UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FLORIDA DEMOCRATIC PARTY,

Plaintiff,

v. Case No. 04:04cv395 RH

GLENDA HOOD, in her official capacity
as Florida Secretary of State; and
DAWN ROBERTS, in her official capacity
as Director of the Division of Elections,

Defendants.

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MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

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MEMORANDUM BY THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

The United States submits this Memorandum as amicus curiae in support of the defendants. The United States respectfully requests that this Court dismiss the HAVA complaint with prejudice and deny plaintiff all relief on the HAVA claims.

INTEREST OF THE UNITED STATES AS AMICUS CURIAE

At issue in this lawsuit are various provisions of HAVA, a federal statute. As the federal governmental entity responsible for enforcing HAVA, the Department of Justice has an interest in providing this Court with its views. See 42 U.S.C. 15511.

INTRODUCTORY STATEMENT

The United States in this brief takes no position regarding whether the Florida statutes or the Constitution require the remedy that plaintiff seeks. The United States, likewise, takes no position regarding whether traditional precinct-based voting is to be preferred, from a policy perspective, over a system offering the kind of statewide provisional balloting demanded by the plaintiff. As was demonstrated during the extensive floor debates on HAVA, there are policy arguments supporting each approach, but that policy decision was left by Congress to the individual States, some of which have decided one way, some the other.

The United States submits this brief, as amicus curiae, for two purposes. First, it is clear that Congress did not intend to authorize private enforcement, via litigation, of the requirements of HAVA, but instead intended to channel private complaints into state administrative processes and to reserve judicial enforcement to the Department of Justice. Second, it is equally clear that Congress did not intend through HAVA to preclude States from choosing precinct-based voting systems. Granting the relief sought by plaintiff here would offend both of these congressional policy judgments.

Had Congress intended to make HAVA privately enforceable via litigation, it could have done so explicitly, as it did in the Voting Rights Act of 1965, and as it did in the National Voter Registration Act (NVRA). That it did not is made clear by HAVA's text and reinforced by its legislative history. Indeed, Senator Dodd of Connecticut – a HAVA conferee and sponsor – openly lamented the fact that HAVA did not create a private right of action:

> While I would have preferred that we extend [a] private right of action * * * , the House simply would not entertain such an enforcement provision. Nor would they [sic] accept federal judicial review of any adverse decision by a State administrative body.

148 Cong. Rec. S10512 (daily ed. Oct. 16, 2002). Congress, having made an explicit decision not to create a private right of action, clearly did not intend to create a right enforceable through Section 1983.

Congress, similarly, could have chosen to set a uniform federal standard with respect to what is a "jurisdiction" for purposes of provisional balloting, precluding the States from operating precinct-based electoral systems. Yet it plainly did not do so. Indeed, HAVA explicitly commands that "the specific choices on the methods of complying with the requirements of this title shall be left to the discretion of the State." 42 U.S.C. 15485. Senator Dodd acknowledged this as well:

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

148 Cong. Rec. S10510 (daily ed. Oct. 16, 2002).

STATEMENT OF THE CASE

In an effort to improve the administration of federal elections, Congress enacted the Help America Vote Act (HAVA). Among its numerous provisions, HAVA provides that States permit any individual to cast a provisional ballot if such individual declares that he "is a registered voter in

the jurisdiction in which [he] desires to vote and that [he] is eligible to vote in an election for Federal office" but his name "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." 42 U.S.C. 15482(a). HAVA further provides that "[a]n election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation * * * to an appropriate State or local election official for prompt verification." 42 U.S.C. 15482(a)(3). Provisional voting is also permissible under HAVA for novice voters who registered by mail to vote but fail to provide identification if appearing in person at their precinct. As to counting these provisional ballots, if a state official "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)(4). HAVA, therefore, mandates that ballots be validated in accordance with state law. Consequently, HAVA works in conjunction with state law; it does not displace it. In this respect, HAVA was not intended to preempt state law regarding ballots cast by voters in an improper precinct because it is replete with references to state law determining the validity of ballots.

Florida enacted legislation implementing HAVA. See Fla. Stat. Ann. § 101.045. Conspicuously, this implementing legislation did not repeal, abolish, or displace Florida law's requirement that voters cast their ballots in the precincts in which they reside. See *id.* More specifically, Florida law requires that a person may not vote in any election precinct or district other than the one in which he maintains a legal residence and in which he is registered. In this connection, the Florida Secretary of State promulgated a Polling Place Procedures Manual that advises supervisors of elections and poll workers to direct those arriving at any incorrect voting precinct to their correct precinct. See *id.* § 102.014(5). The Supreme Court of Florida has upheld these statutes as reasonable regulations of the election laws. See *American Fed'n of Labor &*

Congress of Indus. Org. v. *Hood*, No. 2004-CA-002 (Sup. Ct. Fla. Oct. 18, 2004). Moreover, Florida ballot envelopes state on their face that a ballot will not be counted if the voter cast a provisional ballot in the improper precinct, and Florida elections boards count provisional ballots only after a determination that the precinct-voting eligibility requirements have been satisfied, see *id.* § 101.048.

Thereafter, the Florida Democratic Party (Plaintiff) filed a complaint pursuant to 42 U.S.C. 1983 and 28 U.S.C. 2201 seeking declaratory and injunctive relief and a motion for a preliminary injunction. More specifically, Plaintiff alleged that Florida's laws relating to provisional voting that require a voter to cast a provisional ballot at the polling place to which he is assigned violate HAVA. On October 8, the district court denied the Plaintiff's motion for a preliminary injunction. The United States files this brief in its capacity as amicus curiae on behalf of the defendants, urging that this Court dismiss the HAVA complaint with prejudice and deny relief on the HAVA claims.

ARGUMENT

Title III of the Help America Vote Act of 2002 (HAVA), 42 U.S.C. 15301 *et seq.*, which the United States Department of Justice is explicitly charged with enforcing, see 42 U.S.C. 15511, was enacted pursuant to Congress's constitutional authority to alter state laws governing the administration of federal elections. See U.S. Const. Art. I, § 4, cl. 1. Not surprisingly, therefore, Title III's text unmistakably speaks not to the rights of individual voters (as does the Voting Rights Act of 1965, which, unlike HAVA, was enacted pursuant to Congress's authority to enforce the Fifteenth Amendment), but rather to the state and local election officials responsible for administering federal elections. Indeed, as HAVA's preamble makes clear, the purpose of Title III was to "establish minimum election administration standards for States and units of local government * * * responsibl[e] for the administration of Federal elections." Pub. L. No. 107-252,

116 Stat. 1666. Consistent with its preamble, the numerous provisions contained in Title III, including the provision creating the provisional balloting scheme at issue here, uniformly focus on the administration of federal elections rather than on the individuals who participate in them. By declining to employ words well understood to create privately enforceable rights, Congress did not unambiguously create individual rights enforceable by Section 1983.

Moreover, in enacting Title III of HAVA, Congress intentionally looked to state law to define the terms of voter eligibility and the counting of provisional ballots. As set forth in greater detail below, HAVA commands specifically that provisional ballots may be cast only in the jurisdiction in which the "individual is a registered voter" and that provisional ballots will be counted "in accordance with state law." 42 U.S.C. 15482. Indeed, HAVA explicitly provides that "the specific choices on the methods of complying with the requirements of this title shall be left to the discretion of the State." 42 U.S.C. 15485. HAVA's legislative history is perfectly consistent with the Act's unambiguous language. As Senator Dodd of Connecticut – a HAVA conferee and sponsor – specifically acknowledged, "nothing in [HAVA] establishes a Federal definition of when a voter is registered or how a vote is counted." 148 Cong. Rec. S10510 (daily ed. Oct. 16, 2002).

Because HAVA is not amenable to private enforcement and, alternatively, because Florida state law is not inconsistent with HAVA's requirements for provisional ballots, this Court should dismiss the lawsuit with respect to all HAVA claims.

I

NEITHER HAVA IN GENERAL NOR THE PROVISIONAL BALLOT PROVISION IN PARTICULAR MAY BE ENFORCED THROUGH PRIVATE LITIGATION

On its face, HAVA does not contain a private right of action, nor have any of the parties

suggested that it contains a so-called "implied right of action." The inquiry, therefore, is whether HAVA may be enforced through 42 U.S.C. 1983, which imposes liability on anyone who, under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States.[1]

For a statute to be so enforced, Congress must have (1) unambiguously manifested its intent to create an individual right, and (2) not intended for that right to be enforced exclusively through one or more specific means other than Section 1983. See *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 280, 283-285 (2002). HAVA satisfies neither condition. First, Congress nowhere manifested an unambiguous intent to create individual rights. Second, HAVA expressly sets forth Congress's intended enforcement mechanisms. Accordingly, HAVA may not be enforced privately through

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[1] To the extent Plaintiff purports to assert that the Supremacy Clause precludes application of Florida's election laws, such an assertion is meritless. While it is true that a federal court has federal question jurisdiction over claims of federal preemption, Plaintiff is not entitled to any relief unless it has a valid theory to support a claim. As explained in this amicus brief, neither HAVA nor Section 1983 provide any such private cause of action, and the Supreme Court has clearly rejected the argument that the Supremacy Clause itself creates a claim through Section 1983. See *Dennis* v. *Higgins*, 498 U.S. 439, 450 & n.8 (1991) (explaining that the Supremacy Clause "does not by itself confer any rights, privileges, or immunities within the meaning of § 1983" and stating that "[a]n additional reason why claims under the Supremacy Clause, unlike those under the Commerce Clause, should be excluded from the coverage of § 1983 is that if they were included, the 'and laws' provision in § 1983 would be superfluous"); *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979) (explaining that the Supremacy Clause is not a source of any federal rights). In addition, numerous circuit courts have ruled that the Supremacy Clause does not create a preemption cause of action under Section 1983. See *Boston & Maine Corp.* v. *Town of Ayer*, 330 F.3d 12, 18 (1st Cir. 2003) (explaining that "[a] claim based solely on the Supremacy Clause does not create rights within 28 U.S.C. § 1343(a)(3) and is not cognizable under 42 U.S.C. § 1983"); *Gustafson* v. *City of Lake Angelus*, 76 F.3d 778, 792 (6th Cir.) (explaining that "a claim premised on a violation of the Supremacy Clause through preemption is not cognizable under 42 U.S.C. § 1983"), cert. denied, 519 U.S. 823 (1996); *Maryland Pest Control Ass'n* v. *Montgomery County*, 884 F.2d 160, 163 (4th Cir. 1989), cert. denied, 494 U.S. 1056 (1990) (holding that "federal preemption of local ordinances pursuant to the Supremacy Clause is not actionable under Section 1983" and citing supporting cases from the Seventh, Eighth, Ninth, and Tenth Circuits).

Section 1983.

A. HAVA Does Not Confer Individual Rights

A statute may be enforced through Section 1983 only if it contains an "unambiguously conferred right." *Gonzaga*, 536 U.S. at 283. The mere fact that a statute benefits an individual, even intentionally, does not trigger Section 1983.[2] See *ibid.*; see also *Blessing* v. *Freestone*, 520 U.S. 329, 340 (1997); accord *Suter* v. *Artist M.*, 503 U.S. 347, 357 (1992) (noting that Section 1983 speaks in terms of "rights, privileges or immunities," not violations of federal law that merely provide benefits).

Whether a statute confers a right "require[s] a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries." *Gonzaga*, 536 U.S. at 285. This

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[2] Prior to its decision in *Gonzaga*, the Supreme Court had used various formulations to discuss the level of legislative precision necessary to confer an individual right that might be enforced through Section 1983. For instance, in *Wilder* v. *Virginia Hospital Association*, 496 U.S. 498, 509 (1990), the Court cast the inquiry in terms of "whether the provision in question was intended to *benefit* the putative plaintiff" (quotations and internal alterations omitted). In other cases, however, the Court has recognized that a statute may well benefit a third party, intentionally or otherwise, without conferring a right on that individual. See, *e.g.*, *Blessing* v. *Freestone*, 520 U.S. 329, 340 (1997) ("In order to seek redress through § 1983 * * * a plaintiff must assert a violation of a federal *right*, not merely a violation of federal *law*," and that the conferring of a benefit is but one part of this inquiry.); *Suter* v. *Artist M.*, 503 U.S. 347, 357 (1992) (noting that Section 1983 speaks in terms of "'rights, privileges or immunities,' not violations of federal law"). In *Gonzaga*, however, the Supreme Court ended any such debate: "We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983. . . . [I]t is *rights*, not the broader or vaguer 'benefits' or 'interests' that may be enforced under the authority of that Section." 536 U.S. at 283 (emphasis added). Therefore, the mere fact that a statute benefits an individual, even intentionally, does not trigger Section 1983. It is also worth noting that the Court's decision in *Gonzaga* predated HAVA's enactment. Thus, Congress was well aware that nothing short of an unambiguously conferred right would be sufficient to create a cause of action brought under Section 1983. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law.").

inquiry begins with "the text and structure of the statute," and if these "provide no indication that Congress intends to create new individual rights, there is no basis for a private suit." *Id.* at 286. Further, the statutory language must be considered in context and in light of the statute's overall structure. See *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 18-20 (1981) (references to rights and patient "bill of rights" do not create individually enforceable rights when read in the context of the statute as a whole). The text and structure of HAVA reveal that Congress evinced no such intent; as a result, there is no basis for plaintiff' private HAVA suit.

1. HAVA Contains No Rights-Creating Language

The touchstone of a rights-conferring statute is "rights-creating" language, of which Title VI of the 1964 Civil Rights Act, 42 U.S.C. 2000d, and Title IX of the Higher Education Amendments, 20 U.S.C. 1681(a), provide the paradigmatic examples. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 693 n.13 (1979) ("[T]he right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action."). Both Title VI and Title IX speak directly to the putative plaintiff: "*No person* * * * *shall* * * * be subjected to discrimination." 42 U.S.C. 2000d (emphasis added); 20 U.S.C. 1681(a). Indeed, the overriding – even sole – purpose of those two Titles was to confer an enforceable right on the class of individuals who had been victimized by the statutorily targeted forms of discrimination. Each thus has been recognized as creating a privately enforceable right.

But the Supreme Court made definitively clear that, had those statutes been drafted not "with an unmistakable focus on the benefitted class," but rather as a limitation on federally funded programs, or as an instruction to the federal employees charged with implementing them, "there would have been far less reason to infer a private remedy in favor of individual persons." *Cannon*,

441 U.S. at 690-692. Statutes that "focus on the *person regulated* rather than the *individuals protected* create 'no implication of an intent to confer rights on a particular class of persons.'" *Alexander* v. *Sandoval*, 532 U.S. 275, 289 (2001) (emphasis added) (quoting *California* v. *Sierra Club*, 451 U.S. 287, 294 (1981)).

In sharp contrast to Title VI and Title IX, Title III of HAVA unmistakably focuses on the "person regulated," *i.e.*, States and state and local election officials charged with running federal elections, *not* on the "individuals protected," *i.e.*, individual voters. As HAVA's preamble makes clear, Title III "establish[es] minimum election administration standards for States and units of local government * * * responsibl[e] for the administration of Federal elections." Pub. L. No. 107-252, 116 Stat. 1666. Consistent with its preamble, the standards established by Title III focus on the administration of federal elections rather than on the individuals who would benefit from the administration of well-run elections. Section 301, for example, requires the States to use voting systems that meet certain specified standards. See 42 U.S.C. 15481. Section 302(a) and (c) require the States to use provisional ballots in certain specified situations. See 42 U.S.C. 15482. Section 302(b) requires States to post certain voter information at each polling place used for a federal election. *Ibid.* Section 303(a) requires States to create a single, uniform, centralized, and interactive computerized statewide voter registration list and to maintain that list according to certain standards. See 42 U.S.C. 15483. Section 303(a) also requires States to obtain certain identification numbers from applicants (such as drivers license numbers) who register to vote. *Ibid.* Section 303(b) requires the States to obtain specific identification documents or verifying information from individuals who register to vote by mail for the first time for federal elections. *Ibid.* Section 304 notes that Title III sets "minimum requirements" and Section 305 provides that the specific choices on the "methods

of complying" with Title III "shall be left to the discretion of the State." 42 U.S.C. 15484, 15485.

Viewed in context, it is clear that the provisions of Title III focus on the administration of federal elections and the duties and obligations of the States and state and local election officials in administering them, not on individual voters (although individual voters will certainly benefit from improved administration). See *Pennhurst*, 451 U.S. at 18-20 (holding that provision in question did not create individually enforceable rights when read in the context of the statute as a whole). Moreover, even if Section 302(a) is viewed in total isolation, rather than as part of the comprehensive scheme that Congress created, it still lacks the unambiguous and clear "rights-creating" language necessary to create an individual right that may be privately enforced. Section 302(a) merely instructs that, once certain circumstances are met, state election officials shall permit individuals to cast a provisional ballot.

Section 302(a)(1) states that "*[a]n election official* at the polling place *shall notify* the individual that the individual may cast a provisional ballot." 42 U.S.C. 15482 (emphasis added). Section 302(a)(2) instructs *election officials* that "*individual[s] shall be permitted*" to vote provisionally "upon the execution of a written affirmation * * * before an election official." *Ibid.* (emphasis added). Section 302(a)(3) requires that "*an election official* * * * *shall transmit* the ballot cast * * * to an appropriate State or local election official." *Ibid.* (emphasis added). Section 302(a)(4) provides that "*if the appropriate State or local election official* * * * *determines* that the individual is eligible under State law to vote, the ballot shall be counted as a vote in that election in accordance with state law." *Ibid.* (emphasis added). Section 302(a)(5)(A) commands that "*the appropriate State or local election official shall give* the individual written information" regarding how to check whether the provisional ballot was counted. *Ibid.* (emphasis added). Section

302(a)(5)(B) further requires that "*the appropriate State or local election official shall*" establish a system allowing individuals to check whether a provisional ballot was counted. *Ibid.* (emphasis added). Section 302(a) also mandates that "*[T]he appropriate state or local election official shall establish and maintain* reasonable procedures necessary to protect the security, confidentiality and integrity of the personal information collected" pursuant to the system established under (5)(B). And, Section 302(b) commands that the "*appropriate State or local election official shall cause* voting information to be publicly posted at each polling place on the day of each election for Federal office." *Ibid.* (emphasis added).

It is clear that Section 302, like the other provisions of Title III, focuses on the duties and obligations of state and local election officials in administering federal elections. While making provisional balloting easier may benefit individual voters,[3] that alone is insufficient to create an individual right. See *Gonzaga*, 536 U.S. at 283. As a result, Section 302 simply does not unambiguously confer individual rights.

Moreover, that HAVA regulates an area traditionally left to the States – voting[4] – also counsels against a finding that HAVA may be enforced privately through Section 1983. The Supreme Court has noted that it is reluctant to read private remedies into a statute where Congress is regulating an area of "traditional state functions" and the statute itself does not unambiguously

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[3] Indeed, HAVA merely strengthens and reinforces a person's pre-existing right to vote. Section 302(a)'s provisional ballot provisions merely complement this extant right; they do not create new ones.

[4] Voting is an area that was specifically reserved to the States by the United States Constitution. See U.S. Const. Art. I, § 4, Cl. 1.

provide for such remedies. See *id.* at 286 n.5 (noting that to infer a private remedy under statute regulating education would require "judicial assumption, with no basis in statutory text, that Congress intended to set itself resolutely against a tradition of deference to state and local school officials"). Cf. *Owasso Ind. Sch. Dist.* v. *Falvo*, 534 U.S. 426, 435 (2002) (refusing to adopt proposed interpretation of statute regulating education as Supreme Court "doubt[ed] Congress intended to intervene in this drastic fashion with traditional state functions"). Like *Gonzaga*, finding a private remedy under HAVA would entail not only a "judicial assumption, with no basis in statutory text," but also would drastically interfere with an area of "traditional state function." 536 U.S. at 286 n.5. This Court, like the Supreme Court in *Gonzaga*, should reject any such interpretation.

It is true that Title III, including Section 302, references "individual[s]" and "voters." This fact, however, is particularly unilluminating. Indeed, it is difficult to conceive how a statute directing election officials to permit provisional balloting could be drafted *without* mentioning the voters who will cast those ballots. The terms "individual" and "voters," therefore, are necessary terms in a statute that is addressed to the activities of state and local election officials and provide little, if any, insight into whether or not Congress intended to create an individual right.

Similarly, the fact that HAVA, in one subclause, requires election officials to post information regarding "the right of an individual to cast a provisional ballot," 42 U.S.C. 15482(b)(2)(E), does not support the plaintiff's position. The Supreme Court spoke directly to such language in *Gonzaga*. There, the Court rejected the argument that because other parts of the statute employed the term "rights" to describe obligations imposed on state or federally funded actors, the obligation *itself* must be an individual and enforceable right. 536 U.S. at 289 n.7; see also

Pennhurst, 451 U.S. at 18-20 (rejecting presumption of private right of action because a statute uses the term "rights"). Similarly, that Congress in this one instance employed the term "right" to describe the obligations imposed on States and state and local officials under HAVA does not convert the obligations themselves into personal rights.

Hence, it is hardly surprising that Senator Dodd (D-Ct.), a Senate conferee and sponsor of HAVA, openly lamented HAVA's limited enforcement provisions:

> While I would have preferred that we extend [a] private right of action * * *, the House simply would not entertain such an enforcement provision. Nor would they [sic] accept federal judicial review of any adverse decision by a State administrative body.

148 Cong. Rec. S10504 (daily ed. Oct. 16, 2002). As the Conference Report confirmed, the enforcement provision only "[a]llows for civil action by the Attorney General to carry out the requirements under Section 301-303." H.R. Conf. Rep. No. 730, 107th Cong., 2d Sess. 76 (2002). Having explicitly rejected efforts to include an express private right of action, Congress did not then create a right enforceable through Section 1983. *Gonzaga*, 536 U.S. at 290 ("It is implausible to presume that the same Congress nonetheless intended private suits to be brought before thousands of federal- and state-court judges."); cf. *Alexander* v. *Sandoval*, 532 U.S. 275, 288 (2001) (Court may look to legislative context to the extent that context clarifies the text.).

As the Supreme Court has made clear, a privately enforceable right may be conferred only with text that is "clear and unambiguous." HAVA comes nowhere near that high mark.

2. HAVA's Comprehensive Remedial Scheme Also Supports The Conclusion That HAVA Does Not Confer Individual Rights

In addition, HAVA's remedial scheme also supports the conclusion that HAVA does not confer individual rights. See *Gonzaga*, 536 U.S. at 289 (noting that the Court's conclusion that the

statute under review "fail[ed] to confer enforceable rights is buttressed by the mechanism that Congress chose to provide for enforcing those rights").

HAVA provides two distinct yet related means of enforcement. First, HAVA requires states to establish a state-based administrative complaint procedure for private citizens to air grievances. 42 U.S.C. 15512. This procedure, which applies to all States receiving federal funds under HAVA,[5] permits an individual who believes that a violation has occurred, is occurring, or is about to occur, to file a written and notarized complaint with the State. 42 U.S.C. 15512(a)(2). Section 15512 sets out nine specific requirements for the administrative complaint procedures, including that they be "uniform and nondiscriminatory," that similar complaints be consolidated, that a hearing be held upon request of the complainant, and that a final determination be made within 90 days unless the complainant consents to a longer period. *Ibid.* If the State determines that a violation of any of HAVA's uniform and nondiscriminatory election technology and administration provisions has occurred, the State *must provide* an appropriate remedy; if the State determines that there is no violation, it dismisses the complaint, but the State is required to publish the results of the administrative process. *Ibid.* If the State fails to meet the deadline for a determination, the complaint must be resolved within 60 days under alternative dispute resolution procedures. *Ibid.*

Second, Congress authorized the Attorney General to bring civil actions for declaratory and injunctive relief to enforce HAVA's provisions; thus, the United States ensures that States abide by

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[5] As of January 1, 2004, States not receiving federal funds under HAVA are required to certify to the Election Assistance Commission that they have established a state-based administrative complaint procedure to remedy grievances of private citizens "in the same manner" as states receiving federal funds under HAVA or to submit a compliance plan to the Attorney General providing detailed information on the steps the State will take to ensure that it satisfies HAVA's uniform and nondiscriminatory election technology and administration requirements. 42 U.S.C. 15512(b)(1).

HAVA's mandates. HAVA provides that:

> The Attorney General may bring a civil action against any State or jurisdiction in an appropriate United States District Court for such declaratory and injunctive relief (including a temporary restraining order, a permanent or temporary injunction, or other order) as may be necessary to carry out the uniform and nondiscriminatory election technology and administration requirements under sections 15481, 15482, and 15483 of this title.

42 U.S.C. 15511. Indeed, during the first year of HAVA's operation, the Attorney General has already exercised this authority, having filed the Department's first enforcement action against San Benito County, California, for violations of Section 302. *United States* v. *San Benito County*, No. C04-02056 (N.D. Cal. Oct. 10, 2004).

Thus, each State is required by HAVA to adopt a comprehensive administrative process for individual complaints that provides appropriate relief. These processes, moreover, are required to be published, are subject to notice and comment, and must be filed with the Election Assistance Commission. See 15 U.S.C. 15512. And, by empowering the Attorney General to seek judicial relief, HAVA provides for judicial review, ensuring that state officials will not have the final say over HAVA's federal requirements.

At the same time, HAVA's State/Federal enforcement scheme serves two valuable purposes. First, Congress was intentionally deferential to the fact that States have traditionally, and still do, direct the machinery of federal elections. Congress, therefore, left the primary policing of those systems to the individual states. Second, Congress sought to impose uniform national standards in several discrete areas. Congress, therefore, vested enforcement authority in the Attorney General. Allowing individual voters to judicially enforce HAVA's requirements would undermine each of these important purposes.

"Where a statute expressly provides a particular remedy or remedies, a court must be chary

of reading others into it," *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979), or finding them elsewhere. Here, HAVA's comprehensive remedial scheme supports the conclusion that Congress did not intend to create privately enforceable rights.

B. Even If HAVA Confers An Individual Right, Congress Foreclosed Use Of Section 1983 As A Remedy

Even if HAVA confers an individual right, that right may not be enforced through Section 1983 where "[a]llowing a plaintiff' to bring a § 1983 action 'would be inconsistent with Congress' carefully tailored scheme.'" *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 107 (1989) (quoting *Smith* v. *Robinson*, 468 U.S. 922, 1012 (1984)).

Although "[p]laintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes," the availability of a private remedy under Section 1983 is a *rebuttable* presumption.[6] *Gonzaga*, 536 U.S. at 284. That presumption is rebutted – and a plaintiff may not rely upon Section 1983 to enforce rights created by statute – where "Congress specifically foreclosed a remedy under § 1983." *Smith*, 468 U.S. at 1005 n.9. Congress's intent to foreclose use of Section 1983 can be manifested in one of two ways, either "expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Blessing* v. *Freestone*, 520 U.S. 329, 341 (1997); see also *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981) ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may

[6] By contrast, a plaintiff suing under an implied right of action has the burden of showing that the statute demonstrates "an intent to create not just a private right but also a private remedy." *Alexander*, 532 U.S. at 286.

suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.").

As with the inquiry into whether a private right exists at all, the question whether Congress foreclosed recourse to the remedies available through Section 1983 is at core an inquiry into "the intent of the Legislature." *Sea Clammers*, 453 U.S. at 13. See also *Smith,* 468 U.S. at 1012. This inquiry should not be wholly divorced from the question of whether the statute creates individually enforceable rights. The less clear the evidence that Congress intended to create private rights, the more carefully the court should scrutinize the impact of a Section 1983 action on the enforcement mechanisms that Congress expressly provided.

Thus, the relevant question is not whether any particular remedy, such as judicial review for private litigants, is available, but rather whether taken as a whole, the statute evidences Congress's desire to have its handiwork be the only means by which to enforce the statute. Here, HAVA clearly evidences that desire.

As described *supra*, Congress created a detailed and comprehensive remedial scheme. Congress required States to establish comprehensive administrative procedures to entertain individual HAVA complaints, 42 U.S.C. 15512, and authorized the Attorney General to bring civil actions for declaratory and injunctive relief to enforce HAVA's provisions in the event that States or state and local election officials fail to properly implement HAVA, 42 U.S.C. 15511. Congress also specifically declined to provide an express private right of action. Finally, HAVA's legislative history indicates that Congress did not contemplate private parties being able to use federal courts to enforce HAVA's provisions. See 148 Cong. Rec. S10512 (daily ed. Oct. 16, 2002) (statement of Sen. Dodd) ("While I would have preferred that we extend the private right of action afforded private parties under [the National Voter Registration Act], the House simply would not entertain such an

enforcement provisions [sic].").

HAVA's enforcement scheme is closely akin to the scheme the Supreme Court found precluded private suits under Section 1983 in *Smith* v. *Robinson*. In *Smith*, the Court held that the Education of the Handicapped Act established a "carefully tailored" enforcement scheme for aggrieved persons. There, the statute provided a local administrative remedy for individual claims that included fair and adequate hearings, procedural protections, and parental involvement. 468 U.S. at 1009-1011.

> In light of the comprehensive nature of the procedures and guarantees set out in the EHA and Congress' express efforts to place on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child, we find it difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go directly to court with an equal protection claim.

Id. at 1011. Such recourse would "render superfluous most of the detailed procedural protections outlined in the statute." *Ibid.* Similarly here, Congress set forth a "carefully tailored" enforcement scheme which would be "render[ed] superfluous" if private suits were permitted pursuant to Section 1983.

Indeed, the existence of a private right of action in the National Voter Registration Act (NVRA), 42 U.S.C. 1973gg-9(b), attests to Congress's ability explicitly to provide voters with a private right of action to seek relief for violations of federal statutes governing elections when it intends to do so. In HAVA, the absence of that provision speaks volumes. As was the case in *Gonzaga*, "[i]t is implausible to presume that the same Congress [as crafted the precise statutory remedies] nonetheless intended private suits to be brought before thousands of federal- and state-court judges." 536 U.S. at 290.

In sum, HAVA clearly delineated the respective roles of the States and the federal government on one hand, and individual voters on the other, in its enforcement. Indeed, Congress's scheme serves a clear purpose. The United States Constitution itself provides that while Congress is authorized to modify those rules, it has always recognized the States' historic (and constitutional) role in administering federal elections. HAVA's enforcement scheme demonstrates that Congress intended election mechanisms to remain largely the province of the States, requiring individual citizens to seek redress within those state systems. At the same time, by requiring each State to provide an administrative enforcement process for individual complaints that provides real relief, and by authorizing the Attorney General to seek judicial relief, HAVA makes certain that state and local election officials comply with its requirements. Recognizing a private cause of action to enforce HAVA would duplicate and frustrate the thorough enforcement scheme that Congress expressly put in place. Indeed, this carefully and deferentially crafted scheme clearly evidences Congress's intention to foreclose resort to Section 1983.

II

HAVA DOES NOT PREEMPT PRECINCT-BASED ELECTION SYSTEMS

American elections have long been precinct based – prospective voters are registered by their home address and assigned to a precinct where they may vote a ballot containing all candidates whose offices cover the area of the voter's residence. A well-understood premise of such a system is that a voter must appear at the correct polling place – the one to which the voter was assigned, and on whose rolls the voter appears – or else the voter will not be able to vote. HAVA neither requires nor preempts such a precinct-based system and its text (along with its legislative history) is clear on

this issue.[7]

HAVA's provisional ballot provisions are designed to permit certain voters whose eligibility to vote is in question to cast a ballot, leaving the confirmation of their eligibility until later. Specifically, these provisions look to assist those who believe that they are at the correct polling place, and are registered, yet who do not appear on the registrar's rolls, or who are otherwise informed by election officials that they cannot vote. Under 42 U.S.C. 15482(a), HAVA operates in the following manner:

- First, a prospective voter must declare that "such individual is a registered voter in the jurisdiction in which the individual wishes to vote * * * in an election for Federal office";
- Election workers must be unable to locate the individual on the precinct rolls, or must otherwise assert that the individual is not eligible to vote;
- Election workers then inform the voter of his or her ability to cast a provisional ballot;
- Before doing so, the voter must attest in writing 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";
- The voter may then vote a provisional ballot, which election officials "shall transmit * * * to an appropriate State or local election official for prompt verification";
- If such official "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) (emphasis added). Moreover, HAVA commands specifically that "[t]he specific choices on the methods of complying with the requirements of this subchapter shall be left to the

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[7] There is currently a split in the lower federal courts on whether HAVA precludes a State from requiring that a voter cast a provisional ballot at the polling place the voter is registered in order for that ballot to be counted. Compare *Hawkins* v. *Blunt*, No. 04-4177-CV-C-RED (W.D. Mo. Oct. 12, 2004), with *Sandusky County Democratic Party* v. *Blackwell*, Case No. 3:04CV7582 (W.D. Ohio Oct. 14, 2004).

discretion of the State." 42 U.S.C. 15485.

The key to understanding HAVA's requirements in this regard lies in the term "jurisdiction." A prospective provisional ballot voter must attest to being a registered voter in the jurisdiction in which the individual desires to vote, and it is that attestation to which election officials subsequently look in determining whether to count the provisional ballot. Congress did not define the term "jurisdiction" in the statute. Rather, Congress left the determination of that term to the laws of each State. 42 U.S.C. 15482. Election laws, including voter registration laws, differ widely from State to State. Congress recognized that variety, and rather than pre-empt the field, Congress in HAVA looked to state law to determine the appropriate jurisdiction for purposes of voter eligibility. The term "jurisdiction," as employed in HAVA, lends itself as easily to a specific precinct or polling place in which the voter is permitted under State law to vote, as it does to whatever wider jurisdiction a state might want to define.

Again, HAVA's legislative history supports, if not demands, this reading. Here, both Senators Dodd and Bond commented on HAVA's reach. First, with regard to HAVA's conference report, Senator Dodd noted:

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

148 Cong. Rec. S10510 (daily ed. Oct. 16, 2002). Moreover, "[n]othing in this compromise usurps the state or local election official's sole authority to make the final determination with respect to whether or not an applicant is duly registered, whether the voter can cast a regular vote, or whether that vote is duly counted." *Ibid.*

The Senate's discussion of 42 U.S.C. 15482(a)(4), which requires that votes be counted in accordance with state law, is equally illuminating. First, "ballots will be counted according to state law * * * . 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." 148 Cong. Rec. S10491 (daily ed. Oct. 16, 2002) (statement of Sen. Bond).

If it is determined that the voter is registered in a neighboring jurisdiction and state law requires the voter to vote in the jurisdiction in which he is registered, meaning the vote was not cast in accordance with State law, the vote will not count. Indeed, it was contemplated by the authors of the statute that under such circumstances, the vote would not count. In fact, Senator Bond – one of HAVA's floor managers – spoke to this very scenario:

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

148 Cong. Rec. S10491 (daily ed. Oct. 16, 2002). Senator Dodd, for his part, noted that HAVA does not establish "a Federal definition of when a voter is registered or how a vote is counted." *Id.* at S10504. Rather, HAVA provides that once a provisional ballot is cast, "[w]hether a provisional ballot is counted or not depends solely on state law." *Ibid.*

At the very least, HAVA evidences no hostility to the traditional precinct-based electoral system still followed by many states. Indeed, Senator Bond expressly noted that the provisional ballot requirement "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." See 148 Cong. Rec. S10493

(daily ed. Oct. 16, 2002). HAVA made it clear that states possess significant discretion in determining whether an individual whose right to vote was in question was eligible under state law to vote, and that provisional ballots should only be "counted as a vote" in accordance with each State's individual laws.

It has been suggested that because Congress did not define "jurisdiction" in HAVA, the "definition" of "jurisdiction" provided in the National Voter Registration Act (NVRA) should be applied. However, the NVRA did not disturb the long-held right of States to determine in which precinct or other jurisdiction an individual must cast a ballot, and HAVA must be read consistently with the NVRA. The NVRA regulates certain registration issues, but with the exception of citizenship, it does not address voter eligibility, which is explicitly left to state law. See 42 U.S.C. 1973gg-3(c)(2)(B); *ACORN* v. *Miller*, 912 F. Supp. 976, 985 (W.D. Mich. 1995) (explaining that the NVRA "does not regulate the qualification of voters"), aff'd, 129 F.3d 833 (6th Cir. 1997).

Section 8 of the NVRA simply requires that election officials allow a voter who "has moved from an address in the area covered by one polling place to an address in an area covered by a second polling place within the same registrar's jurisdiction and the same congressional district and who has failed to notify the registrar of the change of address" to vote either at the voter's former polling place, at a central location, or (if state law permits) at his new polling place. 42 U.S.C. 1973gg-6(e)(2)(a). The word "jurisdiction" is qualified by the word "registrar" in the NVRA. Even under this NVRA provision and the reference to a "registrar's jurisdiction" (and there is no reference in HAVA to the "registrar's jurisdiction"), voters are not allowed to vote anywhere they want within such jurisdiction, the result urged by the plaintiff. Such a requirement was clearly not contemplated under the NVRA when it was passed in 1993 nor under HAVA which does not refer to a "registrar's

jurisdiction."[8] Neither law disturbs the States' ability to require voting in the precinct to which a voter is assigned based on his residential address. HAVA left it to the States to define "jurisdiction" according to their state laws governing eligibility as the "specific choices on the methods of complying with the requirements" of HAVA are left to the discretion of the States. 42 U.S.C. 15485.

Forcing States to allow provisional balloting anywhere within a registrar's jurisdiction would also turn on its head the reason that the provisional balloting provisions were included in HAVA. Congress was trying to remedy problems in the voter registration system, not allow voters who are correctly registered to precinct shop. As Senator Bond stated, provisional ballots are meant to allow an individual who is registered to vote, but whose name, because of administrative or other clerical errors by election officials, does not appear on a voter registration list at the voter's assigned precinct, to vote a provisional ballot:

> Congress has said only that voters in Federal elections should be given a provisional ballot if they claim to be registered in a particular jurisdiction and that jurisdiction does not have the voter's name on the list of registered voters. The voter's ballot will be counted only if it is subsequently determined that the voter was in fact properly registered and eligible to vote in that jurisdiction. In other words, the provisional ballot will be counted only if it is determined that the voter was properly registered, but the voter's name was erroneously absent from the list of registered voters. 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.

148 Cong. Rec. S101493 (daily ed. Oct.16, 2002).

CONCLUSION

HAVA's text unmistakably speaks not to the rights of individual voters, but rather to the state

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[8] That the NVRA explicitly allows removal of an ineligible voter from the registration rolls due to "a change in the residence of the registrant," 42 U.S.C. 1973gg-6(a)(4)(B), is yet another example of how the NVRA did not disturb States' precinct-based voting system.

and local election officials responsible for administering federal elections. Nowhere does it contain a "clear and unambiguous" statement to the contrary. That, coupled with HAVA's remedial scheme, which includes both individual and governmental enforcement mechanisms, demonstrates Congress's intent to preclude resort to Section 1983 as a means to carry out its provisions. In any event, plaintiff fails to show any conflict between HAVA and Florida state law. This Court should dismiss any HAVA claims in this lawsuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2004, the foregoing MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF was electronically filed with the Clerk and the following parties of the Court using the CM/ECF system:

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