

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO**

THE LEAGUE OF WOMEN VOTERS OF OHIO, ET. AL.,

v.

J. KENNETH BLACKWELL.

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Case No.: 3:04 CV 7622

Judge: Carr

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

INTRODUCTION

This motion for emergency relief is brought to halt the Ohio Secretary of State from illegally nullifying federal law mandating that provisional ballots be provided to certain categories of voters and that provisional ballots submitted by eligible registered voters on election day be counted. Absent this Court's intervention, the Defendant intends to defy federal law and to disenfranchise thousands of eligible Ohio voters.

In response to the widespread disenfranchisement that occurred during the 2000 Presidential election, Congress passed the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. §§ 15301 *et seq.*, to guarantee that this prior travesty of voting justice would never again occur. To ensure that every individual eligible to vote in an election for federal office may cast a vote and have that vote counted, HAVA mandates that "provisional ballots" be provided to two categories of voters, among others, whose eligibility to vote cannot immediately be confirmed at a polling site: (1) certain first-time voters who registered by mail and who cannot provide identification on Election Day,

and (2) voters who seek to vote at the wrong polling place. Of equal importance, HAVA requires election officials subsequently to seek to verify the eligibility of the voters who cast provisional ballots and to count all votes cast on a provisional ballot once the voter's eligibility is confirmed.

In direct defiance of this federal law, the Defendant has directed election officials not to verify the eligibility of first-time voters who cast provisional ballots but do not have identification, and not to count their provisional ballots, including those cast by eligible voters. If implemented, this directive would turn the provisional balloting scheme into a meaningless sham, presenting the voter with a decoy ballot while effectively disenfranchising him or her. In further defiance of federal law, the Defendant has also directed election officials not even to provide provisional ballots to any voters, including eligible voters, who seek to vote in polling places other than those assigned to them by election officials. If implemented, this directive would irreversibly deny eligible voters the protection of federal law and disenfranchise them.

Defendant's attempt to nullify federal law's "fail-safe voting" safeguards by administrative fiat must be stopped. As demonstrated below, Plaintiffs are overwhelmingly likely to succeed on the merits of their claims that Defendant's directives violate HAVA and will be irreparably harmed if the requested injunction is not issued.¹

Plaintiffs thus seek by this motion to enjoin the Defendant from illegally (i) rejecting provisionally ballots cast by eligible first-time voters who registered by mail but do not provide identification at the polling place on Election Day and (ii) refusing to

¹ While Plaintiffs are also likely to succeed on the merits of their federal constitutional claims, in order to expedite consideration of this motion for preliminary relief, Plaintiffs do not raise those claims on this motion.

issue provisional ballots to voters who cast provisional ballots in the wrong precincts on Election Day. The eligibility of these voters can be determined without significant burden to the State, and HAVA requires that Ohio make that determination rather than disenfranchising eligible voters. Plaintiffs have already filed a motion to consolidate this case with *Sandusky County Democratic Party et al. v. Blackwell*, No. 04-CV-7582, and would like to adhere to any schedule established in that case so as not to cause any delay.

STATEMENT OF FACTS

A. The Federal Help America Vote Act Mandating the Issuance and Counting of Provisional Ballots

In the 2000 presidential election, thousands of voters in every State – including Ohio – were unfairly turned away from the polls without having cast a ballot because poll workers could not find their names on the official list of eligible voters for a particular polling place. In many cases, these rejected voters were eligible and properly registered voters. The National Commission on Election Reform, chaired by former Presidents Gerald Ford and Jimmy Carter, found that in the 2000 election, administrative errors effectively disenfranchised thousands of eligible registered voters. *See* National Commission on Election Reform, *To Assure Pride and Confidence in the Electoral Process*, at 34 (2001) (hereinafter “Ford-Carter Report”) (Exhibit 1 to the Declaration of Wendy R. Weiser, dated Oct. 5, 2004 (“Weiser Decl.”)).

The administrative problems in the 2000 election had a disproportionate impact on voters who were members of racial minority groups, and on low-income voters. *See* **General Accounting Office, Elections: Statistical Analysis of Factors That Affected Uncounted Votes in the 2000 Presidential Election**

(Weiser Decl., Ex. 2), at 3 (2001) (“[C]ounties with higher percentages of minority residents tended to have higher percentages of uncounted presidential votes, while counties with higher percentages of younger and more educated residents tended to have lower percentages of uncounted presidential votes.”); see also House Committee on Government Reform, Minority Staff, Special Investigations Division, Income and Racial Disparities in the Undercount in the 2000 Presidential Election (Weiser Decl., Ex. 3), at 8 (July 9, 2001) (percentage of uncounted votes in 20 congressional districts with low-income/high minority populations were higher, regardless of the type of voting equipment used, than in congressional districts with high-income/low minority populations).

To prevent future disenfranchisement of eligible voters, the Ford-Carter Commission recommended that the following two-part procedure be adopted nationwide. First, every State should replace local voter rolls with a system of statewide voter registration, with one computerized voter file accessible to local election officials throughout the State. Second, every State should permit “provisional voting” by any voter who claims to be qualified to vote in that State. The Commission explained that, in recommending the adoption of provisional balloting, “we are motivated by a consistent goal: No American qualified to vote anywhere in her or his state should be turned away from a polling place in that state.” **(Weiser Decl., Ex. 1, at 35.)** *Accord* Caltech/MIT Voting Technology Project, *Voting: What Is, Could Be* (Weiser Decl., Ex.

4), at 30 (2001) (“estimating that 1.5 million rejected votes of eligible voters could have been saved in the 2000 presidential election by use of “provisional ballots.”

A provisional ballot is “a ‘fail safe’ method that can be used when a potential voter’s registration status is challenged at the precinct.” *Id.* at 29-30. Provisional voting allows a voter whose information does not appear on a polling place’s list of registered voters to cast a ballot that is segregated from the regular ballots and counted later, after election officials verify the voter’s eligibility. Ordinarily, the voter places a provisional ballot in an envelope bearing her signature and information about the circumstances of the provisional vote. After the election, officials use the information on the outside of the provisional-ballot envelope to research the voter’s eligibility. If they verify that the voter was eligible to vote, the envelope is opened and the election officials count the votes she cast for the offices for which the voter was qualified to vote. If the election officials determine that the voter was not eligible to vote, the envelope remains sealed and the ballot goes uncounted. *Id.*

In order to revive confidence in the voting system after widespread criticism of the administration of the 2000 Presidential election, Congress passed the Help America Vote Act of 2002 (“HAVA”), which President George Bush signed into law on October 29, 2002. HAVA contains a number of provisions to promote voting and election administration systems that will “be the most convenient, accessible, and easy to use for voters,” and will “be nondiscriminatory and afford each registered and eligible voter an equal opportunity to vote and to have that vote counted.” 42 U.S.C. §§ 15381(a)(1), (3) (goals to be promoted by Election Assistance Commission). Among those provisions are HAVA’s provisional ballot requirements. As set forth below, HAVA requires every

State to implement a system of provisional balloting so that no qualified voter will be turned away from the polls without being able to cast a meaningful vote by provisional ballot.

Congress found that provisional balloting was needed to guarantee that eligible voters would not be disenfranchised in future elections, as they were in the 2000 election.

As Representative Menendez stated:

Hundreds, maybe thousands of voters were improperly turned away from the polls in the last election, their votes effectively robbed through a careless bureaucracy at best, and mal intent at worst. We may never know for sure, but we do know that we need provisional voting to prevent this travesty from ever occurring again.

150 Cong. Rec. H7227 (daily ed. Dec. 12, 2001) (statement of Rep. Menendez).

Representative Ney, the House sponsor of the bill, explained on the night of the final vote in the House that the goal of HAVA's provisional balloting provisions is to prevent the disenfranchisement of registered voters:

When this legislation goes into effect, the voting citizens in this country will have the right to a provisional ballot, so no voter will be turned away from a polling place, no voter will be disenfranchised, just because their name does not appear on a registration list.

148 Cong. Rec. H7837 (daily ed. Oct. 10, 2002) (statement of Rep. Ney).

HAVA mandates that states count provisional ballots if “the individual is eligible under State law to vote.” 42 U.S.C. § 15482(a)(4). Thus, by requiring that each State enact the provisional balloting fail-safe mechanism, HAVA defers to the State's ability to define voter eligibility, but requires that mere administrative requirements cannot keep an otherwise eligible voter from voting and having her vote count. As set forth below, an individual is eligible to vote in Ohio if she is a citizen of the United States, is eighteen or more years old, has been a resident of the state of Ohio for the thirty days prior to the

election in which she seeks to vote, and has been registered to vote anywhere in the State for the thirty days prior to the election.

B. Ohio Plan to Implement the Help America Vote Act

Notwithstanding the broad provisional voting rights guaranteed by HAVA, Ohio has never amended its statutory scheme to meet HAVA's mandate. (*See* Compl. ¶¶ 42-44.) Recognizing, however, that significant changes were needed to bring Ohio's provisional balloting system into compliance with federal law, in 2003, Defendant Blackwell submitted to the Federal Election Assistance Commission "A State Plan to implement the Help America Vote Act of 2002 in accordance with Public Law 107-252, § 253(b)" (Weiser Decl., Ex. 5), which was published in the Federal Register on March 24, 2004, 69 Fed. Reg. 14879, 2004 WL 578763.²

The Ohio State Plan acknowledged that HAVA requires election reform in Ohio to meet "the more encompassing aim of the Act," namely, "to invite more voters into the process to exercise their rights and responsibilities as qualified voters." (Weiser Decl., Ex. 5, at 17.) In furtherance of this overriding goal, the State Plan discussed "[t]he critical role of provisional voting in election reform," and called provisional voting "a way to ensure every eligible voter who shows up at the polls on Election Day can cast a ballot." *Id.* at 33.

Recognizing that the extant Ohio system already "protects those who changed their residence," the State Plan promised that Ohio would be "sensitive" to other voters whose names do not appear on the voter rolls, such as voters who show up at the polls

² The State Plan was submitted to comply with Section 253 of HAVA, as a condition for Ohio's receipt of federal funds. *See* 42 U.S.C. § 15403. Among other things, HAVA required each state plan to outline how the state would use federal funds to comply with the requirements of Title III of HAVA, the title containing the new provisional ballot requirements. *See, e.g., id.* § 15404(a)(1).

having been “incorrectly purged from the voter registration list.” *Id.* The document further promised that “the Secretary of State is committed to making sure every voter and every vote counts.” *Id.* The document continued:

Ohio and the Secretary of State, as a matter of public policy, embraces the concept that every effort should be made at every board of elections in the state to accommodate every voter who, for whatever reason, does not appear on the certified list of registered voters in any jurisdiction of the state. Provisional voting is a valuable fail-safe mechanism that is an essential component of election reform in Ohio.

Id. at 34. As a result, the State Plan promised to ensure “provisional voting policies that are weighted more toward inclusion in the voting process than challenges and exclusion in the ballot process.” *Id.* With respect to provisional ballots for those who cannot meet the new identification requirements, the State Plan said: “As no voter should be denied an opportunity to cast a provisional ballot in those circumstances where their name might not appear on the voter rolls, neither should a voter be denied an opportunity to vote because of arbitrary and restrictive identification requirements.” *Id.* at 36.

Despite the fact that Ohio’s State Plan committed to comply with HAVA’s provisional ballot requirements, Defendant Blackwell subsequently issued two directives that completely subvert the protections mandated by federal law.

C. Improper Directive 2004-07 Issued by the Secretary of State

On February 20, 2004, Defendant Blackwell issued Directive 2004-07 (Weiser Decl., Ex. 6) to all County Boards of Elections in Ohio. (*See* Compl. ¶¶ 53-56.) Among other things, the directive purports to implement HAVA’s provisional ballot requirements for individuals who registered to vote by mail after January 1, 2003. It does no such thing.

Although Directive 2004-07 instructs election officials to issue provisional ballots to first-time voters who registered by mail and cannot provide identification at the polls on Election Day,³ it then directs officials *not* to verify or count any of those ballots. Specifically, Directive 2004-07 provides that a provisional ballot cast by a first-time voter who does not show identification will only “be included in the official canvass” if the voter in fact does provide “acceptable proof of identity either to the board office or to the precinct election officials by the time the polls close” on Election Day. (Weiser Decl., Ex. 6, at 3.) If the voter does not provide identification on Election Day, the Directive mandates that “the ballot cannot be counted.” *Id.*

These instructions in Directive 2004-07 effectively nullify the fail-safe voting provisions of HAVA with respect to a category of voters who are entitled by federal law to vote by provisional ballot: first-time voters who registered by mail and who cannot provide identification at the polling place on Election Day. Although these voters will be issued provisional ballots, the Defendant has directed in advance that their ballots will not be counted, regardless of whether a voter was eligible to vote in the election. If implemented, Directive 2004-07 would entirely eviscerate the provisional balloting scheme, rendering HAVA’s election reforms meaningless and disenfranchising scores of eligible voters.

D. Improper Directive 2004-33 Issued by the Secretary of State

On September 16, 2004, Defendant Blackwell issued Directive 2004-33 (Weiser Decl., Ex. 7), entitled “Issuing and Processing Provisional Ballots,” to all Ohio County

³ Directive 2004-07 provides that a first-time voter who registered by mail and did not provide a driver’s license number, the last four digits of his or her social security number, or “acceptable documentary proof of the applicant’s identity” when “*both* (1) registering to vote *and* (2) voting for the first time in person in a federal election,” may cast a provisional ballot after completing a written affirmation. (Weiser Decl., Ex. 6, at 3) (emphasis in original). In contrast, HAVA requires first-time voters to provide identification *either* when registering to vote *or* when voting in person or by mail. 42 U.S.C. § 15483(b)(2)(A).

Boards of Elections. (See Compl. ¶¶ 57-61.) Directive 2004-33 does not even purport to comply with HAVA. Rather, under the guise of an effort to enforce election administration provisions of Ohio law regarding voting precincts, Directive 2004-33 effectively disenfranchises another category of voters entitled by HAVA to vote by provisional ballot: eligible voters who appear to vote in precincts other than those (correctly or incorrectly) assigned to them by election officials.

Specifically, Directive 2004-33 limits the right to cast a provisional ballot to Ohio voters who have moved from one precinct to another and who appear to vote in the correct precinct for the new address. (Weiser Decl., Ex. 7, at 1.) If, however, a voter has not moved from one Ohio precinct to another and appears to vote at a polling place other than that assigned by election officials, Directive 2004-33 provides that the voter may *not* be given a provisional ballot:

Before issuing a provisional ballot as provided for under state or federal law, the pollworkers must confirm that the voting residence address claimed by the voter is located within the area shown on the precinct map and listed on the street listing.

Only after the precinct pollworkers have confirmed that the person is eligible to vote in that precinct shall the pollworkers issue a provisional ballot to that person. Under no circumstances shall precinct pollworkers issue a provisional ballot to a person whose address is not located in the precinct, or portion of the precinct, in which the person desires to vote. . . .

Id. In other words, Directive 2004-33 does not permit the issuance of a provisional ballot to any voter whose residence the pollworker determines to be outside the precinct. *Id.*⁴

Thus, unless a voter has moved from one precinct to another and appears to vote in the

⁴ If a pollworker determines that the voter is not in the correct precinct, the pollworker is instructed to contact the board of elections, and the board, in turn, is instructed to advise the voter of the location of the correct polling place. *Id.* at 2. If a voter cannot or will not travel to the correct polling place or disputes the board's determination as to the correct polling place, the pollworker still may not allow that voter to cast a provisional ballot.

correct precinct for the new address, that voter may not even cast a provisional ballot, let alone have the ballot counted.

As set forth below, by denying outright provisional ballots to voters whom election officials claim appear to vote in the wrong precincts, Directive 2004-33 violates HAVA's clear requirement that any voter who claims to be eligible to vote in the jurisdiction is entitled to cast a provisional ballot. And by preventing many of those voters from voting at all, Directive 2004-33 further contravenes HAVA's rules for counting provisional ballots.

E. The Injury to Plaintiffs' Voting Rights

Plaintiff the League of Women Voters of Ohio is a non-profit membership organization devoted to promoting political responsibility through informed and active participation of citizens in government, with 3,100 members eligible to vote in Ohio. Aff. of E. Scott Britton, Oct. 1, 2004, ¶¶ 3, 4. Plaintiff Ohio AFL-CIO is a federation of labor unions operating within the State of Ohio and is composed of local unions, affiliated committees, state and local councils, joint boards, district councils, whose membership totals more than 800,000 working men and women in Ohio, including members eligible to vote in every county. Aff. of Pierrette M. Talley, Oct. 1, 2004, ¶¶ 3, 4. Plaintiff the Association of Community Organizations for Reform Now ("ACORN") is a membership organization of low and moderate-income families, which focuses on community organizing in low-income communities. Decl. of Catherine M. Gall, October 4, 2004, at ¶¶ 3, 4. Plaintiff People for the American Way Foundation ("PFAW") is a non-profit membership organization that seeks to foster freedom of thought, expression and religion, a sense of community and tolerance and compassion for others, including

through public education and voter registration. Aff. of Vicky L. Beasley, Oct. 4, 2004, ¶ 3. PFAW has 15,00 member in Ohio, including 500 in the northeast Ohio/Toledo area. *Id.* ¶ 4. Plaintiff Ohio Council 8, American Federation of State, County and Municipal Employees, AFL-CIO (“Ohio Council 8”) is a non-profit labor organization that represents over 43,000 employees of cities, counties, hospitals, universities and boards of education throughout Ohio, including 7,300 in Northwest Ohio, and works to improve the rights of Ohio’s workers. Aff. of Patricia A. Moss, Oct. 5, 2004 (“Moss Aff.”), ¶¶ 2, 4. Plaintiff OAPSE/AFSCME is a non-profit labor organization that represents over 38,000 employees of public schools, public libraries, Head Start agencies and Boards of Mental Retardation and Developmental Disabilities and works to improve the lives of working men and women. Aff. of Joseph P. Rugola, Oct. 5, 2004 (“Rugola Aff.”), ¶¶ 2, 4. Plaintiff the Coalition of Black Trade Unionists is a national non-profit membership organization of black trade unionists with eight chapters across the State of Ohio, and represents more than 1,500 members in Ohio. Plaintiff A Philip Randolph Institute is a national non-profit membership organization of black trade unionists with eight chapters in Ohio and represents approximately 500 members in Ohio. Plaintiff the Coalition of Homelessness and Housing in Ohio (COHHIO) is a non-profit coalition of 600 organizations and individuals across Ohio committed to ending homelessness and promoting decent, safe, fair and affordable housing for all, with a focus on low-income people and those with special needs. Aff. of Bill Faith, Oct. 4, 2004 (“Faith Aff.”), ¶¶ 3, 4. Plaintiff Project Vote is a non-profit organization with offices in Toledo, Ohio and elsewhere in the state, whose mission is to increase civic participation among low-

income and minority citizens through voter education, registration, and mobilization efforts. *Aff. of Nakita K. Jones*, Oct. ___, 2004, ¶ 3.

The membership organization Plaintiffs bring this action to enjoin the disenfranchisement of their members resulting from Defendants' illegal acts, which will occur absent this Court's intervention. Through this action, all Plaintiffs further seek to avert the ongoing frustration of their organizational purposes, weakening of their political advocacy efforts, and diversion of their organizational resources that has resulted from Defendant's actions.

ARGUMENT

I. Standards on This Motion

In determining whether to issue a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure, a court must consider (1) whether the movant has established a strong or substantial likelihood of success on the merits; (2) the irreparable harm that could result to the movant if the injunction does not issue; (3) the possibility of substantial harm to others if the injunction is issued; and (4) whether the public interest would be served by issuing the injunction. *See Hamad v. Woodcrest Condo. Ass'n*, 328 F.3d 224, 230 (6th Cir. 2003) (quoting *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 888 (6th Cir. 2000)). The elements are factors to be balanced against each other; each element need not be satisfied to issue a preliminary injunction. *See Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1480 (6th Cir. 1995) (quoting *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)). Here, the elements are easily met.

II. Plaintiffs Have Demonstrated a Clear Likelihood of Success on the Merits of Their Action

A. Defendant's Instructions Not to Issue or Count Certain Provisional Ballots Violate and Are Preempted by Federal Law

Plaintiffs are likely to succeed on their claim that Directives 2004-07 and 2004-33 violate HAVA and therefore are preempted by federal law.

Under the Supremacy Clause of the United States Constitution, “state laws that ‘interfere with, or are contrary to the laws of congress, made in pursuance of the constitution’ are invalid.” *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824)). Thus, it is well established that Congress may pre-empt state law, even in an area of traditional state regulation. *See Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000). “[E]ven if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute.” *Id.*; accord *Ass’n of Banks in Ins. v. Duryee*, 270 F.3d 397 (6th Cir. 2001) (quoting *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 260 (1985)); *Bibbo v. Dean Witter Reynolds, Inc.*, 151 F.3d 559 (6th Cir. 1998). Indeed, where it is “physically possible to comply with both” the challenged state law and under conflict preemption analysis, the federal law, a state law will be preempted if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, as manifested in the language, structure and underlying goals of the [federal law].” *Id.* at 563. Thus, a state law or regulation “is preempted if it interferes with the methods by which the federal statute was designed to reach th[at] goal.” *Duryee*, 270 F.3d at 404 (quoting *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)). When a federal statute preempts a state law or regulation,

injunctive relief against state officers is appropriate. *See, e.g., Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004); *Burgio & Campofelice, Inc. v. New York State Dep't of Labor*, 107 F.3d 1000 (2d Cir. 1997); *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1269 (9th Cir. 1995); *Bunning v. Kentucky*, 42 F.3d 1008, 1012 (6th Cir. 1994).

Because Defendant's instructions for handling provisional ballots in both Directives 2004-07 and 2004-33 directly contravene the requirements of HAVA and stand as an obstacle to Congress' goals in enacting HAVA, federal law preempts the Directives' instructions, and this Court must enjoin them.

1. Directive 2004-07's Requirement that First-Time Registrants Provide Identification as a Condition of Having their Provisional Ballots Counted Violates HAVA

In stark violation of HAVA, Directive 2004-07 instructs election officials to discard valid ballots that are cast by eligible first-time voters who register by mail but who do not provide photo identification or documentary proof of residence at the polling place on Election Day. This is not permissible under HAVA, which requires provisional ballots to function as a "fail-safe voting" mechanism. HAVA expressly mandates that provisional ballots must be verified and then counted if the voters are eligible under State law to vote in that election. Moreover, the legislative history of HAVA makes clear that the purpose of HAVA's provisional ballot provisions is "to ensure that every eligible American who goes to vote gets to vote and that every vote cast counts." 148 Cong. Rec. S726 (daily ed. Feb. 13, 2002) (statement of Sen. Schumer); *see also* 148 Cong. Rec. S711 (daily ed. Feb. 13, 2002) (statement of Sen. Dodd) ("By passing this bipartisan election reform bill, the Senate will help ensure that every single eligible American has the equal opportunity to both cast a vote and, of course, to have their vote counted.").

The fail-safe voting provisions in HAVA ensure that burdensome identification requirements and mere administrative requirements cannot invalidate the ballot of a voter who is eligible to vote under State law. Because it is inconsistent with those provisions, Directive 2004-07 violates and is preempted by HAVA.

Although HAVA requires certain first-time voters who register by mail to submit identification either with their applications for registration or at the polling place, *see* 42 U.S.C. § 15483(b)(2)(A), in order to ensure that voters who cannot meet those requirements are not thereby disenfranchised, HAVA explicitly includes “fail-safe voting” provisions for those voters. HAVA’s “fail-safe voting” provisions require that any first-time voter who registered by mail and “who does not meet the [identification] requirements” is allowed to cast a provisional ballot. *Id.* § 15483(b)(2)(B)(i) and (ii); *see also id.* § 15482(a) (any voter whose eligibility is questioned at the polling place “shall be permitted to cast a provisional ballot”). Those ballots are to be counted in accordance with Section 302(a) of HAVA. *Id.* § 15483(b)(2)(B)(i) and (ii).

Section 302(a) of HAVA provides that States must permit an individual “to cast a provisional ballot” if the voter declares that he or she is (i) registered to vote in the jurisdiction and (ii) eligible to vote in an election for federal office. 42 U.S.C. § 15482(a). Once a voter casts a provisional ballot, HAVA requires election officials to “transmit” the ballot or the voter information contained in the accompanying written affirmation “to an appropriate State or local election official for prompt verification.” *Id.* § 15482(a)(3). If the election official determines that “the individual is eligible under State law to vote,” HAVA provides that the individual’s provisional ballot “*shall be counted as a vote in that election.*” *Id.* § 15482(a)(4) (emphasis added). Accordingly,

eligibility to vote under State law is the *only* permissible precondition for counting votes cast in a provisional ballot.

The provision of identification is not a requirement of eligibility under Ohio law to vote. Rather, as discussed *infra*, at 18-19, an individual is eligible to vote under Ohio law if he or she is a citizen of the United States, is eighteen or more years old, has been a resident of the state of Ohio for the thirty days prior to the election in which he or she seeks to vote, and has been registered to vote anywhere in the State for the thirty days prior to the election. *See* Ohio Const. art. V, § 1, Ohio Rev. Code Ann. § 3501.01. In fact, no provision of Ohio law requires any class of voters, including first-time voters who registered by mail, to show identification, let alone makes the provision of identification a condition of voter eligibility. Prior to the issuance of Directive 2004-07, Ohio did not require any class of voters to present identification at the polling place on Election Day as a condition of voting or having their votes counted.

In enacting HAVA's identification provisions, Congress specifically provided for the use of provisional ballots as a safeguard in order to prevent the new requirements from disenfranchising eligible and registered voters. As Senator Dodd, one of the law's main sponsors, explained in the Senate debates on the HAVA identification requirement:

[E]ven if a voter does not meet the new Federal requirements for first-time voters to verify their identity, or for new registrants to provide their drivers license number, or the last four digits of their Social Security number, if that voter otherwise meets the requirements as set out in State law for eligibility, the State shall count that ballot pursuant to State law.

148 Cong. Rec. S10508 (daily ed. Oct. 16, 2002) (statement of Sen. Dodd).

Moreover, in debates concerning HAVA's identification requirements, a number of members of Congress expressed concern that an inflexible identification requirement

would disproportionately burden minority or low-income voters. *See, e.g.*, 148 Cong. Rec. S1227 (daily ed. Feb. 27, 2002) (statement of Sen. Landrieu) (“History has shown that requiring photo identification or certain other documents most significantly impacts minority voters.”); 148 Cong. Rec. S1224 (daily ed. Feb. 27, 2002) (statement of Sen. Schumer) (“The intent of this legislation is to take people, particularly those who live in the corners of America who do not fly airplanes and use their credit cards all the time but rather people who may not have a driver’s license, who may not have a utility bill, and allow them to vote, our most sacred right.”); 148 Cong. Rec. S10502 (daily ed. Oct. 16, 2002) (ACLU letter dated Oct. 9, 2002) (“As a disproportionate number of racial and ethnic minority voters, the homeless, as well as voters with disabilities and certain religious objectors, do not have photo identification nor the financial means to acquire it, the burden of this requirement would fall disproportionately and unfairly upon them.”). The ACLU letter read into the record during the Senate debates noted that, given the costs involved in obtaining identification or documentation of residence,⁵ an inflexible identification requirement would amount to a *de facto* poll tax. *Id.* In part as a result of concerns over this disparate impact, Congress added the provisional ballot requirement to HAVA’s new identification provision to prevent the new identification requirements from becoming an absolute barrier to voting, “thereby avoiding the potential disenfranchisement of minority voters.” 148 Cong. Rec. S10504 (daily ed. Oct. 16, 2002) (statement of Sen. Dodd).

⁵ In Ohio, the cost of a driver’s license ranges from \$19.25 to \$24.00, and the cost of a state identification card ranges from \$7.50 to \$8.50. *See* Ohio Bureau of Motor Vehicles, “BMV License and Registration Fees Effective January 1, 2004,” *available at* http://bmv.ohio.gov/01012004_BMV_Fees.htm (last visited Oct. 5, 2004).

Directive 2004-07's blanket refusal to count provisional ballots nullifies these "fail-safe voting" mechanisms in HAVA. Under the instruction outlined in Directive 2004-07, the criteria making an individual eligible to receive a provisional ballot are the *very* criteria used to deny his or her vote. That instruction, if implemented, would result in the *exact* type of wrong that Congress sought to avert in enacting the fail-safe voting provisions. The harm is especially egregious when voters are deceptively handed provisional ballots even though election officials have determined in advance that under no circumstances will those ballots be counted. Accordingly, the instruction violates HAVA, is preempted by HAVA, and must be enjoined.

2. Directive 2004-33's Instruction Not to Issue Provisional Ballots to Voters in the Wrong Precincts Violates HAVA.

Directive 2004-33 violates HAVA by denying voters who appear to vote in the wrong precincts the right, secured by HAVA, to cast provisional ballots. Furthermore, by preventing many of those voters from voting at all, Directive 2004-33 further violates HAVA's requirement that the ballots cast by such voters be counted if they are eligible to vote in that election.

HAVA requires each state to permit an individual whose name does not appear on the "official list of eligible voters for the polling place" or whom a state official claims is not eligible to vote for any reason "to cast a provisional ballot" if the individual declares that he or she is "a registered voter in the jurisdiction" and is eligible to vote in that election for federal office. 42 U.S.C. § 15482(a). Since a voter whom an election official claims is at the wrong polling place is unquestionably an individual whose name does not appear on the "official list of eligible voters for the polling place" or whose

eligibility is questioned by an election official, that voter is entitled under HAVA to cast a provisional ballot upon making the required affirmation.

Although HAVA does not define the term “jurisdiction” used in the provisional voter’s affirmation, Congress directed that HAVA be construed in harmony with the National Voter Registration Act of 1993 (“NVRA”), which does define jurisdiction. *See* 42 U.S.C. § 15545(a)(4). NVRA uses the term “registrar’s jurisdiction” to refer to the geographic scope of the unit of government that maintains the voter registration rolls. *See* 42 U.S.C. § 1973gg-6(j); 148 Cong. Rec. S2532 (daily ed. Apr. 11, 2002) (statement of Sen. Dodd) (“It is our intent that the word ‘jurisdiction,’ for the purposes of determining whether the provisional ballot is to be counted, has the same meaning as the term ‘registrar’s jurisdiction’ in section 8(j) of the National Voter Registration Act.”). In Ohio, where voter registration is maintained by each county, *see* Ohio Rev. Code Ann. §§ 3501.11(t), (U), and where voter eligibility is determined on the basis of residence in the States, *see* Ohio Const. art. V, § 1; Ohio Rev. Code Ann. § 3501.01, “jurisdiction” necessarily refers to a geographic unit at least on the level of a county. Thus, nothing in the affirmation required of provisional voters changes the conclusion that a citizen who appears to vote at the wrong precinct is entitled under HAVA to cast a provisional ballot.

Once a voter who appears to vote in the wrong precinct casts a provisional ballot, HAVA then obligates States to transmit the provisional ballots to appropriate election officials for verification, *id.* § 15482(a)(3), and to “count[] as a vote in that election” the provisional ballot cast by any individual who is eligible under state law to vote, *id.* § 15482(a)(4).

Under Ohio law, the precinct requirement is not a condition of voter eligibility. Rather, the only conditions of voter eligibility under Ohio law are those authorized by Article V, Section 1 of the Ohio Constitution, which provides: “Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote in all elections.” That constitutional provision delegates to the Ohio legislature the authority to provide for durational residency requirements in “the state, county, township, or ward,” but not in the precinct. Under the authority of Article V, the Ohio legislature provided that a person must be a resident of *the state* for thirty days immediately preceding the election to be a qualified elector. Ohio Rev. Code Ann. § 3503.01. Ohio law has no durational residency requirement in a county, township, or ward for an individual to be eligible to vote. Thus, under Ohio law, an individual is eligible to vote if he or she is a citizen of the United States, eighteen or more years old, a resident of the state for the thirty days prior to the election, and registered to vote anywhere in the State for the thirty days prior to the election.

Thus, under HAVA and the voter eligibility provisions of Ohio law (incorporated by HAVA), not only must the state allow voters to cast provisional ballots in the wrong precinct, but the state may not use precinct requirements as a basis for refusing to count votes cast by provisional ballot for all races in which a registered voter was eligible to vote. Since Directive 2004-33 violates both of these requirements of federal law, Plaintiffs are likely to – indeed, will – succeed on the merits of their claim seeking to strike this illegal Directive.

IV. Plaintiffs Will Suffer Irreparable Harm Absent an Injunction

Plaintiffs' members are seeking to exercise a right that the Supreme Court has consistently declared a fundamental political right, preservative of all rights – the right to vote. *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Because Directives 2004-07 and 2004-33 completely deny the right to vote and to have one’s vote counted to thousands of eligible voters, including Plaintiffs’ members, Plaintiffs will be irreparably harmed absent an injunction.

Directive 2004-07’s instruction not to count the votes cast by first-time voters who register by mail but do not provide identification will disenfranchise many eligible voters, and will disproportionately affect low-income voters. Many individuals eligible to vote in Ohio, including Plaintiff’s members, do not possess photo identification or documentary proof of residence because they are low-income, unemployed, or without fixed residence. *See, e.g., Faith Aff.* ¶ 4 (most homeless members of COHHIO do not have identification or proof of residence). Thus, the requirements of the Directive 2004-07 not to count those provisional ballots unless the voters present identification are particularly insidious, because many voters will be without the means to cure the purported defects in their provisional votes.

The costs or administrative hassles of obtaining photo identification can be an obstacle for low-income voters. *See supra* note 5 (costs of obtaining state identification in Ohio). Indeed, a requirement that voters expend money to obtain state identification as a condition of voting would amount to an impermissible poll tax. *See* U.S. Const. Amend. XXIV, 1. While Directive 2004-07 allows voters to provide other acceptable documentary proof of residence, many eligible voters do not have such proof. *See, e.g.,* Faith Aff. ¶ 4.

The injury to Plaintiffs' members from Directive 2004-07 is also particularly acute because its burden falls squarely and disproportionately on low-income and minority voters.⁶ Both the Ford-Carter Commission and a 2001 Task Force on the Federal Election found that identification requirements would disproportionately burden low-income voters. *Ford-Carter Report* at 32 ("5-7% of adults do not possess a driver's license or other photo identification, and are disproportionately poor and urban"); John Mark Hansen, *Verification of Identity, Task Force on the Federal Election System* at 4 (July 2001) ("[T]o require [photo identification] for voting would be to impose an additional expense on the exercise of the franchise, a burden that would fall disproportionately on people who are poorer and urban."). Moreover, in the debates over the passage of HAVA, Congress expressed concern that inflexible identification or documentary proof of residence requirements would disproportionately burden minority and low-income voters. *See supra*, at 16-17. It is precisely because Congress realized

⁶ There is "cause for serious concern" where the state's action "results in a greater negative impact on groups defined by traditionally suspect criteria." *Black v. McGuffage*, 209 F. Supp. 2d, 889, 899 (N.D. Ill. 2002) (discussing burden on African-American and Latino voters); *see also Auerbach v. Retallata*, 765 F.2d 350, 354 (2d Cir. 1985) (noting that Supreme Court subjects to strict scrutiny state laws that prohibit identified class of persons from voting). Likewise, an otherwise reasonable restriction will trigger greater scrutiny when the impact on voting rights is related to the resources of the affected voters. *See Bullock v. Carter*, 405 U.S. 134, 144 (1972).

that such requirements could disproportionately disenfranchise minority and low-income voters that HAVA provides for the issuance of provisional ballots to voters who cannot present such identification. *Id.* The nullification of this safeguard will irreparably harm the voting rights of many of Plaintiffs' members in Ohio and will disproportionately burden the voting rights of minority and low-income voters. Only by counting the votes properly cast by provisional ballot will Ohio accord "the equal dignity owed to each voter" required by the fundamental right to vote. *Bush v. Gore*, 531 U.S. 98, 104 (2000).

Similarly, there is no question that Directive 2004-33's instruction not to provide provisional ballots to voters appearing in the wrong precincts will disenfranchise eligible, registered voters – that is, voters, including Plaintiffs' members, who satisfy the state eligibility requirements – and exact the severest possible burden on their right to vote. The precinct requirements in this case will not, and in many cases, cannot, be met by thousands of otherwise eligible voters. In past elections in Ohio, many individuals have been unable to vote in their assigned polling places, whether because of last-minute precinct reassignment, inability to determine the correct polling place, lack of a fixed residence, or inability to travel. *See, e.g.*, Aff. of Rose Boutagy, October 1, 2004, at ¶ 7 (elderly voter unable to vote in 2000 election because election officials told her, incorrectly, that she was registered at a different polling place); Aff. of Susan Gwinn, Sept. 30, 2004 ("Gwinn Aff."), ¶ 11 (many provisional votes cast in wrong precincts were determined by Athens County Board of Elections to have resulted from pollworker error). Indeed, it is inevitable that eligible voters will show up in the wrong precincts this year, as many voters are still unable to determine their correct polling locations. *See, e.g.*, Aff. of Tammy K. Lang, October 2, 2004, at ¶ 4 (voter unable to determine her

correct polling place after moving); Moss Aff. ¶ 7 (many voters registered by Ohio Council 8 are not informed of the precinct locations at which they may vote); Rugola Aff. ¶ 7 (same with respect to voters registered by OAPSE/AFSCME).

Furthermore, in 2001, Ohio engaged in a statewide redistricting, redrawing all state and federal legislative district lines. As a result, county boards of elections were required to alter many of their precinct boundary lines in order to accommodate the new legislative districts. Thus, a substantial number of Ohio voters have been assigned to different precincts than they were in the 2000 elections. Thus, many Ohio voters who seek to cast a vote at the polling place to which they were assigned in the 2000 election will arrive at a polling place other than their newly assigned one.

Redirecting those voters to different polling places will not prevent the injury to their voting rights. Many individuals, particularly low-income individuals, do not have easy access to means of transportation to travel to a new polling place. *See, e.g.,* Gwinn Aff. ¶ 10 (students who do not have a means of transportation to get to their polling place will be disenfranchised). And since a large portion of voters seek to vote at the end of the day after work, many voters will not have sufficient time to reach a new polling place before the polls close.

Obviously, no monetary award can compensate for the unwarranted denial of an individual's right to cast a vote for the candidate of his choice and to have that vote counted in the final election results. *American Civil Liberties Union v. Taft*, No. 02-3924, -- F.3d --, 2004 WL 2147021, at *2 (6th Cir. Sept. 27, 2004) (reversing district court's denial of preliminary injunction where ACLU demonstrated, *inter alia*, that its members were threatened with imminent denial of their right to vote); *Montano v. Suffolk*

County Legislature, 268 F. Supp. 2d 243, 261 (E.D.N.Y. 2003) (“An abridgement or dilution of the right to vote constitutes irreparable harm.”) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) (loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury)).

The Plaintiff organizations themselves have also suffered and will continue to suffer irreparable injury if this Court does not enjoin the challenged instructions in Defendant’s Directives. *See Elrod*, 427 U.S. at 373. With each of their members’ votes lost, Plaintiffs lose not only their own votes but also the concomitant strength in advocating in the political arena for their policy priorities. *See, e.g.*, *Rugola Aff.* ¶¶ 5, 9; *Moss Aff.* ¶¶ 5, 9; *see also Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986) (an organization’s “attempts to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association”) (citing *Democratic Party v. Wisconsin*, 450 U.S. 107 (1981)); *ACLU*, 2004 WL 2147021 at *2-*3; *Nat’l Prisoners Reform Ass’n v. Sharkey*, 347 F. Supp. 1234, 1237 (D.R.I. 1972) (“Deprivation of the First Amendment rights of the members of plaintiff organization is in and of itself irreparable injury.”); *cf. McCloud v. Testa*, 97 F.3d 1536, 1552 (6th Cir. 1996) (“Political association is at the core of the First Amendment, and even practices that only potentially threaten political association are highly suspect.”); *NAACP Anne Arundel County Branch v. City of Annapolis*, 133 F. Supp. 2d 795, 800-801 (D. Md. 2001). Moreover, the challenged provisions have nullified and will continue to nullify a substantial part of Plaintiffs’ voter education, registration, and mobilization

efforts, causing irreparable frustration of Plaintiffs' policy goals. *Cf. ACLU*, 2004 WL 2147021 at *3.

V. Others Will Not Suffer Substantial Harm if an Injunction Is Issued

It is hard to imagine what harm to others could justify refusing to allow an eligible and registered voter to cast a vote and have that vote counted. But that is essentially what Defendant's instructions do. Directive 2004-07 instructs voting officials to provide provisional ballots to certain eligible, registered voters and then to refuse to count them, in violation of federal law. Directive 2004-33 instructs election officials not to allow certain eligible, registered voters to cast provisional ballots at all, in violation of federal law. Compliance with HAVA's mandate that those voters be allowed to cast provisional ballots and that the ballots of those eligible to vote be counted, on the other hand, cannot be deemed "substantial harm to others."

Indeed, compliance with HAVA itself would pose little burden for Ohio's election officials. Because of the existing requirements of the Ohio election law, it would require only a minimal administrative burden for election officials to determine the eligibility of a voter who does not provide identification or who has cast a provisional ballot even in the wrong precinct. Ohio has never found it necessary to use identification requirements as an *absolute prerequisite* to voting by any group, including first-time voters who register by mail, and thus the state has long relied on other means of verifying a voter's eligibility. Other states, such as Florida, use a procedure of matching the signature on a provisional ballot to the voter's signature on his or her registration card to confirm the identity of a provisional voter who does not have documentation. *See Fla. Stat. §§ 101.043, 101.048(2).*

With respect to voters who appear in the wrong precincts, well before the enactment of HAVA and up to 2004, at least some Ohio counties counted provisional ballots cast by voters in the wrong precincts. *See, e.g.*, Aff. of Steve Harsman, Sept. 28, 2004 (“Harsman Aff.”), ¶5 ; Gwinn Aff. ¶¶ 2-3, 11-12. Montgomery County, for example, used the following procedure when a voter cast a ballot in the wrong precinct: County election officials would first determine the voter’s eligibility by checking the voter’s registration form. If the voter was registered to vote in Ohio, was a U.S. citizen and was eighteen years of age on Election Day, County election officials would determine the voter to be eligible to vote in all federal, state and countywide races and would count the votes cast by provisional ballot in those races. If the voter also cast a vote in a local race which impacted an area of the county in which the voter did not reside, election officials would determine the voter to be ineligible to vote in that race and would not count the vote for that race. Harsman Aff. ¶ 6. Athens County used a similar procedure for counting provisional ballots cast by students at off-site voting locations rather than the precincts in which they resided. Gwinn Aff. ¶¶ 3, 12. Neither County found the procedure burdensome in past elections, *id.* ¶ 13; Harsman Aff. ¶ 8, and neither experienced problems with voter fraud in connection with that procedure. *Id.* ¶ 7.

While protecting fair elections and reducing voter fraud is undoubtedly a legitimate goal of elections regulation, the refusal to provide or count provisional ballots is not rationally related to reducing voter fraud.⁷ This is especially so because, in the

⁷ In the constitutional context, even the otherwise compelling interests of preventing fraud and protecting the integrity of the voting process do not justify a state practice without an established threat to those interests, nor do they justify a state response that is not narrowly tailored to protect those interests. *See Lerman v. Bd. of Elections*, 232 F.3d 135, 149 (2d Cir. 2000) (city’s practice held unconstitutional despite asserted interest in preventing fraud where city was unable to establish “demonstrable threat to the integrity” of process), *cert. denied*, 533 U.S. 915 (2001). Moreover, a “State has a less important interest in

State of Ohio, there is no history of fraud by individual voters. Further, Ohio has numerous other statutory provisions in place to protect the integrity of the election process and to protect against voter fraud.⁸

In short, there is no danger of substantial (or even minimal) harm to others from allowing voters to cast provisional ballots and counting the ballots cast by those who are registered and eligible to vote in Ohio.

VI. The Public Interest Mandates the Grant of a Preliminary Injunction

The public interest is also clearly advanced by granting the requested equitable relief. The public interest weighs strongly in favor of counting every vote properly cast by an eligible voter. In contrast, Defendant's interest in limiting the rights of voters to cast provisional ballots frustrates the stated purpose of HAVA to empower citizens to vote and participate in the democratic process. Far from harming Defendants, this request ensures that whatever action Defendants take in connection with the November 4, 2004 election results will comply with federal and Ohio law and that the final election results for the State of Ohio will accurately reflect the votes cast by all eligible Ohio voters. Finally, because Defendant will not suffer any monetary loss as a result of the entry of preliminary injunctive relief, a bond is not required under Federal Rule of Civil Procedure 65(c).

CONCLUSION

regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983).

⁸ These include safeguards against dual voting, criminal penalties against voters who submit false statements in voter registrations, requirements for the investigation of suspected fraudulent voting, mandatory removal of the names of improperly registered voters from the voters rolls, and signature matching of Election Day voter signatures against signatures on voter registration cards, among others.

For the foregoing reasons, we respectfully request that the Court enter an order prohibiting the enforcement of (i) Directive 2004-07's instructions not to count provisional ballots cast by eligible first-time voters who registered by mail but do not provide photo identification or documentary proof of residence at the polling place on election day and (i) Directive 2004-33's instructions not to provide provisional ballots to eligible registered voters in the wrong precincts.

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Respectfully submitted,

s/ Donald J. McTigue

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Certificate of Service

I hereby certify that on October 6, 2004, a copy of the foregoing Motion for Preliminary Injunction was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's system.

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