

FILED  
POLK COUNTY IA

04 OCT 25 AM 9:53

CLERK DISTRICT COURT

DEAN BROOKS, , PATRICIA SCHULTZ, )  
ELIZABETH ISAACSON, BEVERLY )  
PONCIN and MARK HAVLICEK, )

Plaintiffs, )

v. )

CHESTER J. CULVER, in his official )  
capacity as Iowa Secretary of State, )  
MICHAEL MAURO, in his official )  
capacity as County Auditor of Polk County, )  
Iowa, THE SPECIAL PRECINCT )  
COUNTING BOARD OF POLK )  
COUNTY, a/k/a THE SPECIAL )  
PRECINCT ELECTION BOARD OF )  
POLK COUNTY, and DARLENE )  
HATCHITT, VINCE RODRIGUEZ, )  
ROBERT LANGBEHN, MARJORIE )  
LANGBEHN, HAROLD HARKER, BEV )  
HARKER, and CATHY FUEHLING, in )  
their official capacities as members of the )  
Special Precinct Counting Board of Polk )  
County a/k/a The Special Precinct Election )  
Board of Polk County, )

Defendants. )

No. \_\_\_\_\_

**PETITION FOR DECLARATORY  
JUDGMENT, APPLICATION FOR  
PRELIMINARY INJUNCTION AND  
APPLICATION FOR WRIT OF  
MANDAMUS  
AND  
REQUEST FOR IMMEDIATE HEARING**

**COME NOW** Plaintiffs, pursuant to Iowa Rules of Civil Procedure 1.1101 and 1.1501,  
and for their Petition for Declaratory Judgment, Application for Preliminary Injunction and  
Application for Writ of Mandamus, state as follows:

**PETITION FOR DECLARATORY JUDGMENT**

**I. SUMMARY OF THE CASE AND RELIEF SOUGHT**

1. This is a suit to declare the validity of, and require Defendant election officials to  
enforce, Iowa's existing election laws, which require that provisional ballots must be cast in the  
correct precinct of the voter in order to be valid and counted, in the face of election-eve efforts

by Defendant Secretary of State to ignore Iowa statutes and unilaterally do away with Iowa's long-established precinct-based voting requirement, and permit "Stop-and-Shop" voting or "county-wide" voting by voters in precincts in which their names do not appear on the official election register and in which they do not reside, using "provisional" ballots<sup>1</sup>, under the incorrect assertion that a recent federal statute conflicts with and forbids precinct voting in states such as Iowa, which have precinct-based voting.

2. Plaintiffs seek to enjoin Defendants from disregarding and acting in contravention of existing Iowa law and precinct-based voting requirements. Such action, if taken by Defendant election officials, would not only be unlawful, but would produce election day chaos in Iowa, increased voting irregularities, confusion, uncertainty, and would delay or prevent an accurate count of all valid ballots. Such potential actions by Defendants, if not restrained before the November 2 general election, would move the Iowa election tally from the ballot box to precinct-based counting room debates over a substantially increased number of "provisional" or "challenged" ballots cast by ineligible voters (in wrong precincts), not only assuring delay, but increasing the risk of voting irregularities, the counting of invalid votes, inaccurate or uncertain ballot tabulation, and, almost certainly, litigation. Such a directive allowing "Stop-and-Shop" voting would also disenfranchise voters by either allowing them to vote in an election for which

---

<sup>1</sup> A provisional ballot is a ballot provided to an individual who appears at a polling location to vote, but whose name does not appear on the official list of eligible voters for that precinct. If the individual nevertheless claims he or she is eligible to vote and desires to vote at that location, a "provisional" ballot is then provided to the voter pursuant to the procedures and conditions set forth in Iowa Code §§ 49.77 and 49.81, copies of which are attached hereto for the Court's convenience as Exhibits B and C. Provisional ballots have also been referred to as "challenged" or "special" ballots in Iowa.

they are not qualified to vote and thereby canceling out the vote cast by a resident that does live in that district, or alternatively, the provisional voter would be denied opportunity to cast a ballot in local races in which he or she is lawfully entitled to vote by being at the wrong precinct.

3. The timing of Defendant Secretary of State's actions as described herein follows and coincides with recent and ongoing efforts by the Democratic Party, and interest groups sympathetic to its position, to overturn precinct-based voting requirements in numerous other states, i.e., to invalidate state laws, like Iowa's, which are designed to assure only those votes cast by voters who are properly registered, reside in, and are qualified and eligible to vote in the precinct in which their ballot is cast, are counted. Similar efforts to obtain "Stop-and-Shop" voting by judicial fiat have been sought by Democratic Party organizations and allied Groups in Florida, Colorado and Missouri. In all these cases, the effort to overturn precinct voting has been denied<sup>2</sup>. Orders in two other states, Ohio and Michigan, which initially nullified precinct-based voting, have now been reversed or stayed on appeal, such that there is now no currently effective judicial decision anywhere in the country that has nullified state precinct voting requirements on the basis of alleged HAVA pre-emption.

4. . . . Because of the immediacy and irreparable nature of the harm to these Plaintiffs and the Iowa general election process, an immediate hearing is requested for the issuance of a preliminary injunction, enjoining Defendants from disregarding and acting in contravention of existing Iowa law requiring precinct-based voting in the acceptance and counting of provisional ballots.

---

<sup>2</sup> Hawkins v. Blunt, Case No. 04-4177-CV-C.RED (W.D. Mo. Oct. 12, 2004); Colorado Common Cause v. Davidson, Case No. 04-CV-7709 (Colo. State Dist. Ct. October 18, 2004); and The Florida Democratic Party v. Hood, Case No. 4:04-CV-395-RH/WCS (N.D. Fla. October 21, 2004).

## II. PARTIES

5. Plaintiffs Dean Brooks, Patricia Schultz, Elizabeth Isaacson, Beverly Poncin and Mark Havlicek are all citizens of Iowa, residents of Polk County, and registered voters of Polk County. Plaintiffs have voted in past elections in their respective correct precincts in Polk County, Iowa, in person or by legal absentee ballot specific to their precinct, and intend to vote or have voted in the November 2, 2004, general election in their correct precincts or by legal absentee ballot specific to their correct precinct, in Polk County, Iowa.

6. Defendant Chester J. Culver is sued in his official capacity as Iowa Secretary of State, and maintains his official office in Polk County, Iowa. As Secretary of State, Defendant Culver is designated by the Iowa Code as the State Commissioner of Elections. Iowa Code §47.1 (2003). In that role, he is charged under the applicable statutes with the supervision of county election commissioners (county auditors). As State Commissioner of Elections, Defendant Culver prescribes rules, practices and procedures as directed by election laws, including forms to be used in the conduct of elections, and adopts rules necessary to carry out his electoral duties. This includes administering proper voter registration verification, polling place procedures, ballot issuance, ballot return, tabulation of ballots, and other election procedures required by Iowa law and essential to the conduct of a fair, impartial, orderly and accurate election.

7. Defendant Michael Mauro is sued in his official capacity as Auditor of Polk County and is a resident of Polk County. Under Iowa law, each county auditor is designated as the County Commissioner of Elections, conducts voter registration, and is responsible for conducting all elections within the county. Iowa Code §47.2 (2003). This includes provisional

ballot procedures, the administration of polling place procedures, ballot issuance, ballot returns, and tabulation as above set forth.

8. Defendant Special Precinct Election Board, also referred to as the Special Precinct Counting Board, is charged by statute with duties relating to provisional ballot review, including the determination of voter eligibility and whether or not a particular provisional ballot cast in Polk County is valid under Iowa law, and thus whether it will be counted in the general election. Iowa Code §53.22 (2003). Individual Defendants Darlene Hatchitt, Vince Rodriguez, Robert Langbehn, Marjorie Langbehn, Harold Harker, Bev Harker and Cathy Fuehling are sued in their official capacities as members of that Board appointed to date by the County Auditor.

### III. SUMMARY OF ALLEGATIONS

9. Plaintiffs seek a declaratory judgment confirming the validity of Iowa election laws and statutes, which require, and have long required, that eligible voters cast ballots in their correct precinct, in order to have those votes counted (including provisional ballots), and specifically confirming that these Iowa statutes are in conflict with or have been pre-empted by a federal statute, the "Help America Vote Act" (hereinafter "HAVA"). 42 U.S.C. §15482, *et. seq.* (2004). To the contrary, HAVA expressly and specifically left to state law the determination of eligibility.

10. Iowa Code §49.9 states:

"No person shall vote in any precinct but that of the person's residence."

(A copy of §49.9 is attached for the Court's convenience as Exhibit D).

11. Plaintiffs seek a declaratory ruling that:

Iowa law requiring that provisional ballots be cast by a registered voter in the precinct in which the voter resides in order to be valid and counted does not conflict with and is not pre-empted by the

provisions of the Help America Vote Act, specifically HAVA §302, 42 U.S.C. §15482.

#### IV. CHRONOLOGY OF EVENTS LEADING TO THIS PETITION

12. On or about October 12, 2004, Defendant Culver forwarded a written request for an opinion of the Iowa Attorney General's office as to whether two provisions of Iowa election law have been impacted by HAVA<sup>3</sup>. Mr. Culver's letter request is attached hereto as Exhibit A. The second of the issues raised in Mr. Culver's letter is the subject of this Petition: whether or not HAVA is in conflict with and pre-empts Iowa law, which has long required that votes, including provisional ballots, must be cast in the correct precinct in order to be valid and counted. Iowa Code §49.9 (2003).

13. In his letter, Mr. Culver expresses his personal view and his inclination, if permitted, to interpret Iowa precinct-based voting requirements as having been pre-empted by HAVA, such that, unless enjoined, he is likely to direct Iowa county auditors and election officials under his jurisdiction and supervision to ignore Iowa's precinct-based voting requirements and permit the counting of votes cast by voters in any precinct or polling place of their choice within the county in which they are registered. (See Ex. A, p.3). Mr. Culver does not explain in his letter why he seeks this additional opinion at this late date in light of his statement in his letter that the Attorney General had already previously rendered "informal legal advice" to him that "*consistent with past Iowa practice and the interpretation of Code §49.9,*" the Secretary of State "has advised county auditors that a provisional ballot cast by an Iowa voter

---

<sup>3</sup> On October 20, the Attorney General issued a written letter providing "informal advice" as to the first issue, involving the effect of a failure of a voter to check the "citizenship" box on the ballot application. That issue is not involved in this Petition. Since HAVA was passed in October of 2002, it is not clear why Secretary of State Culver waited until only 21 days before the 2004 general election to issue his opinion request letter and suggest he might not require precinct-based voting.

in the 2004 general election *will not in fact be counted* if an otherwise eligible voter is later determined to have voted in the right county but wrong precinct.” (*Id.* p.4). (emphasis added).

14. Late in the afternoon on Friday, October 22, Attorney General Thomas Miller issued a letter of “informal legal advice”, stating to Secretary of State Culver the view that election officials now need *not* follow Iowa statutory law requiring precinct-based voting, and that voters may cast provisional ballots in any precinct of the county in which they are registered, and have them counted, regardless of whether the voter is on that precinct’s official election register or resides in that precinct. (Letter of Attorney General of October 22, 2004, attached as Exhibit E, p.7)<sup>4</sup>.

15. The Attorney General’s “informal advice” letter cited only two court decisions in support of his conclusion, a federal district court order from Ohio and a federal district court order from Michigan.<sup>5</sup> Since the issuance of the Attorney General’s letter on October 22, however, the Sixth Circuit Federal Court of Appeals has summarily reversed, in a *per curiam* opinion, the Ohio District Court’s conclusion that HAVA pre-empted precinct-based voting requirement. *Sandutsky County Democratic Party et al., v. [Insert Defendants]*, (6<sup>th</sup> Cir., Nos. 04-4266, 04.4266) (filed October 23, 2004), copy attached hereto as Exhibit K. Similarly, on Sunday, October 24, the Sixth Circuit stayed the order of the District Court in Michigan pending expedited appeal and briefing. See Exhibit M. The prompt reversal and stay orders of

---

<sup>4</sup> The Attorney General’s October 22 letter addressed only the second issue of Secretary Culver’s opinion request letter – provisional balloting.

<sup>5</sup> Attorney General glossed over discussion of the then three contrary court decisions from Missouri, Florida and Colorado which upheld precinct-based voting requirements and rejected the claim that HAVA “pre-empts” precinct-based voting requirements.

the Sixth Circuit now establish that the informal advice letter and conclusion of the Attorney General is without supporting authority from any court in the country.

16. Also omitted from the Attorney General's "informal advice" letter of October 22 was any discussion of critical statements found in the Congressional Record concerning the legislative intent of Congress when HAVA was enacted, which clearly demonstrate there was no intent that HAVA displace state precinct voting requirements. See 148 Cong. Rec. S 10,000, 491 (October 16, 2002), (statement of Senator Bond) ("It is not the intent of the authors to overturn state laws regarding registration or state laws regarding the jurisdiction in which a ballot must be cast to be counted...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*") (emphasis added); *Id.* at 10,493 (statement of Senator Bond) ("This provision is in *no way intended to require any state or locality to allow voters to vote from any place other than the polling site where the voter is registered.*") (emphasis added); *Id.* at S 10,508 (statement of Senator Dodd) ("*Nothing in this conference report establishes a rule for when a provisional ballot is counted or not counted.* Once a provisional ballot is cast, it is within the sole authority of the state or local election official to determine whether or not that ballot should be counted, *according to state law.*") (emphasis added). Also omitted from the Attorney General's letter was any mention of the letter of October 21, 2004, co-signed by congressional sponsors of HAVA, Representative Ney and Senator Bond, sent to all Secretaries of State in the country, confirming that there was no intent in the passage of HAVA to pre-empt state mandated precinct voting. (See Exhibit L attached).

17. This void of any authoritative legal support for the Attorney General's "informal advice" and conclusions, combined with the potentially disastrous consequences of the Secretary of State implementing county-wide voting in violation of Iowa law virtually on the eve of the

November 2 general election, dictates that the Attorney General ought now withdraw his “informal advice” letter, but if he does not do so, this Court should promptly act to enjoin the Secretary of State and other Defendants from implementing county-wide voting in direct violation of Iowa’s mandated precinct voting laws.

V. **FAILURE OF DEFENDANTS TO ENFORCE EXISTING IOWA PRECINCT-BASED VOTING LAWS WOULD BE UNLAWFUL AND WOULD SEVERELY DISRUPT THE IOWA GENERAL ELECTION**

18. For reasons that will be set forth in briefs to be filed in support of this Petition, the proposition that HAVA conflicts with and has pre-empted Iowa’s legitimate and long-established precinct-based voting system and requirements for provisional ballot voting is incorrect and is a misreading of HAVA. Plaintiffs will show that the express language of HAVA and its legislative history in Congress, to the contrary, evidence a clear intent by Congress that HAVA was not intended to, and does not, supplant or pre-empt local voting eligibility requirements of the several states, such as precinct-based voting requirements.

19. Any effort by Defendants to abandon or refuse to enforce Iowa laws and precinct-based voting requirements for provisional ballots, initiated virtually on the eve of the November 2 general election, would not only be contrary to Iowa law, but raises the likelihood of election day chaos in Iowa, increased voting irregularities, confusion, delay, and election inaccuracies. Such action also has the potential to overwhelm the limited resources of respective county auditors to staff and administer certain polling places, which are not adequately prepared to manage an unpredictable influx of voters not properly registered in that precinct, or to deal with the substantial increase in the number of voters who may seek to cast provisional ballots, as will undoubtedly occur if the interpretation suggested by Mr. Culver is applied. Such situation will lead to the disenfranchisement of voters and the creation of chaos in the conduct of the

election. Further, any abandonment of precinct-based voting requirements and attempted administrative nullification of Iowa law and Iowa's precinct-based voting requirements by Defendants would impose significant uncertainty and additional burdens on the Special Precinct Counting Board, created by statute and appointed by the county auditor to review the validity of, and count, provisional ballots. In all respects such action threatens to disrupt a fair, legitimate, orderly and accurate election process in Iowa, including substantially delaying the final counting and determination of the validity of provisional ballots.

20. Pursuant to the statutory requirement that voters must vote in the proper precinct in order to have their votes considered valid and counted, Iowa's well-organized and historical precinct-based voting system is the foundation on which Iowa's election structure and voting procedures are based. This includes, but is not limited to, the basis for assignment by county auditors of important resources such as the number of poll workers and the number of ballots to be allocated to each precinct, which, in turn, is based on the number of registered voters in the precinct and historical precinct turnout. Such localized, precinct-based voting has long been recognized and served Iowa well as a valid deterrent and safeguard against voting irregularities and fraud.

21. An actual and justiciable controversy exists between Plaintiffs on the one hand and Defendants on the other as to the validity and enforcement of existing Iowa law requiring precinct-based voting for the casting and counting of provisional ballots, and whether these provisions of Iowa law are in conflict with or have been pre-empted by the provisions of HAVA. The letter of Mr. Culver reveals that the prospect of him choosing not to follow established Iowa law requiring precinct-based voting in the conduct of the general election of November 2 is a real and imminent threat. A declaratory ruling declaring the rights of the parties on these issues and

consideration of injunctive relief by this Court is necessary before the November 2 general election.

22. The issue presented by this declaratory judgment action is of immediate and great importance to these Plaintiffs, election officials charged with overseeing and administering the Iowa general election, and to the citizens of Iowa. These Plaintiffs, and all other Iowa registered voters who intend to vote lawfully in their correct precinct, have a vested interest and constitutional right to fair, impartial and orderly elections in accordance with state law, and are at risk of having their validly cast votes in the November 2 election offset and diluted by ineligible and invalid provisional ballots cast and counted in contravention of longstanding Iowa law, thus suffering immediate and irreparable harm.

23. Further, the rights of these Plaintiffs to a fair and proper election on local issues and local candidates specific to their respective precincts would be prejudiced by permitting and counting provisional ballots cast by voters who live outside Plaintiffs' precincts, who have no standing, stake or right to vote on local issues pertaining to precincts in which they do not reside. Iowa's ballot forms, including provisional ballots, are precinct specific; i.e., local elected offices and issues are different from ballot to ballot, depending on the geographic location of the particular voting precinct. As such, Iowa's precinct-based voting requirement is essential to assure that only votes cast in the proper precinct and by those voters who are entitled to vote on the local issues and local elective offices reflected on each precinct's ballot will be counted. Abandoning precinct-based voting and permitting "county-wide" voting, as suggested by Mr. Culver, allowing voters to cast a vote at any precinct of their choosing within the county, and have that vote counted, irrespective of local races and issues being voted upon in a given precinct, would unlawfully and unfairly nullify and dilute the votes of legitimate precinct voters,

create confusion, impose undue burdens on local precinct election officials, and would improperly permit voters to cast ballots on local issues and local candidates as to which they are ineligible and have no stake. Further, if different rules are to apply to federal votes than to non-federal votes, as the Attorney General's letter seems to suggest, election officials will have to parse and review each individual provisional ballot to determine whether the voter was eligible to vote for the non-federal candidates on his provisional ballot. This will cause significant delays and will violate the doctrine of secret ballot. Also of equal concern, properly registered voters will be misled into believing they can vote outside of their correct precincts, only to later discover they will be voting on that different precinct's ballot form, which may not include their own local candidate races and issues, as well as having their provisional ballot likely declared invalid.

**WHEREFORE**, Plaintiffs pray for declaratory judgment against Defendants as above set forth, specifically entering a declaratory ruling that Iowa statutes requiring that provisional ballots be cast by a registered voter in the precinct in which the voter resides in order to be valid and counted, do not conflict with and are not pre-empted by the provisions of the Help America Vote Act, for the costs of this action, and for such other and further relief as the Court finds just in the premises.

### **APPLICATION FOR PRELIMINARY INJUNCTION**

#### **I. IRREPARABLE HARM AND BASIS FOR INJUNCTIVE RELIEF**

24. Plaintiffs incorporate by reference their allegations of Paragraphs 1 through 23 inclusive.

25. Plaintiffs have no adequate remedy at law, inasmuch as the indication of the Defendant Secretary of State that he may choose to interpret Iowa election laws as having been

pre-empted by HAVA, and thus not enforce existing Iowa law, and instruct and direct local election officials that they need not enforce long-established Iowa law and precinct-based voting requirements, will cause irreparable harm to these Plaintiffs, in the form of the offsetting or dilution of their valid votes cast in the proper precincts of their registration, by unlawful provisional ballots cast and counted in contravention of longstanding Iowa law, and thus nullifying their rights as citizens and registered voters to a fair, properly regulated, impartial, orderly and accurate election. Monetary or other legal relief cannot restore those rights lost.

26. As is demonstrated by the foregoing, and as will be further demonstrated in briefs to be filed, Plaintiffs have a substantial likelihood of succeeding on the merits.

27. Plaintiffs' Application for Preliminary Injunction has not been presented in whole or in part to, or refused by, any other Court.

28. That this Application for Preliminary Injunction is supported by the Affidavits of the respective Plaintiffs, as Exhibits F, G., H, I and J, attached hereto.

## **II. IMMEDIACY OF HARM AND REQUEST FOR IMMEDIATE HEARING**

29. The election-eve actions of Defendant Culver and the Attorney General's "informal" advice letter, now to apparently be implemented by the Secretary of State, would operate to nullify Iowa's precinct-based voting requirements and will throw election procedures into disarray and chaos, with insufficient time for county auditors to adequately respond to such changed election procedures. Adoption of the position set forth in the Attorney General "informal advice" letter by Defendant Culver that Iowa election and polling officials should abandon Iowa statutory precinct-based voting requirements with respect to provisional balloting, is an unlawful action and no degree of post-election court intervention would be sufficient to cure the harm generated by invalid, unlawful and improper provisional ballots cast and counted

in the wrong precincts, including permeating and skewing the results of local ballot issues in which the non-precinct provisional voters have no standing or stake.

30. Because of the immediacy and importance of the issues set forth above, and the likelihood that unless enjoined and restrained, Defendant Culver will issue directives to county auditors, including Defendant Mauro, which instruct them to no longer enforce existing Iowa law concerning polling place conduct with respect to provisional ballots, and the risk that the County Auditor and Special Precinct Counting Board will follow such directives as to the counting of provisional ballots, make this case appropriate for immediate injunctive relief.

31. The issues raised herein should be immediately heard and decided prior to the general election of November 2.

32. The issues herein are not such that Defendants stand to suffer monetary loss should this Application for Preliminary Injunction be granted. Plaintiffs do not seek to enjoin Defendants in a manner that will affect their livelihood or personal financial wellbeing. As such, the requirement of Iowa Rule of Civil Procedure 1.1508 requiring the posting of a bond in order to obtain temporary injunctive relief does not have application to the relief sought herein. Nonetheless, should this Court deem such a bond necessary, Plaintiffs are prepared to post a reasonable and appropriate bond to be determined by the Court in support of any injunction the Court may issue.

**WHEREFORE**, Plaintiffs pray the Court enter a preliminary injunction enjoining Defendants and each of them from 1) disregarding and acting in contravention of, or instructing any state or county election official to disregard and act in contravention, of Iowa Code §49.9 by considering as valid and counting any provisional ballot cast by any voter in a precinct other than the precinct in which the voter resides, 2) disregarding and acting in contravention of, or

instructing any state or county election official to disregard and act in contravention of, any portion of Iowa Code §§ 49.77, 49.81, 53.22 or 53.23, 3) separating, at any time, any provisional ballot from its respective envelope, attachments, or other accompanying documents or information which would indicate the precinct in which the voter resides and the precinct in which the ballot was cast, in a manner such that a post-counting review would be unable to determine which ballots were cast in a precinct in which it is later determined the voter did not reside, that the Court set a time and place for an immediate hearing on this Application for Preliminary Injunction and prescribe the method of notice to be given to Defendants of such hearing, and for such further relief as the Court may find just in the premises.

#### **APPLICATION FOR WRIT OF MANDAMUS**

33. Plaintiffs incorporate by reference their allegations of Paragraphs 1 through 32 inclusive.

34. By Defendants' offices, trust, and stations, Defendants have a duty to enforce Iowa's laws governing the conduct and determination of elections.

35. There is no other plain, speedy, and adequate remedy in the ordinary course of the law available to Plaintiffs in this action.

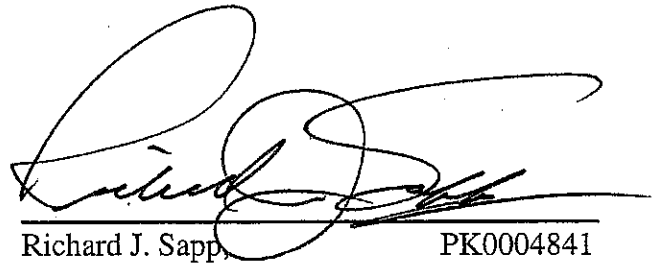
36. The issues discussed herein concern issues of personal interest to the Plaintiffs and the public interest, the importance of which requires mandamus relief.

37. Plaintiffs may or will sustain damage by Defendants' failure to perform their duties as discussed herein.

38. The attitude and conduct of certain of the Defendants has clearly manifested an intent on the part of the Defendants to fail to perform their duties as the law requires.

39. Pursuant to Iowa Code §661.16, Plaintiffs request, as necessary, a temporary order issued by this Court preventing damage or injury to the Plaintiffs during the pendency of this action.

**WHEREFORE**, Plaintiffs respectfully request the Court issue a Writ of Mandamus commanding the Defendants to enforce and follow Iowa law governing the conduct of elections, which requires that, in order to be considered valid and to be counted, ballots must be cast in the precinct in which the voter resides.



Richard J. Sapp, PK0004841

---of the firm of

NYEMASTER, GOODE, WEST,

HANSELL & O'BRIEN, P.C.

700 Walnut Street, Suite 1600

Des Moines, Iowa 50309

Telephone: (515) 283-3144

Facsimile: (515) 293-8045

**ATTORNEY FOR PLAINTIFFS**

October 12, 2004

Honorable Tom Miller  
Attorney General  
State of Iowa

Dear General Miller:

I request an opinion of your office regarding two issues of Iowa election law that could have a significant impact in the upcoming November 2, 2004 general election. Both of these issues concern the rights of voters under both Iowa and federal law, particularly as impacted by the Help America Vote Act, 42 U.S.C. section 15301 ("HAVA"), et seq., the 1964 Civil Rights Act, 42 U.S.C. section 1971(a) and changes in Iowa law in Senate File 2269 (SF 2269) enacted by the 2004 session of the General Assembly. Therefore, I respectfully request an Opinion regarding the following:

**1. Voter Registration "check the box" issues.**

HAVA in Section 303 provides that "[t]he Mail Voter Registration form developed under [the NVRA] shall include the following: (i) The question '[a]re you a citizen of the United States of America?' and boxes for the applicant to check to indicate whether the applicant is or is not a citizen of the United States . . ." 42 U.S.C. § 15483(b)(4)(A)(i). Subsection (4)(B) of the same provision states that "[I]f an applicant for voter registration fails to answer the question included on the mail voter registration form pursuant to subparagraph (A)(i), the registrar shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office."

Iowa's voter registration form, however, actually allows the voter to attest to his or her citizenship in two ways. The form (copy attached) includes the question and check-off box required by HAVA, above. It also separately asks the applicant to "Read the following and sign below: I swear or affirm that: I am the person named above . . . . I am a United States citizen . . . ." (Emphasis added).



One can argue that, if a voter signs an oath, under penalty of criminal perjury and imprisonment for five years, that he or she is a U.S. citizen, the voter has satisfactorily answered the question required by HAVA of whether the voter is a U.S. citizen. Nevertheless, pursuant to a provision in SF 2269, newly enacted Iowa Code § 48A.26(3A), our process now designates such a registration as valid "only for elections that do not include candidates for federal offices on the ballot," if the voter left blank the check-off box regarding citizenship included at the top of the form. The registrar (county auditor) then advises the voter that he or she must fill out a new registration form in order to vote in federal elections. If the voter responds by correctly filling out the form and "checking the box" and returns the form to the county auditor, then the auditor changes their status to that of an active voter and the voter will be allowed to vote in all elections, federal and local. However, if the voter fails to respond and submit the corrected form by the day before the election, the voter will not be allowed to vote in the November 2 election since there are federal positions on the ballot.

In essence, SF 2269 has established a dual registration requirement for those Iowans registering by mail, denying voters the right to vote in federal elections even though the same voter is considered fully qualified to vote in state and local elections as a U.S. citizen and even though a similarly situated voter who registers in person is not subject to the dual registration classification. Administrative Rules adopted by the Iowa Voter Registration Commission carry out the policy of SF 2269. See IAC 821-2.8(3).

We are advised that at least five other states with similar voter registration forms – Colorado, Ohio, Michigan, Washington, and Wisconsin – have already concluded that the failure to check the citizenship box should not prevent a voter registration from being processed for all federal, state and local elections, so long as the applicant signs the oath swearing that he or she is a U.S. citizen. The federal Election Assistance Commission has recently advised states that an interpretation of HAVA as we are following in Iowa would defeat the very purpose of HAVA.

Additionally, I am concerned that the apparent requirements of SF 2269 to reject applications for voter registration based on a failure to "check the box" may well be such a non-material omission on the voter registration form that it would violate an independent provision of federal law. Under 42 U.S.C. § 1971(a)(2)(B) (enacted as part of the Civil Rights Act of 1964), it is illegal for an election official to deny "the right of any individual to vote in an election because of an error or omission on any error or paper relating to an application, registration, or other act requisite to voting, if such error is not material to determining whether such individual is qualified under state law to vote in such election." When a voter swears, under penalty of criminal perjury, that he or she is a U.S. citizen, is it then immaterial that the voter may have left unchecked a duplicative box that asks precisely the same question?

Therefore, should county auditors accept as a fully completed voter registration form received by mail a form where the citizenship box is not checked, ignoring the provisions in SF 2269? Does the Voter Registration Commission need to revise its administrative rules accordingly?

## 2. Provisional ballots in the “wrong” precinct.

In the 2000 elections, poll workers in many states turned voters away from the polls without permitting them to cast a ballot because the poll workers could not find the voters' names on the official list of those eligible to vote in the given precinct. In certain cases, eligible voters' names were not on the precinct register because the voters recently moved. In other cases, names were missing simply due to election officials' failures to maintain accurate voter rolls or to inform registrants of their correct polling-place locations. Congress responded by passing certain provisions of HAVA, 42 U.S.C. §15301, *et seq.* HAVA requires that states permit “provisional” voting, which allows a voter whose eligibility to vote is in question to cast a special ballot that will be segregated from the regular ballots and will be counted later if election officials verify the voter's eligibility. 42 U.S.C. § 15482(a).

Provisional voting is not a new practice under Iowa election law. In the past, Iowa called these ballots “challenged ballots” or “special ballots”. These ballots are voted at the polling place when a voter's name does not appear on the list of registered voters for the polling place. A special ballot board reviews these ballots later and, if the ballot is determined to be from a properly registered voter in the correct precinct, the ballot is counted. Historically, few, if any, Iowa elections have turned upon the counting of provisional ballots. While some states have had difficulty in dealing with provisional ballots in primary elections earlier this year, our Iowa experience and the level of competency of our local elections officials gives me some degree of comfort that Iowa voters will not have a negative experience this year.

Iowa Code § 49.77(4) recognizes that registered voters may sometimes be missing from the election register at the precinct due to errors in the election records, or may inadvertently appear at the incorrect precinct. Under these circumstances, the person “shall not be permitted to vote, unless the person affirms that the person is currently registered in the county and presents proof of identity, or the commissioner informs the precinct election officials that an error has occurred and that the person is a registered voter of that precinct.” (Emphasis supplied). Iowa Code § 49.77(4) further provides that “If the commissioner finds no record of the person's registration but the person insists that the person is a registered voter of that precinct, the precinct election officials shall allow the person to cast a ballot in the manner prescribed by section 49.81.”

Code § 49.81(4), in turn, allows a voter subject to § 49.77(4) to cast a provisional ballot, by signing an affirmation on the ballot envelope stating:

I believe I am a registered voter of this county and I am eligible to vote in this election. I registered to vote in ..... county on or about ..... at ..... My name at that time was ..... I have not moved to a different county since that time. I am a United States citizen, at least eighteen years of age.”

(Emphasis supplied).

Thus, under Iowa law, a voter casting a provisional ballot is required only to affirm that he or she is “a registered voter of this county” (Code § 49.81(4)), not that he or she is a resident of the precinct. Indeed, prior to 2004, Code § 49.81(4) required an attestation affirming that the voter is “a registered voter of this precinct,” but that provision was amended in S.F. 2269.

In reliance on informal legal advice from your office citing to Code § 49.9, our office has advised county auditors that a provisional ballot cast by an Iowa voter in the 2004 general election will not in fact be counted if an otherwise eligible voter is later determined to have voted in the right county but the wrong precinct. This is consistent with past Iowa practice and the interpretation of Code § 49.9.

It has been suggested to us by the Iowa League of Women Voters and other groups that a state’s refusal to count a ballot for a federal election merely because the voter has voted in the wrong precinct conflicts with HAVA and is therefore unlawful under the Supremacy Clause of the United States Constitution. HAVA mandates that states collect and count provisional ballots for a federal election from any voter who affirms that he is registered “in the jurisdiction” in which he desires to vote and is eligible to vote in that federal election. 42 U.S.C. § 15482(a)(2). Although HAVA does not define “jurisdiction,” Congress directed that HAVA be construed in harmony with the National Voter Registration Act of 1993 (“NVRA”), which does define jurisdiction. 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. 42 U.S.C. § 1973gg-6(j).

HAVA in § 302(4) states that “[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.” 42 U.S.C. § 15482 (emphasis supplied). Section 302(4) does not state *where* the individual must be “eligible under state law to vote.” Since HAVA was enacted against the backdrop of the NVRA’s settled definition of “jurisdiction” and addresses the same subject as the NVRA, i.e., procedures for registering to vote and voting in elections for federal office, it is argued that the two statutes should be construed *in pari materia* because “when a new legal regime develops out of an identifiable predecessor, it is reasonable to look to the precursor in fathoming the new law.” Johnson v. United States, 529 U.S. 694, 710 (2000); see 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”). Construed in this way, § 302(4) of HAVA may well mean that if it is determined that the individual is eligible to vote within the geographic scope of the unit of government that maintains the voter-registration rolls, the provisional ballot must be counted.

Under Iowa law, the unit of government that maintains the voter registration rolls is the county. Iowa Code § 47.2(1) (providing that county auditor shall serve as county commissioner of elections and shall administer voter registration and conduct elections). Further, Iowa's Constitution sets forth the requirements for being eligible to vote in Iowa, with specific reference to residence in a county: "Every citizen of the United States of the age of twenty-one years<sup>1</sup> who shall have been a resident of this State for such period of time as shall be provided by law and of the county in which he claims his vote for such period of time as shall be provided by law, shall be entitled to vote at all elections which are now or hereafter may be authorized by law." Iowa Const., Art. II, § 1 (emphasis added). Similarly, by statute, the only requirements to be "an eligible elector" in Iowa are that the voter be a citizen of the United States, an Iowa resident, at least 18 years of age, and not claim the right to vote in more than one place. Iowa Code § 48A.5(2).

However, Iowa Code § 49.9 states that "[n]o person shall vote in any precinct but that of the person's residence,". Is that a requirement of eligibility to be an elector under Iowa law, or merely a provision regarding the location where a vote should be cast. This distinction may be underscored by the fact that Iowa law creates "special precincts" in each county for the express purpose of counting absentee and special votes, Iowa Code § 53.20, the jurisdiction of which "shall be coterminous with the borders of the county[.]" Provisional ballots "shall be considered as having been cast in the special precinct established by section 53.20 for purposes of the post election canvass." Iowa Code § 48.81(1). Thus, the provisional ballots cast for federal elections within the county can arguably be "counted in accordance with State law," as contemplated by HAVA Section 302(4), by counting them in the special precincts established by state law.

Because HAVA's requirement for provisional balloting is intended to assure the right of voters to vote in federal elections, and is keyed to voter eligibility within the "registrar's jurisdiction," the issue is then whether a provisional ballot cast by an Iowa voter must be counted with respect to federal elections if it is cast in the correct county. Has Congress in effect pre-empted state law on this issue?

Furthermore, because Iowa law specifically allows a voter casting a provisional ballot to do so by affirming that he/she is "a registered voter of this county" (not "precinct"), would it be a violation of the due process rights of voters to provide such a ballot to voters making this attestation and then invalidate the ballot for federal elections even when state officials confirm that the voter was, indeed, registered in the county? "Due process" generally requires that the party attempting to abridge a citizen's rights must, at a minimum, provide adequate notice. Is due process denied when a voter relies to his detriment on statements or representations by state or local officials? It seems to make little sense for a precinct election official to offer a voter a provisional ballot when it is not intended that the ballot will ever be counted.

---

<sup>1</sup> Of course, the 26<sup>th</sup> Amendment to the United States Constitution lowered the voting age to 18, as reflected in Code § 48A.5(2)(c).

Finally, in many parts of Iowa, a voter could be voting in the "wrong" precinct but still be voting in a precinct where all or most of the offices and candidates are identical to those for which the voter is entitled to vote in the voter's precinct of residence. Should you determine that HAVA or constitutional provisions require that provisional ballots be counted for federal offices even though the ballot is cast in the "wrong" precinct, must Iowa election officials also count votes for local or state offices cast in the wrong precinct where the voter is voting for offices and candidates for which the voter is entitled to vote in the voter's correct precinct?

I trust that you share my interest in assuring that the right of Iowa citizens to vote in the upcoming election is protected to the fullest extent possible. I hope that you are able to reconcile Iowa law with federal law in order that full compliance with both can be accomplished and the rights of Iowa voters are protected. Should I have the authority to interpret any of these provisions of Iowa or federal law, it is my inclination to do so in a way that grants the fullest possible participation rights to as many Iowa voters as, i.e., directing local election officials to register voters as fully active voters even if the "check the box" requirement is not met and directing local election boards to count provisional ballots in the manner suggested by the League of Women Voters. However, I understand that my authority may be limited by state law and therefore need further legal guidance from your office.

Iowa election officials need clear and consistent guidance both from the Secretary of State and the Attorney General. I look forward to your prompt response to this letter. As you know, with only 21 days remaining until the general election, our office needs to clarify these issues for local elections officials and for Iowa voters in a timely manner.

Sincerely,

Chester J. Culver  
Iowa Secretary of State

**49.77 Ballot furnished to voter.**

1. The board members of their respective precincts shall have charge of the ballots and furnish them to the voters. Any person desiring to vote shall sign a voter's declaration provided by the officials, in substantially the following form:

**VOTER'S DECLARATION  
OF ELIGIBILITY**

I do solemnly swear or affirm that I am a resident of the ..... precinct, ..... ward or township, city of ....., county of ....., Iowa.

I am a registered voter. I have not voted and will not vote in any other precinct in said election.

I understand that any false statement in this declaration is a criminal offense punishable as provided by law.

.....  
Signature of Voter

.....  
Address

.....  
Telephone

Approved:

.....  
Board Member

2. One of the precinct election officials shall announce the voter's name aloud for the benefit of any persons present pursuant to section 49.104, subsection 2, 3, or 5. Any of those persons may upon request view the signed declarations of eligibility and may review the signed declarations on file so long as the person does not interfere with the functions of the precinct election officials.

3. A precinct election official shall require any person whose name does not appear on the election register as an active voter to show identification. Specific documents which are acceptable forms of identification shall be prescribed by the state commissioner.

A precinct election official may require of the voter unknown to the official, identification upon which the voter's signature or mark appears. If identification is established to the satisfaction of the precinct election officials, the person may then be allowed to vote.

4. A person whose name does not appear on the election register of the precinct in which that person claims the right to vote shall not be permitted to vote, unless the person affirms that the person is currently registered in the county and

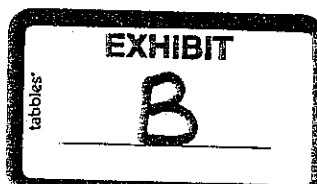
presents proof of identity, or the commissioner informs the precinct election officials that an error has occurred and that the person is a registered voter of that precinct. If the commissioner finds no record of the person's registration but the person insists that the person is a registered voter of that precinct, the precinct election officials shall allow the person to cast a ballot in the manner prescribed by section 49.81.

A person who has been sent an absentee ballot by mail but for any reason has not received it shall be permitted to cast a ballot in person pursuant to section 53.19 and in the manner prescribed by section 49.81.

5. The request for the telephone number in the declaration of eligibility in subsection 1 is not mandatory and the failure by the voter to provide the telephone number does not affect the declaration's validity.

[C97, §1114; C24, §794, 795; C27, 31, 35, §718-b20, 794, 795; C39, §718.21, 794, 795; C46, 50, 54, 58, 62, 66, 71, §48.21, 49.77, 49.78; C73, 75, 77, 79, 81, §49.77]

83 Acts, ch 176, §5; 87 Acts, ch 221, §16, 17; 88 Acts, ch 1119, §19; 94 Acts, ch 1169, §50; 94 Acts, ch 1180, §14; 98 Acts, ch 1123, §6



**49.81 Procedure for challenged voter to cast ballot.**

1. A prospective voter who is prohibited under section 49.77, subsection 4, or section 49.80 from voting except under this section shall be permitted to cast a paper ballot. If a booth meeting the requirement of section 49.25 is not available at that polling place, the precinct election officials shall make alternative arrangements to insure the challenged voter the opportunity to vote in secret. The marked ballot, folded as required by section 49.84, shall be delivered to a precinct election official who shall immediately seal it in an envelope of the type prescribed by subsection 4. The sealed envelope shall be deposited in a special envelope marked "ballots for special precinct" and shall be considered as having been cast in the special precinct established by section 53.20 for purposes of the postelection canvass.

2. Each person who casts a special ballot under this section shall receive a printed statement in substantially the following form:

Your qualifications as a registered voter have been challenged for the following reasons:

- I. ....
- II. ....
- III. ....

Your right to vote will be reviewed by the special precinct counting board on ..... You have the right and are encouraged to make a written statement and submit additional written evidence to this board supporting your qualifications as a registered voter. This written statement and evidence may be given to an election official of this precinct on election day or mailed or delivered to the county commissioner of elections, but must be received before ..... a.m./p.m. on ..... at ..... If your ballot is not counted you will receive notification of this fact.

3. Any elector may present written statements or documents, supporting or opposing the counting of any special ballot, to the precinct election officials on election day, until the hour for closing the polls. Any statements or documents so presented

shall be delivered to the commissioner when the election supplies are returned.

4. The individual envelopes used for each paper ballot cast pursuant to subsection 1 shall have printed on them the format of the face of the registration form under section 48A.8 and the following:

I believe I am a registered voter of this precinct. I registered to vote in ..... county on or about ..... at ..... My name at that time was ..... I have not moved to a different county since that time. I am a United States citizen, at least eighteen years of age.

.....  
(signature of voter) (date)

The following information is to be provided by the precinct election official:

Reason for challenge:

.....  
.....

.....  
(signature of precinct election official)

[C77, 79, 81, §49.81]  
87 Acts, ch 221, §19, 20; 94 Acts, ch 1169, §51, 64;  
2002 Acts, ch 1134, §40, 115

2002 amendment to subsection 2, unnumbered paragraph 2, takes effect January 1, 2003, and applies to elections held on or after that date; 2002 Acts, ch 1134, §115

Subsection 2, unnumbered paragraph 2 amended



## **49.9 Proper place of voting.**

No person shall vote in any precinct but that of the person's residence.

[C73, §605; C97, §1090; S13, §1090; C24, 27, 31, 35, 39, §727; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §49.9]





THOMAS J. MILLER  
ATTORNEY GENERAL

## Department of Justice

ADDRESS REPLY TO:  
HOOVER BUILDING  
DES MOINES, IOWA 50319  
TELEPHONE: 515/281-5164  
FACSIMILE: 515/281-4209

October 22, 2004

The Honorable Chester J. Culver  
Iowa Secretary of State  
State Capitol Building  
Des Moines, Iowa 50319

Dear Secretary Culver:

On October 12, 2004, you submitted a request for an opinion addressing two issues concerning the impact of the Help America Vote Act upon Iowa election practices. Because resolution of each of these issues has the potential to have a significant impact on procedures for the upcoming November 2, 2004, general election, we provide an expedited response through informal advice. This letter addresses only your second inquiry regarding provisional voting.

Section 302(a) of HAVA requires election officials to notify all individuals who appear at the polls that they may cast a provisional ballot if they declare that "they are registered voters of the jurisdiction in which they desire to vote" and that they "are eligible to vote in an election for Federal office." 42 U.S.C. 15482(a)(1). Individuals who sign a written affirmation indicating that they are registered in the jurisdiction and eligible to vote in the election must be allowed to cast a provisional ballot at that polling place. 42 U.S.C. 15482(a)(2). If upon review state or local officials determine "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)(4). In interpreting HAVA, it is important to further the purposes of the Act - to make it easier to vote and harder to cheat in elections.

The concept of provisional voting is not new to Iowa election law. For nearly thirty years, Iowa law has allowed voters whose names do not appear upon the election register for the precinct polling place at which the voters appear and voters whose qualification to vote are otherwise challenged to cast provisional ballots. These ballots have historically been referred to as challenged or special ballots. See 1975 Iowa Acts (66 G.A.) ch. 81, §§ 77-80. Under current Iowa law, a provisional ballot is available to: (1) "a person whose name does not appear on the



election register of the precinct in which the person claims a right to vote;" (2) "a person who has been sent an absentee ballot by mail but for any reason has not received it;" (3) any person appearing to vote who has been challenged as unqualified; and (4) any person who is required to show identification if the voter is unable to present identification at the polls on election day. Iowa Code §§ 49.77(4), 49.79 (2003) and 48A.8(4) as amended by 2004 Iowa Acts, ch. 90, § 6.

Your inquiry concerns only the first category of provisional voters, those who are unable to vote regular ballots at the polls because their names do not appear on the precinct election register. Questions have arisen regarding whether HAVA section 302(a) requires states to count provisional ballots which are cast in the wrong precinct by otherwise qualified registered voters of a county. It is our current understanding that the states are approximately equally split on whether or not provisional ballots cast in the wrong polling place will be counted. At least five states that have laws requiring rejection of such ballots have been sued in recent months over this practice. Orders have been issued by the United States District Courts hearing these challenges in Missouri, Ohio, Michigan, and Florida. The Ohio and Michigan courts concluded that HAVA preempted a state from rejecting a provisional ballot which was cast by an otherwise eligible registered voter solely because the ballot was cast outside of the voter's precinct of residence. Sandusky County Democratic Party v. Blackwell, \_\_\_ F.Supp.2d \_\_\_ (2004 WL 2308862) (N.D. Ohio, Oct. 14, 2004); Bay County Democratic Party v. Land, \_\_\_ F.Supp.2d \_\_\_, 2004 WL 2345560 (E.D. Mich., Oct. 19, 2004). The Missouri court upheld that state's practice of counting only those ballots which were cast in the appropriate precinct, absent evidence that the voter had been directed to the wrong polling place by election officials, thus concluding that HAVA does not require states to count provisional ballots cast in the wrong polling place. Hawkins v. Blunt, 04-4177- CV-C-RED (W.D. Mo., Oct. 12, 2004). In a decision issued on October 21, 2004, the Florida district court rejected the HAVA preemption argument, concluding that although the federal act required states to allow voters to cast provisional ballots outside of their precinct of residence, HAVA left to the states the determination if those ballots would be counted. The Florida Democratic Party v. Hood, 4:04cv395-RH/WCS (N.D. Fla., Oct. 21, 2004).<sup>1</sup>

Against this background, you have asked us to examine whether section 302(a) of HAVA requires provisional ballots which are cast in the wrong precinct to be counted, thereby preempting the provisions of Iowa law which would require rejection of these ballots. If we conclude that HAVA does require this result, you ask whether only the federal portion of the ballots, or all federal, state and local offices and questions for which the voter could have voted in the voter's precinct of residence should be counted.

---

<sup>1</sup> A Colorado state district court has also upheld statutes of that state which require rejection of a provisional ballot cast in the incorrect precinct, concluding that HAVA section 302(a) allows state eligibility criteria to control this determination. Colorado Common Cause v. Davidson, No. 04CV7709 (Colo. State D.Ct., Denver, 10/18/04).

The basic principles of preemption set forth in the analysis in our October 20, 2004, letter to you are equally applicable here. "[I]t has been settled that state law that conflicts with federal law is 'without effect.'" Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407, \_\_\_\_ (1992). HAVA contains no general preemption clause and there is no evidence that Congress intended to "occupy the field" of election law requirements. Rather, section 304 of HAVA explicitly provides that the requirements of HAVA Title III "are minimum requirements" and that nothing in the title "shall be construed to prevent a State from establishing election . . . administration requirements that are more strict than the requirements established under this subchapter so long as such State requirements are not inconsistent with the Federal requirements . . ." 42 U.S.C. § 15848 [HAVA § 304].

State law requirements may not be found inconsistent with HAVA unless they "actually conflict" with the requirements of HAVA. An actual conflict exists if "it is impossible to comply with both state and federal law, or the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581, 107 S.Ct. 1419, 1425, \_\_\_ L.Ed.2d \_\_\_ (1987) (quotations and citations omitted).

Therefore, in order to resolve this inquiry, we must determine exactly what HAVA requires. As in all cases of statutory construction, our "analysis begins with the language of the statute. . . . And where the statutory language provides a clear answer, it ends there as well." Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999). The following portions of HAVA section 302(a) control our inquiry:

(a) 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) [HAVA § 302(a)(1)-(4)] (emphasis added).

Under the clear language of section 302(a), a voter who declares himself to be registered in the jurisdiction where he appears to vote and eligible to vote in the federal election is entitled to cast a provisional ballot. Definition of the term "jurisdiction" is critical to understanding the impact of this section.

We are convinced that the term "jurisdiction," as used in HAVA section 302(a), was intended to mean a municipal jurisdiction of a broader scope than a single voting precinct. "Jurisdiction" is generally defined as "[a] government's general power to exercise authority" or, "[a] geographic area within which political or judicial authority may be exercised." Black's Law Dictionary, p. 855 (7<sup>th</sup> ed. 1999). Jurisdiction is a broad and rich legal and governmental concept, well beyond a single voting precinct.

In the key section of HAVA cited above, 42 U.S.C. § 15482(a)(1)-(4), the term "jurisdiction" is used twice and the term "polling place" is used four times. The Congress used "jurisdiction" when it meant jurisdiction and "polling place" when it meant polling place. This is another basis for determining that they are separate and distinct concepts for our purposes here.

Additionally, in a closely-related act, the National Voter Registration Act [NVRA], the act defines "registrar's jurisdiction" as geographic area governed by the unit of government which maintains voter registration records. 42 U.S.C. § 1973gg-6(j).

Section 302(a) of HAVA requires an individual to declare that he or she is "registered in the jurisdiction in which the individual desires to vote." Under Iowa law, elections are administered at the county level of government and voter registration records are maintained at the county level. Most Iowans, if asked, would likely identify a county as the jurisdiction in which they are registered to vote. Therefore, we hold that the term "jurisdiction" as used in section 302(a), means an Iowa county. Applying this definition, section 302(a) entitles a voter to cast a provisional ballot, if the voter declares the he or she is eligible to vote and is registered in the county where he or she appears to vote.

The right to cast a provisional ballot is only one aspect of section 302(a). This provision also requires the appropriate election officials to determine whether the individual casting the ballot was "eligible under State law to vote," and, if so, instructs that the "ballot shall be counted as a vote in that election in accordance with State law." 42 U.S.C. § 15482(a)(4) [HAVA § 302(a)(4)]. Again, the term "eligible" is not defined within HAVA. We believe that "eligibility," in this context, is related to who is entitled to vote, not how or where the vote is to be cast. To be qualified to register to vote in Iowa, an individual must be a citizen of the United States and an Iowa resident, at least eighteen years of age, and not claim the right to vote in more than one place. Iowa Const. Art. II, sec. 1; Iowa Code § 48A.5(2) (2003). To be eligible to vote in any election, an individual must meet the constitutional and statutory qualifications and be registered to vote. If election officials reviewing a provisional ballot determine that the voter was registered in the county where the ballot was cast and met the basic eligibility requirements of state law, HAVA dictates that votes on the ballot must be counted.

If "eligible under state law to vote" was read to require the voter being in the correct precinct, the voter would be truthful and accurate in the representations required under HAVA to receive a provisional ballot (i.e., that the voter is registered in the county and eligible to vote) – but would be denied the right to have his or her vote counted. It is extremely unlikely that Congress intended this result.

Finally, it should be noted that allowing voters to cast provisional ballots when they are eligible to vote and registered to vote in the county where the vote was cast is consistent with the purposes of HAVA – making it easier to vote and harder to cheat in elections.

To the degree that Iowa statutes conflict with this interpretation of HAVA, the principles of preemption dictate that the federal law must prevail. With regard to casting provisional ballots, Iowa statutes are closely aligned with the dictates of HAVA. As noted above, Iowa Code section 48.77(4) allows a voter whose name does not appear on the election register and whose registration in the precinct cannot be verified to cast a provisional ballot if "the person insists that the person is a registered voter of the precinct . . ." We believe the portion of this subsection which requires the voter to "insist" that he or she is registered "in the precinct" in order to cast a provisional ballot, is preempted by HAVA, and the instructions of the Secretary of State should be changed accordingly.

The express terms of HAVA section 302(a) neither require nor preclude precinct poll workers from attempting to locate the correct precinct polling place for a voter who is registered in another precinct of the county. We believe the practice of directing voters to the correct polling place is vitally important in order to assure that each voter has the opportunity to cast a vote for every office and upon every public question that voter is eligible to determine. The Election Assistance Commission, which is created under HAVA to serve as "a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections," 42 U.S.C. § 15322 [HAVA § 202], has recommended the inclusion of this step in the provisional voting process. See *BEST PRACTICES IN ADMINISTRATION, MANAGEMENT AND SECURITY IN VOTING SYSTEMS AND PROVISIONAL VOTING: A Tool Kit for Election Administrators and Stakeholders: Issue One*, section IX(B) at pp. 60-61 (published by the EAC on July 30, 2004, available at the EAC website: [www.eac.gov/bp](http://www.eac.gov/bp)) (advising states to "establish sound methods for directing voters to the correct polling place . . ." The suggested methods for doing so include providing "resources to help poll workers direct a voter to his/her voting place.")<sup>2</sup>

If "the situation is not resolved" because the voter declines to go to an alternate voting location or the voter believes he or she is registered in the precinct, a provisional ballot is provided to a voter. The provisional ballot envelope does not require voters to insist they are registered in the precinct. Rather, the declaration provided which an Iowa voter must sign in order to cast a provisional ballot includes the following statement: "I believe I am a registered voter of this county and I am eligible to vote in this election." Iowa Code § 49. 41(4), as amended by 2004 Iowa Acts, ch. 90 [SF 2269], § 20.<sup>3</sup>

---

<sup>2</sup> Although the EAC is precluded from issuing rules or regulations, or taking "any action which imposes any requirement on any State or unit of local government" (42 U.S.C. § 15329 [HAVA § 209]), the commission is empowered to conduct studies and issue reports regarding election administration issues, with the goal of promoting methods for voting and election administration which "will be the most convenient, accessible, and easy to use for voters . . ." 42 U.S.C. § 15381(a) [HAVA § 241].

<sup>3</sup> The full statement provides:

I believe I am a registered voter of this county and I am eligible to vote in this election. I registered to vote in \_\_\_\_\_ county on or about \_\_\_\_\_ at \_\_\_\_\_. My name at that time was \_\_\_\_\_. I have not moved to a different county since that time. I am a United States citizen, at least eighteen years of age.

*Id.* at 49.41(4). In 2004, the Iowa Legislature changed this required statement from a representation that the voter is registered in the precinct to a representation that the voter is

Iowa statutes regarding the counting of provisional ballots provide less specific direction. In the days immediately following the election, all provisional ballots are delivered to a county-wide special precinct counting board which is charged with determining whether each ballot should be rejected or counted. Iowa Code §§ 50.20 – 50.23 (2003). "The decision to count or reject each ballot shall be made upon the basis of the information given on the envelope containing the [provisional] ballot, the evidence concerning the challenge, the registration and the returned receipts of registration." Iowa Code § 50.22 (2003). If a provisional ballot is rejected, "the person casting the ballot shall be notified by the commissioner within ten days of the reason for the rejection . . ." *Id.* Iowa election law contains no other provision establishing specific standards for the acceptance or rejection of provisional ballots. Iowa law does, however, contain a clear directive requiring voters to vote at the polling place in their precinct of residence. Iowa Code § 49.9 (2003) ("No person shall vote in any precinct but that of the person's residence."). In addition, Iowa law requires the special precinct counting board to reject an absentee ballot if the voter is not a duly registered voter of the precinct in which the ballot is cast. Iowa Code § 53.25 (2003); 721 Iowa Admin. Code 21.361(2) (indicating that "precinct" in this context "means a precinct established pursuant to Iowa Code sections 49.3 through 49.5").

Historically, the guidance issued by your office to the precinct boards has instructed that provisional ballots should be assessed based upon the same factors which control the counting of absentee ballots and other challenged ballots. *See* Iowa Code §§ 53.25, 53.31 (2003), 721 Iowa Admin. Code 21.361. Given that Iowa law imposed no special criteria for counting various types of challenged, or provisional, ballots and that all of these ballots are reviewed by the same special precinct election board, this practice made good sense. However, the counting process for provisional ballots must be revised to accommodate the preemptive impact of HAVA.

We have concluded that HAVA requires local election officials to count a provisional ballot if they determine that the voter was registered in the county where the ballot was cast and met the basic eligibility requirements of state law. To the extent that Iowa law conflicts with HAVA, the federal act must prevail. HAVA does not, however, affect the ability of the state to enforce existing time, place, and manner requirements as to voting in state or local elections. "The right granted by HAVA is to vote only for those federal offices for 'which the individual is eligible to vote.'" *Bay County Democratic Party v. Land*, 2004 WL 234560 (slip. op. at p. 46), quoting 42 U.S.C. § 15482(a) [HAVA § 302(a)]. Because HAVA applies only to federal elections, "the votes for state and local offices and initiatives on out-of-precinct ballots need not be tabulated." *Id.* Indeed, given the unequivocal Iowa law dictate for in-precinct voting we conclude that it would be inappropriate for a counting board to accept any greater portion of a ballot cast outside of a voter's precinct of residence than mandated by federal law. Therefore, only votes on the federal portion of these ballots should be accepted and tabulated by the

---

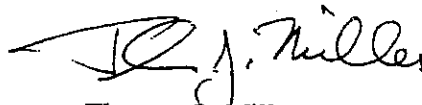
registered in the county.

Chester J. Culver  
Iowa Secretary of State  
Page 8

counting board.

Finally, we wish to underscore again that poll workers should make every effort to direct voters to the correct polling place - and we urge voters to make every effort to go to their correct precinct -- in order to assure that each voter has the opportunity to cast a vote for every office and upon every public question that the voter is eligible to determine. We hope that, as observed by the Michigan court, "the prospect of having one's entire ballot counted, not just the votes for federal offices, provides a strong incentive to vote in the correct precinct of one's residence."

Sincerely,

A handwritten signature in dark ink, appearing to read "T. J. Miller". The signature is fluid and cursive, with a large initial "T" and "J".

Thomas J. Miller  
Attorney General of Iowa

## AFFIDAVIT

My name is Dean Brooks, and I present the following statement:

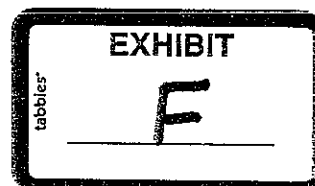
1. I am a citizen of Iowa and a resident of Polk County, and am registered to vote in Polk County.

2. In past elections I have either voted by appearing at the polling place of the precinct in which I live, or by using my precinct's absentee ballot form. It is my intention to vote in the 2004 general election on November 2.

3. I have requested an absentee ballot for my precinct, but, because I have become concerned about the accuracy and regularity of the absentee voting system, I may decide to vote in person at my precinct's voting place on November 2.

4. I am concerned that, if voters who do not reside in my precinct and whose names do not appear on the official election register for my precinct, are nonetheless allowed to vote in my precinct, and to have their votes counted, my lawful vote will be offset and diluted by those votes.

5. I am concerned that, if voters who do not reside in my precinct and whose names do not appear on the official election register for my precinct are nonetheless allowed to vote in my precinct, and to have their votes counted, voters of other precincts will be given the power to choose local elected officials specific to my precinct; voters that will not be represented by my local elected officials would be choosing my elected officials. These voters would also be voting on local issues specific to my precinct, in which they do not reside.



6. I am concerned that, if voters who do not reside in my precinct and whose names do not appear on the official election register for my precinct are encouraged to or choose to vote in my precinct, a substantial number of non-precinct voters will vote in my precinct and cause a substantial increase in the total number of voters at the polling place. I am concerned that an unexpected large number of non-resident voters would cause undue delay in voting at my precinct. I am also concerned that an unexpected large number of voters would cause a disruption at my polling place, as my precinct officials might be unprepared to deal with the large number of extra voters. I am concerned that such a delay and disruption might cause voters in my precinct to become frustrated and that some resident precinct voters in my precinct might leave the polling place before having cast their vote.

7. I am concerned that, if voters who do not reside in my precinct and whose names do not appear on the official election register for my precinct are encouraged to or choose to vote in my precinct, confusion caused by a large number of votes cast by individuals that do not live in my precinct might result in a greater chance of mistake, irregularity, and voter fraud.

I certify under penalty of perjury and pursuant to the laws of the State of Iowa that the preceding is true and correct.

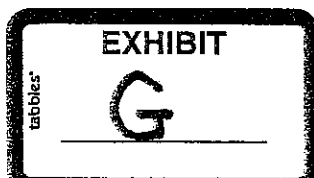
Date: 10/25/04

  
Dean Brooks

## AFFIDAVIT

My name is Patricia Schultz, and I present the following statement:

1. I am a citizen of Iowa and a resident of Polk County, and am registered to vote in Polk County.
2. Since 1996, I have voted in elections by appearing at the polling place of the precinct in which I live. It is my intention to vote in this manner in the 2004 general election on November 2.
3. I am concerned that, if voters who do not reside in my precinct and whose names do not appear on the official election register for my precinct, are nonetheless allowed to vote in my precinct, and to have their votes counted, my lawful vote will be offset and diluted by those votes.
4. I am concerned that, if voters who do not reside in my precinct and whose names do not appear on the official election register for my precinct are nonetheless allowed to vote in my precinct, and to have their votes counted, voters of other precincts will be given the power to choose local elected officials specific to my precinct; voters that will not be represented by my local elected officials would be choosing my elected officials. These voters would also be voting on local issues specific to my precinct, in which they do not reside.
5. I am concerned that, if voters who do not reside in my precinct and whose names do not appear on the official election register for my precinct are encouraged to or choose to vote in my precinct, a substantial number of non-precinct voters will vote in my



precinct and cause a substantial increase in the total number of voters at the polling place. I am concerned that an unexpected large number of non-resident voters would cause undue delay in voting at my precinct. I am also concerned that an unexpected large number of voters would cause a disruption at my polling place, as my precinct officials might be unprepared to deal with the large number of extra voters. I am concerned that such a delay and disruption might cause voters in my precinct to become frustrated and that some resident precinct voters in my precinct might leave the polling place before having cast their vote.

6. I am concerned that, if voters who do not reside in my precinct and whose names do not appear on the official election register for my precinct are encouraged to or choose to vote in my precinct, confusion caused by a large number of votes cast by individuals that do not live in my precinct might result in a greater chance of mistake, irregularity, and voter fraud.

I certify under penalty of perjury and pursuant to the laws of the State of Iowa that the preceding is true and correct.

Date: 10/24/04

Patricia A Schultz  
Patricia Schultz

# AFFIDAVIT

My name is Elizabeth Isaacson, and I present the following statement:

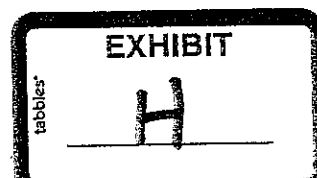
1. I am a citizen of Iowa and a resident of Polk County, and am registered to vote in Polk County.

2. In past elections I have either voted by appearing at the polling place of the precinct in which I live, or by using my precinct's absentee ballot form. It is my intention to vote at my precinct's polling place in the 2004 general election on November 2.

3. I am concerned that, if voters who do not reside in my precinct and whose names do not appear on the official election register for my precinct, are nonetheless allowed to vote in my precinct, and to have their votes counted, my lawful vote will be offset and diluted by those votes.

4. I am concerned that, if voters who do not reside in my precinct and whose names do not appear on the official election register for my precinct are nonetheless allowed to vote in my precinct, and to have their votes counted, voters of other precincts will be given the power to choose local elected officials specific to my precinct; voters that will not be represented by my local elected officials would be choosing my elected officials. These voters would also be voting on local issues specific to my precinct, in which they do not reside.

5. I am concerned that, if voters who do not reside in my precinct and whose names do not appear on the official election register for my precinct are encouraged to or



choose to vote in my precinct, a substantial number of non-precinct voters will vote in my precinct and cause a substantial increase in the total number of voters at the polling place. I am concerned that an unexpected large number of non-resident voters would cause undue delay in voting at my precinct. I am also concerned that an unexpected large number of voters would cause a disruption at my polling place, as my precinct officials might be unprepared to deal with the large number of extra voters. I am concerned that such a delay and disruption might cause voters in my precinct to become frustrated and that some resident precinct voters in my precinct might leave the polling place before having cast their vote.

6. I am concerned that, if voters who do not reside in my precinct and whose names do not appear on the official election register for my precinct are encouraged to or choose to vote in my precinct, confusion caused by a large number of votes cast by individuals that do not live in my precinct might result in a greater chance of mistake, irregularity, and voter fraud.

I certify under penalty of perjury and pursuant to the laws of the State of Iowa that the preceding is true and correct.

Date: October 24, 2000

Elizabeth A. Isaacson  
Elizabeth Isaacson

## AFFIDAVIT

My name is Beverly Poncin, and I present the following statement:

1. I am a citizen of Iowa and a resident of Polk County, and am registered to vote in Polk County.
2. Since 1996, I have voted in elections by appearing at the polling place of the precinct in which I live. It is my intention to vote in this manner in the 2004 general election on November 2.
3. I am concerned that, if voters who do not reside in my precinct and whose names do not appear on the official election register for my precinct, are nonetheless allowed to vote in my precinct, and to have their votes counted, my lawful vote will be offset and diluted by those votes.
4. I am concerned that, if voters who do not reside in my precinct and whose names do not appear on the official election register for my precinct are nonetheless allowed to vote in my precinct, and to have their votes counted, voters of other precincts will be given the power to choose local elected officials specific to my precinct; voters that will not be represented by my local elected officials would be choosing my elected officials. These voters would also be voting on local issues specific to my precinct, in which they do not reside.
5. I am concerned that, if voters who do not reside in my precinct and whose names do not appear on the official election register for my precinct are encouraged to or choose to vote in my precinct, a substantial number of non-precinct voters will vote in my



precinct and cause a substantial increase in the total number of voters at the polling place. I am concerned that an unexpected large number of non-resident voters would cause undue delay in voting at my precinct. I am also concerned that an unexpected large number of voters would cause a disruption at my polling place, as my precinct officials might be unprepared to deal with the large number of extra voters. I am concerned that such a delay and disruption might cause voters in my precinct to become frustrated and that some resident precinct voters in my precinct might leave the polling place before having cast their vote.

6. I am concerned that, if voters who do not reside in my precinct and whose names do not appear on the official election register for my precinct are encouraged to or choose to vote in my precinct, confusion caused by a large number of votes cast by individuals that do not live in my precinct might result in a greater chance of mistake, irregularity, and voter fraud.

I certify under penalty of perjury and pursuant to the laws of the State of Iowa that the preceding is true and correct.

Date: Oct. 24, 2004 Beverly Poncin  
Beverly Poncin

# AFFIDAVIT

My name is Mark Havlicek, and I present the following statement:

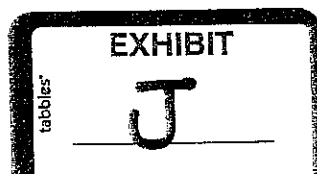
1. I am a citizen of Iowa and a resident of Polk County, and am registered to vote in Polk County.

2. In past elections I have either voted by appearing at the polling place of the precinct in which I live, or by using my precinct's absentee ballot form. I have voted in the November 2 general election by submitting my precinct's absentee ballot.

3. I am concerned that, if voters who do not reside in my precinct and whose names do not appear on the official election register for my precinct, are nonetheless allowed to vote in my precinct, and to have their votes counted, my lawful vote will be offset and diluted by those votes.

4. I am concerned that, if voters who do not reside in my precinct and whose names do not appear on the official election register for my precinct are nonetheless allowed to vote in my precinct, and to have their votes counted, voters of other precincts will be given the power to choose local elected officials specific to my precinct; voters that will not be represented by my local elected officials would be choosing my elected officials. These voters would also be voting on local issues specific to my precinct, in which they do not reside.

5. I am concerned that, if voters who do not reside in my precinct and whose names do not appear on the official election register for my precinct are encouraged to or choose to vote in my precinct, a substantial number of non-precinct voters will vote in my

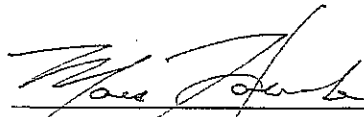


precinct and cause a substantial increase in the total number of voters at the polling place. I am concerned that an unexpected large number of non-resident voters would cause undue delay in voting at my precinct. I am also concerned that an unexpected large number of voters would cause a disruption at my polling place, as my precinct officials might be unprepared to deal with the large number of extra voters. I am concerned that such a delay and disruption might cause voters in my precinct to become frustrated and that some resident precinct voters in my precinct might leave the polling place before having cast their vote.

6. I am concerned that, if voters who do not reside in my precinct and whose names do not appear on the official election register for my precinct are encouraged to or choose to vote in my precinct, confusion caused by a large number of votes cast by individuals that do not live in my precinct might result in a greater chance of mistake, irregularity, and voter fraud.

I certify under penalty of perjury and pursuant to the laws of the State of Iowa that the preceding is true and correct.

Date: 10-24-2004

  
\_\_\_\_\_  
Mark Haylicek

RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 04-4265, 04-4266

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

FILED

OCT 23 2004

LEONARD GREEN, Clerk

SANDUSKY COUNTY DEMOCRATIC PARTY, *et al.*,  
*al.*,  
Plaintiffs-Appellees,  
v.  
J. KENNETH BLACKWELL,  
Defendant-Appellant.

ORDER

Before: BOGGS, Chief Judge; GILMAN, Circuit Judge; and WEBER, District Judge.\*

PER CURIAM. Defendant-Appellant J. Kenneth Blackwell, Ohio Secretary of State ("the Secretary"), appeals an October 14, 2004 Order of the United States District Court for the Northern District of Ohio finding that *Ohio Secretary of State Directive 2004-33*, issued by the Secretary on September 16, 2004, violated the federal Help America Vote Act, Pub. L. 107-252, Title III, § 302, 116 Stat. 1706 (codified at 42 U.S.C. § 15301 *et seq.*) ("HAVA"), and requiring him to issue a revised directive that conforms to the requirements of HAVA.

The motions of Plaintiffs-Appellees and *Amicus Curiae* the United States to file oversized briefs are granted. Also granted are the motions for leave to file briefs *amici curiae* of Congressman Elijah E. Cummings and members of the Congressional Black Caucus; the American Association

---

\*The Honorable Herman J. Weber, United States District Judge for the Southern District of Ohio, sitting by designation.



Nos. 04-4265, 04-4266

Sandusky County Democratic Party v. Blackwell

of People with Disabilities; Senator Christopher J. Dodd and U.S. Representative Steny Hoyer, Tennessee Representative Delores Noguera Gresham and Mr. Timothy Ishii; and members of the Ohio congressional delegation. Defendant-Appellant's motion to stay the district court's orders of October 14, 2004 and October 20, 2004 is denied as moot.

Upon consideration of the briefs of parties and *Amici*, we **AFFIRM** the district court's rulings that (1) the right created by 42 U.S.C. § 15482(a) to cast a provisional ballot in federal elections is enforceable under 42 U.S.C. § 1983; (2) at least one of the Plaintiffs-Appellees has standing to enforce that right in the district court; and (3) *Directive 2004-33* violates HAVA insofar as it fails to ensure that any individual affirming that he or she "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 . . . shall be permitted to cast a provisional ballot." See 42 U.S.C. § 15482(a).

However, to the extent that the district court held that HAVA requires that a voter's provisional ballot must be counted as a valid ballot if it is cast anywhere in the county in which the voter resides, even if it is cast outside the precinct in which the voter resides, we **REVERSE**. Accordingly, the district court may require the Secretary to implement "Directive Number 2: Provisional Voting: Home Precinct Balloting Only" that was sent to all Ohio County Election Boards on October 22, 2004 in response to the district court's orders of October 20, 2004. The district court may not require the Secretary to implement "Directive Number 1: Provisional Voting: County-Wide Balloting."

A written opinion will follow.

CHAIRMAN

VERNON J. EHLERS, MICHIGAN  
JOHN L. MICA, FLORIDA  
JOHN LINDER, GEORGIA  
JOHN T. DOOLITTLE, CALIFORNIA  
THOMAS M. FLYNN, NEW YORK

JOHN B. LARSON, CONNECTICUT  
BANKING MINORITY MEMBER

JUANITA MILLINDER-MCDONALD, CALIFORNIA  
ROBERT A. BRADY, PENNSYLVANIA

PAUL VINOVIK, STAFF DIRECTOR  
GEORGE SHEVLIN, MINORITY STAFF DIRECTOR

# Congress of the United States House of Representatives

COMMITTEE ON HOUSE ADMINISTRATION

1309 LONGWORTH HOUSE OFFICE BUILDING  
(202) 225-8281

Washington, DC 20515-6157

www.house.gov/cha

October 21, 2004

The Honorable Chester J. Culver  
Office of the Secretary of State  
Lucas Building, First Floor  
321 E. 12th Street  
Des Moines, Iowa 50319

Dear Secretary Culver:

In recent weeks and months, there have been questions raised about the provisional ballot requirement contained in the Help America Vote Act of 2002 (HAVA). As co-sponsors and authors of HAVA, we wanted to take an opportunity to bring to your attention the relevant language of HAVA and the Congressional intent regarding this provision.

Under HAVA, if an individual claims to be registered to vote but his or her name does not appear on the official list of registered voters, that individual is permitted to cast a provisional ballot. 42 U.S.C. § 15482. The purpose of this provision is to protect properly registered voters whose names are not on the rolls due to a processing error or other administrative mistake.

Many of the questions regarding the provisional ballot requirement have focused on whether HAVA requires provisional ballots cast outside the voter's designated precinct to be counted. The simple answer is: HAVA leaves it to the states to decide how to count provisional ballots. The law clearly states that if the appropriate election official determines that the individual casting a provisional ballot "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). State authority to determine the conditions under which provisional ballots will be counted is further buttressed by language in HAVA that declares that "[t]he specific choices on the methods of complying with the requirements of [HAVA] shall be left to the discretion of the State." Id. § 15485.

Some have suggested it was the intent of the authors of HAVA to require election officials to count provisional ballots cast in an unassigned precinct. In considering HAVA, Congress was aware that different states have different laws regarding voter eligibility and voting procedures. Congress realized that many states require in-precinct voting and had no intention of overturning such requirements. While we agree that,



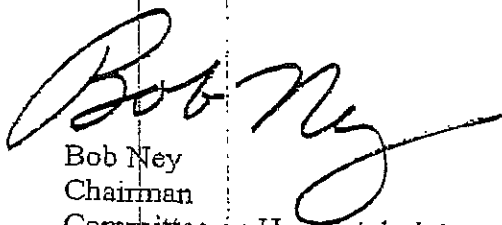
October 21, 2004

Page 2

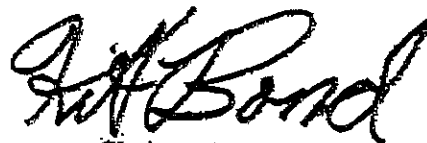
under HAVA, every voter who seeks to cast a provisional ballot must be able to do so, regardless if the voter is in his or her designated precinct, it was the intent of Congress to allow state law to resolve the question of whether that provisional ballot will be counted. For this reason, HAVA deliberately left the term "jurisdiction" undefined so that each state could define the term in a manner consistent with state law. By no means did HAVA abolish a state's prerogative to maintain a precinct-based provisional ballot system. Therefore, if a state decides to count only those provisional ballots cast in the voter's assigned precinct, it is perfectly within the state's prerogative to do so. The Department of Justice, in an *amicus curiae* brief recently submitted in federal court in Florida, confirms that Congress did not intend HAVA to overrule state laws that require in-precinct voting.

Again, we want to reiterate that the decision about which provisional ballot system to adopt—whether precinct-based or county-based—is left to the states to determine. HAVA permits voters to cast a provisional ballot, but it is state law that sets the conditions for when that ballot will count.

Sincerely,



Bob Ney  
 Chairman  
 Committee on House Administration



Christopher Bond  
 Senator  
 United States Senate

Nos. 04-2307/2318

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

BAY COUNTY DEMOCRATIC PARTY and  
MICHIGAN DEMOCRATIC PARTY,

Plaintiffs - Appellees,

v.

TERRI LYNN LAND, Michigan Secretary of State,  
and CHRISTOPHER M. THOMAS, Michigan  
Director of Elections, in their official capacities,

Defendants - Appellants (04-2307),

and

MICHIGAN STATE CONFERENCE OF NAACP  
BRANCHES; ASSOCIATION OF COMMUNITY  
ORGANIZATIONS FOR REFORM NOW; and  
PROJECT VOTE,

Plaintiffs - Appellees,

v.

TERRI LYNN LAND, Michigan Secretary of State,  
and CHRISTOPHER M. THOMAS, Michigan  
Director of Elections, in their official capacities,

Defendants - Appellants (04-2307),

MICHAEL F. WALSH, in his individual capacity;  
DANIEL C. KRUEGER, in his individual capacity and  
as Clerk of the County of Ottawa; LINDA S.  
COBURN, in her individual capacity and as Clerk of  
the County of Grand Traverse; JANICE A. VEDDER,  
in her individual capacity and as Clerk of the Charter  
Township of Delta; and DIANE K. MOSIER, in her  
individual capacity and as Clerk of the Charter  
township of DeWitt,

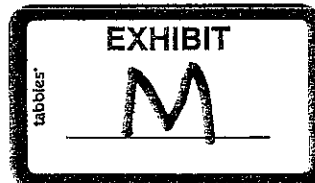
Proposed Intervening Defendants -  
Appellants (04-2318).

**FILED**

OCT 24 2004

LEONARD GREEN, Clerk

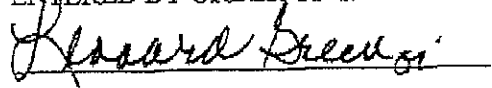
ORDER



Before: BOGGS, Chief Judge; GILMAN, Circuit Judge; and WEBER, District Judge.\*

Appellants Land and Thomas moved for a stay pending appeal of the district court's October 19, 2004 order granting an injunction and for expedited consideration of this appeal. The motion to stay is GRANTED. The motion for expedited consideration is also GRANTED, and the clerk is ordered to set an expedited briefing schedule.

ENTERED BY ORDER OF THE COURT



Leonard Green, Clerk

---

\*The Honorable Herman J. Weber, United States District Judge for the Southern District of Ohio, sitting by designation.