio four years ago, *see* Associated Press, *Criticisms mount over Ohio election chief's decisions*, MSNBC News, *available at* http://www.msnbc.msn.com/id/6199635/, that number is likely to be far higher on November 2, 2004. If even one of those voters is denied the opportunity to cast a provisional ballot as provided by HAVA, the injury will be irreparable; given that tens of thousands of voters (at least) will be eligible to vote provisionally, the risk of widespread disenfranchisement is exponentially more significant. The fundamental democratic rights of thousands of voters now hinge on the Secretary's articulation – albeit unacceptably belated – of provisional-balloting procedures that comply with HAVA. Only the injunction

under review can stem the massive and irreparable harm to Ohio voters – and to the integrity of the franchise itself – that would otherwise occur.

B. The Preliminary Injunction Imposes Comparatively Minimal Burdens on Defendant Blackwell.

In stark contrast to Plaintiffs' irreparable harm – which will be averted by keeping the injunction in place – the Secretary's claims of harm are trivial, speculative, and unsubstantiated. Indeed, the Secretary has ***never*** presented any evidence to support those claims.

As the District Court explained: "Implementing HAVA need not be complicated. The essence of the statute is: give a ballot, get a vote, and confirm eligibility and count that vote later." Inj. Order at 36. Of course, actually implementing HAVA's provisional-voting rules will involve some work – finally – on the part of the Secretary and the county boards of elections. But as this Court has held, "'[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.'" *Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 930 (6th Cir. 2002) (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)).

The Secretary baldly asserts, without any factual support, that the District Court's injunction "creates the heightened potential for voter fraud, anarchy at the polling places, and dilution of the votes of others." Sec'y Br. at 39. As in the District Court, the Secretary expresses an unsubstantiated fear of "[t]he possibility"

of "chaos and confusion" that may result from having to implement HAVA in time for the November election. *Id.* But, as the District Court found, these claims are supported by "nothing but speculation," Inj. Order at 35, and fall well short of the "certain and great" harm that is properly considered in the preliminary-injunction analysis. *Celebrezze*, 812 F.2d at 290.

As noted above, the District Court has ordered the dissemination to all Ohio county boards of elections a set of HAVA-compliant instructions, to take effect once this Court resolves the present appeal. *See* October 20, 2004 Order 14-15; October 22, 2004 Order at 1; Cover Memorandum to County Boards of Elections, with proposed Directive Nos. 1 & 2 (included in the Addendum to this brief). The boards of elections are well equipped to comply with the court-ordered directive, which imposes only minimal additional burdens on local elections officials. Indeed, as Plaintiffs' affiants make clear (in affidavits attached to Appellees' Opp'n to Appellants' Mot. to Stay), elections officials throughout Ohio stand ready to implement HAVA to the letter, without undue delay, practical difficulty, or administrative hardship. *See, e.g.*, Hackett Aff. ¶ 4 (affirming that "the Franklin County Board of Elections can and is prepared to administer the November 2, 2004 General Election in accordance with all federal and state laws including, but not limited to, the Help America Vote Act (HAVA) as ordered by Judge James Carr"). The testimony of these experienced, on-the-ground election officials – in contrast

to the Secretary's vague and repeated excuses for HAVA noncompliance – deserves great weight.[6]

C. The Preliminary Injunction Serves the Public Interest.

Finally, the public interest is clearly advanced by leaving the District Court's injunction in place. The public interest weighs strongly in favor of counting every vote properly cast by an eligible voter. As the District Court explained, the denial of HAVA rights – which would be the effective result of granting the stay – "diminishes the confidence in the integrity of the electoral process," as well as the "vitality of our democracy." Inj. Order at 33. In contrast, the Secretary's decision to limit provisional balloting frustrates the stated purpose of HAVA and undermines his previously claimed desire to ensure that "every eligible voter who shows up at the polls on Election Day can cast a ballot." State Plan at 33, 69 Fed. Reg. at 14895.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CHALLENGE TO THE SECRETARY'S UTTER FAILURE TO IMPLEMENT THE PROVISIONAL-VOTING RIGHTS GUARANTEED BY HAVA.

Not only do the equities overwhelmingly support the preliminary injunction now in place, but, as the District Court concluded, Plaintiffs are also likely to

[6] *See also, e.g.*, Gwinn Aff. ¶¶ 11-12 ("The [Athens County] Board of Elections [ACBOE] has always counted provisional ballots cast in the wrong precinct. . . . If a voter appeared at the wrong polling place and cast a provisional ballot, the ACBOE would count the ballot for any race in which the voter was eligible to vote.").

succeed on the merits of this case. *See Celebrezze*, 812 F.2d at 291. In his Injunction Order, Judge Carr interpreted and applied HAVA, Ohio law (including Directive 2004-33), and relevant legal principles with scrupulous care and accuracy. *See Fisher*, 70 F.3d at 1480. Secretary Blackwell has offered no basis to disturb the District Court's well-reasoned legal analysis.

A. HAVA's Provisional-Voting Section Confers Individual Rights Enforceable Through 42 U.S.C. § 1983.

There can be no question that in enacting HAVA, Congress conferred the right to cast a provisional ballot, and to have that ballot counted, on individuals to whom its terms apply. Moreover, there is no evidence that Congress intended to foreclose enforcement under Section 1983. Accordingly, the provisional-voting rights described in HAVA are enforceable through Section 1983, as the District Court – and every court to reach this question – has correctly held.[7]

Section 1983 provides a cause of action against any person who, acting under color of state law, abridges rights created by the Constitution or laws of the United States. 42 U.S.C. § 1983; *see Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980). The legal test for determining whether a right is enforceable under Section 1983 is straightforward. *First*, the statute must "unambiguously confer" individual rights,

[7] *See* Inj. Order at 8-17; *Bay County Democratic Party v. Land*, No. 04-10257-BC, 2004 WL 2345560, at *15-*18 (E.D. Mich. Oct. 19, 2004); *Florida Democratic Party v. Hood*, No. 4:04 CV 395-RH/WCS, slip. op. at 8-10 (N.D. Fla. Oct. 21, 2004).

using individually focused "rights-creating" language. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283, 287 (2002). *Second*, if the statute confers such rights, then there is a presumption of enforceability under Section 1983, which the State may rebut only "by showing that Congress 'specifically foreclosed a remedy under § 1983.'" *Id*. at 285 (quoting *Smith v. Robinson*, 468 U.S. 992, 1004 n.9 (1984)). Plaintiffs have firmly established a likelihood of success on the merits of both these steps.

1. HAVA Unambiguously Confers Individual Rights.

The provisional-voting section of HAVA, *see* 42 U.S.C. § 15482, plainly contains the "rights-creating" language required by the Supreme Court to show that an "individual right" has been conferred. *Gonzaga*, 536 U.S. at 286-87; *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001). As the Supreme Court has required, HAVA's provision-voting text is:

(1) "'phrased in terms of the persons benefited,'" *Gonzaga*, 536 U.S. at 284 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 692 n.13 (1979));

(2) "couched in mandatory, rather than precatory, terms," *Blessing v. Freestone*, 520 U.S. 329, 341 (1997); and

(3) cast in the language of "'***individual*** entitlement,'" *Gonzaga*, 536 U.S. at 287 (quoting *Blessing*, 520 U.S. at 343) (emphasis in original).

From its opening sentence, HAVA's provisional-ballot section speaks relentlessly in terms of the individual voter: "If an ***individual*** declares that such

individual is a registered voter in the jurisdiction in which the ***individual*** desires to vote and that the ***individual*** is eligible to vote in an election for Federal office, but the name of the ***individual*** does not appear on the official list of eligible voters for the polling place or an election official asserts that the ***individual*** is not eligible to vote, such ***individual*** shall be permitted to cast a provisional ballot . . . ." 42 U.S.C. § 15482(a) (emphasis added). In describing the manner in which individual voters "***shall*** be permitted" to cast a provisional ballot, 42 U.S.C. § 15482(a) (emphasis added), the section spells out the contours of those voters' rights in detailed, mandatory terms: that the "individual" voter "***shall***" be notified by election officials of the opportunity to vote provisionally, *id.* § 15482(a)(1) (emphasis added); that the "individual ***shall*** be permitted" to cast a provisional ballot upon making the required affirmations, *id.* § 15482(b) (emphasis added); that the provisional ballot cast by the "individual" voter "***shall***" be transmitted for verification of the individual voter's eligibility, *id.* § 15482(a)(3) (emphasis added); and that the "individual's" ballot "***shall*** be counted as a vote," *id.* § 15482(a)(4) (emphasis added). As is plain from the text of these provisions, Congress has provided unambiguously for "the ***right of an individual*** to cast a provisional ballot." *Id.* § 15482(b)(2)(E) (emphasis added). Accordingly, the District Court was correct to observe that HAVA's provisional-voting provisions

establish a "broad, unambiguous provisional voting mandate," the primary object of which is the individual voter. Inj. Order at 11.

In the face of this overwhelming textual evidence that Congress conferred provisional-voting rights, Secretary Blackwell's claim that Plaintiffs have "cobbled together . . . a few, out-of-context references to the word 'shall' and the word 'rights'" falls flat. Sec'y Br. at 21. Equally belied by the relevant provisions of the statute itself is the United States' rhetoric that HAVA's provisional-balloting rules "uniformly focus" on election officials, rather than individual voters, DOJ Br. at 7, and Intervenors' unfounded claim that HAVA is "bereft of any language" that speaks of individual rights. *See* Intervenors' Br. at 10. As the statutory text reveals, these statements are demonstrably untrue. HAVA's provisional-voting section opens with clear and strong individual-rights-creating language. The section's subsequent references to election officials simply describe the correlative duties those individual rights impose on state and local officials.

Indeed, it is the Secretary, the Intervenors, and the United States that have cobbled together legislative history and other statutory provisions that are largely irrelevant, to obfuscate the straightforward rights-creating language in HAVA. *See, e.g.*, DOJ Br. at 13-14 (discussing the preamble and inapposite sections of

HAVA); Intervenors' Br. at 14-15 (same).[8] Their "broad brush" approach to determining whether a statute creates rights has been expressly rejected by the Supreme Court, which has explained that Section 1983 analysis must "identify with particularity" the specific rights a plaintiff seeks to enforce, rather than considering a statute "as an undifferentiated whole." *Blessing*, 520 U.S. at 342. Here, Plaintiffs seek to enforce HAVA's provisional-voting section – not other provisions of HAVA – and that section clearly establishes an individual right regardless of whether other statutory provisions create rights.

Perhaps most revealing of all is a comparison of the relevant language of HAVA to (1) the language in Title VI and Title IX, which the United States, *see* DOJ Br. at 12, and Intervenors, *see* Intervenors' Br. at 12-13, deem "paradigmatic examples" of rights-creating statutes, and (2) the statutory language held insufficient to create rights in *Gonzaga*:

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[8] Where, as here, the statutory language clearly confers an individual right, there is no need for resort to legislative history. Indeed, the *Gonzaga* Court anticipated that statutory "text and structure" would be dispositive of the "individual rights" inquiry. *Gonzaga*, 536 U.S. at 286. What is more, the snippets of legislative history referred to by Secretary Blackwell (at 27-30), Intervenors (at 18-19, 22-23), and the United States (at 18-19) are completely irrelevant, because those excerpts pertain to whether Congress intended to create a ***private right of action*** – a question that all parties agree is a separate matter not at issue here. *See Gonzaga*, 536 U.S. at 283-84 (explaining that Section 1983 enforceability "is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute," because "[p]laintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy"). Any claim that Congress "considered, and rejected, creating a private right of action under HAVA," Intervenors' Br. at 23 – even if true – is utterly irrelevant.

> Titles VI and IX: "No person . . . shall be subjected to discrimination . . . ."
>
> HAVA: "[S]uch individual . . . shall be permitted to cast a provisional ballot . . . ."
>
> *Gonzaga*: "No funds shall be made available [to an institution] which has a policy or practice of permitting the release of education records . . . ."[9]

As this comparison starkly shows, HAVA – just like Titles VI and IX, but in contrast to the statute at issue in *Gonzaga* – unambiguously confers individual rights.

2. Congress Has Not Specifically Foreclosed Section 1983 Enforcement Of HAVA's Provisional Voting Rights.

Once HAVA is properly deemed to confer an "individual right" to provisional voting, that "right is presumptively enforceable by Section 1983." *Gonzaga*, 536 U.S. at 384. The Secretary is unable to overcome that presumption (which, indeed, he completely ignores), because he has not demonstrated – as he must – "that Congress shut the door to private enforcement either expressly, through 'specific evidence from the statute itself,' or 'impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'" *Gonzaga*, 536 U.S. at 284 n.4 (citations omitted); *see,*

[9] Also crucial is the fact that the statute in *Gonzaga* was enacted under the Spending Clause (whereas HAVA's provisional-voting section was not), a factor that the Supreme Court deemed critical to its analysis because Spending Clause legislation creates relationships between the government and institutions, not individuals. *See, e.g.*, *Gonzaga*, 536 U.S. at 279; *id.* at 290 (explaining that the statute "serve[s] primarily to direct the Secretary of Education's distribution of public funds to educational institutions").

e.g., *Blessing*, 520 U.S. at 346 (noting the "difficult showing" needed to rebut this presumption); *Smith v. Robinson*, 468 U.S. at 1012.[10] Accordingly, Section 1983 enforcement is plainly appropriate.[11]

The Secretary points to no statutory language expressly foreclosing Section 1983 enforcement – because there is none. Thus, he is left to argue that HAVA's two enforcement schemes – (1) civil actions brought by the U.S. Attorney General for declaratory and injunctive relief, *see* 42 U.S.C. § 15511; and (2) state-based administrative complaint review, *see id.* § 15512 – supplant Section

[10] The United States and the Intervenors and both improperly attempt to import wholesale the "comprehensive enforcement" inquiry (which comes *after* a right has been identified, *see Gonzaga*, 536 U.S. at 284 n.4, 290 n.8) into the initial "individual rights" inquiry. *See* DOJ Br. at 19-23; Intervenors' Br. at 20-24. Although *Gonzaga* noted that its conclusion that FERPA created no individual rights was "buttressed" by the availability of a central administrative enforcement mechanism, *Gonzaga*, 536 U.S. at 289, the Supreme Court by no means suggested – as the United States and Intervenors and appear to – that the existence of such mechanisms could be an independent basis for denying an individual right. Were that the case, then the second step of the Section 1983 inquiry would swallow the first, thereby extinguishing the presumptive enforceability of a clear federal right.

[11] The United States ignores this well-settled presumption of enforceability as well, opting instead to set forth a novel legal framework for determining "whether taken as a whole, the statute evidences Congress's desire to have its handiwork be the only means by which to enforce the statute." DOJ Br. at 24-25. But this framework would replace the Supreme Court's well-established presumption of enforceability with a sliding-scale test based on how "clear the evidence" was "that Congress intended to create private rights." *Id.* at 24. Such an inquiry is completely unsupported in precedent and marks a sharp break from the United States' long-held position that absent "a federal tribunal for the resolution of individual charges," an administrative enforcement scheme will be insufficient to rebut the presumption of enforceability. Br. for the United States as *Amicus Curiae* Supporting Petitioners, *Gonzaga v. Doe*, No. 01-679, at 5 (U.S. filed Feb. 2002).

1983. But these mechanisms are patently inadequate, because neither provides for private judicial enforcement of the rights HAVA guarantees. *See, e.g.*, *Blessing*, 520 U.S. at 347 (noting that "[o]nly twice have we found a remedial scheme sufficiently comprehensive to supplant § 1983" and that in both cases Congress had authorized private judicial remedies independent of § 1983); *Wright v. Roanoke Redev. & Housing Auth.*, 479 U.S. 418, 427 (1987). Simply put (and as the District Court concluded, Inj. Order at 16-17), the Secretary cites no case – because there is none – finding a comprehensive enforcement scheme absent individual federal remedies, which are not present here.[12]

With respect to the Attorney General, the Supreme Court has made clear that the availability of enforcement by the Attorney General is not "'sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983.'" *Wright*, 479 U.S. at 424 (quoting *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981)). An express provision for enforcement by the Attorney General could hardly be "incompatible with individual enforcement" of a voting-rights statute like HAVA,

[12] The United States argues that "HAVA's enforcement scheme is closely akin to the scheme that the Supreme Court found precluded private suits under Section 1983 in *Smith v. Robinson*[, 468 U.S. 992 (1984)]." DOJ Br. at 25. What the United States fails to mention and what the Supreme Court found crucial in *Blessing*, however, is that in *Smith*, the administrative procedures for individuals were "followed by federal judicial review." *Blessing*, 520 U.S. at 347. In contrast, HAVA makes no provision for ***any*** individual federal judicial review.

cf. Gonzaga, 536 U.S. at 284 n.4 (internal quotation marks omitted), for such a provision did not stop the Supreme Court from finding an ***implied*** private right of action to enforce Section 5 of the Voting Rights Act. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 556-57 & n.21 (1969). In the present context, the theoretical existence of federal enforcement has been demonstrably insufficient: As the United States concedes, the Attorney General has filed only one enforcement action to date. *See* DOJ Br. at 15. Indeed, it is ironic at best that the Secretary chides Plaintiffs for failing to request the Attorney General's assistance, *see* Sec'y Br. at 31, given the Attorney General's view that HAVA creates no provisional voting rights at all, *see, e.g.*, DOJ Br. at 9 ("HAVA Does Not Confer Individual Rights").

As for HAVA's provision of administrative review, Congress did not require – as the Secretary claims, *see* Sec'y Br. at 31 – that ***all*** states provide an administrative review process. Rather, only those States accepting federal funds under HAVA must do so. *See* 42 U.S.C. §§ 15512(a)(1), (b)(1)(B). In any event, the Supreme Court has "stressed that a plaintiff's ability to invoke § 1983 cannot be defeated simply by '[t]he availability of administrative mechanisms to protect the plaintiff's interests.'" *Blessing*, 520 U.S. at 348 (quoting *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 106 (1989)); *see also Wilder v.*

Virginia Hosp. Ass'n, 496 U.S. 498, 523 (1990).[13] Just as in *Wright*, where the fact that Congress required public housing authorities to operate grievance procedures did not foreclose a Section 1983 remedy against those authorities, 479 U.S. at 427-28, Congress's decision to encourage election administrators to operate grievance procedures does not foreclose a Section 1983 remedy against those administrators. Finally, it is significant to note (as the Secretary, Intervenors, and the United States have failed to) that under Ohio's HAVA administrative-grievance process, complaints are to be ruled on by Secretary Blackwell himself. *See* Inj. Order at 16; Office of the Ohio Sec'y of State, *Election Complaint Procedure Pursuant to Section 402 of the Help America Vote Act of 2002*, § 16(A). Given that complete discretion for resolving administrative complaints lies with the very state official who has refused to bring Ohio into compliance with HAVA's provisional-balloting rules, Ohio's administrative procedures hardly suffice.

In short, HAVA confers "individual rights" and Congress has not foreclosed Section 1983 enforcement. The District Court thus properly concluded – as have all other courts reaching the question – that Section 1983 may be invoked to enforce provisional-voting rights under HAVA.

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[13] Moreover, by its terms, HAVA does not require any judicial review of adverse state administrative decisions, whereas the Supreme Court has found that statutes contain sufficiently comprehensive enforcement schemes to supplant Section 1983 only when "the statutes at issue themselves provided for private *judicial* remedies." *Wright*, 479 U.S. at 427 (emphasis added).

B. The District Court Correctly Held that Plaintiffs Have Standing to Enforce the Individual Rights Created by HAVA.

The Secretary suggests that Plaintiffs lack standing because none of the Plaintiffs "identified a single voter or prospective voter who suffered an injury or threatened injury as a result of the directive." Sec'y Br. at 14; *see also id.* at 17, 19. On the contrary, Plaintiffs have demonstrated ample injury to support standing. *See* Inj. Order 17-18.[14] The District Court was correct to permit the political-party Plaintiffs to represent the interests of voters as litigants with ***third-party standing***, because the failure properly to issue and count provisional ballots would irreparably injure the ***political parties themselves***. The District Court was also correct to permit the union Plaintiffs to represent their members' interests as litigants with ***associational standing***, because some provisional-balloting failures would irreparably harm the ***union members***. Finally, the District Court was correct to accord the political party Plaintiffs standing on their own behalf.

1. The Political-Party Plaintiffs Have Third-Party Standing to Assert the Voting Rights of Democratic Voters.

Under *Powers v. Ohio*, 499 U.S. 400 (1991), where a litigant has suffered or will suffer an "injury in fact," that litigant may assert the rights of a party to whom

[14] Other courts addressing this issue in the HAVA context have agreed with the District Court and found standing. *See Bay County Democratic Party*, 2004 WL 2345560, at *12-*14; *Florida Democratic Party*, slip. op. at 10-12; *cf. Hawkins v. Blunt*, No. 04-4177-CV-C-RED, slip op. at 1 (E.D. Mo. Oct. 12, 2004) (permitting Missouri Democratic Party to pursue a claim under HAVA).

the litigant has a "close relation," if there is "some hindrance" to the third party's doing so on his own behalf. *Id.* at 410-11; *see also, e.g., United v. Ovalle*, 136 F.3d 1092, 1102 (6th Cir. 1998). The District Court correctly found that the political-party Plaintiffs easily satisfy the tripartite *Powers* test. *See* Inj. Order at 17-18.

First, the Democratic Party will suffer an "injury in fact" if Directive 2004-33 goes back into effect.[15] The Directive provides for provisional voting in an absurdly small fraction of the cases in which it is mandated by HAVA. Many voters who wish to cast ballots for Democratic candidates will, as a result, be unable to do so. Even if the lost votes would not determine the outcome of any election—and indeed, even if voters who would cast ballots for other parties lose their chance to vote as well—the Democratic Party suffers a distinct injury. The Party has an interest in assuring that election results accurately reflect the preferences of all Democratic voters, and that the vote totals of Democratic candidates are maximized. The Party also is injured when it expends time and money on efforts to get voters registered and to the polls, only to have them unable to cast their ballots. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982).

[15] In the context of third-party standing, the relevant injury is that of the litigant, not of the individuals whose interests the litigant is asserting. *See, e.g., Craig v. Boren*, 429 U.S. 190, 195-96 (1976).

Second, just like a "candidate for public office," a political party "is so closely related to and dependent upon those who wish to vote for" its slate as to make the party a proper vehicle for vindicating those voters' rights. *Mancuso v. Taft*, 476 F.2d 187, 190 (1st Cir. 1973). Indeed, many voters have specifically chosen to associate themselves with the Party by voting in its primary elections. *See* Ohio Rev. Code § 3503.23. That choice gives rise to an undeniably "close relation" with the Party. *See Powers*, 499 U.S. at 411.

Third, the individual voters whose rights the Party asserts could not realistically bring own their challenge under HAVA, because it would be impossible for them to anticipate their need for provisional ballots. A voter simply does not know today whether he will need a provisional ballot on Election Day. Today, he plans to vote at what he believes to be the correct polling place; it will not be until November 2 that he discovers the omission of his name from the registration list there, either because of human error at the board of elections, or because of her own misinformation, or for any number of unaccountable reasons. As the hindrance contemplated by the third *Powers* factor need not amount to a complete barrier, *see, e.g.*, *Carey v. Population Services, Int'l*, 431 U.S. 678, 684 n.4 (1977); *Craig*, 429 U.S. at 195-96, standing is clearly appropriate here.

Other courts have recognized that third-party standing is properly exercised by a political entity asserting the rights and interests of voters. *See, e.g.*,

Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs., Inc., 280 F.3d 278, 288 n.10 (3d Cir. 2002) (observing that "candidates for public office may be able to assert the rights of voters"); *Walgren v. Board of Selectmen of Amherst*, 519 F.2d 1364, 1365 n.1 (1st Cir. 1979). The Secretary's reading of *Northampton County Democratic Party v. Hanover Twp.*, 2004 WL 887386 (E.D. Pa. April 26, 2004), is incorrect. *See* Sec'y Br. at 18-19. In that case, a local political party asserted claims against local ordinances regulating the posting of political signs "[i]ndividually and on behalf of all its candidates for public office ***and the citizen electors of Northampton County***." *Id.* at *1 (emphasis added). The court "conclude[d] that the Party does have standing to bring the claims in this case on behalf of itself, its candidates, ***and the electors***." *Id.* at *8 (emphasis added).

2. The Union Plaintiffs Have Associational Standing to Assert the Voting Rights of Their Members.

Associational standing is appropriate if an organization's members would otherwise have standing to sue on their own behalf, the interests the organization seeks to vindicate are germane to its purpose, and the suit does not require the participation of the members themselves. *See Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 343 (1977). "Even in the absence of injury to itself, an association may have standing solely as the representative of its members." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). The District Court properly

concluded that the union Plaintiffs may assert the rights of their members under this standard.

First, were it not for the equitable relief entered by the District Court, members of the union Plaintiffs would suffer significant injuries as a result of Directive 2004-33. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (to establish standing, plaintiff must demonstrate injury in fact, causation, and redressability). It is a statistical certainty that, under the Directive, members of the unions would suffer the injury of being refused the provisional ballots to which they are entitled on November 2. *See Wiley v. Mayor & City Council of Baltimore*, 48 F.3d 773, 775-76 (4th Cir. 1995) (Powell, J.); *Roe v. Operation Rescue*, 919 F.2d 857, 866 (3d Cir. 1990). The Building Trades Council's constituent unions represent 16,000 members. *See* Am. Compl. ¶ 8. IBEW Local 245 has 1,500 active members. *Id.* ¶ 9. And FLOC represents approximately 200 associate members who are U.S. citizens and residents of Northwestern Ohio, but who frequently change their addresses and whose voter registrations are therefore particularly likely to be plagued with errors on Election Day. *Id.* ¶ 10. Of these thousands of Ohio voters, a significant number will need provisional ballots.[16]

[16] The racial-gerrymandering cases cited by the Secretary, *see* Sec'y Br. at 17, are inapposite. In *United States v. Hays*, 515 U.S. 737 (1995), the Supreme Court rejected a challenge to a congressional district where the plaintiffs did not reside. *Id.* at 739. The *Hays* plaintiffs did not articulate a third-party standing theory, let alone an associational standing theory. Moreover, the Court held that those voters

Second, a significant purpose of the union Plaintiffs is to endorse candidates for public office who will best represent their members' interests and to provide support for those candidates. Contrary to the Secretary's argument, unions do not exist solely "for the purpose of representing their members in collective bargaining with their members' employers." Sec'y Br. at 17 n.7. They also seek more generally to "obtain[] benefits for [their] workers" and, in pursuit of that goal, to advocate for "legislation on a national scale." *California Rural Legal Assistance v. Legal Servs. Corp.*, 917 F.2d 1171, 1174 (9th Cir. 1990). These goals require participation in the electoral process. To these ends, the Building Trades Council, IBEW Local 245, and FLOC all seek – through endorsements, campaign contributions, and public education efforts – to muster votes for particular candidates. The voting rights of the union members are particularly germane to this purpose: The casting and counting of union members' votes will directly affect the likelihood that their preferred candidates will prevail at the polls. *See Hunt*, 432 U.S. at 343.

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lacked standing because, as nonresidents in the discriminatory district, they did not "suffer the special representational harms racial classifications can cause in the voting context." *Id.* at 745; *see also Shaw v. Hunt*, 517 U.S. 899, 904 (1996) (holding that voters who lived in allegedly race-based districts had standing to challenge their constitutionality, but that nonresident voters lacked standing to challenge a district); *Bush v. Vera*, 517 U.S. 952, 958 (1996) (same). By contrast, the voters who belong to the Plaintiff unions here are residents of Ohio and are directly affected by Directive 2004-33. They will suffer harm on November 2 if the Directive is implemented, because many of them will be entitled to a provisional ballot under HAVA and the Directive will deprive them of that ballot.

Third, there is no need for the union members to participate personally in this suit. The illegality of the Directive is readily apparent without reference to the circumstances of those members, and the appropriate relief may be crafted without their participation. *See id.*

3. The Political-Party Plaintiffs Have Standing on Their Own Behalf.

As the District Court correctly observed, the Democratic Party has standing to challenge Directive 2004-33 on its own behalf. The Directive's illegal system of provisional balloting will cause serious injury to the Party, which the District Court's equitable relief will redress. *See Lujan*, 504 U.S. at 560-61; *Hunt*, 432 U.S. at 341-42; *Warth*, 422 U.S. at 511; *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 332-33 (6th Cir. 2002). The Party has a significant interest in vindicating the voting rights of Democratic voters and maximizing the returns for Democratic candidates. Any system that falls so severely short of HAVA's provisional-voting requirements as does the Directive injures that interest. As the District Court concluded: "The political party plaintiffs have . . . standing on their own behalf. Directive 2004-33 directly affects their interests by creating a risk that voters who, by law, are entitled to vote for Democratic candidates for President, Senator, and Representative will be barred from doing so." Inj. Order at 17-18. The District Court thus properly concluded that all Plaintiffs have standing.

C. The District Court Correctly Held that Directive 2004-33 Conflicts with HAVA.

By its plain terms, HAVA guarantees voters the right to cast provisional ballots in elections for federal office whenever two conditions obtain. *First*, the voter must declare that he "is a registered voter in the jurisdiction" and that he "is eligible to vote in [the] election." 42 U.S.C. § 15482(a). *Second*, either the voter's name must "not appear on the official list of eligible voters for the polling place" where he offers to vote or an election official must "assert that [he] is not eligible to vote." *Id.* After the election, officials must take "prompt" steps to verify the voter's eligibility. *Id.* § 15482(a)(3), (4). And once those officials determine that the provisional voter was "eligible under State law to vote, [his] provisional ballot shall be counted as a vote in that election in accordance with State law." *Id.* § 15482(a)(4).

As the District Court properly concluded, Secretary Blackwell's Directive 2004-33 violates these rules in two crucial respects. *First*, it unlawfully limits provisional voting to persons who have moved between Ohio precincts. It thereby withholds provisional ballots from qualified voters who appear at their proper polling place but whose names have been erroneously omitted from the voter-registration list. *Second*, it unlawfully withholds a provisional ballot from a voter who shows up to vote in his county of residence, but at the "wrong" polling place

within that county and fails to require poll workers to notify such an individual of his right to vote provisionally.

Notably, before this Court neither the Secretary nor the Intervenors challenge the District Court's conclusion that the Secretary's directive violated HAVA by "limit[ing] the opportunity to vote provisionally to persons who have moved." Inj. Order. at 19. That significant limitation prevents Ohio's provisional-voting procedure from reaching voters whom Congress clearly sought to protect when it enacted HAVA – voters who, like the many turned away from the polls in Florida and other States in the 2000 election, are erroneously challenged as ineligible to vote. Because Defendant and Intervenors have effectively conceded that Ohio law violates HAVA in this respect, the part of the preliminary injunction addressing this violation must be affirmed.[17]

The Secretary and Intervenors focus entirely on the aspect of the District Court's order that permits otherwise eligible voters to cast provisional ballots, and have them counted, at polling places that lie within their county of residence but outside of the precinct where their homes are located. But they cannot overcome the statute's plain text, which specifically provides that any qualified voter whose name "does not appear on the official list of eligible voters ***for the polling place***"

[17] Nor do Defendants challenge the District Court's conclusion that the Directive violates HAVA by requiring pollworkers to verify eligibility ***before*** issuing provisional ballots. *See* Inj. Order at 21-22, 32.

nonetheless "shall be permitted to cast a provisional ballot ***at that polling place***" upon making the statutorily required affirmations. 42 U.S.C. § 15482(a), (a)(2) (emphasis added). Notwithstanding this clear language, the Secretary and Intervenors contend that voters who appear at the "wrong" polling place do not satisfy HAVA's requirements of being "registered . . . in the jurisdiction in which [they] desire[] to vote" and of being "eligible under State law to vote." 42 U.S.C. § 15482(a), (a)(4). They also appear to contend that a State is entitled categorically to refuse to count the provisional ballots of voters who appear at the "wrong" polling place, because HAVA provides that such ballots should be "counted . . . in accordance with State law," *id.*§ 15482(a)(4), and Ohio law does not permit out-of-precinct ballots to be counted. These arguments rest on a misreading of state and federal law and on a reversal of the ordinary rule that it is federal law that preempts state law, not the other way around.

1. Voters Who Offer to Vote in the County in Which They Are Registered, But at the "Wrong" Polling Place, Are "Registered . . . in the Jurisdiction" Pursuant to HAVA.

The Secretary and Intervenors contend that a voter who presents himself to vote in the county in which he is registered, but at a different polling place from the one assigned to his address, is not a "registered voter in the jurisdiction in which the individual desires to vote," 42 U.S.C. § 15482(a), (a)(2)(A), and therefore has no right to cast a provisional ballot under HAVA. *See* Sec'y Br. at

33; Intervenors' Br. at 40. In their view, to vote in the wrong precinct is to vote in the wrong "jurisdiction" for HAVA purposes. Defendants misread the statute.

Defendants proceed as if the word "jurisdiction" refers to any territorial unit.[18] It does not. A "jurisdiction" is a "geographic area ***within which political or judicial authority may be exercised***" or a "***political or judicial subdivision*** within such an area." Black's Law Dictionary (6th ed. 2004) (emphasis added). Under Ohio law, a precinct is not a political or judicial subdivision in its own right; it is an administrative unit into which political subdivisions are divided "for the convenience of the voters and the proper conduct of elections." Ohio Rev. Code § 3501.18(A). Nor does an Ohio precinct exercise any political or judicial authority in its own right. It is the ***county*** board of elections that maintains voting records. Ohio Rev. Code § 3501.11(T), (U). The precinct is merely the vehicle by which the county board exercises its authority. State law expressly recognizes that it is the county that is the "jurisdiction[al]" unit in elections, and that precincts are merely administrative subunits. *See* Ohio Rev. Code § 3501.18(A) ("The board of elections may divide a political subdivision ***within its jurisdiction*** into precincts,

[18] The United States goes further, suggesting that because "the word 'jurisdiction' is susceptible of different meanings" it can mean whatever a state wants it to mean. DOJ Br. 35. As we show in text, there are ample reasons to reject that Alice-in-Wonderland argument. Whatever different meanings the word might bear in general, in the context of HAVA the term clearly excludes polling precincts.

establish, define, divide, rearrange, and combine the several election precincts ***within its jurisdiction*** . . . .") (emphasis added).

Because it is the ***county*** board of elections that administers the voting rolls, it is the ***county*** that is the relevant "jurisdiction" for HAVA purposes in Ohio. Indeed, to hold that a precinct can be a "jurisdiction" would be to disregard the text and structure of HAVA's provisional-voting section. Where that section refers to the geographic location where voting occurs (the precinct), it uses the term "polling place." Indeed, that term appears four times in Section 15482(a). By using the distinct term "jurisdiction" in the same statutory section to refer to the political unit in which a voter must be registered, Congress clearly intended that the term have a different meaning than "precinct." *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.").[19]

The broader *corpus juris* of federal election law makes clear that HAVA's "jurisdiction" language refers not to a precinct but to a governmental entity that

[19] For its part, the United States makes the meritless argument that Congress would have used the term "county" if it had meant "county." DOJ Br. at 33. But it is "jurisdiction" that mattered to Congress – that is, the unit of government that administers the voting rolls, be it a county, city, or state. Moreover, the United States' argument falls on its own premise, as we have shown. For Congress plainly knew how to refer to the geographic locations where voting occurs, but it chose to use the word "jurisdiction" to refer to the unit of government in which a voter must be "registered."

maintains voter-registration rolls – in Ohio, the county. Although HAVA does not contain its own definition of "jurisdiction," Congress directed that the statute be construed in harmony with the National Voter Registration Act of 1993 ("NVRA"), which does contain such a definition. *See* 42 U.S.C. § 15545(a)(4). The NVRA uses the term "registrar's jurisdiction" to refer to the geographic scope of the unit of government that maintains the voter-registration rolls. *See* 42 U.S.C. § 1973gg-6(j). HAVA was enacted against the backdrop of that settled definition of jurisdiction, and it addresses the same subject as the NVRA. Indeed, HAVA's provisional-ballot section uses the word "jurisdiction" in precisely the same context as does the NVRA—identifying the unit that manages voter registration. Accordingly, the two statutes should be construed *in pari materia*, for "when a new legal regime develops out of an identifiable predecessor, it is reasonable to look to the precursor in fashioning the new law." *Johnson v. United States*, 529 U.S. 694, 710 (2000); *see also Branch v. Smith*, 538 U.S. 254, 281 (2003) (plurality opinion of Scalia, J.) (reading two federal election-law statutes consistently with one another, even though they were enacted 26 years apart, because "courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes"); *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co., Inc.*, 221 F.3d 924, 927 (6th Cir. 2000) ("'[W]e are mindful that where two or more statutes deal with the same subject, they are to be read *in pari*

materia and harmonized, if possible.'") (quoting *Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257, 262 (6th Cir. 1984)).[20] Contrary to the United States's argument (DOJ Br. 34), in determining whether an individual is "registered . . . in the jurisdiction," 42 U.S.C. § 15482(a), the "jurisdiction" to which the statute plainly refers is the "registrar's jurisdiction," 42 U.S.C. § 1973gg-6(j).

It is no accident that HAVA requires provisional voters to affirm that they are registered in the jurisdiction, but not necessarily the precinct, in which they wish to vote. Because voter rolls are maintained on a jurisdiction-wide basis, election officials can readily verify the eligibility of a voter who casts a ballot in any precinct in the jurisdiction where he is registered. And because HAVA requires provisional voting only in federal elections, *see* 42 U.S.C. § 15482(a), precinct lines are largely irrelevant for its purposes.

Because Directive 2004-33 instructs poll workers to withhold provisional ballots from any voter who is not a resident of the ***precinct*** in which he seeks to vote, the District Court correctly concluded that the Directive denies voters in the proper "jurisdiction" (*viz.*, county) the HAVA-guaranteed right to cast a provisional ballot.

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[20] Although there is no ambiguity that requires resort to legislative history here, we note that the major sponsor of HAVA stated on the Senate floor that "[i]t is our intent that the word 'jurisdiction' . . . has the same meaning as the term 'registrar's jurisdiction' in section 8(j) of the National Voter Registration Act." 148 Cong. Rec. S2535 (daily ed. Apr. 11, 2002) (statement of Sen. Dodd) (citing 42 U.S.C. § 1973gg-6(j)).

2. Otherwise Qualified Voters Who Appear at the "Wrong" Polling Place are "Eligible . . . to Vote in [the] Election."

The Secretary and the Intervenors contend, *see* Sec'y Br. at 33; Intervenors' Br. at 40, that because Ohio state law prohibits voters from casting ballots in any precinct outside of their precinct of residence, out-of-precinct voters are not "eligible under State law to vote." 42 U.S.C. § 15482(a)(4). Accordingly, they argue, such voters are not entitled to cast provisional ballots or have those ballots counted. Again, Appellants fundamentally misapprehend the law.

By its plain text, HAVA alters voting ***procedures*** in federal elections, but it leaves to the states the power to establish the basic ***qualifications*** for voters. *Cf. Association of Community Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995) (holding that Congress has power under Article I, section 4 of the Constitution to regulate the procedures in federal elections but not the qualifications of voters). Thus, HAVA requires that an individual be permitted to cast a provisional ballot if he is registered anywhere "in the ***jurisdiction***" where he seeks to vote, 42 U.S.C. § 15482(a), (a)(2)(A) (emphasis added), even if doing so overrides a state law governing voting procedures. But HAVA leaves it to the State to determine who is "eligible to vote in [the] election." 42 U.S.C. § 15482(a), (a)(2)(B).[21]

[21] It was only by failing to perceive this point that the district court in *Florida Democratic Party v. Hood*, No. 4:04cv395-RH/WCS (N.D. Fla. Oct. 21, 2004),

In Ohio, voter qualifications are established by the state constitution: "Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections." Ohio Const. art. V, § 1. The Secretary, strikingly, seems to concede that anyone who possesses these qualifications is an "eligible" voter under state law. *See* Sec'y Br. at 38-40 & n.13. Although state statutes require that individuals vote in the precinct in which they reside, *see* Ohio Rev. Code §§ 3503.01, 3599.12(A)(1), that requirement is a regulation of the ***manner*** in which individuals cast their ballot rather than a baseline requirement of "eligib[ility] to vote in [the] election," 42 U.S.C. § 15482(a)(2)(B).[22] *Cf. AFL-CIO v. Hood*, No. SC 04-1921, 2004 WL 2331776, at *3 (Fla. Oct. 18, 2004) (holding that Florida statutory requirement that voters cast

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concluded that out-of-precinct voters are not "eligible" under HAVA, *id.*, slip op. at 15-16 – and even that court held that States must permit such voters to ***cast*** provisional ballots, *see id.* at 17. The district court in *Hawkins v. Blunt*, No. 04-4177-CV-C-RED, slip op. at 15-16 (E.D. Mo. Oct. 12, 2004) similarly conflated voter qualifications with voting procedures. But even that court suggested that a procedure like Ohio's – in which a provisional ballot may ***never*** be cast or counted in a precinct where the voter does not reside – would be "troublesome" and risk "direct conflict with the federal statute." *Id.* at 20.

[22] Because HAVA's provisional-ballot section merely regulates the ***procedures*** governing federal elections – an area of overriding federal power – Intervenors' and the United States's contentions that a special plain-statement rule applies to the statute, Intervenors' Br. at 38; DOJ Br. 34, or that the statute violates the Tenth Amendment, *id.* at 47, lack force. *See ACORN*, 56 F.3d at 793-95.

ballots in their home precinct "is a regulation of the voting process, not a qualification placed on the voter"). If a properly registered voter possesses all the qualifications for voting, he is "eligible to vote in [an] election" by the plain meaning of those terms. He may as a practical matter forfeit his chance to vote by showing up at the wrong precinct (or, for that matter, by showing up a day late or by failing to show up to vote at all), but that does not make him any less "eligible" to vote in the election. "One remains an eligible voter even if he or she has voted 'improperly.'" Inj. Order at 26.

In this context, *Bell v. Marinko*, 367 F.3d 588 (6th Cir. 2004), on which Appellants place substantial reliance, *see* Sec'y Br. at 31, 33; Intervenors' Br. at 40-41, is simply inapposite. In discussing "eligibility," *Bell* did not address the situation of voters who properly registered but merely showed up at the wrong polling place to cast their ballots. Rather, that case involved individuals who registered using an address where they did not reside. *See id.* at 592. As a result, their initial ***registrations*** were invalid. *See id.* Nothing in the District Court's reading of HAVA would require the State to place voters on the registration rolls in a location where they do not reside. And conversely, nothing in *Bell* would require or permit the State to deem a properly registered voter ineligible simply because he appeared to vote at the "wrong" polling place. Accordingly, *Bell* can provide no support for the Secretary and Intervenors here.

If States were free, as Appellants suggest, to impose limits on provisional-ballot procedures simply by calling those limits rules of voter "eligibility," they would have boundless power to write themselves out of HAVA's provisional-voting requirements. A State could, for example, pass legislation adding to the list of qualifications for an "eligible" voter the requirement that the person "appear on the official list of voters for a given polling place." But that would render HAVA's provisional-balloting rules wholly meaningless. The District Court properly rejected that interpretation of HAVA's "eligible" language.

3. HAVA's Requirement that Provisional Ballots Be Counted "In Accordance With State Law" Does Not Permit a State Simply to Refuse to Count Provisional Ballots Cast at the "Wrong" Polling Place.

Appellants suggest, *see* Sec'y Br. at 37, that the State's refusal to count provisional ballots cast by voters at the "wrong" polling place is authorized by HAVA's directive that provisional ballots be counted "in accordance with State law." 42 U.S.C. § 15482(a)(4). They appear to read that language as broadly authorizing States to refuse to submit to the ordinary vote-counting process any class of provisional ballots a State's legislature wishes to define. The District Court properly rejected that contention. Inj. Order at 26-27.

HAVA provides that once an individual's eligibility to vote in the specific federal election has been verified, his "provisional ballot shall be counted as a vote in that election in accordance with State law." 42 U.S.C. § 15482(a)(4). This

provision is plainly mandatory in its terms, and the phrase "in accordance with State law" cannot be read to render the decision to count provisional ballots wholly optional with the State. Yet that appears to be the import of Appellants' position. *See* Sec'y Br. at 37 ("Not only does state law determine voter eligibility under HAVA, it also governs whether votes that are cast will be counted."). If a State believes it not worth the trouble to count provisional ballots (or some classes of provisional ballots) under that reading, all it must do is pass a law providing that such ballots shall not be counted. But HAVA does not say that a provisional ballot shall be counted "if state law permits." The statute sets forth a clear and mandatory federal-law duty ("the individual's provisional ballot shall be counted as a vote in that election") and then leaves it to state law to determine the precise means by which the duty is to be accomplished ("in accordance with State law"). States remain free to apply to provisional ballots the same rules governing the counting of votes that apply to all other ballots – for example, how to interpret a dimpled or hanging "chad" on a punch-card ballot. *See, e.g.*, Ohio Rev. Code § 3505.27 ("Counting of votes"). But a state law that categorically refuses to submit provisional ballots for which voter eligibility has been verified to the ordinary vote-counting process is a state law that flatly contradicts the federal requirement

that any such ballot "shall be counted as a vote in that election." 42 U.S.C. § 15482(a)(4).[23]

[23] Intervenors argue that because Directive 2004-33 does not "address, in any manner, how provisional ballots are to be counted," the District Court's opinion – insofar as it concerns the counting of provisional ballots – is an invalid advisory opinion. *See* Intervenors' Br. at 30. That argument is puzzling. Not only does Directive 2004-33 address the counting of ballots, *see* Directive at 1 (describing circumstances in which "provisional ballot ***will be counted*** in the official canvass") (emphasis added), but the Directive's failure to provide for the counting of out-of-precinct provisional ballots, as HAVA requires, was a hotly contested issue below. *See, e.g.*, Am. Compl. ¶ 41("Directive 2004-33 violates HAVA by depriving a voter who arrives at the 'wrong' precinct within the county of his residence the right to cast a provisional ballot ***and to have that ballot counted***.") (emphasis added), *id.* at Prayer for Relief ¶ 7 (seeking an order "[r]equiring Defendant promptly to issue a new directive to all Ohio county boards of elections, instructing them to issue *and count* provisional ballots in accordance with the Help America Vote Act of 2002") (emphasis added); *see also id.* ¶¶ 3, 4, 19, 31, 34, 38, 41, 43, 45, Prayer for Relief ¶¶ 1, 2, 4; Pls.' Mot. for PI at 4, 6, 7, 10, 13, 14, 16, 20, 22, 23, 33; Pls.' Reply in Support of Mot. For PI at 9, 10, 12, 13, 14, 15, 16, 18, 19, 20. It is therefore startlingly disingenuous for Intervenors to suggest that the hotly contested counting issue did not constitute a "case or controversy" before the District Court. *See, e.g.*, *McGrath v. Kristensen*, 340 U.S. 162, 167-68 (1950); *Franklin Fed. Sav. Bank v. Director, Office of Thrift Supervision*, 927 F.2d 1332, 1336-37 (6th Cir. 1991) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967)); *U.S. Pipe & Foundry Co. v. Johnson*, 927 F.2d 296, 297-98 (6th Cir. 1991). The counting issue here is neither "hypothetical," *see Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979), nor "chimerical," *see Carey*, 431 U.S. at 684 n.3. It was entirely appropriate for the District Court to grant relief on this issue. Having found that the Secretary's Directive violated HAVA by failing to provide for either the casting ***or*** the counting of out-of-precinct provisional ballots, the District Court properly granted relief redressing both legal violations.

4. HAVA's Ambiguous Legislative History Cannot Trump the Statute's Plain Text.

Both the Secretary and Intervenors place substantial reliance not on HAVA's text, but on a handful of snippets from the Senate floor debates on the statute. *See* Sec'y Br. at 36-37; Intervenors' Br. at 38-40. But as the District Court concluded, "no recourse to legislative history is necessary" here, because HAVA's text is plain. Inj. Order. at 23-24 (citing *Saylor v. United States*, 315 F.3d 664, 670 (6th Cir. 2003). Moreover, as the District Court properly held, the balance of the legislative history weighs decisively against Defendants' position.

This conclusion is evident from the Secretary's and Intervenors' submissions on appeal. They point to three brief statements from the legislative history, two of which are irrelevant to the issue before the Court. Senator Dodd's statement that "a voter's eligibility is determined under State law," 148 Cong. Rec. S10510 (daily ed. Oct. 16, 2002) (quoted in Sec'y Br. at 36), is irrelevant here, because a rule that a voter must cast his ballot in his home precinct is not a rule of voter "eligibility." Similarly, Senator Bond's statement that if a voter casts a ballot in the wrong "jurisdiction" "the vote will not count," 148 Cong. Rec. S10491 (daily ed. Oct. 16, 2002) (quoted in Sec'y Br. at 37), is irrelevant because a precinct is not a "jurisdiction." And although Senator Bond did state that poll workers "can direct" a voter who arrives at the wrong polling place "to the correct polling place," *id.* (quoted in Sec'y Br. at 37), that statement conflicts with HAVA's plain text, as we

have shown. It also conflicts with other portions of the statute's legislative history. *See id.* at S10508 (Sen. Dodd) (stating that the provisional-balloting section would "ensure[] that ***never again*** can a person who appears at the polls in order to vote and desires to vote [be] turned away, ***for any reason***") (emphasis added); *id.* at S10496 (Sen. Durbin) (applauding the statute for guaranteeing the right of voters "to cast a provisional ballot ***at their chosen polling place*** if the voter's name isn't on the list of eligible voters") (emphasis added).

In short, Appellants' one-sided account of HAVA's floor debates is a classic example of using "legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment). That account cannot possibly prevail over the statute's plain text.

5. Defendants' Policy Arguments Are Neither Relevant nor Persuasive.

The Appellants, finally, contend that allowing voters to cast provisional ballots outside of their "home" precincts would have harmful consequences. Those policy arguments are properly directed at Congress, for HAVA's mandate in this regard is clear.

In any event, Appellants' policy arguments are unpersuasive.[24] The Secretary contends that permitting out-of-precinct provisional voting will lead to "uncounted votes" – presumably because those who cast provisional ballots will not be able to vote in the state and local races that are being contested at the election. *See* Sec'y Br. at 36, 38; *see also* Intervenors' Br. at 47. But as the experience of the 2000 election showed, ***not*** permitting provisional voting ***also*** leads to "uncounted votes," as those who are turned away from the polling place lose the chance to cast any ballot at all. A person who arrives at the "wrong" polling place just as polls are about to close – perhaps because local election officials failed correctly to inform him of his polling place – would be utterly disenfranchised if he lacked the opportunity to cast a provisional ballot. HAVA, by its plain text, guarantees him that right.

[24] The Secretary points to provisional-voting statutes in a number of other States that, he says, "have the same or similar effect as Ohio statutes and Directive 2004-33." Sec'y Br. at 38 & n.12. Although the Secretary is incorrect in his characterization of these state statutes, that is irrelevant in interpreting ***federal*** law. In any event, any suggestion that complying with HAVA poses severe administrative difficulties is belied by the numerous state statutes that contemplate "wrong precinct" provisional voting for individuals who seek to vote in the county of their residence. *See, e.g.*, Cal. Elec. Code § 14310 (c)(3) (requiring only "written affirmation stating that the voter is eligible to vote and registered in the county where the voter desires to vote"); N.M. Stat. Ann. § 1-12-8 (providing a provisional ballot to a voter if "his residence is within the boundaries of the county in which he offers to vote"); *see also* Alaska Stat. § 15.15.198; Ga. Code Ann. § 21-2-418; Md. Code Ann., Elec. Law § 9-404; Nev. Rev. Stat. §§ 293.3081 *et seq.*; N.C. Gen. Stat. § 163-166.7(c)(6); 25 Pa. St. § 3050; Wash. Rev. Code § 29A.04.008(5).

The Secretary also argues that permitting out-of-precinct provisional balloting will lead to voter fraud, *see* Sec'y Br. at 39-40, and the Intervenors similarly contend that such a practice will dilute the votes of those who cast ballots in the precincts to which they are assigned, *see* Intervenors' Br. at 44-45. But HAVA specifically requires election officials to verify that each individual voter is eligible to vote in the election in which he cast a provisional ballot ***before*** his ballots will be counted. *See* 42 U.S.C. § 15482(a)(4). This practice provides a ready opportunity to detect fraud and double voting, and it assures that no provisional ballot will be counted in an election in which the voter is not eligible to participate.

Finally, and most generally, Appellants argue that the District Court's order will "unravel" the "fundamental" precinct-based system of voting. *See* Intervenors' Br. at 43; *see also* Sec'y Br. at 12; DOJ Br. at 36-37.[25] But that is simply not true. Ohio is still free to administer its elections on a precinct basis.

[25] The United States argues that the United States Election Assistance Commission ("EAC") has interpreted HAVA contrary to the District Court, and asserts that the EAC agrees that the District Court's interpretation would lead to the end of precinct-based elections. DOJ Br. 36-37. First of all, the EAC has no rulemaking authority, *see* 42 U.S.C. § 15329, so its views on the topic carry no weight. But, more importantly, the United States has completely mischaracterized the EAC's position. In fact, the Chairman of the EAC has contacted Secretary Blackwell in order to request that he "stop saying the commission agrees with his position," because, in the Chairman's view, Secretary Blackwell is "the only secretary of state in the country to misinterpret" the EAC's position. *See* A. Welsh-Huggins, *Legal battle over provisional ballots moves to appeals court*, Akron Beacon Journal, Oct. 21, 2004.

All the elections officials must do, as HAVA requires, is to permit a voter who shows up in the correct county but at the wrong precinct to cast a provisional ballot that will be counted in those ***federal*** races for which he is eligible to vote.[26] Under this system, voters will have a strong incentive to appear at the correct polling place – if only to preserve their ability to vote for state and local races as well. And indeed, experience in other large jurisdictions that allow for out-of-precinct provisional voting demonstrates that only a small number of voters – on the order of two to four percent – cast provisional ballots. *See* Nat'l Comm'n on Fed. Election Reform, *supra*, at 36 (describing experiences in Los Angeles County, California, and Kings County, Washington). Applying HAVA's plain terms by no means "unravels" Ohio's precinct system.

CONCLUSION

As the Secretary himself has recognized, "'Ohio is ground zero in a high-stakes presidential election'"[27] – a fact that is certain to increase turnout generally and the need for provisional ballots specifically. Yet the Secretary has refused to

[26] Intervenors complain that HAVA's implementation creates a system in which different rules apply to federal races than to state and local races that occur at the same time. *See* Intervenors' Br. at 46-48. But that is a straightforward consequence of two legal facts: (1) Congress's Article I, section 4 power is limited to elections for federal office; and (2) Ohio has chosen to apply different rules to its state elections than HAVA requires for federal elections.

[27] K. Kemper, *Officials Busy Trying to Keep Franklin Co. from Becoming an Election Day Debacle*, Columbus Bus. First, Oct. 8, 2004 (quoting Secretary Blackwell).

bring Ohio into compliance with HAVA – despite promising that he would do so, and despite recognizing the need to modify Ohio procedures "to mak[e] sure every voter and every vote counts." State Plan at 33, 69 Fed. Reg. at 14895. By entering the preliminary injunction now in effect, the District Court preserved the opportunity for a HAVA-compliant election in Ohio this November and prevented Plaintiffs from suffering irreparable harm. The fundamental rights of voters to have their voice heard is at stake. The District Court's ruling should be affirmed.

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Dated: October 23, 2004

CERTIFICATE OF COMPLIANCE

This brief was drafted mindful of the type-volume limitation of Fed. R. App. P. 32(a)(7)(B); because this brief contains 15,923 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), we have filed a motion for leave to file an oversized brief.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2004, I caused a true and accurate copy of the foregoing Brief of Plaintiffs-Appellees and Motion for Leave to File Oversized Brief, to be served via electronic mail or facsimile, in accordance with the Court's briefing schedule, on the following:

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