

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

THE LEAGUE OF WOMEN VOTERS OF OHIO, et al.,)	
)	Case No. 3:04 CV 7622
)	
Plaintiffs,)	Hon. James G. Carr
)	
vs.)	
)	REPLY MEMORANDUM IN SUPPORT
J. KENNETH BLACKWELL,)	OF PLAINTIFFS' APPLICATION FOR
Secretary of State,)	PRELIMINARY INJUNCTION
)	
Defendant.)	

INTRODUCTION

The Help America Vote Act of 2002 (“HAVA”) was designed to achieve the goal of making sure that every eligible voter’s vote is counted. The two directives challenged in this case will have the opposite effect, preventing many eligible Ohio voters from even casting a provisional ballot, let alone having their votes counted. This case presents two fundamental questions: (1) May the Ohio Secretary of State effectively nullify the federal law requirement that voters who lack ID be allowed to vote provisionally, by conditioning the counting of provisional ballots on presentation of ID by the time the polls close; and (2) May the state nullify the federal law requirement that voters registered in the jurisdiction be allowed to cast provisional ballots, to be counted if the voter is subsequently determined to be an eligible elector under state law, by denying such ballots to those who appear at the incorrect precinct, including those who do so through no fault of their own?

In arguing that this Court should deny relief, Defendant misconstrues the relationship between the federal and state laws in question, and misstates the relief that Plaintiffs seek. Contrary to the red herring conjured up by Defendant, Plaintiffs do *not* seek to abolish precinct-based voting. Plaintiffs do not demand that “unqualified” individuals be allowed to vote. Nor do Plaintiffs question that Defendant may count provisional ballots only for those races for which an

individual is eligible to vote. For example, Plaintiffs make no claim that a voter who lives in Sylvania should have his vote counted for a Toledo school levy. All Plaintiffs ask is that provisional ballots be issued to voters who affirm that they are registered in the county, and that these ballots be counted for those contests *for which the individual is eligible to vote*. At the very least, that means counting votes cast for the U.S. President and Senate races, for which every voter within the county (and indeed within the state) is necessarily eligible to vote.

Defendant's imaginative parade of horrors thus mischaracterizes the relief that Plaintiffs seek, which in fact is nothing more than compliance with the "fail-safe" provisions of the Help America Vote Act of 2002 ("HAVA"). Plaintiffs acknowledge the *provisional* nature of the provisional ballots newly required by HAVA, and recognize that each voter's eligibility necessarily must be verified by election officials before his or her provisional ballot is counted. Thus, a voter who shows up at the "wrong precinct" through no fault of her own should be allowed to cast a provisional ballot and have that ballot counted in those races for which she is later determined eligible to vote. So too, a voter who is subject to HAVA's ID requirement who does not come to the polls with ID must be allowed to cast a provisional ballot and have that ballot counted if the voter is later determined eligible.

Unfortunately, the Secretary of State's directives attempt to avoid clear requirements of HAVA. Directive 2004-07 requires voters to present identification or proof of address by the time the polls close. Directive 2004-33 forbids counties from even issuing a provisional ballot, unless poll workers confirm that the individual is a "resident of the precinct, or portion of the precinct, in which the person desires to vote." If implemented, these directives will deny countless voters the right to cast a meaningful ballot – and in some cases to cast any ballot at all, provisional or otherwise. Instead of complying with HAVA's mandate, Defendant Blackwell seeks to avoid the requirements of federal law by relying on Ohio's much more limited provisional voting rules that existed prior to enactment of HAVA. However, under HAVA and the Supremacy Clause these provisions may not be employed to refuse to provide or count provisional ballots, including for federal offices. Plaintiffs seek to require that the state make

fail-safe voting available to those whom Congress intended to protect and that it count the votes of those who are eligible, by compelling Defendant to (1) rescind the requirement that first-time voters who registered by mail produce ID by the time polls close, to be issued a provisional ballot, and for their provisional ballots to be counted, and (2) rescind the requirement that provisional ballots not be issued or counted, to those who appear in the correct county but the incorrect precinct, and instead count those ballots for all races in which the individual is eligible to vote.

ARGUMENT

I. THE CHALLENGED DIRECTIVES VIOLATE THE SUPREMACY CLAUSE, BY DENYING PROVISIONAL BALLOTS TO ELIGIBLE VOTERS UNDER OHIO LAW AND BY REFUSING TO COUNT THE PROVISIONAL BALLOTS OF ELIGIBLE VOTERS WITHOUT IDENTIFICATION AS REQUIRED BY HAVA.

Plaintiffs' motion for a preliminary injunction is based solely on their claim that portions of Directives 2004-07 and 2004-33 conflict with HAVA, and therefore violate the Supremacy Clause. Oddly, Defendant devotes a significant portion of his brief to constitutional protections for the fundamental right to vote, which have nothing to do with the instant motion. Op. Mem. at 4-8. In order to re-focus the discussion, it is helpful to start by reviewing the core provisions of HAVA, which form the basis for Plaintiffs' preliminary injunction motion. Defendant's argument depends upon disregarding the plain language of this statute, which clearly delineates the circumstances under which provisional ballots must be issued and counted, and instead substituting the more limited version of provisional voting that had been in effect in the state before HAVA's enactment. As explained below, Defendant's argument ignores HAVA's preemptive effect, and construes Ohio law in a manner that nullifies the purpose of HAVA that is plainly evident from the face of this statute.

A. Directive 2004-33 Conflicts With HAVA, Which Requires That Voters Be Allowed To Cast Provisional Ballots If They Are Registered In The Jurisdiction And That Those Provisional Ballots Be Counted If The Voters Are Eligible To Vote Under Ohio Law.

“The starting point in interpreting a statute is its language, for if the intent of Congress is clear, that is the end of the matter.” *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 409 (1993)(internal quotations omitted); *see also United States v. Menasche*, 348 U.S. 528, 538 (1955) (“The cardinal principle of statutory construction is to save and not to destroy.”); *Lake Cumberland Trust, Inc. v. United States Env. Protection Agency*, 954 F.2d 1218, 1222 (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.”)

Section 302 of HAVA (42 U.S.C . § 15482), sets forth the basic requirements for who must be issued a provisional ballot and the circumstances under which those provisional ballots should be counted. Under subsection (a):

If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot

These requirements are fleshed out in greater detail in the subparagraphs that follow. In particular, subparagraph (a)(2) states that an individual must be allowed to *cast* a provisional ballot if she signs an affirmation that she is:

- (A) a registered voter in the jurisdiction in which the individual desires to vote; and
- (B) eligible to vote in that election.

42 U.S.C . § 15482(a)(2).

Individuals must therefore be issued and allowed to cast provisional ballots, if they affirm that they are registered “in the jurisdiction” and eligible to vote in that election. Subparagraph

(a)(4) proceeds to define the rule for determining whether or not provisional ballots should be counted:

If the appropriate State or local election official to whom the ballot or voter information is transmitted ... determines that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law.

42 U.S.C . § 15482(a)(4).

Defendant concedes that HAVA requires States to permit a voter 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. Op. Mem. at 13. Where Defendant goes wrong is in confusing *eligibility* requirements (e.g., that the voter be over 18 and a citizen), with rules of administrative convenience dictating *where* an eligible voter is supposed to cast his or her ballot.

As an initial matter, HAVA requires that a voter be allowed to cast a provisional ballot if registered to vote “in the jurisdiction” and eligible to vote in that election. Determining whether the voter is registered to vote in the “jurisdiction” is a straightforward undertaking and depends on the entity that is responsible for maintaining voter registration rolls. Although HAVA itself does not define “jurisdiction,” Congress directed that HAVA be construed in harmony with the National Voter Registration Act of 1993 (“NVRA”), which defines “registrar’s jurisdiction” as the geographic scope of the unit of government that maintains the voter-registration rolls. *See* 42 U.S.C. § 1973gg-6(j). This stands to reason, since that entity is in the position to determine whether or not in fact the individual is really an eligible voter.

If there could be any lack of clarity on this point from the text of the statute alone, it is resolved by the comments of Sen. Dodd, one of HAVA’s two principal co-sponsors in the

Senate. As he stated in no uncertain terms: “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.” 148 Cong. Rec. S2532 (daily ed. Apr. 11, 2002) (statement of Sen. Dodd). Although this language was noted in Plaintiffs’ opening brief, Defendant does not respond to it, much less attempt to refute that “registrar’s jurisdiction” means county here in Ohio, since counties maintain voter registration rolls. See Ohio Revised Code § 3501.11 [Each county board of elections shall: (Q) Investigate and determine the residence qualifications of electors; (T) Establish and maintain a voter registration of all qualified electors in the county who offer to register; (U) Maintain voter registration records, make reports concerning voter registration as required by the Secretary of State and remove ineligible electors from the registration lists in accordance with law and directives of the Secretary of State; (V) At least annually, or on a schedule and in a format prescribed by the Secretary of State, submit to the Secretary of State an accurate and current list of all registered voters in the county for the purpose of assisting the Secretary of State to maintain a master list of registered voters and (Y) Assist each designated agency, deputy registrar of motor vehicles, public high school and vocational school, public library and office of a county treasurer in the implementation of a program for registered voters at all voter registration locations as prescribed by the Secretary of State. Under this program each board of elections shall direct to the appropriate board of elections any voter registration applications for persons residing outside the county where the board is located within five days after receiving the applications]. Indeed, a precinct is not a jurisdiction or any other entity, but a unit of administrative convenience for determining where voters should appear to cast their votes.

For this reason alone, Directive 2004-33 conflicts with HAVA. This directive requires that poll workers not issue a provisional ballot until and unless they confirm that the voter resides

in the precinct: “Under no circumstances shall the 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.” The conflict between Blackwell’s directive and 42 U.S.C . § 15482(a)(2) could hardly be clearer. Because jurisdiction means county, a voter must be not only be issued a provisional ballot but allowed to cast that provisional ballot, if he or she resides in the county.

Defendant incorrectly argues that 42 U.S.C. §§ 15482(a)(1), (2), and (3)’s requirement that an eligible voter affirm his or her registration in the “jurisdiction of the polling place” supports Defendant’s contention that a voter must only be given a provisional ballot if she appears in the correct precinct. This is a misreading of the plain language of the statute. In fact, this language suggests that jurisdiction is a *broader* category than polling place, one that encompasses but is not limited to a single polling place. There are, of course, many “polling places” within any jurisdiction. Thus, for example, Lucas County is the jurisdiction of a polling place located in Toledo, while Cuyahoga County is the jurisdiction of a polling place located in Cleveland Heights and so on. Defendant’s reading of the statute is, moreover, inconsistent with HAVA’s purpose, discussed in Plaintiffs’ opening brief, to provide fail-safe voting to eligible voters who arrive at the wrong polling place within the jurisdiction in which they reside – including those who do so through no fault of their own.

That does not, of course, mean that a provisional ballot cast at an incorrect precinct must be *counted* for every single election contest appearing on the ballot. It is on this point that Defendant most grievously mischaracterizes Plaintiffs’ argument. All that Plaintiffs ask is that, in conformance with HAVA, provisional ballots be counted *for those elections in which an individual is eligible to vote*. To take Defendant’s hypothetical (Op. Mem. at 9), Plaintiffs do not seek to require that a voter registered in Sylvania have his vote counted on a Toledo tax levy.

The Sylvania resident obviously would not be eligible to vote in that election. But if a Sylvania voter casts a provisional ballot in Toledo, then her vote should be counted for those election contests in which that voter is eligible to vote – at the very least, the U.S. President and Vice President and U.S. Senator contests, since those are necessarily the same throughout the county and indeed the state. There may also be other countywide races or state or county ballot issues that are common on all ballots within the county and upon which all registered voters of the county are entitled to vote.

Defendant correctly points out that HAVA defers to states to determine whether a voter is “eligible.” Where they go wrong is in confusing state-law rules for determining *eligibility* with rules of administrative convenience defining *where* a voter is supposed to appear. A rule stating that voters must be over 18, citizens of the U.S., and residents for at least 30 days is an eligibility requirement. By contrast, a rule providing that an eligible voter is supposed to appear at a particular time or at a particular place is not. Defendant fails to address the obvious fact that a voter achieves eligibility as a registered voter before Election Day, regardless of her assigned precinct, and certainly before she enters a polling place to cast her vote.

In an attempt to avoid this problem, Defendant must of necessity argue that the individual achieves eligibility only *after* arriving at her assigned polling place to cast her vote. But this argument disregards the Ohio Constitution’s clear guidance on who is eligible. Article V, Section 1 of the Ohio Constitution states: “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” (emphasis added). 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.

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.

These eligibility rules should not be confused with rules defining where and when a voter is supposed to appear to cast his or her ballot. Ohio law contains several provisions which function to have voters cast ballots in their assigned precincts. Plaintiffs do not challenge any part of these provisions *except* to the extent that Directive 2004-33 conflicts with HAVA's requirements: (1) that voters be allowed to cast provisional ballots upon affirmation that they are registered in the jurisdiction and eligible to vote in that election; and (2) that those provisional ballots be counted if the voter is later determined eligible (i.e., to be a citizen, 18 or older, residing in the state for 30 days before the election, and registered in the state at least 30 days before the election). Neither Ohio law nor the Supremacy Clause allow Defendant Blackwell to abridge an eligible, registered voter's clearly delineated rights under HAVA by refusing to issue or count a provisional ballot to eligible voters who appear at the wrong precinct.

B. Directive 2004-7's Instruction Not To Count The Provisional Ballots Of First-Time Registered Voters Without Identification Violates HAVA.

HAVA requires that certain first-time voters provide identification or other proof of address at the time of registration or voting,¹ in order to cast regular ballots. 42 U.S.C. § 15483(b)(2). HAVA also includes a "fail-safe" mechanism for voters who do *not* bring ID to the polling place – because they do not have it, because they did not know they would be required to bring it, or for some other reason. In particular, HAVA requires that voters subject to the ID requirement be allowed to cast *provisional ballots*, if they do not bring ID with them to the polls:

¹ HAVA includes a non-exclusive list of what forms of photo identification or other proof of name and address are considered acceptable. 42 U.S.C. §15483(b)(2)(A). These include a current and valid photo identification, utility

(C) Fail-safe voting.

- (i) In person.--An individual who desires to vote in person, but who does not meet the requirements of subparagraph (A)(i) [that ID be shown at the polling place], may cast a provisional ballot under section 302(a) [42 U.S.C. § 15482(a)].

42 U.S.C. § 15483(b)(2)(C).

Directive 2004-07 renders this provision of HAVA a nullity. It requires that, for provisional ballots to be counted, an individual produce ID by the time the polls close. Yet for voters who present such ID, there is absolutely *no need* for provisional voting because under 42 U.S.C. § 15483(b)(2), voters who present ID are already entitled to cast regular ballots. Thus, the effect of this directive is to make a sham of HAVA's requirement that voters without the required ID be allowed to cast provisional ballots. Under the Secretary of State's rule, provisional ballots cast by those without ID will not be counted. Notwithstanding Defendant's protestations to the contrary, such a rule is bizarre.

Quite obviously, this is not what Congress intended at the time that it enacted HAVA. As the plain language of 42 U.S.C. § 15483(b)(2)(C) states, the purpose of this provision was to provide "fail-safe" voting for those first-time voters who do *not* present ID at the polling place. And as Sen. Dodd stated during the floor discussion of HAVA:

[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); *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.").

bill, bank statement or government check. For purposes of brevity, these are collectively referred to by the

As noted above, provisional ballots must be counted if the voter is determined “eligible” to vote under state law. 42 U.S.C . § 15482(a)(4). The only conceivable argument that the Defendant could make to uphold his refusal to count provisional votes without an ID is that the ID requirement is an eligibility requirement under Ohio state law. But Defendant makes no such argument and, indeed, could not so argue because Ohio law contains no such provision. As Plaintiffs have already explained, the only eligibility requirements imposed by Ohio law are that the individual be 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. If there is any question regarding whether a person who casts a provisional ballot actually resides at the address where he or she registered, which is the purpose of HAVA’s ID provision, the person’s residence can be verified after the election by the county board of elections. This is not unlike the process county boards have followed for over fifteen years for voters who have cast ballots under Ohio’s provisional voting laws. If it is determined that the voter does not reside at the address given, then the provisional ballot is not counted. By contrast, if HAVA’s “fail safe” requirement that such voters be provided a provisional ballot and be permitted to cast the provisional ballot is ignored, then the opportunity to have the ballot counted is lost forever.

Showing a stunning disregard of the election laws he is charged with enforcing, Defendant asks rhetorically whether there is “a voter in America who has not been required to produce some identification at some point before voting.” Op. Mem at 15. The answer is that, yes, there are many such voters. Like many other states, Ohio does not require voters to provide identification to establish eligibility to vote. Despite his bluster, Defendant cannot identify any provision of Ohio law that makes presentation of ID an eligibility requirement in Ohio. To the shorthand “ID” in this brief.

contrary, Ohio treats the voter's signature on Election Day as sufficient verification to count the voter's ballot. It should do the same for voters entitled to cast a provisional ballot under 42 U.S.C. § 15483(b)(2)(C).

II. CONTRARY TO DEFENDANT'S CONTENTION, PLAINTIFFS' PRELIMINARY INJUNCTION MOTION IS NOT BASED UPON 42 U.S.C. § 1983, BUT ARISES DIRECTLY UNDER THE SUPREMACY CLAUSE.

Defendant argues at length that Plaintiffs' challenge to Directives 2004-07 and 2004-33 must fail because HAVA does not create a private right of action enforceable under 42 U.S.C. § 1983. (Op. Mem., at 19-26.)² This argument is unavailing because Plaintiffs' Supremacy Clause claim does not rest on section 1983.

Defendant concedes that the Supremacy Clause of the Constitution requires that they comply with HAVA. (*See, e.g.*, Op. Mem., at 6 and 16.) Where a state regulation conflicts with binding federal law, the Supreme Court has made it clear that federal courts have subject matter jurisdiction to entertain a suit by an aggrieved plaintiff to enjoin that regulation: "A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 (1983).

The Supreme Court recently reaffirmed its holding that courts have jurisdiction over preemption claims in *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 642 (2002). In that case, Verizon sought an injunction prohibiting the enforcement of an order by a state utility commission on the grounds that the order was preempted by the

² Defendants do not – and could not – dispute that Plaintiffs have a cause of action under § 1983 to enforce their constitutional rights. Accordingly, this Court has subject matter jurisdiction over Plaintiffs' constitutional claims.

Telecommunications Act of 1996. Explaining that “no opinion” was needed as to whether Verizon had a private right of action under the Telecommunications Act, *id.* at 642-43, the Supreme Court held that it had “no doubt that federal courts have jurisdiction under § 1331 to entertain such a suit,” because the plaintiff sought relief from a regulation that was “pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail.” *Id.* at 642 (citing *Shaw*, 462 U.S. at 96 n.14). The Court summarily dispensed with the defendants’ argument that, because there was no private right of action under the federal law at issue, the district court was without subject matter jurisdiction to hear Verizon’s claim that the law preempted a state order, noting that “the district court has jurisdiction if the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.” *Id.* at 643 (internal quotations omitted). Since, like Verizon, Plaintiffs seek to enjoin enforcement of a state regulation that conflicts with a federal law, there should be “no doubt” that this Court has the power to determine whether the Secretary of State’s directives are pre-empted by HAVA and therefore violate the Supremacy Clause.³

It is well established in this Circuit that where plaintiffs seek prospective injunctive relief from a state action that would conflict with a federal law, no private right of action under the underlying federal law is necessary. For example, in *Bunning v. Kentucky*, 42 F.3d 1008 (6th Cir. 1994), the Sixth Circuit allowed a member of Congress to bring suit to enjoin a State Registry of Election Finance from conducting an investigation, on the ground that the state’s actions were preempted by the Federal Election Campaign Act (“FECA”). The Sixth Circuit affirmed the district court’s holding that the state’s actions were preempted by FECA, *id.* at

³ The *Verizon* Court also held that the Eleventh Amendment presented no obstacle to the suit because, under the doctrine of *Ex parte Young*, “a court need only conduct a ‘straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.’” *Id.* at 646

1012, even though the Congressman did not have a private right of action under FECA. *See Bunning v. Kentucky Registry of Election Fin.*, 1994 WL 16168453, at * 2 (E.D. Ky. Feb. 17, 1994) (noting that FECA commits enforcement authority to the Federal Elections Commission and does not explicitly provide for a private right of action, except after exhaustion of an administrative remedial scheme, which Congressman Bunning had not done); *see also Millsaps v. Thompson*, 96 F. Supp. 2d 720 (E.D. Tenn. 1996), *aff'd*, 259 F.3d 535 (6th Cir. 2001) (finding jurisdiction over citizen plaintiffs' suit for declaratory and injunctive relief alleging that Tennessee's Early Voting Statutes conflicted with 2 U.S.C. §§ 1, 7 and 3 U.S.C. § 1).

The Sixth Circuit is in accord with federal courts of appeals in sister circuits, which have explicitly held that: “[A] federal statutory right of action is not required where a party seeks to enjoin the enforcement of a regulation on the grounds that the local ordinance is preempted by federal law. A party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action.” *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004); *accord Burgio & Campofelice, Inc. v. New York State Dep't of Lab.*, 107 F.3d 1000, 1008 (2d Cir. 1997)(holding ERISA allows action for injunctive relief based on preemption); *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1269 (9th Cir. 1995) (“Even in the absence of an explicit statutory provision establishing a cause of action, a private party may ordinarily seek declaratory and injunctive relief against state action on the basis of federal preemption.”); *Western Airlines, Inc. v. Port Authority of N.Y. & N.J.*, 817 F.2d 222 (2d Cir. 1987) (holding that the Supremacy Clause provides a cause of action for a suit claiming that a state regulation violates federal law, even if the federal law does not – independently or through § 1983 – create a private right of action, because “[a] claim under the Supremacy Clause that a federal law preempts a state regulation is distinct from a claim for the

(citation omitted). Here, like in *Verizon*, Plaintiffs seek only prospective relief to prevent an ongoing violation of federal law by state officials.

enforcement of that federal law”); *see also* 13B C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure: Jurisdiction 2d* § 3566, at 102 (1984 & 2004 Supp.) (“[T]he Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws”).

Accordingly, the question whether a private right of action exists under § 1983 to enforce HAVA has nothing to do with this motion.⁴ Under settled precedent that Defendant does not even mention, this court has the power to issue prospective relief to prevent enforcement of a state rule that is preempted by federal law.

III. PLAINTIFFS HAVE STANDING

Plaintiffs have standing to bring this suit both on behalf of their members and to vindicate their own associational rights. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 511 (1975) (organization may assert standing on its own behalf); *see also Citizens for Leg. Choice v. Miller*, 144 F.3d 916, 920 (6th Cir. 1998) (organization may have representational standing). Defendant is correct to note that standing requires: (1) an injury in fact that is concrete and particularized, and that is actual or imminent, (2) that the injury is fairly traceable to the challenged action, and (3) that the injury is redressable. Defendant is less clear in explaining why he believes that Plaintiffs fail to meet these requirements.

Plaintiffs likewise satisfy the requirements set forth in *Hunt v. Washington State Apple Adv. Comm.*, 432 U.S. 333, 343 (1977), to establish their standing to bring suit on behalf of their

⁴ Although Plaintiffs did not bring their HAVA-based claims under § 1983, Defendants are incorrect that HAVA creates no rights enforceable under § 1983. Defendants argue at length (Op. Mem., at 9-11) that no private right of action exists because HAVA “is not phrased in the terms of the alleged persons to be benefited in this case, i.e. voters.” (*Id.* at 10.) But Defendants fail to reference the language of the relevant statute, which states in pertinent part:

If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, *such individual shall be permitted to cast a provisional ballot* as follows

42 U.S.C. § 15482(a) (emphasis added). Contrary to Defendants’ assertion, Section 15482(a) is clearly “phrased in terms of” individual voters. Section 15482(a) does more than merely regulate the conduct of election officials; it grants those individual voters the right to cast a meaningful provisional ballot.

members: (a) Plaintiffs' members would otherwise have standing to sue in their own right; (b) the interests Plaintiffs seek to protect are germane to their purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Defendant does not contest the second and third points. It is indisputable that Plaintiffs are voting rights organizations seeking to ensure franchise rights, which is sufficient to satisfy the second *Hunt* prong. *See Citizens for Legislative Choice*, 144 F.3d at 920.

There is no doubt that members of The League of Women Voters of Ohio and other plaintiff groups will suffer an imminent "injury in fact" which can be redressed by a favorable decision from this Court.⁵ Defendant's argument that the injury of disenfranchisement is too speculative has no merit. The threat of "immediate" prospective injury is sufficient to satisfy the "injury in fact" requirement. *See, e.g., Miyazawa v. City of Cincinnati*, 45 F.3d 126, 127 (6th Cir.1995) (an actual controversy exists where a plaintiff has "sustained or is immediately in danger of sustaining some direct injury as a result of [a law].") In this case, eligible voters who are not given a provisional ballot or whose provisional ballot will not be counted, as required by HAVA, are clearly injured. Nor can there be any question that at least some of the members of the Plaintiff groups will be among those affected by these rules. And it is clear that this injury is redressable by court orders requiring that Defendant comply with HAVA, by (1) rescinding Directive 2004-33, and requiring that provisional ballots be issued if the voter is registered within the jurisdiction and that those ballots be counted for those contests in which the individual is eligible to vote, and (2) rescinding that portion of 2004-07 which requires that provisional ballots not be counted by voters who fail to present ID by the time the polls close.

IV. A PRELIMINARY INJUNCTION SHOULD ISSUE, UNDER THE FOUR-PART TEST APPLICABLE IN THIS CIRCUIT

As set forth in Plaintiffs' opening papers, a preliminary injunction is warranted because (1) Plaintiffs have a strong or substantial likelihood of success on the merits; (2) Plaintiffs would

⁵ Notably, organizations that otherwise establish standing may assert preemption claims under the Supremacy Clause. *See, e.g., Ass'n of Banks in Ins., Inc. v. Duryee*, 270 F.3d 397, 403 (6th Cir. 2001) (organizations that

suffer irreparable harm if an injunction is not issued; (3) there is no possibility of substantial harm to others if the injunction is issued; and (4) 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)).⁶ Here, all four factors weigh in favor of an injunction. But even if the Court believes that questions on the merits remain, it should still grant the injunction because Plaintiffs can establish irreparable harm to themselves and others, and the injunction would benefit the public interest in securing the constitutionally protected right of registered voters to cast meaningful ballots for candidates for when they are eligible to vote.

There can be no question that irreparable injury will occur in the absence of the relief sought. If Directive 2004-33 stands, then provisional ballots will not be issued much less counted, even when: (1) voters are mistakenly told they are in the wrong precinct; (2) voters' precincts have changed since the last time they voted and they appear at the old precinct; (3) voters are mistakenly directed by poll workers to a wrong precinct; (4) voters are newly registered and have not been notified of what precinct they are supposed to appear. If Directive 2004-07 stands, then the provisional ballots cast by voters without ID will be meaningless ones, never to be counted.

established injury in fact had standing to assert preemption claims); *see also Massachusetts Nurses Ass'n v. Dukakis*, 570 F. Supp. 628, 633-34 (D. Mass. 1983).

⁶ In ruling on a preliminary injunction, courts may consider affidavits and otherwise inadmissible evidence when to do so would serve the purposes of preventing irreparable harm before a full trial. *Flynt Dist. Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984); *see also Communic. Workers of America v. NYNEX Corp.*, 898 F.2d 887, 891 (2d Cir. 1990) (finding reliance upon hearsay evidence in deciding preliminary injunction motion proper); *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995); *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1363 (9th Cir. 1988); *Fed'l Sav. & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 558-59 (5th Cir. 1987); *Asseo v. Pan Am. Grain Co., Inc.*, 805 F.2d 23, 26 (1st Cir. 1986); *Federal Trade Comm'n v. Renaissance Fine Arts, Ltd.*, 1994 WL 543048 at * 1, n.2 (N.D. Ohio 1994). The weight to be given such evidence is a matter of the Court's discretion upon consideration of the competence, credibility, and personal knowledge of the declarant. *See, e.g., Bracco v. Lackner*, 462 F. Supp. 436, 442 n.3 (N.D. Cal. 1978).

The only “justification” advanced for the Secretary of State’s disregard of HAVA’s fail-safe provisions is Defendant’s *speculation* that if this Court grants the relief that Plaintiffs seek, polling places will be overrun by voters using provisional ballots to cast votes for candidates for whom they are not eligible to vote, with fraud and abuse running rampant. In fact, Defendant can point to no evidence that such fraud has occurred or will occur. To the contrary, the instant record evidences that Ohio county boards of elections have for many years been providing provisional ballots to, and counting the provisional ballots of, voters who appear at the wrong precinct for whatever reason. (See attached: Affidavit of Harsman at paras. 5 & 6; Affidavit of Gwinn at paras. 3, 4, 11, & 13.) These boards have established procedures for determining voter eligibility and for counting provisional ballots for only those races in which voters are eligible to vote. (Affidavit of Harsman at paragraph 6; Affidavit of Gwinn at para. 12.) The implementation of these procedures have not proven over-burdensome or lead to widespread voter fraud. (Affidavit of Harsman at paras. 7 & 8; Affidavit of Gwinn at para. 13.) More recently, election officials at the Cuyahoga County Board of Elections announced plans to provide provisional ballots to voters who appear at the wrong polling place. *See* Scott Hiaasen & Robert L. Smith, *Cuyahoga County Officials To Defy Blackwell Provisional Ballot Order*, THE PLAIN DEALER, Oct. 5, 2004, (also available at <http://www.Cleveland.com/politics/index.ssf?/base/cuyahoga/1096968623232520>). Such action further undermines Defendant’s assertion that chaos will reign unless HAVA’s provisional balloting provisions are ignored.

This evidence establishes that there is nothing to prevent the Secretary of State from ascertaining whether voters truly meet the eligibility requirements of Ohio law. In fact, it is his obligation to do so. This Court cannot and should not assume that Defendant will be unable to perform his responsibility of ensuring that the provisional ballots of eligible voters – and only

eligible voters – are counted. This spectre of fraud, unsupported by a shred of evidence, cannot excuse Defendant from his obligation to comply with the mandates of federal law, nor can it justify the denial of immediate relief.

CONCLUSION

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

Dated: October 13, 2004.

Respectfully submitted,

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Certificate of Service

I hereby certify that on October 13, 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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