Nos. 04-4265, 04-4266

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE SANDUSKY COUNTY DEMOCRATIC PARTY, *et al.*,

Plaintiffs-Appellees

v.

J. KENNETH BLACKWELL,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT AND URGING REVERSAL

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INTEREST OF THE UNITED STATES

The United States in this amicus brief 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 plaintiffs. As was demonstrated during the extensive floor debates on the Help America Vote Act of 2002 (HAVA), 42 U.S.C. 15301 *et seq.*, 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* pursuant to Federal Rule of Appellate Procedure 29(a), 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 United States 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 National Voter Registration Act (NVRA), 42 U.S.C. 1973gg *et seq*. Congress's intent not to do so 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.

148 Cong. Rec. S10488-02, 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 42 U.S.C. 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 Bond acknowledged this as well:

> 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. * * * 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. at S10493.

STATEMENT OF THE ISSUES

1. Whether HAVA may be enforced privately under 42 U.S.C. 1983.

2. Whether HAVA precludes States from choosing precinct-based voting systems.

STATEMENT OF THE CASE

In response to shortcomings in the nation's electoral systems revealed by the 2000 election, Congress enacted the Help America Vote Act of 2002 (HAVA), 42 U.S.C. 15301 *et seq.* Among its many provisions, HAVA requires that state and local election officials permit any individual whose name does not appear on the official registration list for the polling place or whose eligibility to vote is called into question 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." 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). 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)(4).

HAVA requires each State receiving federal funds under the statute to establish a state-based administrative complaint procedure for private citizens to air grievances. 42 U.S.C. 15512. This procedure must permit 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 and request a hearing on the record. 42 U.S.C. 15512(a)(2). Under HAVA, if the State determines under these procedures 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 no violation has occurred, it may dismiss the complaint, but the State is required to publish the results of the administrative process. *Ibid.*

Moreover, HAVA expressly vests authority to seek equitable judicial relief to redress violations of HAVA with the United States:

> 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.

On September 16, 2004, defendant Ohio Secretary of State J. Kenneth Blackwell issued Ohio Secretary of State Directive 2004-33 (Directive 2004-33) to all Ohio County Board of Elections. Directive 2004-33 provides, in relevant part,

that

> [o]nly after the precinct pollworkers have confirmed that the person is eligible to vote in that precinct shall the pollworkers issue a provisional ballot to that person. Under no circumstances shall precinct pollworkers issue a provisional ballot to a person whose address is not located in the precinct, or portion of the precinct, in which the person desire[s] to vote. However, no provisional ballot will be disallowed because of pollworker error in a split precinct.

Sandusky County Democratic Party v. *Blackwell*, No. 04 civ. 7582, 2004 WL 2308862 (N.D. Ohio Oct. 14, 2004) (quoting Directive 2004-33).

Plaintiffs – the Sandusky County Democratic Party, the Ohio Democratic Party, and three labor organizations – sued defendant in Ohio district court under 42 U.S.C. 1983 contending that Directive 2004-33 violates HAVA in several respects. Among plaintiffs' claims is an assertion that Ohio may not prevent a voter from casting a provisional ballot at a precinct other than the one in which he resides. Plaintiffs also moved for a preliminary injunction enjoining defendant from applying the provisions of Directive 2004-33 that violate HAVA and requiring prompt issuance of a new directive instructing county election boards to issue and count provisional ballots in accordance with HAVA. Defendant filed an opposition to plaintiffs' motion for a preliminary injunction and a motion to dismiss that argued, *inter alia*, that plaintiff possessed no individual right of action to enforce HAVA via Section 1983 and that Directive 2004-33 conformed to HAVA's requirements.

On October 14, 2004, the district court issued an order denying defendant's motion to dismiss and granting plaintiff's motion for a preliminary injunction. *Sandusky County Democratic Party* v. *Blackwell*, No. 04 civ. 7582, 2004 WL

2308862 (N.D. Ohio). The district court concluded, in relevant part, that HAVA created individual rights enforceable in a Section 1983 action and that HAVA's remedial scheme was not sufficiently comprehensive to preclude resort to Section 1983. The court also held that HAVA precludes States from counting only provisional ballots cast in the precinct in which the voter resides. Defendant filed a notice of appeal with the Sixth Circuit, and filed its appellate brief on October 21, 2004.

SUMMARY OF ARGUMENT

In order to bring suit in federal court under 42 U.S.C. 1983 to enforce HAVA, plaintiffs must show that Congress (i) unambiguously manifested its intent to create an individual right, and (ii) did not intend for that right to be enforced through one or more specific means other than Section 1983. See *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 280, 283-285 (2002). Plaintiffs fail on both counts. First, HAVA's terms relating to provisional voting are phrased in terms of the duties and obligations of state and local election officials responsible for administering federal elections rather than the rights of individual voters, thus failing to demonstrate a "clear and unambiguous" intent to confer individual rights. Second, HAVA's enforcement scheme, which authorizes the Attorney General to bring civil actions for declaratory and injunctive relief to enforce its provisions and requires States to establish detailed administrative schemes to entertain complaints of private plaintiffs, is sufficiently comprehensive to preclude resort to Section 1983.

HAVA also neither conflicts with, nor preempts, precinct-based electoral systems such as Ohio's. HAVA requires that a voter attest in writing that he is "a

registered voter in the jurisdiction in which the individual desires to vote" before receiving a provisional ballot. 42 U.S.C. 15482(a). Because HAVA does not define the term "jurisdiction" in the statute, but rather left that term for the States to define, HAVA is completely consistent with Ohio's requirement that a voter cast a provisional ballot at the polling place to which he is assigned.

ARGUMENT

The district court erred in ruling that Title III of the Help America Vote Act of 2002 (HAVA), 42 U.S.C. 15301 *et seq.*, created an individual right enforceable in a Section 1983 action. Title III of HAVA, 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. See pp. 12-15, *infra*. 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.

The district court also erred in ruling that the portion of Ohio Directive 2004-33 dealing with provisional balloting conflicts with the requirements of HAVA. 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 Bond of Missouri – one of HAVA's floor managers – specifically acknowledged, "[t]his 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. S10488-02, S10493 (daily ed. Oct. 16, 2002).

Because HAVA is not amenable to private enforcement and, alternatively, because Congress did not intend through HAVA to preclude States from choosing precinct-based voting systems, this Court should reverse the judgment of the district court and remand the case to the district court with instructions to vacate the preliminary injunction and dismiss all of the plaintiffs' HAVA related 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.

Not every violation of a federal statute, however, constitutes a deprivation of "rights" within the meaning of Section 1983. *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 106 (1989). For a statute to be so enforced, Congress must have (i) unambiguously manifested its intent to create an individual right, and (ii) 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 mechanism. Accordingly, HAVA may not be enforced privately through 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.[1] *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 inquiry begins with "the text and structure of the statute," and if these "provide no indication that Congress intends to create new

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[1]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" (emphasis added) (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.").

individual rights, there is no basis for a private suit." *Id.* at 286. Further, the statutory language cannot be considered in isolation. It 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).

In addition, the determination whether a statute creates individual rights cannot be wholly divorced from consideration of the enforcement mechanisms statutorily prescribed by Congress. Where, as here, Congress creates specialized enforcement procedures that envision uniform and centralized enforcement of the law, and/or ongoing interaction and cooperation between the federal and state governments, the operation of the statute as a whole weighs against concluding that Congress simultaneously intended to confer individual rights to be enforced through broad and dispersed litigation in state and federal courts across the country. *Gonzaga*, 536 U.S. at 289 ("Our conclusion that FERPA's nondisclosure provisions fail to confer enforceable rights is buttressed by th mechanism that Congress chose to provide for enforcing those provisions."). Indeed, inherent in the question of whether a particular statute creates a new substantive federal right is what the scope of that right is – a question that necessarily imports considerations of remedy and relief.

As set forth in greater detail below, an examination of the text and structure of HAVA, along with a consideration of the enforcement mechanisms statutorily prescribed by Congress, reveal that Congress did not intend to confer individual

rights upon a class of beneficiaries. As a result, there is no basis for plaintiffs' 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; 20 U.S.C. 1681(a) (emphasis added). 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" that the States may exceed, 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). Indeed, the overall structure of Title III focuses broadly and structurally on voting mechanisms, procedures, and systems designed to benefit the voting populace as a whole, rather than the interests of any individual voter. *Gonzaga* made clear that statutes that speak to macro, institutional policies and programs and have such an "aggregate" focus "are not concerned with whether the needs of any particular person have been satisfied, and they cannot give rise to individual rights." 536 U.S. at 288.

Even if Section 302(a) were 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 "*the 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)." *Ibid.* (emphasis added). 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. Because Section 302 was not drafted "with an unmistakable

focus" on voters, but was instead drafted with a focus on the state actors charged with overseeing voting, there is "far less reason to infer a private remedy in favor of individual persons." *Cannon*, 441 U.S. at 690-692. Moreover, while making provisional balloting easier may benefit individual voters, that alone is insufficient to create an individual right.[2] See *Gonzaga*, 536 U.S. at 283. As a result, Section 302 simply does not unambiguously confer individual rights.

Of course, as the district court noted, Title III, including Section 302, references "individuals" 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 create a privately enforceable right. The central flaw in the district court's analysis is that it focuses narrowly upon this one isolated subclause. *Sandusky County Democratic Party* v. *Blackwell*, No. 04 civ. 7582, 2004 WL 2308862, at *6 (N.D. Ohio Oct. 14, 2004). As noted above, however, it is

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[2] 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.

simply not enough to identify statutory language that, considered in total isolation, could be read to create an individual right. Moreover, Congress's description of a statutory directive as a "right" is not enough because it does not answer the controlling question of whether Congress intended to "secure" those "rights" in the specific sense in which the term is used in Section 1983. Indeed, in *Gonzaga* the Court rejected the argument that, because other parts of the statute employed the term "rights" to describe obligations imposed on a 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.

Moreover, that HAVA regulates an area traditionally left to the States – voting – also counsels against a finding that HAVA may be enforced privately through Section 1983. Indeed, control over voting procedures, locations, and qualifications resides largely in the hands of the State not merely as a product of tradition and practice, but as a matter of constitutional design.[3] 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 provide for such remedies. See *Gonzaga*, 536 U.S. 273 at 286 n.5

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[3] Administering federal elections, including voting, is an area that was specifically reserved to the States by the United States Constitution. See Art. I, § 4, cl. 1.

(noting that to infer 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.

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.

148 Cong. Rec. S10488-02, S10512 (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."[4] H.R.

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[4] Representatives of the National Council of LaRaza, which opposed HAVA's enactment, also commented on what it considered "weak enforcement provisions," noting that under HAVA

> Voters who are denied their right to vote because of this law *cannot turn to the federal courts for a remedy.* Rather, disenfranchised voters must either wait for the Department of Justice to take action or

(continued...)

Conf. Rep. No. 730, 107th Cong., 2d Sess. 76 (2002). The district court brushed this evidence aside, concluding that it evidenced only Congress's plain intent not to create an express private right of action, and therefore that it has no bearing on whether HAVA permits private enforcement through Section 1983. *Sandusky County*, 2004 WL 2308862, at *9-*10. But, the touchstone of this analysis is Congress's intent, *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981), and it is manifestly implausible that having explicitly rejected efforts to include an express private right of action, Congress yet intended to 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

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[4](...continued)

> ask the same state election system that disenfranchised them to determine that there is a violation and provide a remedy for the problem.

148 Cong. Rec. at S10501 (emphasis added).

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").

Congress carefully considered and delineated precisely what enforcement mechanisms would be available under HAVA. Indeed, it devoted an entire title of the law to "ENFORCEMENT." See Title IV. In Title IV, Congress crafted two mutually reinforcing remedial schemes that ensure compliance with federal law, while respecting traditional state discretion and autonomy in this area. 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

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[5] According to the Election Assistance Commission, all 55 of the covered States and territories have received federal funds under HAVA. See Election Assistance Commission, HAVA Title II Requirements Payments Processed By The EAC As Of September 29, 2004, *available at* http://www.eac.gov/docs/HAVA%20Req.%20Paymts.%209-29-04.pdf; see also Election Assistance Commission, Funding For States: Early Money Distributed to States *available at* http://www.eac.gov/early_money.asp?format=none. Moreover, Ohio has received over $130 million in HAVA funding. *Ibid.*

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 may dismiss 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 HAVA's mandates. HAVA states 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 this 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., San Jose Division).

Thus, each State is required by HAVA to formally adopt a comprehensive administrative process for individual complaints that provides appropriate relief.[6]

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[6] These processes, moreover, are required to be published, are subject to notice and

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Courts must assume that state officials, acting through such formalized procedures, will comply with and adhere to federal law. See, *e.g.*, *Agostini* v. *Felton*, 521 U.S. 203, 223-224 (1997) (Court presumes that state actors will comply with federal restrictions). Of particular importance, Congress required that any decision adverse to the individual be published. That requirement ensures that any erroneous applications or interpretations of HAVA can be brought to the attention of the Attorney General, who can then decide whether federal enforcement action is warranted or whether the problem can better be addressed through inter-governmental discussion and cooperative remedial efforts. It is unlikely that Congress intended that carefully crafted remedial scheme in an area of sensitive federal-state relations to be supplemented by the heavy remedial hammer of Section 1983 action. See *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 75 (1996).

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 operation 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. Indeed, it is implausible to

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[6](...continued)
comment, and must be filed with the Election Assistance Commission. See 42 U.S.C. 15512.

suppose that the same Congress that sought to obtain uniformity, stability, and certainty in voting procedures for federal elections simultaneously intended to consign control over HAVA's interpretation to thousands of federal and state court judges and juries across the country. See *Gonzaga* 536 U.S. at 290.

"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. 992, 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.[7] *Gonzaga*, 536 U.S. at 284. That presumption is rebutted – and a plaintiff may not rely upon Section 1983

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[7] 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.

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*, 520 U.S. at 341; see also *Sea Clammers*, 453 U.S. at 20 ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may 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,[8] the statute evidences Congress's desire to have its handiwork be the only

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[8] The district court erred in decoupling HAVA's governmental enforcement section from its private enforcement section to determine whether HAVA's remedial scheme was sufficiently comprehensive to preclude Section 1983 suits by private

(continued...)

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 States or state and local election officials fail to implement HAVA properly, 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 go into federal court to enforce HAVA's provisions. 148 Cong. Rec. at S10512 (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*. 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 claimants that included fair and adequate

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[8](...continued)
individuals. When these provisions are correctly viewed as a coherent whole, they clearly evince Congress's intent to foreclose recourse to this remedy. See, *e.g.*, *Sea Clammers*, 453 U.S. at 20 (reviewing entire remedial scheme in determining congressional intent to preclude suits under Section 1983).

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.

Smith, 468 U.S. 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.

The statutory remedial scheme Congress established under HAVA differs significantly from those schemes that the Supreme Court found lacking in *Wright*, *Wilder*, and *Blessing*. In *Wright* v. *City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 427-428 (1987), the Court held that the availability of limited local grievance procedures to tenants living in local public housing authorities, and the Secretary of Housing and Urban Development's "generalized powers" to audit those authorities, to enforce annual contributions contracts, and to cut off federal funds, were "insufficient to indicate a congressional intention to foreclose § 1983 remedies." The Court reached the same conclusion in *Wilder* v. *Virginia Hospital Ass'n*, 496 U.S. 498, 521-523 (1990), where the Medicaid Act authorized the Secretary of Health and Human Services to reject state Medicaid plans or to withhold federal funding to States whose plans did not comply with federal law, and health care providers to obtain administrative review of individual claims for payment. And in *Blessing*, the Court concluded that the remedial

scheme's lack of a "private remedy – either judicial or administrative – through which aggrieved persons [could] seek redress," and its reliance upon the limited power of the Secretary of Health and Human Services to audit and cut federal funding to ensure that States lived up to their child support plans, made the case more like *Wright* and *Wilder* than *Sea Clammers* and *Smith*. 520 U.S. at 348.

Here, by contrast, HAVA contains a private remedy through which aggrieved persons can seek redress. As discussed in detail on pages 19 to 21, HAVA requires that States establish comprehensive administrative procedures to entertain *individual* HAVA complaints. 42 U.S.C. 15512. Significantly, Section 402 does not impose the sort of limitations on the administrative procedure that the Court found, in *Wright* and *Wilder,* permitted the use of Section 1983. See *Wright*, 479 U.S. at 427; *Wilder*, 496 U.S. at 523.

Second, HAVA authorized the Attorney General to bring civil actions for declaratory and injunctive relief to enforce HAVA's provisions. 42 U.S.C. 15511. This authority is substantially greater than that of the federal agencies in *Blessing*, *Wilder*, and *Wright*. In those cases, the only remedial powers expressly conferred on the agencies by the statutes were the power to audit and to terminate federal funds. Here, by contrast, the Attorney General "may bring a civil action against any State or jurisdiction" in federal court and may seek any declaratory and injunctive relief that is necessary, including a temporary restraining order or a permanent or temporary injunction. 42 U.S.C. 15511. This authority is significant and ensures federal judicial review, an element that was lacking in *Blessing*, *Wilder*, and *Wright*. In fact, Section 401 is more comparable to the provisions of the Federal

Water Pollution Control Act that entitled government officials to sue to implement the Act, which the Supreme Court deemed sufficiently comprehensive to preclude use of Section 1983 in *Sea Clammers*.

Although Section 402 does not require judicial review of the state administrative decision, this omission is not dispositive. First, the lack of mandatory judicial review is consistent with the informal and expedited nature of Section 402's administrative complaint procedure. Second, and more importantly, even if an individual cannot seek judicial review of the State's administrative decision, Congress's decision to permit the Attorney General to seek equitable relief in a United States District Court to redress HAVA violations provides an alternative means for federal judicial review of violations of the Act.

Indeed, the existence of a private right of action in the National Voter Registration Act, 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 States, not federal courts, are to establish rules for

voting. See U.S. Const., Art. I, § 4, cl. 1. 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

HAVA was designed to supplement and improve States' voting systems for federal elections. It was not designed to supplant or to dramatically restructure them. The Constitution, practice, and tradition have long left the definition of voting jurisdictions and the establishment of voting locations to the States. When Congress has intended to alter that longstanding practice, such as by requiring preclearance under the Voting Rights Act, it has said so explicitly and not elliptically.

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 of the 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.[9] Yet that is the upshot of the district court's ruling and plaintiffs' arguments. They read Section 302(a) as creating a right to vote in any precinct an individual "desires to vote" as long as the individual is otherwise qualified to vote in the State's election for Federal offices.

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 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 and that the individual is eligible to vote in an election for federal office";

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[9] We would note that 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 civ. 4177 (W.D. Mo. Oct. 12, 2004) (unpublished) (attached as an addendum), and *Florida Democratic Party* v. *Hood*, No. 04 civ. 395 (N.D. Fla. Oct. 21, 2004) (unpublished) (attached as an addendum), with *Sandusky County Democratic Party* v. *Blackwell*, No. 04 civ. 7582, 2004 WL 2308862 (N.D. Ohio Oct. 14, 2004), and *Bay County Democratic Party* v. *Land*, No. 04 civ. 10257, 2004 WL 2345560 (E.D. Mich. Oct. 19, 2004).

- 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).

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 (Section 302(a)(2)(A)), and it is that attestation to which election officials subsequently look in determining whether to count the provisional ballot (Section 302(a)(4)).

Congress did not define the term "jurisdiction" in the statute. The better reading of the statutory text – one that both respects the important interests served by precinct-based voting and that advances the purposes that animated HAVA – is that Section 302(a) permits persons who, in good faith, have attempted to vote at their designated polling place but whose names do not appear on the rolls to cast a provisional ballot that protects their interests pending resolution of their entitlement to vote in the federal election. Under that reading of the statute, the term "jurisdiction" refers to the voting location identified by state law in which the

particular voter may lawfully cast a ballot under state law. Congress chose a flexible term like voting "jurisdiction" because it recognized that the delineation of the appropriate locale for casting a lawful vote will vary depending on state law. See *Storer* v. *Brown*, 415 U.S. 724, 730 (1974) ("[T]he States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates."). Congress was well aware that election laws differ widely from State to State, and rather than preempt the field, Congress respected the State's traditional role in this area and looked to state law to determine the appropriate jurisdiction under HAVA. See 42 U.S.C. 15485 (commanding that "the specific choices on the methods of complying with the requirements of [Title III] shall be left to the discretion of the State").

Further, the Supreme Court has made clear that statutory terms should be interpreted in light of the context of the overall statutory scheme and in light of nearby statutory provisions that reflect similar concerns. See, *e.g.*, *Christensen* v. *Harris County*, 529 U.S. 576, 583-584 (2000); see also *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). Here, Section 302(a)(4) of HAVA clearly provides that determinations of whether an individual is eligible to vote and whether a provisional ballot should be counted are to be made *under and*

in accordance with State law, thereby reflecting Congress's concern that State law in this area be respected. 42 U.S.C. 15482(a)(4).

In its ruling below, the district court, however, concluded that "jurisdiction" must mean "county." *Sandusky County Democratic Party* v. *Blackwell*, No. 04 civ. 7582, 2004 WL 2308862, at *14 (N.D. Ohio Oct. 14, 2004). Yet, 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. Had Congress meant "county," it would have said "county." Had it meant "the unit of government that maintains the voter-registration rolls," it would have used those words. But it did not. Congress simply chose not to define the term "jurisdiction" in HAVA. Instead, as noted above, Congress decided to leave the definition of "jurisdiction" up to the States, just as it did voter eligibility. Cf. *Oneida Tribe of Indians* v. *Wisconsin*, 951 F.2d 757 (7th Cir. 1991) (noting that Congress would have used the term "lottery" in the Indian Gaming Regulatory Act had it so intended. That it chose instead to use the term "lotto" demonstrates it did not intend "lotto" to mean "lottery").

The lynchpin of the district court's contrary holding was its conclusory assertion that the term "jurisdiction" in HAVA has the same meaning as the term "registrar's jurisdiction" in the National Voter Registration Act (NVRA), 42 U.S.C. 1973gg *et seq*. *Sandusky County*, 2004 WL 2308862, at *14. The NVRA defines the term "registrar's jurisdiction" as the geographic reach of the unit of government that maintains the voter-registration rolls. See 42 U.S.C. 1973gg-6(j). Under that

definition, the court concluded that, at least for purposes of Ohio law, the term "jurisdiction" means county, rather than precinct, as voter-registration rolls in Ohio are maintained by the county. For the reasons that follow, the district court erred by reading into HAVA the NVRA's definition of "registrar's jurisdiction."

First, the NVRA doesn't even define the word "jurisdiction." Rather, the NVRA defines the phrase "registrar's jurisdiction," a term that is both unique to the NVRA, which specifically deals with registration issues, and completely foreign to HAVA, which includes absolutely no references to the term "registrar" much less the phrase "registrar's jurisdiction." As such, the NVRA definition is simply inapplicable to HAVA.

Second, while Section 906 of HAVA explicitly provides that it should not be construed to supersede, restrict, or limit a number of other statutes, including the NVRA, failing to apply the NVRA's definition of "registrar's jurisdiction" to HAVA would neither supersede, restrict, nor limit the NVRA. Indeed, the NVRA did not disturb the long-held right of States to determine in which precinct or other jurisdiction a voter must cast his or her ballot. Rather, the NVRA regulates certain registration issues not at issue here and, with the exception of citizenship, simply does not address voter eligibility, which, under the NVRA, is explicitly left to state law.[10] 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

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[10] As another example of how the NVRA did not disturb States' precinct-based voting system, 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).

of voters"), aff'd, 129 F.3d 833 (6th Cir. 1997).

Third, if Congress had wanted to borrow a definition from the NVRA, it could have done so. Congress knows how to borrow definitions from other statutes when it wants to, see, *e.g.*, 42 U.S.C. 12114 (definition section of Americans with Disabilities Act using or incorporating by reference definitions in Title VII), and, if it so desired, could easily have done so here. That it did not is telling. See *Christensen*, 529 U.S. at 585 (finding that "[b]ecause the statute is silent on th[e] issue and because [Respondent's] policy is entirely compatible with" the statutory provision, petitioners cannot prove violation of statute).

Fourth, as the Supreme Court noted twice last Term, the word "jurisdiction" is susceptible of different meanings. See *Kontrick* v. *Ryan*, 124 S. Ct. 906, 915 (2004); *Scarborough* v. *Principi*, 124 S. Ct. 1856, 1864-1865 (2004); see also *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 90 (1998) ("'Jurisdiction,' it has been observed, is a word of many, too many, meanings.") (internal quotation marks omitted). If there is any ambiguity in the meaning of "jurisdiction" such that it could be read to dispense with precinct-based voting or preserve the States' ability to maintain precinct-based voting, it is well settled that the term should not be interpreted to override a traditional state practice. See *United States* v. *Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."); see also *Penn Dairies, Inc.* v. *Milk Control Comm'n*, 318 U.S. 261, 275 (1943) ("An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative

command, read in the light of its history, remains ambiguous."). Applying the NVRA's definition of jurisdiction would eviscerate the considered judgment of the States that require precinct-based voting, thereby eliminating a long-standing tradition in United States election law. See, *e.g.*, *AFL-CIO* v. *Hood*, No. SC04-1921, slip op. 5 (Fla. S. Ct. Oct. 18, 2004) (noting tradition of precinct-based elections in holding that precinct-specific provisional balloting law does not violate the Florida Constitution). Put simply, "[a]n inroad upon [State laws and standards] of such far-reaching import as is involved here, ought to await a clearer mandate from Congress." *Federal Trade Comm'n* v. *Bunte Bros., Inc.*, 312 U.S. 349, 354-55 (1941). Indeed, before discarding so core an element of so many States' voting systems, Congress certainly would have afforded it more discussion. It may well be the case that on balance precinct voting should be discarded – the United States does not take a position – but that particular policy matter was not for the district court to decide. See *Owasso Ind. Sch. Dist.* v. *Falvo*, 534 U.S. 426, 432 (2002) ("We would hesitate before interpreting the statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation.").

Fifth, importing the NVRA's definition of "registrar's jurisdiction" into HAVA – which would have the effect of prohibiting precinct-based election systems – is inconsistent with guidance recently issued by the United States Election Assistance Commission (EAC). The EAC, a federal agency established by Section 201 of HAVA, see 42 U.S.C. 15321, is charged with assisting the States in meeting the requirements of Title III by adopting "voluntary guidance consistent with such

requirements," 42 U.S.C. 15501. On October 12, 2004, the EAC adopted Resolution 2004-02. In this resolution, the EAC encourages States to take all actions necessary to make certain that provisional balloting is administered effectively and with clarity and "[i]n States where a provisional ballot is validly cast only when cast at the voter's assigned polling place or precinct, that these States make information available to poll workers at all precincts and/or polling places that will allow the poll workers to determine the voter's assigned precinct and polling place." U.S. Election Assistance Commission, Resolution 2004-02 Provisional Voting, *available at* http://www.eac.gov/docs/Resolution%20-%20Provisional%20Voting.pdf. Clearly, the EAC explicitly recognizes that HAVA does not preempt precinct-based elections systems.

Finally, HAVA's legislative history supports, if not demands, this reading. As Senator Bond – one of HAVA's floor managers – stated, provisional ballots are meant to allow an individual who 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. S10488-02, S10493 (daily ed. Oct. 16, 2002) (emphasis added). In

fact, Senator Bond spoke to the very scenario at issue in this case:

> Additionally, it is inevitable that voters will mistakenly arrive at the wrong polling place. If it is determined by the poll worker 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. at S10491 (emphasis added).

The Senate's discussion of Section 302(a)(4), which requires that votes be counted in accordance with state law, is equally illuminating. First, Senator Bond stated that "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. at S10491. Senator Dodd also 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. at S10510. 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 ballot, or whether that vote is duly counted." *Ibid.* See also *id.* at S10504 (noting that HAVA does not establish "a Federal definition of when a voter is registered or how a vote is counted").

The district court dismissed this history in a footnote, *Sandusky County*, 2004 WL 2308862, at *15 n.7, finding it "not pertinent" because the court had already

concluded that "'jurisdiction' means county." As discussed above, though, the court chose to define what Congress had intentionally left undefined. Election laws differ widely from State to State. Congress recognized that variety, and rather than preempt the field, Congress in HAVA looked to state law to determine the appropriate jurisdiction for purposes of voter registration and eligibility.

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. at S10493. HAVA made 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.

CONCLUSION

HAVA's text unmistakably speaks not to the rights of individual voters, but rather to the state 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, plaintiffs fail to show any conflict between HAVA and Ohio law. This Court should reverse the judgment of the district court and remand the case to the

district court with instructions to vacate the preliminary injunction and dismiss all of the HAVA related claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains no more than 10,949 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Date: October 22, 2004

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2004, a copy of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT AND URGING REVERSAL was served by electronic mail or facsimile transmission, in accordance with the Court's briefing schedule, to the following counsel of record:

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