UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE SANDUSKY DEMOCRATIC PARTY, *et al.*,	:	
Plaintiffs-Appellees,	:	
	:	Case Nos. 04-4265 & 04-4266
v.	:	
J. KENNETH BLACKWELL,	:	
Defendant-Appellant.	:	

On Appeal from the United States District Court
for the Northern District of Ohio, Western Division

PROOF BRIEF OF APPELLANT J. KENNETH BLACKWELL, SECRETARY OF STATE OF OHIO

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Defendant-Appellant.	:	

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Appellant J. Kenneth Blackwell, Secretary of State of Ohio, makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation? NO
   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome? NO
   If the answer is YES, list the identity of such corporation and the nature of the financial interest:

_____ _____
Richard G. Lillie (Date)

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I. STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant J. Kenneth Blackwell, Secretary of State of Ohio ("Appellant" or "Secretary"), believes that oral argument will assist the Court in assessing and resolving the issues in this case, which are of great importance not only in Ohio, but throughout the nation. This case involves a challenge to the validity of the Secretary's Directive 2004-33 to county boards of elections regarding "provisional ballots"—issued in his role as Ohio's chief elections officer—in relation to the recently enacted Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15301, *et seq.* Because HAVA is a relatively recent enactment, many of the issues involved in this case are issues of first impression for this Court, and the Secretary further believes that oral argument will assist the court in resolving those issues.

II. STATEMENT OF JURISDICTION

Plaintiffs commenced this 42 U.S.C. § 1983 action asserting that jurisdiction was appropriate pursuant to 28 U.S.C. § § 1331 & 1343. Appellant asserts, *inter alia*, that Plaintiffs lack standing to maintain this action, and that the district court, therefore, lacked jurisdiction over this matter

The district court issued an Order granting Plaintiffs' motion for a preliminary injunction on October 14, 2004. Appellant timely filed a Notice of Appeal from that Order on that same day. Appellate jurisdiction is proper pursuant

to 28 U.S.C. § 1292(a)(1), under which this Court has "jurisdiction of appeals from: [i]nterlocutory orders of the district courts of the United States . . . , or of the judges thereof, granting . . . injunctions . . . ."

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in holding that Plaintiffs have standing to maintain this action.
2. Whether the district court erred in holding that HAVA created a private right enforceable pursuant to 42 U.S.C. § 1983.
3. Whether the district court erred in holding that the Secretary's Directive 2004-33 conflicts with the requirements of HAVA.
4. Whether the district court erred in holding that Plaintiffs had established the prerequisites for obtaining preliminary injunctive relief.

IV. STATEMENT OF THE CASE

Plaintiffs Sandusky Democratic Party and the Ohio Democratic Party (collectively "Party Plaintiffs") commenced this 42 U.S.C. § 1983 action on September 27, 2004 (R. 1: Complaint; J.A. at__). In their Complaint, Plaintiffs assert that the Secretary's September 16, 2004 directive to "all county boards of election" regarding "Issuing and Processing Provisional Ballots" ("Directive 2004-33") violated unnamed and unidentified individuals' "right" under HAVA to cast "provisional ballots." Also on September 27, 2004, the Party Plaintiffs filed their motion for a preliminary injunction seeking to enjoin the application of Directive 2004-33 in violation of HAVA. (R. 4: Motion for Preliminary Injunction; J.A.

__). On October 1, 2004, Plaintiffs filed an amended complaint adding the Farm Labor Organizing Committee, Inc., the North Central Ohio Building & Construction Trades Council, and the International Brotherhood of Electrical Workers, Local 245 as Plaintiffs (collectively, "Union Plaintiffs") (R. 4: Amended Complaint; J.A. __), and a supplemental memorandum in support of their motion for a preliminary injunction. (R. 5: Supplemental Memorandum in Support of Motion for Preliminary Injunction; J.A. __).

On October 4, 2004, three individual Ohio voters, Gregory L. Arnold, Thomas W. Noe, and Glenn A. Wolfe (collectively, "Intervenors") moved to intervene in the action as defendants. Both the Secretary and the Intervenors moved to dismiss the action, arguing, *inter alia*, that (1) Plaintiffs lacked standing to maintain this action, (2) HAVA did not create a private right enforceable pursuant to 42 U.S.C. § 1983, (3) the Secretary's Directive 2004-33 did not conflict with HAVA, and (4) that the Plaintiffs had otherwise failed to establish their entitlement to declaratory or injunctive relief. (R. 13: Motion to Dismiss and Brief in Opposition to Plaintiffs' Complaint and Motion for Declaratory and Injunctive Relief; J.A. at ___); (R. 8, Ex. A: Motion to Dismiss; J.A. __). On October 7, 2004, the district court granted the Intervenors' motion to intervene. (R. 12: Order; J.A. ___).

On October 14, 2004, the district court issued an Order granting Plaintiffs' motion for preliminary injunction. (R. 26: Order; J.A. ___). As it relates to the issuance and casting of provisional ballots, the District Court's Order also required Defendant-Appellant, J. Kenneth Blackwell, to issue a New Directive to the Ohio County Boards of Elections relative to such provisional ballots:

> The plaintiff's motion for preliminary injunction be, and the same hereby is granted: The defendant J. Kenneth Blackwell, [Secretary of State], and his employees, agents, representatives, and successors in office are hereby enjoined and restrained from applying the provisions of Ohio Secretary of State Directive 2004-33 that, as described herein, violate the Help America Voting (sic) Act of 2002, 42 U.S.C. §§ 15301, et seq.; and said defendant J. Kenneth Blackwell shall forthwith, in compliance with this Order, prepare, and not later than 4 p.m., Monday, October 18, 2004, file with this Court a Directive that complies with the Help America Vote Act, and shall otherwise be consistent with this Order.

(R. 26: Order at 37; J.A. ___).

On the same day, shortly after the district court issued its Order, the Secretary and the Intervenors both filed their notices of appeal to this Court. (R. 27: Notice of Appeal; J.A. ___); (R. 28: Notice of Appeal; J.A. __) and also moved the district court to stay its decision and to suspend its injunction pending appeal (R. 29: Motion for Stay and Suspension; J.A. __); (R. 31: Motion for Stay: J.A. __). Such motions were denied by the District Court on October 16, 2004 in

an Order filed October 18, 2004. (R. 35: Order: J.A. __). A similar motion to stay is pending before this Court.

On October 18, pursuant to the mandated contained in the Court's October 14, 2004 Order, Defendant-Appellant filed a proposed new directive concerning provisional ballots. (R. 37: Notice of Filing Proposed New Directive Pursuant to Court Order; J.A. __). Thereafter, the District Court issued a separate Order which modified the original October 14, 2004 mandate. (R. 39: Order; J.A. __). In the new order, the district court:

> Ordered that defendant J. Kenneth Blackwell shall, in compliance with this Order, prepare, and, not later than 4 p.m., Wednesday, October 20, 2004, file with this Court a Directive that complies with the Help America Voter Act, if, under that statute, the defendant is required to issue a HAVA-compliant directive which, *inter alia*, permits voters to vote provisionally only in their precinct of residence, and which otherwise shall be consistent with this Order and the Injunction previously issued on October 14, 2004.

(R. 39: Order at 3; J.A. __).

The district court issued a subsequent Order concerning the Secretary's submission of directives on October 20, 2004. (R.__: Order, J.A. ____).

V. STATEMENT OF FACTS

In filing this action, Plaintiffs sought a new and wholly unusual system of voting in Ohio which is contrary to Ohio's well-established precinct-based system of voting. That well-established practice—based on Article V §1 of the Ohio

Constitution codified in R.C. 3503.01[1]—is necessitated by the fact that most district and political subdivision lines subdivide or otherwise cross county boundaries. Precinct-based voting is the only rational way that the State can assure that all voters may cast votes for all federal, state, and local offices and issues in the counties, municipalities, townships, or districts in which they reside.[2]

The very court from which the Secretary now appeals has previously held that "[r]esidency within the precinct is a *crucial qualification.*" *Bell v. Marinko,* 235 F.Supp.2d 772, 776 (N.D.Ohio 2002), *aff'd*, 367 F.3d 588 (6th Cir. 2004), a state-law qualification that is not overridden by the Voter Registration Act, 42 U.S.C. § 1973gg, *et seq.* Indeed, the district court observed that "[o]ne simply cannot be a 'qualified elector' entitled to vote unless one resides in the precinct

[1]Ohio Const. Art. V §1 provides in relevant part: "Every citizen of the United States of the age of 18 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 30 days, has the qualifications of an elector, and is entitled to vote at all elections." R.C. 3503.01 provides, in pertinent part that "[e]very citizen of the United States who is of the age of eighteen years or over and who has been a resident of the state thirty days immediately preceding the election . . . has the qualifications of an elector and may vote in all elections *in the precinct in which the citizen resides.*" (emphasis added).

[2]For example, congressional, state senate, state house of representatives, and state board of education districts, as well as municipal (and city or village council wards or districts within those municipalities), township, school district, and numerous other political subdivision boundaries are all incongruent with county boundaries in Ohio. Thus, an individual's place of residence determines which offices and issues for which that individual is entitled to vote.

where he or she seeks to cast a ballot." *Id.*, 272 F.Supp.2d at 776. See also *Bell v. Marinko*, 367 F.3d 588, 592 (6th Cir. 2004) ("Eligible voters, at a minimum, are those who qualify as bona fide residents of the precinct in which they are registered or wish to register to vote.") (citations omitted).

Plaintiffs herein sought the ability, contrary to state and federal law, to have individuals wander into any polling place and cast a provisional ballot in the upcoming November 2, 2004 general election. In granting Plaintiffs' Motion for a Preliminary Injunction, the district court erroneously acceded to this improper request.

In an effort to avoid the long-standing practice and requirement that Ohio voters cast ballots at particular/assigned polling places, *i.e.*, precincts[3]—Plaintiffs sought to create a new "county-wide" voting system in Ohio. Under HAVA, the term "jurisdiction" necessarily depicts a pre-defined "territory" or district in which

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[3] "'Precinct' means a district within a county established by the board of elections of such county within which all qualified electors having a voting residence therein may vote at the same polling place." R.C. 3501.01(Q). "'Polling place' means the place provided for each precinct at which the electors having a voting residence in such precinct may vote." R.C. 3501.01(R).

a voter would properly cast and/or register to cast his or her vote. In Ohio, the relevant, pre-defined "territory" is the precinct.[4]

Congress enacted HAVA following the 2000 presidential election for the express legislative intent:

> to provide funds to States to replace punch card voting systems, to establish the Election Assistance Commission to assist in the administration of Federal elections and to otherwise provide assistance with the administration of certain Federal election law and programs, to establish minimum election administration standards for States and units or local government with responsibility for the administration of Federal elections, and for other purposes.

Help America Vote Act of 2002, Pub. L. No. 107-522, 116 Stat. 1666 (codified at 42 U.S.C. §§ 15301 *et seq*.). With regard to provisional ballots, HAVA provides:

---

[4] See, Election Law @ Moritz, Edward B. Foley, "HAVA's History Sheds Light on Provisional Voting Dispute", wherein the author anticipates many of the Plaintiffs' arguments, Sec. 5.1, P.1:

> We have not seen a response from the Secretary of State yet, but we can anticipate his argument. He will likely say that the term "jurisdiction" denotes a legally defined territory or district and in this case the relevant territory is the precinct. He will argue that the use of the term "polling place" indicated that the purpose of HAVA was to let eligible voters cast a ballot if they go to the right place but for some reason they are not on voter registration list. Congress, however, did not intend to let voters choose which polling place to go to – for example, one closer to work than home – as long as voters choose among the many polling places available within the county where they are registered. If Congress had this intent, the Secretary presumably will say, it would have written HAVA more clearly to let everyone know of this new development in election law.

PROVISIONAL VOTING REQUIREMENTS. ---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 as follows:

(1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.

(2) The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is –

(A) a registered voter in the jurisdiction in which the individual desires to vote; and

(B) eligible to vote in that election.

(3) An election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual under paragraph (2) to an appropriate State or local election official for prompt verification under paragraph (4).

(4) If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) 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.

42 U.S.C. § 15482(a)(1)-(4).

On September 16, 2004, the Secretary issued Directive 2004-33 to all county boards of elections in Ohio. That directive provided, in its entirety as follows:

Issuing And Processing Provisional Ballots

All boards of elections must instruct their pollworkers on the provisional voting procedures authorized by state and federal law.

State Law: Provisional voting eligibility based on elector moving from one Ohio precinct to another

Ohio law provides that every United States citizen who is of the age of 18 years or over and who has been a resident of the state 30 days immediately preceding the election at which the citizen offers to vote, is a resident of the county and precinct in which the citizen offers to vote, and has been registered to vote for 30 days, has the qualifications of an elector and may vote at all elections in the precinct in which the citizen resides. R.C. 3503.01.

State law further provides that an eligible elector who moves from one Ohio precinct to another before an election may, in accordance with the procedures set forth in R.C. 3503.16, update his or her existing voter registration to the new voting residence address and vote a provisional ballot for the precinct in which the person's new voting residence is located. The provisional ballot will be counted in the official canvass if the county board of elections confirms that the person was timely registered to vote in another Ohio precinct, and that the person did not vote or attempt to vote in that election using the person's former voting residence address.

Because R.C. 3599.12 specifically prohibits anyone from voting or attempting to vote in any election in a precinct in which that person is not a legally qualified elector, pollworkers in a precinct must confirm before issuing a provisional ballot that the person to whom the provisional ballot will be issued is a resident of the precinct, or portion of the precinct, in which the person desires to vote.

In order for that confirmation process to work, the boards of elections must include with the supplies for each precinct a complete and correct map of, and street listing for, that precinct. Both the map and street listing must clearly indicate any splits within the precinct.

> Before issuing a provisional ballot as provided for under state or federal law, the pollworkers must confirm that the voting residence address claimed by the voter is located within the area shown on the precinct map and listed on the street listing.
>
> Only after the precinct pollworkers have confirmed that the person is eligible to vote in that precinct shall the pollworkers issue a provisional ballot to that person. Under no circumstances shall precinct pollworkers issue a provisional ballot to a person whose address is not located in the precinct, or portion of the precinct, in which the person desire to vote. However, no provisional ballot will be disallowed because of pollworker error in a split precinct.
>
> If the pollworkers determine that the address of a person who desires to vote in a particular location is not located within that precinct, the pollworkers must contact the board of elections, and the board shall advise both:
>
> 1. The precinct in which the voter's address is located, and
> 2. The location of the polling place for that precinct.
>
> If you have any questions regarding this Directive, please call my Elections Division at 614-46-2585 [*sic*].

Directive 2004-33 (emphasis in original).[5] It is this directive that the Plaintiffs have challenged, and the district court has invalidated, in this case.

VI. SUMMARY OF ARGUMENT

[5] Directive 2004-33 was issued in addition to other directives dealing with the conduct of elections in general, and provisional ballots in particular, including Directive 2004-7, issued on February 19, 2004, which is under challenge in another lawsuit currently pending before Judge Carr in the Northern District of Ohio. *League of Women Voters of Ohio v. Blackwell*, Case no. 3:04CV7622 (N.D.Ohio).

Appellant maintains that the district court incorrectly resolved two threshold issues—the Plaintiffs' standing to maintain this action and the enforceability of HAVA through 42 U.S.C. § 1983—and therefore erroneously reached the merits of Plaintiffs' claims.

Additionally, the district court erred by failing to dismiss Plaintiffs' Amended Complaint for failure to state a claim as Plaintiffs have no private or "individual" rights with respect to HAVA and HAVA compliance by the 50 states. The district court erred by reaching the merits of Plantiffs' claim and granting the Plaintiffs' motion for a preliminary injunction.

HAVA does not require Ohio or any other state to abandon residency-based precinct voting. Precinct voting is designed both to prevent election fraud and to enable voters to cast votes for all offices and on all issues pertinent to them based upon their place of residence. The district court's Order, which allows voters to cast provisional ballots in any precinct in their county, thus opens the door to fraud in what is expected to be a very close election. In addition, it has the effect of disenfranchising the voters who cast provisional ballots in the wrong precinct because, as the district court recognized, their ballots will only be counted for the offices of President and United States Senator.

VII. ARGUMENT

A. STANDARD OF REVIEW

This court reviews the district court's determination of standing under "the traditional de novo standard of review . . . because the issue of whether a claimant has constitutional standing is a question of law." *United States v. Real Property and All Furnishings Known as Bridwell Grocery & Video,* 195 F.3d 819, 821 (6th Cir. 1999).

> We review the district court's grant of a motion for a preliminary injunction for abuse of discretion. "A district court abuses its discretion when it relies on clearly erroneous findings of fact . . . or when it improperly applies the law or uses an erroneous legal standard. Under this standard, this court must review the district court's legal conclusions de novo and its factual findings for clear error."

Taubman Co. v. Webfeats, 319 F.3d 770, 774 (6th Cir. 2003) (citations omitted).

B. THE DISTRICT COURT ERRONEOUSLY HELD THAT THE PLAINTIFFS HAVE STANDING TO MAINTAIN THIS ACTION AS PLAINTIFF ORGANIZATIONS HAVE FAILED TO ESTABLISH THE REQUIREMENTS FOR STANDING IN THEIR OWN RIGHT OR THE REQUIREMENTS FOR ASSOCIATIONAL OR ORGANIZATIONAL STANDING.

The Plaintiffs in this action are all **organizations**, including the Sandusky and Ohio Democratic Parties, two labor unions, and one association of labor unions. (R. __: Amended Complaint at 4-6, ¶¶ 6-10; J.A. ___). All Plaintiffs sought to bring this action challenging the Secretary's Directive 2004-33 on behalf of their individual members, who presumably are voters or potential voters, but

none of the Plaintiffs identified a single voter or prospective voter who suffered an injury or threatened injury as a result of the directive.

The Supreme Court has recognized

> the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests.

Powers v. Ohio, 499 U.S. 400, 410-11 (1991) (citations omitted).

The associational and organizational plaintiffs meet these requirements in this case.

The plaintiffs will suffer an injury in fact if there is a failure to facilitate provisional voting, which is a prerequisite to collecting and counting the ballots of electors covered by the provisional voting provisions of HAVA. The plaintiffs have the close relation to their members required under Powers. * * * Individual electors cannot effectively challenge noncompliance with HAVA's provisional voting provisions, as they would not know until election day that they had a basis for such challenge. It would then be too late to do anything to regain the franchise, were it taken from them in a manner contrary to HAVA.

The political party plaintiffs have, in any event, 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.

(R. 26: Order at 17-18; J.A. ___). This conclusion is not supported either by the facts or the law, and the district court's determination that the Plaintiffs have standing to maintain this action must be reversed.

Standing is "the threshold question in every federal case." *Warth v. Seldin,* 422 U.S. 490, 498 (1975). The standing requirement limits federal court jurisdiction to actual controversies so that the judicial process is not transformed into a vehicle for the vindication of the value interests of concerned bystanders. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982). "[S]tanding to sue . . . is a jurisdictional requirement." *Coal Operators & Assocs., Inc. v. Babbitt,* 291 F.3d 912, 915 (6th Cir. 2002) (footnote omitted). Plaintiffs bear the burden of establishing standing, must allege facts demonstrating that they are a proper party, and must prove facts sufficient to avoid dismissal on standing grounds. *United States v. Hays,* 515 U.S. 737, 743 (1995).

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . th[e] result [of] the independent action of some third party not before the court." Third, it

> must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992) (citations omitted).

> In addition to the constitutional requirements, a plaintiff must also satisfy three prudential standing restrictions. First, a plaintiff must "assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Second, a plaintiff's claim must be more than a "generalized grievance" that is pervasively shared by a large class of citizens. Third, in statutory cases, the plaintiff's claim must fall within the "zone of interests" regulated by the statute in question. These additional restrictions enforce the principle that "as a prudential matter, the plaintiff must be a proper proponent, and the action a proper vehicle, to vindicate the rights asserted."

Coal Operators & Assocs., Inc., 291 F.3d at 916 (quoting *Coyne v. American Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999)) (internal citations omitted)

"[A] plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Svcs., Inc.*, 528 U.S. 167, 181 (2000) (citation omitted).

Contrary to the district court's decision, Appellant is unaware of any court—at least until the recent spate of lawsuits brought primarily by Democratic Party organizations throughout the country with regard to HAVA—that has held (like the Plaintiffs here argue) that a political party has standing to maintain an action to "represent the voting interests of . . . individuals," (R. ___: Amended Complaint at ___, ¶ 5; J.A. __), as opposed to some right unique to the party as an organization or its candidates.[6] Indeed, the Supreme Court has held on numerous occasions that only a showing of "individualized harm" of a "particular citizen" is sufficient to establish standing to challenge the alleged dilution of a voter's voting strength through an alleged racial gerrymander. *Hays*, 515 U.S. at 744-45 (1995). See also *Shaw v. Hunt*, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996). Certainly no court that Appellant is aware of has ever held that a political party has standing to enforce unidentified voters' rights.[7]

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[6]See, e.g., *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621 (2d Cir. 1989) (political party had standing to challenge its candidate's exclusion from presidential debates).

[7]The interests of the Union Plaintiffs in this case are even more tenuous, as those organizations generally exist for the purpose of representing their members in collective bargaining with their members' employers, and not to for purpose of nominating and electing candidates for public office. Indeed labor unions presumably have as members individuals who hold various political views and who are members of many different political parties. Certainly, under such circumstances, these Plaintiffs cannot establish that their interests and the interests

Indeed, the primary case cited by the district court to support its ruling that the Plaintiffs had standing in this case—*Northampton County Democratic Party v. Hanover Township*, No. Civ.A.04-CV-00643, 2004 WL 887386 (E.D.Pa. April 26, 2004)—did not broadly hold, as the district court suggests, that the "Democratic Party had standing to represent the interests of the *general electorate*." (R. 26: Order at 17; J.A. __) (emphasis added). Rather, the court in that case merely held that "the Chairman of the Northampton County Democratic Committee . . . has authority to bring this action [challenging local ordinances restricting the display of political signs] on behalf of the committee members and the Democratic candidates the committee supports." *Id.*, 2004 WL 887386 at *7. With regard to the Democratic Party itself, the Court held that "the rights of the Party, its candidates, and the general electorate are all inextricably bound together for the purposes of this litigation," because "the individual candidates all provide the local Democratic Party with signs to be dispersed throughout [the] County." *Id.*, 2004 WL 887386 at *8. The decision in *Northampton Democratic Party* certainly does not stand for

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of their members allegedly affected by Directive 2004-33 are sufficiently aligned to satisfy third-party standing requirements. Under the district court's broad concept of standing, virtually every organization in the country would have standing to represent the interests of voters in exercising their elective franchise because virtually every organization has as a member one or more persons eligible to vote.

the broad proposition that political parties have standing to represent the interests of the general electorate in all cases, or even in cases dealing with voting and elections. As the Supreme Court has made clear, a much more concrete showing is required to support the exercise of third-party or organization standing.

Even if the Plaintiffs could exercise standing on behalf of individual voters, they have failed to identify a single voter who has suffered an injury that is both "concrete and particularized" and "actual or imminent, as opposed to conjectural or hypothetical." Indeed, Plaintiffs' entire case is based upon the speculative premise (1) that some yet-to-be-identified Ohio elector will arrive at his or her polling place on November 2, 2004; (2) that the purported elector's name will not appear on the roll of registered voters for that precinct; (3) that the purported elector will be unable to go to the correct polling place as directed by precinct election officials, and (4) that the purported elector will ultimately be denied the right to cast a "provisional" or other ballot, *i.e.*, that the prospective voter will be denied the right to vote.[8] Here, Plaintiffs can point to no Ohio elector who satisfies these requirements.

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[8]Significantly, the district court's order itself has the effect of disenfranchising potential voters. The court acknowledged that, because congressional and other political subdivision and district lines often cross county boundaries, "the provisional voter's ballot, if cast out-of-precinct, will not count for local, county, or state issues or offices." (R. 26: Order at 28; J.A. __). Thus,

C. THE DISTRICT COURT ERRONEOUSLY HELD THAT THE HELP AMERICA VOTE ACT, 42 U.S.C. § 15301, *ET SEQ.*, CREATED A FEDERAL RIGHT ENFORCEABLE PURSUANT TO 42 U.S.C. § 1983.

This Court must reverse the district court's erroneous conclusion that Plaintiffs have stated a claim under 42 U.S.C. § 1983. Plaintiffs' § 1983 claim is entirely without merit as a matter of law for at least two reasons. First, Plaintiffs cannot state a claim under 42 U.S.C. § 1983 because HAVA does not clearly and unambiguously grant a private right. Second, Plaintiffs cannot state a claim under 42 U.S.C. § 1983 because HAVA contains an exclusive enforcement scheme that is wholly incompatible with an individual's enforcement action pursuant to under 42 U.S.C. § 1983.

1. HAVA Does Not Clearly And Unambiguously Grant To Individuals A Federal Right To Vote Provisionally In Federal Elections.

While the district court properly noted that a claim under 42 U.S.C. § 1983 can only be predicated upon "unambiguously conferred" rights, it then proceeded

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Plaintiffs and the district court would have elections officials provide provisional ballots to voters, which would potentially be counted for only two offices, rather than directing the voter to the correct precinct where, at the very least, he or she could cast a provisional ballot that would, if validated, would be counted for all local and state offices and all local and state issues that appear on the voter's correct ballot. Certainly, under these circumstances, no injury can be traced to Directive 2004-33, a requirement necessary to establish Plaintiffs' standing in this case.

to disregard this critical point. Rather than relying on the plain language of HAVA—which unambiguously does ***not*** grant any individual rights—the court below erroneously accepted Plaintiffs' assertion that a federal right could effectively be cobbled together from a few, out-of-context references to the word "shall" and the word "rights" in HAVA, as well as select portions of legislative history.

a. *The Plain Language Of HAVA Does Not Clearly And Unambiguously Grant To Individuals A Federal Right To Vote Provisionally In Federal Elections.*

The United States Supreme Court has expressly held that 42 U.S.C. § 1983 can only be used to enforce federal rights that are created clearly and unambiguously by Congress. In *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), the Court refused to permit a student to sue under 42 U.S.C. § 1983 for a violation of the Family Educational Rights and Privacy Act ("FERPA") because FERPA did not clearly and unambiguously create a new federal right enforceable by 42 U.S.C. § 1983. The Court explained:

> In sum, if Congress wishes to create new rights enforceable under § 1983, it must do so in ***clear and unambiguous terms***—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action.

Id. at 290 (emphasis added). Indeed, the Court emphasized this point repeatedly throughout it decision:

> We now reject the notion that our cases permit anything short of an ***unambiguously conferred right*** to support a cause of action brought under 1983. Section 1983 provides a remedy only for the deprivation of 'rights, privileges, or immunities secured by the Constitution and laws' of the United States. Accordingly, it is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section.

Id. at 283 (underscore added) (italics in original). *See also Id*. at 281 (federal rights are not created ". . . unless Congress 'speak[s] with a clear ***voice***,' and manifests an '***unambiguous'*** intent to confer individual rights . . . .") (emphasis added).

This fundamental principal has been repeatedly applied in subsequent federal decisions that strongly caution against liberally construing federal law to create federal rights supposedly enforceable under 42 U.S.C. § 1983. *See*, *e.g*., *Association of Community Orgs. for Reform Now v. New York City Dep't of Educ.*, 269 F.Supp.2d 338 (S.D.N.Y. 2003) (the "No Child Left Behind Act" did not create individual rights enforceable under 42 U.S.C. § 1983 because "in view of these [*Gonzaga*] standards, it is clear that Congress did not intend to create individually enforceable rights . . . ."); *Slovinec v. DePaul Univ.*, 222 F.Supp.2d 1058 (N.D.Ill. 2002) (student could not sue under 42 U.S.C. § 1983 for a violation of either the Higher Education Act or FERPA because Congress did not clearly and unambiguously create a privately enforceable right), *aff'd*, 332 F.3d 1068 (7th Cir.

2003); *Wright v. Fred Hutchinson Cancer Research Center*, 269 F.Supp.2d 1286 (W.D.Wash. 2002) (granting motion for judgment on the pleadings with respect to claim under 42 U.S.C. § 1983 to enforce alleged rights relating to human cancer testing because, among other things, Congress did not clearly and unambiguously create rights enforceable under 42 U.S.C. § 1983).

Even the district court here frankly acknowledges that the preamble to HAVA "suggests that its focus [is] on the persons–individual electors–who would benefit from *better administration of those laws*." (R. 26: Order at 9; J.A. __) (emphasis added). The preamble provides that the intent of Congress is:

> To establish a program ***to provide funds*** to States to replace punch card voting systems, to establish the Election Assistance Commission ***to assist in the administration*** of Federal elections and to otherwise provide assistance ***with the administration*** of certain Federal election law and programs, to establish minimum ***election administration standards*** for States and units or local government with responsibility for the administration of Federal elections, and for other purposes.

Help America Vote Act of 2002, Pub. L. No. 107-522, 116 Stat. 1666 (codified at 42 U.S.C. §§ 15301 *et seq*.) (emphasis added). Consequently, to begin with, the preamble alone necessarily injects ambiguity into the Trial Court's already strained construction of HAVA. Moreover, the plain language of HAVA itself regulates only election officials. For instance:

- Section 15482(a)(1) directs the conduct of certain election officials;

- Section 15482(a)(2) directs certain election officials to permit certain events to occur;

- Section 15482(a)(3) directs certain election officials to transit certain information;

- Section 15482(a)(4) directs certain election officials to county certain ballots; and

- Section 15482(a)(5) directs certain election officials to provide information and establish a free access system to obtain information regarding the significance of a provisional ballot.

In short, the plain language of HAVA is aimed exclusively at regulating the conduct of election officials and does not use language that confers direct benefits upon or specific protections to individual voters.

In addition to acknowledging the ambiguity created in the preamble, the district court identified only two excerpts contained in the plain language of the statute that it construed to create a new federal right. Neither of these provisions clearly and unambiguously creates such a right. First, the Court relies upon HAVA's requirement that "voting information" be posted at each polling place and that "voting information" is described as including "general information on voting rights." This definitional provision, contained at 42 U.S.C. § 15482(b)(2)(E), is an insufficient basis upon which to divine the clear and unambiguous creation of a new, individually-enforceable federal right. This is the only subsection that the

district court identifies as having referenced the word "rights." This statutory excerpt does nothing more than describe the content of certain information that is to be posted at polling places. The mere fact that the excerpt references the word "rights" has little bearing on a proper analysis under *Gonzaga*. In fact, the *Gonzaga* Court flatly rejected the formulaic and oversimplified notion that the mere presence of the word "rights" in a statute somehow automatically means that the statute creates federal rights. Thus, even the extensive references to the words "rights" in FERPA's title and language were deemed insufficient by the United States Supreme Court to create a federal right that is enforceable under 42 U.S.C. § 1983. The proposition that *Gonzaga* suggests a private cause of action is simply incorrect. Appellant submits that the thin reed upon which the district court rested its own analysis is likewise necessarily insufficient.

In his dissent to the *Gonzaga* decision, Justice Stevens lamented that the majority rejected his position that various references to "rights" in FERPA necessarily meant that the statute created individually enforceable rights:

> Subsection (a)(1)(A) accords parents 'the right to inspect and review the education records of their children.' Subsection (a)(1)(D) provides that a 'student or a person applying for admission' may waive 'his right of access' to certain confidential statements. Two separate provisions protect students' privacy rights: subsection (a)(2) refers to 'the privacy rights of students,' and subsection (c) protects 'the rights of privacy of students and their families.' And subsection (d) provides that after a student has attained the age of 18, 'the rights

> accorded to the parents of the student' shall thereafter be extended to the student. Given such ***explicit rights-creating language, the title of the statute, which describes 'family educational rights,' is appropriate: The entire statutory scheme was designed to protect such rights***.

Gonzaga at 293-2944 (Stevens, J., dissenting) (emphasis added). In other words, even the extensive references to the words "rights" in FERPA's title and language were deemed insufficient by the United States Supreme Court to create a federal right that is enforceable under 42 U.S.C. § 1983. The thin reed upon which the district court rested its own analysis is likewise necessarily insufficient.

Second, the district court relies upon the use of the word "shall" in 42 U.S.C. § 15482(a)(2) to divine the creation of a new federal right. The court asserts—without explanation—that this language can "only be read" as providing voters with an individually-enforceable federal right. However, the fact that a statute is phrased in the mandatory through the use of the word "shall" does not mean that it creates a new federal right. The FERPA language at issue in *Gonzaga* was likewise mandatory in nature.

Similarly, the language at issue in *Blessing v. Freestone*, 520 U.S. 329 (1997), was mandatory. In *Blessing*, the United States Supreme Court refused to find that Title IV-D of the Social Security Act created an individually-enforceable federal right despite its use of mandatory language. Likewise, in *Suter v. Arist M.*,

503 U.S. 347 (1992), the Court found that the Adoption Assistance and Child Welfare Act of 1980 did not create an individually-enforceable right despite the fact that "the Act is mandatory in its terms." *Id*. at 358.

Amazingly, the district court in the case below found that the foregoing provisions constitute "rights-creating language" that are "***sufficiently*** unambiguous" to satisfy the *Gonzaga* test. (R. 26: Order at 10; J.A. __) (emphasis added). To the contrary, Appellant submits that the *Gonzaga* Court only recognized the creation of new federal rights if the plain language of statute is ***entirely*** unambiguous. *See Gonzaga* at 283 ("We now reject the notion that our cases permit ***anything short of an unambiguously conferred right*** to support a cause of action brought under 1983."). In short, the district court's subtle characterization of the limited provisions above as "sufficiently" unambiguous is belied by its acknowledgement that, even under its own analysis, the statute contains some degree of ambiguity.[9] Any ambiguity in the statutory language necessarily *precludes* a finding of an individually-enforceable federal right. *31 Foster Children v. Bush*, 329 F.3d 1255, 127 (11th Cir. 2003).

b. *The Legislative History Of HAVA Does Not Clearly And Unambiguously Indicate A Grant To Individuals Of A*

[9]While all this Court need conclude is that HAVA contains ambiguity with respect to the creation of federal rights, Appellant maintains that HAVA unambiguously does ***not*** create these alleged rights.

Federal Right To Vote Provisionally In Federal Elections.

The legislative history of HAVA does not clearly and unambiguously indicate a grant to individuals of a federal right to vote provisionally in federal elections. Initially, it must be observed that the district court improperly relied upon legislative history to interpret HAVA when the language of HAVA itself is plain and controlling. *See Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 610 n.4 (1991) (legislative history of a statute may be used if there are ambiguities in the text). Indeed, the district court's reliance on legislative history is yet a further indication that it perceived the plain language of the statute to be ambiguous with respect to an individually-enforceable private right. In any event, for every quotation taken from the floor debates relied upon by the district court, a contrary interpretation or an opposing viewpoint can be cited. For instance, the district court suggested that Senator Christopher Dodd's statement acknowledging the absence of a private right of action in HAVA has no bearing on HAVA's creation of an individually-enforceable right. Senator Dodd's statement simply cannot legitimately be read as the district court suggests:

> While I would have preferred that we extend [a] private right of action . . ., the House simply would not entertain such an enforcement provision. Nor would they accept federal judicial review of any adverse decision by a State administrative body. However, the state-based administrative procedure must meet basic due process

> requirements and afford an aggrieved party a hearing on the record if they so choose.

148 Cong. Rec. S 10504 (daily ed. Oct. 16, 2000) (statement of Senator Dodd). Senator Dodd simply would have no reason to have voiced his concern if he believed that HAVA could be enforced through 42 U.S.C. § 1983.

Likewise, the district court simply failed to acknowledge the testimony of the National Council of LaRaza, which asserted that HAVA "[c]ontains weak enforcement provisions:"

> Voters who are denied their right to vote because of this law *cannot turn to the federal courts for a remedy.* Rather, disenfranchised voters must either wait for the Department of Justice to take action or ask the same state election system that disenfranchised them to determine that there is a violation and provide a remedy for the problem.

148 Cong. Rec. S 10501 (daily ed. Oct. 16, 2002). Once again, the availability of an enforceable right under 42 U.S.C. § 1983 would have eliminated such concerns. However, the National Council of LaRaza opposed the passage of HAVA *for the very reason cited.*

Here, by implying a private right of action under HAVA, the district court would invite countless lawsuits. Permitting such §1983 causes of action would have different federal judges: a) interpreting different state election laws, b) mandating varying levels of compliance therewith, and, c) acting as *de facto* state elections officers running state elections. Indeed, if congress intended HAVA to

specifically define what voter eligibility means in every state or **otherwise mandate some sort of uniform standard – to be utilized in every state –** it would have done so. HAVA does not preempt state law, it uses and relies upon it, providing guidance to the states - without stripping them of their rights to administer federal and state elections. Clearly, the Elections Clause of the United States Constitution, Art. I § 4, cl.1 provides, "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."

In the present case, the District Court's interpretation creates the very instability Congress sought to avoid and raises significant questions under the both Qualifications and the Elections Clauses, U.S. Const. Art, I §§ 2,4; Amend. XVII, cl.2. Given the plain language of the statute, and these constitutional concerns, HAVA cannot be read to permit federal judges to rewrite state electoral qualifications, to preempt state election law, or to permit federal judges to run state elections. Instead, HAVA relies upon state election law providing guidance and support to the states- without stripping them of their rights.

2. HAVA Contains An Exclusive Enforcement Scheme That Is Wholly Incompatible With An Individual's Enforcement Under 42 U.S.C. § 1983.

HAVA contains an exclusive enforcement scheme wholly incompatible with an individual's enforcement under 42 U.S.C. § 1983. Thus, even if HAVA clearly and unambiguously conferred rights upon voters that were theoretically enforceable under 42 U.S.C. § 1983, Plaintiffs' claim would nonetheless be barred. *See, e.g.*, *Smith v. Robinson*, 468 U.S. 992, 1004-5 (1984); *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423 (1987).

HAVA provides Plaintiffs with two, exclusive, mandatory enforcement procedures. First, the Act vests primary federal enforcement authority with the United States Attorney General, who may bring a federal civil action to obtain declaratory or injunctive relief necessary to enforce HAVA. 42 U.S.C. § 15511 provides:

> The Attorney General may bring a civil action against any state or jurisdiction in an appropriate United States District Court for such declaratory and injunctive relief (including temporary restraining order, a permanent or temporary injunction, or other order) as may be necessary to carry out the . . . requirements under [§15481-§ 15483].

Not surprisingly, Plaintiffs do not allege that they have made any attempt to contact the United States Attorney General or to pursue this clear avenue of relief in any manner whatsoever. Second, an aggrieved person may pursue a state administrative appeal—the availability of which HAVA mandates—in which he or she may assert violations of HAVA. 42 U.S.C. § 15512(a) requires states "to

establish and maintain" such a process. This administrative procedure must contain several very specific elements that are wholly protective of due process. Ohio has adopted an administrative procedure that complies with the requirements of 42 U.S.C. § 15512. See The Ohio State Plan, "A State Plan to Implement the Help America Vote Act of 2002 in accordance with Public Law 107-252, 253(b)." Fed. Reg. Vol. 69, No. 57, pp. 14870-14895 (Wed. Mar. 24, 2004) (the "Ohio State Plan."). Plaintiffs here have not chosen to avail themselves of this administrative process. Moreover, the existence of these two alternate and elaborate mechanisms for enforcement entirely undercut the notion that Congress intended 42 U.S.C. § 1983 to be available as an enforcement mechanism.[10] As the United States Supreme Court has held, "courts must be especially reluctant to provide additional remedies" when Congress has provided specific statutory remedies. *Karahalios v. Nat'l Fed. of Fed. Employees*, 489 U.S. 527, 533 (1989). See also *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).

D. THE DISTRICT COURT ERRONEOUSLY GRANTED PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION ENJOINING AND RESTRAINING THE OHIO SECRETARY OF STATE FROM APPLYING THE PROVISIONS OF OHIO SECRETARY OF STATE DIRECTIVE 2004-33.

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[10]As in *Middlesex Cty. Sewerage Authority v. Nat. Sea Clammers*, 453 U.S. 1 (1981), it strains credulity to suggest that Congress intended to preserve a right under 42 U.S.C. § 1983 when it created these specific statutory remedies that fully protect citizens.

Plaintiffs claim, and the District Court agreed, that Directive 2004-33 conflicts with the terms of HAVA. Preliminarily, the district court fails to recognize that HAVA leaves the determination of voter eligibility up to the states. Further, the district court erroneously defines the term “jurisdiction” to mean county instead of “precinct in finding that HAVA does not require a voter’s residence in the “precinct” to be able to vote provisionally. The HAVA statute requires that a voter must be eligible to vote in the "jurisdiction" in which his or her vote is cast. See *Bell, supra.,* 235 F.Supp.2d at 776.

Instead of limiting the term "jurisdiction" with a specific definition, HAVA provides that the "appropriate" state election official is to make decisions as to the would-be voter's eligibility to vote "under State law." 42 U.S.C. § 15482(a)(4). Thus, under the very terms of HAVA, state law determines voter eligibility. Ohio election law has established a precinct-based system. See R.C. 3503.01. Since Ohio law requires a citizen who wishes to vote to do so only in the precinct in which he or she is eligible – i.e, in the precinct in which he or she resides – Directive 2004-33 is necessarily consistent with the terms of HAVA. As previously noted, HAVA provides, with respect to provisional voting, as follows:

> PROVISIONAL VOTING REQUIREMENTS. ---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 as follows:
>
> (1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.
>
> (2) The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is –
>
> (A) a registered voter in the jurisdiction in which the individual desires to vote; and
>
> (B) eligible to vote in that election.
>
> (3) An election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual under paragraph (2) to an appropriate State or local election official for prompt verification under paragraph (4).
>
> (4) If the appropriate State of local election official to whom the ballot or voter information is transmitted under paragraph (3) 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.

42 U.S.C. § 15482, Section 302(a)(1)-(4). Thus, HAVA requires that a voter must be eligible to vote in the "jurisdiction" in which his or her vote is cast. See also *Bell*, 235 F.Supp.2d at 776 ("Residency within the precinct is a *crucial*

qualification. * * * One simply cannot be a 'qualified elector' entitled to vote unless one resides in the precinct where he or she seeks to cast a ballot."); *Bell*, 367 F.3d at 592 ("Eligible voters, at a minimum, are those who qualify as bona fide residents of the precinct in which they are registered or wish to register to vote.") (citations omitted).

Instead of limiting the term "jurisdiction" with a specific definition, HAVA provides that the "appropriate" state election official is to make decisions as to the would-be voter's eligibility to vote "under State law." 42 U.S.C. § 15482(a)(4). Thus, under the very terms of HAVA, state law determines voter eligibility. Ohio election law has established a precinct-based system. See R.C. 3503.01. Since Ohio law requires a citizen who wishes to vote to do so only in the precinct in which he or she is eligible – i.e, in the precinct in which he or she resides – Directive 2004-33 is necessarily consistent with the terms of HAVA.

The district court's order mandates that state election officials promote and facilitate felonious conduct in violation of Ohio Revised Code § 3599.12 which provides in pertinent part:

> **3599.12 Illegal voting.**
>
> (A) No person shall do any of the following:
>
> (1) **Vote or attempt to vote in any primary, special, or general election in a precinct in which that person is not a legally qualified elector**; * * *

> (B) Whoever violates division (A) of this section is guilty of a felony of the fourth degree.

In so disregarding state law and Ohio's right to conduct elections - under the direction of its Chief Elections Official - the district court has confused the purpose of HAVA and misunderstood congress' intent. If Congress had intended HAVA to establish uniform, standard voter eligibility standards throughout the 50 states, it would have done so instead of leaving that determination up to the states and their legislative bodies. Clearly, what the district court has mandated will lead to voters' casting uncounted and/or uninformed votes – to the detriment and disenfranchisement of other voters.

Moreover, although the plain language of HAVA leaves little doubt about the authority of the state to determine appropriate voting procedures, the District Court also ostensibly ignored the overwhelming sentiment of HAVA's drafters with respect to the drafters' desire to reserve, consistent with Constitutional principles, questions of voter eligibility to the states. As Senator Christopher Dodd stated regarding HAVA's conference report:

> [N]othing in this bill establishes a Federal definition of when a voter is registered or how a vote is counted ... . Whether a provisional ballot is counted or not depends on state law, and the conferees clarified this by adding language in section 302(a)(4) stating that *a voter's eligibility is determined under State law.*

148 Cong. Rec. S 10510 (daily ed. Oct. 16, 2002) (statement of Senator Dodd) (emphasis added).

Not only does state law determine voter eligibility under HAVA, it also governs whether votes that are cast will be counted. Joining Senator Dodd in his recognition of the role that state law plays with respect to the issuance and counting of provisional ballots, Senator Kit Bond stated as follows:

> If it is determined that the voter is registered in a neighboring jurisdiction and state law requires the voter to vote in the jurisdiction in which he is registered, meaning the vote was not cast in accordance with State law, the vote will not count. *It was contemplated by the authors of this statute that under such circumstances, the vote will not count.*

148 Cong. Rec. S 10491 (daily ed. Oct. 16, 2002) (statement of Senator Bond) (emphasis added). Senator Bond also predicted the scenario posited by the District Court, where an individual arrives to vote at the wrong polling place. Senator Bond stated:

> Additionally it is inevitable that voters will mistakenly arrive at the wrong polling place. If it is determined by the poll workers that the voter is registered but has been assigned to a different polling place, it is the intent of the authors of this bill that the poll worker can direct the voter to the correct polling place. In most States, the law is specific on the polling place where the voter is to cast his ballot. Again, this bill upholds state law on that subject.

Id. (emphasis added). Senator Bond could not have more squarely addressed the same issues addressed by Directive 2004-33. Under Directive 2004-33, poll

workers are to confirm that the would-be voter is indeed a resident of the precinct in which the would-be voter wishes to vote. If the poll worker determines that the person is not a resident of that precinct, i.e., the person is not an eligible voter in that precinct under Ohio Revised Code § 3503.01, the poll worker is to "direct the voter to the correct polling place." This analysis promotes collecting **votes that will actually count** and is consistent with the ruling in nearly every jurisdiction that has passed on the issue.[11] A significant number of states' provisional ballot statutes have the same or similar effect as Ohio statutes and Directive 2004-33 have in this state. [12]

Under Directive 2004-33, anyone who qualifies as an otherwise "eligible" voter[13] and who wishes to vote, may vote. Directive 2004-33 reflects state law.

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[11]See, e.g., *American Fed'n of Labor & Congress of Indus. Orgs. v. Hood*, No. SC-04-1921, 2004 WL 2331776 (Fla. Oct. 18, 2004); *Colorado Common Cause v. Davidson*, No. 04CV7709, (Co.Tr.Ct. Oct. 18, 2004); *Hawkins v. Blunt*, No. 04-4177-CV-C-RED, (E.D.Mo. Oct. 12, 2004).

[12]See, e.g., Ala. Code § 17-10A-2(b) (1975 & Supp. 2003); Ariz. Rev. Stat. § 16-584C (2004); Colo. Rev. Stat. § 1-9-304.5 (2004); Fla. Stat. Ann. § 101.048 (West 2004); Mass. Gen. Laws ch. 54, § 76C (2004); Mich. Comp. Laws § 168.523a (2004); Mont. Code Ann. § 13-13-601 (2003); Neb. Rev. Stat. § 32-915 (2003); Nev. Rev. Stat. 293.3082 (2003); N.J. Stat. Ann. § 19:53C-20 (West 2003); Ohio R.C. 3599.12; Okla. Stat. tit. 26 § 16-203 (2003); S.C. Code Ann. § 7-13-820 (Law. Co-op. 2003); S.D. Codified Laws § 12-18-40 (Michie 2003); Tenn. Code Ann. § 2-7-112 (2003); Tex. Elec. Code Ann. § 63.011 (2004); Va. Code Ann. § 24.2-653 (Michie 2002); W.Va. Code § 3-2-1 (2004); Wyo. Stat. Ann. § 22-15-105 (Michie 2002).

The law is well settled that a state may not place unreasonable burdens on an individual's right to vote. See, e.g., *Brudick v. Takushi*, 504 U.S. 428 (1992). However, "it does not seem to be much of an intrusion into the right to vote to expect citizens, whose judgment we trust to elect our government leaders, to be able to figure out their polling place." *Colorado Common Cause*, *supra*, slip op. at 25. Thus, in light of Ohio law, under no reasonable interpretation of HAVA may the intent or application of Directive 2004-33 be considered deleterious to a voter's franchise.

The District Court's Order creates the heightened potential for voter fraud, anarchy at the polling places, and dilution of the votes of others. The possibility that election precinct chaos and confusion will drive away those voters who diligently located their correct polling place presents no less substantial harm than the possibility of a voter who did not show such diligence merely being directed to a precinct in which that errant voter is eligible.

The state's compelling interest in preventing voter fraud is demonstrably furthered by conducting elections in the smallest geographic units possible. The District Court's Order has the effect of, essentially, emasculating well-established

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[13]That is, anyone who is a United States citizen who is of the age of 18 years or over and who has been a resident of the state 30 days immediately preceding the election at which the citizen offers to vote, is a resident of the county in which the

election statutes and putting in place a county-wide election system. Prior to Injunction, Ohio's election system took into account the wisdom of the legislature and the Defendant, increased the chances that election officials know the individual voters and vice versa, and had the effect of the right hand in one precinct knowing what the left hand is doing in another precinct.

VIII. CONCLUSION

For the foregoing reasons, Appellant respectfully urges this Court to reverse the district court's October 14, 2004 and its subsequent related Orders in this case.

Respectfully submitted,

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citizen offers to vote, and has been registered to vote for 30 days.

Special Counsel for Appellant Secretary of State
J. Kenneth Blackwell

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

The undersigned counsel for Appellant hereby certifies that the foregoing Appellant's Proof Brief complies with the type-volume limitations set forth in Fed.R.App.P 32(a)(7)(B) and Sixth Cir.R. 32(a) because this brief contains 10,732 words, including all parts. 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 Office Word 2003 in 14-point Times New Roman font.

_____

RICHARD G. LILLIE

CERTIFICATE OF SERVICE

A copy of the foregoing was served on the 21st day of October, 2004 via email to the following:

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ADDENDUM

UNPUBLISHED DISPOSITIONS

Fed'n of Labor & Congress of Indus. Orgs. v. Hood, No. SC-04-1921, 2004 ..

WL 2331776 (Fla. Oct. 18, 2004)

Color*ado Common Cause v. Davidson*, No. 04CV7709, (Co.Tr.Ct. Oct. 18, 2004)

Hawkins v. Blunt, No. 04-4177-CV-C-RED, (E.D.Mo. Oct. 12, 2004)

Northampton County Democratic Party v. Hanover Township, No. Civ.A.04-CV-00643, 2004 WL 887386 (E.D.Pa. April 26, 2004)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE SANDUSKY DEMOCRATIC PARTY, *et al.*,	:	
Plaintiffs-Appellees,	:	
v.	:	Consolidated Case Nos. 04-4265 & 04-4266
J. KENNETH BLACKWELL,	:	
Defendant-Appellant.	:	

On Appeal from the United States District Court
for the Northern District of Ohio, Western Division

Pursuant to Sixth Circuit Rule 30(b), Appellant hereby designate the following items as items to be included in the appendix.

Description of Entry	District Court	Number
District Court Docket Sheet Case No.1:02-CV2037	current	n/a
Complaint	1	9/27/04
Motion for Preliminary Injunction	2	9/27/04
Memorandum in Support of Motion For Preliminary Injunction	3	9/27/04
Amended Complaint for Declaratory And Injunctive Relief	4	10/1/04
Motion to Intervene as a Party filed by Gregory L. Arnold, Thomas W. Noe, Glenn A. Wolfe.	8	10/04/04

Order Granting Intervenors' Motion to Intervene As Parties	12	10/07/04
Motion to Dismiss and Brief in Opposition to Plaintiffs' Complaint/Motion for Declaratory and Injunctive Relief	13	10/07/04
Notice of Manual Filing of Appendices to Motion To Dismiss and Brief in Opposition	14	10/07/04
Appendices to Motion to Dismiss and Brief in Opposition	20	10/08/04
Reply Memorandum, in Support of Motion for Preliminary Injunction	18	10/11/04
Reply Memorandum in Support of Motion for Preliminary Injunction	19	10/12/04
Notice of Filing Supplemental Authority	23	10/13/04
Order	26	10/14/04
Notice of Appeal	27	10/14/04
Notice of Appeal	28	10/14/04
Motion for Stay and Suspension of Injunction Pending Appeal	29	10/14/04
Motion for Stay of Order Pending Appeal	31	10/15/04

Respectfully submitted

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Richard G. Lillie