

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

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: Case No. 3:04 CV 7622
THE LEAGUE OF WOMEN VOTERS OF OHIO, :
et al., : Hon. James G. Carr
:
Plaintiffs, : **SUPPLEMENTAL**
v. : **MEMORANDUM IN FURTHER**
: **SUPPORT OF PLAINTIFFS’**
J. KENNETH BLACKWELL, in his official : **MOTION FOR A PRELIMINARY**
capacity as Secretary of State of Ohio, : **INJUNCTION**
:
Defendant. :
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In response to the issues raised in this Court’s October 15, 2004 Order in the above-captioned matter, Plaintiffs respectfully submit this supplemental memorandum in further support of their motion for a preliminary injunction. Specifically, Plaintiffs respectfully claim that if Directive 2004-07 were interpreted to allow first-time voters who registered by mail to recite the last four digits of their social security number at the polls in lieu of providing documentary proof of identity, the Directive would still violate HAVA’s mandate that provisional ballots be used as a fail-safe for voters who, for any reason, are not able to provide at the time of registration or voting either (a) a driver’s license number or the last four digits of their social security number, or (b) documentary proof of identity.

As set forth in Plaintiffs’ brief and below, the “fail-safe voting” provisions in HAVA require states (1) to allow such voters to cast provisional ballots, (2) to verify those provisional ballots after the election, and (3) to count the provisional ballots of those individuals determined to be eligible under state law to vote. HAVA recognizes that not all persons eligible to vote under state law will necessarily have a social security number, driver’s license or one of the

prescribed types of documentary proof. In such cases, the state may verify a provisional voter's eligibility and identity after the election through other methods, using criteria that do not negate the provisional ballot safeguard, and must count the provisional ballots cast by voters who are determined to be eligible to vote and who have not voted more than once in the election.

Because Directive 2004-07 rejects all provisional ballots cast by first-time voters who do not provide identification or a social security number, regardless of whether they are eligible under Ohio law to vote, it nullifies these "fail-safe voting" provisions and conflicts with HAVA. In order to comply with HAVA, Defendants must rely on some other means of verifying a voter's eligibility that preserves a fail-safe for voters who do not have the requested numbers or identification. In fact, the means of verification Ohio uses for all other voters adequately protects against voter fraud.

I. The Proposed Interpretation of Directive 2004-07 Would Still Lead to the Disenfranchisement of Eligible Voters

If Directive 2004-07 were interpreted to allow voters to recite a social security number at the polls as a means of meeting its identification requirement, it would still disenfranchise eligible, registered voters who have neither identification nor a known social security number, although it would admittedly reduce the number of individuals whose voting rights are denied. Plaintiffs' members include homeless persons, young students, recently naturalized immigrants, and persons recently released from prison, a number of whom have neither acceptable identification nor a known social security number. *See, e.g.*, Aff. of Bill Faith, dated Oct. 4, 2004, at ¶¶ 3, 4 (homeless members of COHHIO usually have no identification). Most common forms of identification cost money to obtain, and individuals must apply to receive social security numbers.

HAVA itself contemplates that at least some eligible voters (whether they are first-time voters or not) will not be able or will simply fail to provide a driver's license number or a social security number on their voter registration forms. *See* 42 U.S.C. § 15483(a)(5)(A)(i). For a voter who “has not been issued a current and valid driver's license or a social security number,” HAVA requires the state to “assign the applicant a number which will serve to identify the applicant for voter registration purposes.” *Id.* § 15483(a)(5)(A)(ii). As discussed at length in Plaintiffs' complaint and preliminary injunction papers, HAVA further contemplates that some of those voters will also be unable to meet documentary identification requirements. It is precisely to protect those voters that Congress included a “fail-safe voting” protection in HAVA's provisions relating to identification. *See id.* § 15483(b)(2)(B).¹

II. Directive 2004-07 Would Violate HAVA Even If It Permitted Voters to Provide Social Security Numbers at the Polls

Directive 2004-07 would run afoul of HAVA even if it permitted voters to provide social security numbers at the polls as a means of verifying their identities because it would not allow any “fail-safe” for voters who have neither identification nor known social security numbers.

Although HAVA contains new requirements to enable states to verify the identities of first-time voters who register by mail, at the same time, HAVA carefully circumscribes those requirements to ensure that eligible voters are not disenfranchised for failure to possess a social security or driver's license number or documentary proof of identity. HAVA therefore includes a three-tiered process for verifying the eligibility of a first-time voter who registers by mail – at the time the individual registers to vote, at the time the individual votes, or after the polls close.

¹ A number of members of Congress were also concerned that identification requirements would disproportionately burden minority or low-income voters. *See, e.g.*, Pl. Br. at 16 (citing legislative history). In part as a result of such concerns, Congress added the fail-safe to HAVA's new identification provision, preventing the new identification requirements from becoming an absolute barrier to voting, and “thereby avoiding the potential disenfranchisement of minority voters.” 148 Cong. Rec. S10504 (daily ed. Oct. 16, 2002) (statement of Sen. Dodd).

First, HAVA provides that a first-time voter who registers by mail is not subject to any further identification requirement if, at the time she registers to vote, (a) she supplies documentary proof of identity, 42 U.S.C. § 15483(b)(3)(A),² or (b) she supplies a driver's license number or the last four digits of her social security number, and the state is able to match that number with an existing state record, *id.* § 15483(b)(3)(B).³ HAVA exempts such individuals from its requirement that identification be shown at the polls because it contemplates that the state will be able to verify their eligibility based on the information provided at registration. An individual who meets these criteria is entitled to vote a regular ballot, not a provisional ballot.

Second, if a first-time voter who registered by mail did not supply such information at registration or if the state was unable to verify his or her identity based on the number supplied, HAVA requires the individual to provide some form of identification at the polls. *Id.* § 15483(b)(1) & (2)(A). This provision affords the state a second opportunity to verify a voter's eligibility before the voter casts a ballot. An individual who provides identification pursuant to this provision is entitled to vote a regular ballot, not a provisional ballot.

Third, if a first-time voter who registered by mail for some reason is not able or has failed to provide a social security number, driver's license or one of the prescribed forms of documentary identification at the time of registration or voting, HAVA expressly includes provisional ballots as a "fail-safe voting" procedure to ensure that voters who do not have the requested numbers or identification are not thereby disenfranchised. This "fail-safe voting" provision mandates that any first-time voter who registered by mail and "who does not meet the [identification] requirements" is entitled to "cast a provisional ballot," which will be counted "in accordance

² HAVA includes a non-exclusive list of what forms of identification are considered acceptable. 42 U.S.C. §§ 15483(b)(2)(A) & (b)(3)(A). These include a current and valid photo identification, utility bill, bank statement, paycheck, government check, or other government document bearing the voter's name and address. *Id.*

³ Ohio has obtained a waiver of HAVA's computer database requirement until 2006. As a result, Ohio is not currently obligated to match voters' drivers' license and social security numbers.

with section 302(a)” of HAVA. *Id.* § 15483(b)(2)(B)(i) and (ii). By enabling such individuals to vote by provisional ballot, this provision serves two important purposes: it affords states a third means of verifying the voter’s eligibility – after the election, and it prevents the disenfranchisement of eligible voters who do not have or did not provide identification.

As set forth in Plaintiffs’ briefs, once an individual casts a provisional ballot,⁴ Section 302(a) of HAVA requires election officials to “transmit” the ballot or the voter information contained in the accompanying written affirmation “to an appropriate State or local official for prompt verification.” *Id.* § 15482(a)(3). If the election official determines that “the individual is eligible under State law to vote,” HAVA mandates that the provisional ballot “*shall be counted as a vote* in that election.” *Id.* § 15482(a)(4) (emphasis added). As this Court found in *Sandusky County Democratic Party v. Blackwell*, No. 04-CV-7582 (N.D. Ohio, Oct. 14, 2004) (“Sandusky Order”), HAVA “preserves the state’s ability to determine *how* ballots are counted, while federal law, under HAVA, prescribes *whether* they are to be counted, after the voter has been found to be ‘eligible under State law’ in the first instance.” *Id.* at 27.

As also explained in Plaintiffs’ brief, the provision of identification or a social security number is not a requirement of eligibility under Ohio law to vote.⁵ Defendant does not even attempt to argue that it is. In fact, no provision of Ohio law requires any class of voters, including first-time voters who registered by mail, to provide identification or a social security

⁴ As this Court found in *Sandusky County Democratic Party v. Blackwell*, the only requirement for an individual to cast a provisional ballot is the execution of a written affirmation that the individual is registered in the jurisdiction in which he or she desires to vote and is eligible to vote in that election. No. 04-CV-7543 (N.D. Ohio, Oct. 14, 2004) (Order), at 28 (“Once the voter signs the written affirmation required by § 15482(a)(2), no more is required, or allowed, under that section before he or she ‘shall be permitted to cast a provisional ballot at that polling place.’”).

⁵ 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 only the authority to provide for durational residency requirements and not the authority to provide for additional voter eligibility requirements.

number, let alone makes the provision of such identification a condition of voter eligibility.⁶ Since the identification requirements in Directive 2004-07 are not requirements of voter eligibility under Ohio law, the Directive does not comply with HAVA's mandate for counting provisional ballots and would not so comply even if interpreted to allow first-time voters who registered by mail to recite the last four digits of their social security number in lieu of providing documentary proof of identity.

Directive 2004-07 violates HAVA because it nullifies HAVA's fail-safe voting protections for eligible voters without identification or social security numbers. In enacting HAVA's identification provisions, Congress specifically provided for the use of provisional ballots as a safeguard to prevent the new requirements from disenfranchising eligible voters. As Senator Dodd, one of HAVA's primary sponsors, explained:

[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). A blanket refusal to count provisional ballots cast by first-time voters who do not provide identification or a social security number would negate this fail-safe voting mechanism.

Put another way, Directive 2004-07 renders the provisional ballot protection meaningless because it uses the criteria entitling an individual to receive and cast a provisional ballot (the lack of a social security number or documentary proof of identification) as the very criteria to deny counting her vote. Had the individual possessed those forms of identification in the first place, she would have received a regular ballot. The provisional ballot is exactly for those instances

⁶ As noted above, while HAVA now requires voters to list their driver's license or social security number on their registration forms, HAVA does not make those numbers an absolute prerequisite to voting, as it requires states to assign voter identification numbers to registrants who do not have those numbers.

where the voter is not able to provide the requested identification; a blanket refusal to count provisional ballots without identification renders the provisional ballot protection meaningless. Such an “illogical result is not compatible with established statutory construction.” *Hawkins v. Blunt*, No. 04-4177-CV-C-RED (W.D. Mo. Oct. 12, 2004), at 20 (interpreting Missouri provisional ballot statute relating to precinct requirements so as not to “negate” the provisional ballot procedure and to “avoid[] direct conflict with” HAVA); *see also Lake Cumberland Trust, Inc. v. United States Env. Protection Agency*, 954 F.2d 1218 (6th Cir. 1992) (“Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous.”). For HAVA’s provisional ballot provisions to have any meaning, states may not limit the opportunity to receive and cast and have counted a provisional ballot to the same forms of identification required for casting a regular ballot. Other methods of verification of identity must be employed. Ohio has long relied on a voter’s signature as sufficient means to verify his or her eligibility. And, as set forth below, there are other reliable methods of verifying a voter’s eligibility.

III. The Relief Plaintiffs Seek Both Respects the State’s Discretion Under HAVA and Ensures that Provisional Voters Are Treated the Same as Regular Voters

The relief Plaintiffs seek would neither undermine the state’s discretion to implement HAVA and establish voter eligibility requirements nor treat provisional voters differently from other voters.

HAVA preserves the States’ discretion in connection with provisional ballots in three important respects. *First*, HAVA recognizes the States’ discretion to establish conditions for eligibility to vote. *See* 42 U.S.C. § 15482(a)(4); Sandusky Order at 28 (noting that, under HAVA, “eligibility to vote remains a matter of state law”). As set forth above, Ohio has

established voter eligibility rules, and they do *not* require the provision of identification or a social security number. To be sure, nothing in HAVA prevents a state from making identification a condition of eligibility under state law to vote (though such a condition may present constitutional problems). But Ohio has plainly not done so. What HAVA does not allow, however, is for states to refuse to count provisional ballots cast by individuals who are registered and eligible under state law to vote. As a result, under HAVA, the Defendant may not unilaterally use a voter's lack of identification as a reason to refuse to count a provisional ballot.

Second, HAVA affords states discretion with respect to how they will verify the eligibility of voters who cast provisional ballots. HAVA facilitates this process by requiring a written affirmation in connection with a provisional ballot. *See* 42 U.S.C. § 15482(a)(2). Pursuant to this discretion, some states, like Florida, are using a procedure of matching the signature on a provisional ballot envelope (the affirmation) to the individual's signature on his or her registration form to confirm the identity of a provisional voter who does not have identification. *See* Fla. Stat. §§ 101.043, 101.048(2). Other states, like Arizona, Connecticut and Missouri, are relying on the individual's affirmation, under penalty of perjury and in the presence of an election official, as proof of the individual's identity. In other contexts, states like Minnesota and Wisconsin use a non-forwardable postcard sent to the individual's registration address as proof that the individual is whom she claims to be. Each of these methods of verification adequately protects against fraud, especially in states, like Ohio, with no significant record of voter fraud. What HAVA does not allow, however, is for a state to use the very criteria that make a voter entitled to a provisional ballot as the criteria to determine that the provisional ballot will not be counted. Such a construction of HAVA would utterly negate the fail-safe voting protection.

Third, HAVA grants states discretion to determine the process they will use for counting provisional ballots. *See* 42 U.S.C. § 15483(a)(4) (... “shall be counted *in accordance with state law*”) (emphasis added); Sandusky Order at 27 (HAVA “preserves the state’s ability to determine *how* ballots are counted ...”) This procedural discretion does not include the discretion to reject votes cast by eligible, registered voters based on impermissible *substantive* criteria, such as the lack of identification or a social security number.

In short, nothing in the relief Plaintiffs seek would undermine Ohio’s discretion under HAVA. To the contrary, there are a variety of means available to Ohio to verify the eligibility and identity of voters who do not provide documentary proof of identity or a social security number. In fact, for all other categories of voters, Ohio treats the voter’s signature on Election Day as sufficient verification to count the voter’s ballot. Ohio also uses a non-forwardable postcard as a means of verifying the voter information provided on registration forms. *See* Ohio Rev. Code § 3503.19(c). It should do the same for voters entitled to cast a provisional ballot under 42 U.S.C. § 15483(b)(2)(B). At the very least, it should use a means of verifying eligibility other than the provision of identification or a social security number.

Conclusion

For the foregoing reasons, as well as for the reasons stated in Plaintiffs' brief in support of their Motion for a Preliminary Injunction, the Court should grant Plaintiffs' Motion for Preliminary Injunction and deny Defendants' Motion to Dismiss.

Dated: October 18, 2004.

Respectfully submitted,

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