

**NEW YORK STATE CITIZENS' COALITION ON HAVA IMPLEMENTATION
POSITION PAPER ON AFFIDAVIT (OR PROVISIONAL) BALLOTS**

To: Joint Legislative Conference Committee on HAVA Implementation

From: New York State Citizens' Coalition on HAVA Implementation

Date: March 21, 2005

Re: Proposal for Implementing the Provisional Ballot Provisions of the Help America Vote Act

This memorandum outlines and analyzes proposals for implementing the provisional ballot and voter identification provisions of the Help America Vote Act ("HAVA"). For the reasons set forth below, the New York State Citizens' Coalition on HAVA Implementation urges the Legislature to adopt the following two proposals with respect to affidavit ballots:

- (1) The boards of elections should be expressly required to count affidavit ballots cast by first-time voters who registered by mail and who do not have identification without regard to whether or not those voters presented identification to election officials.
- (2) The boards of elections should be expressly required to count the affidavit ballot votes cast by registered and eligible voters in the wrong election district or polling place for all offices for which the voters are eligible to vote. At the very least, an affidavit ballot cast by a voter in the wrong election district or polling place must be counted unless there is affirmative evidence that election officials informed the voter that he or she was in the wrong polling place, that election officials directed the voter to the correct polling place, and that the voter could have, without undue hardship, voted at that polling place.

The Coalition would be pleased to answer any of the Legislature's questions relating to these proposals and to provide further research or assistance. Additional clarification may be obtained from Wendy Weiser, Brennan Center for Justice at NYU School of Law, at (212) 998-6130 or wendy.weiser@nyu.edu; Christian Smith-Socarlis, New York Civil Liberties Union, at (518) 436-8598 or nyclu-cs@verizon.net; or Steven Carbo, Demos, at (212) 389-1400 or scarbo@demos-usa.org.

I. PROVISIONAL BALLOTS CAST BY FIRST-TIME VOTERS WHO REGISTER BY MAIL

A. Summary of HAVA's Identification and "Fail-Safe Voting" Provisions

HAVA imposes certain identification requirements on first-time voters who register by mail after January 1, 2003 and who have not previously voted in a federal election in the state. 42 U.S.C. § 15483(b)(1). Specifically, HAVA provides that these voters shall be permitted to

vote in person after presenting one of the following items either at the time of registration or at the polling place on election day: “a copy of a current and valid photo identification,” “a copy of a current utility bill, bank statement, government check, pay check, or other government document that shows the name and address of the voter.” 42 U.S.C. §§ 15483(b)(2)(A) and (b)(3)(A). HAVA does not define the parameters of the above-listed documents, such as what counts as a “utility bill” or “government document,” but rather leaves it to the states to determine how they will define those terms.

HAVA excludes from its identification requirements any person who (a) is entitled to vote other than in person under federal law, 42 U.S.C. § 15483(b)(3)(C), or (b) submits as part of his or her registration either a driver’s license number or the last four digits of a social security number that the state is able to match with an existing state identification record for that person, 42 U.S.C. § 15483(b)(3)(B)(2).

To ensure that covered voters who cannot meet the new identification requirements are not thereby disenfranchised, HAVA explicitly includes a “fail-safe voting” provision in its identification section. 42 U.S.C. § 15483(b)(2)(B). Pursuant to that provision, HAVA requires states to permit first-time voters who register by mail but cannot provide the specified identification to cast provisional ballots. *Id.* 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).

B. New York Must Verify and Count Affidavit Ballots Cast By First-Time Voters Who Register By Mail Whether or Not They Provide Identification

Because of the potentially widespread disenfranchising effects of identification requirements, New York has never required voters to present identification. Nonetheless, as a result of the enactment of the provisions of HAVA outlined above, certain first-time voters who register by mail in New York are now required to present identification in order to cast regular ballots. Voters who cannot meet HAVA’s identification requirements are still entitled to vote – by provisional (or affidavit) ballot. This “fail-safe voting” protection in HAVA (as well as in New York law) ensures that voters who do not have identification are not deprived of their fundamental right to vote, while preserving the state’s ability to verify their eligibility by other means. It also protects against the discriminatory effects of an absolute identification requirement, the burden of which would fall more heavily on low-income voters and persons of color.¹

¹ See, e.g., National Commission on Election Reform, *To Assure Pride and Confidence in the Electoral Process*, at 32 (2001) (Ford-Carter Commission report) (finding that driver’s license and photo identification requirements disproportionately burden poor and urban citizens); John Mark Hansen, *Verification of Identity, Task Force on the Federal Election System*, at 4 (July 2001) (same). In part as a result of concerns over the disparate impact of identification requirements on minority voters, Congress enacted the provisional ballot protection in the 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); *see also* 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

In order to give effect to this important protection in HAVA, the Legislature should enact a provision to guarantee that a voter who cannot meet HAVA's identification requirements and who therefore votes by affidavit ballot will have her vote counted regardless of whether she possesses identification – as is her right under HAVA and the federal and New York constitutions. Specifically, we recommend that the Legislature adopt the following language:

The board of elections shall not reject an affidavit ballot cast by a first-time voter who registered by mail solely because the voter did not provide identification at the time he or she registered to vote or on Election Day.

Once the voter casts her affidavit ballot, election officials can still verify the voter's eligibility using the information provided on the affidavit ballot envelope. Each affidavit ballot envelope in New York contains a space for the voter to sign, in the presence of an election official at the polling place, an oath or affirmation attesting to her eligibility to vote.² That oath or affirmation should be sufficient to confirm the voter's eligibility under New York law and for her votes to therefore be counted. Alternatively, the Legislature can adopt the verification procedure used in Florida and many other states in which election officials match the signature on the affidavit ballot envelope with the signature on the voter registration application. Signature matching is widely acknowledged as a reliable method of verifying identity, even more so than identification.

The rule we propose is consistent with HAVA's identification and provisional voting provisions, and it also protects against unconstitutional denials of the right to vote. In contrast, a rule that would reject affidavit ballots cast by first-time voters who register by mail and do not provide identification would violate HAVA. HAVA *requires* states to "count" all provisional ballots cast by persons who are "eligible under State law to vote." 42 U.S.C. § 15482(a)(4). In other words, "eligib[ility] under [New York] law to vote" is the *only* permissible condition under HAVA for counting a provisional ballot. The possession of identification is simply not a condition of voter eligibility under New York law. In fact, under the New York Constitution, the sole qualifications for voting in an election are that the voter be a citizen, eighteen or more years old, and a resident of the state and of the county, city or village for thirty days prior to the election.³ Moreover, New York law has traditionally presumed that a person is eligible to vote unless there is affirmative evidence that he or she is not.⁴ Since eligibility to vote under New York law does not turn on the possession of identification, HAVA prohibits the state from refusing to count provisional ballots cast by persons who do not provide identification.

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.").

² See N.Y. Elec. Law § 8-302.

³ Article 3, Section 2 of the New York Constitution, entitled "qualifications of voters," specifically provides: "Every citizen shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the vote of the people provided that such citizen is eighteen years of age or older and shall have been a resident of this state, and of the county, city or village for thirty days preceding an election." Section 5-102 of the New York Election Law reaffirms these same qualifications.

⁴ See, e.g., *People v. Pease*, 27 N.Y. 45 (1863) (presumption that foreign-born voter was naturalized unless there is affirmative evidence that he was not).

Indeed, the refusal to count provisional ballots cast by first-time voters who register by mail and do not provide identification would render the “fail-safe voting” mechanisms in HAVA superfluous, in violation of accepted principles of statutory interpretation.⁵ If all such individuals were presumptively ineligible to have their votes counted, there would be no reason to allow them to cast provisional ballots. HAVA’s mandate that voters who do not provide identification be given provisional ballots would certainly not serve as “fail-safe” voting if those same ballots are never counted. HAVA does not sanction the creation of such meaningless provisional ballots. On the other hand, the procedures we recommend comply with both federal and New York law,⁶ ensuring that no eligible voter is unnecessarily disenfranchised, while protecting against voter fraud.

Moreover, HAVA’s requirements must be read in light of a constitutional background in which the right to vote is a fundamental right protected by the First and Fourteenth Amendments to the U.S. Constitution.⁷ Constitutional voting rights jurisprudence makes clear that states cannot place unjustifiably onerous burdens on voters. Where a state has several less burdensome alternatives to verify a voters’ eligibility, the state should adopt one of those procedures rather than completely disenfranchising voters.⁸ The Coalition’s proposal is plainly less restrictive than an absolute requirement that individuals provide identification as a condition of voting or having their votes counted.

New York 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 it should not do so now. Rather, the Legislature should make every effort to ensure that voters who do not have identification can effectively exercise their fundamental right to vote and have their votes counted. Accordingly, we strongly urge you to adopt a provision requiring election officials to count provisional ballots cast by voters who do not provide identification without regard to whether or not those voters have identification. It is not sufficient for the Legislature to leave this determination to the state or local boards of elections, as that would create too great a risk of inconsistent results and violations of voters’ rights under HAVA and the federal and state constitutions.

⁵ See *Lake Cumberland Trust, Inc. v. EPA*, 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.”).

⁶ The New York Court of Appeals has held that “any procedural device which fails to give effect to a vote cast is plainly unconstitutional.” *State ex rel. Ellis v. Eaton*, 541 N.Y.S.2d 287, 289 (N.Y. Sup. Ct., Cattaraugus Co. 1988) (citing *People ex rel. Duster v. Wintermute*, 194 N.Y. 99, 108 (1907)). The refusal to count a provisional ballot cast by registered and eligible voters who do not have identification would unconstitutionally deny those voters their right to vote and to have their vote counted.

⁷ See, e.g., *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

⁸ See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972) (state may not create greater burden on voting “if there are other, reasonable ways to achieve those with a lesser burden on constitutionally protected activity”); cf. 1997 Mich. Op. Atty. Gen. No. 6930 (finding Michigan requirement that voters provide picture identification or sign an affidavit unconstitutionally burdened right to vote).

II. PROVISIONAL BALLOTS CAST BY VOTERS IN THE WRONG ELECTION DISTRICT

A. Summary of HAVA's Provisional Ballot Requirements

HAVA's provisional ballot requirements are intended "to ensure that every eligible American who goes to vote gets to vote and that every vote cast counts."⁹

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 registered to vote in the jurisdiction and is eligible to vote in an election for federal office. 42 U.S.C. § 15482(a). HAVA therefore requires each state to allow an individual who appears to vote at a polling place or station other than the one assigned to their election district to cast a provisional ballot.

The procedure for issuing provisional ballots is as follows. HAVA requires election officials at the polling place to "notify" an eligible individual that "the individual may cast a provisional ballot in that election." *Id.* § 15842(a)(1). HAVA then provides that the individual may "cast a provisional ballot at the polling place upon the execution of a written affirmation" that the individual is a "registered voter in the jurisdiction" and is "eligible to vote in that election." *Id.* § 15842(a)(2).

While HAVA does not define "jurisdiction," Congress directed that HAVA be construed in harmony with the National Voter Registration Act of 1993 (NVRA), which does define jurisdiction. 42 U.S.C. § 15545(a)(4). The NVRA uses the term "registrar's jurisdiction" to refer to the geographic scope of the unit of government that maintains the voter-registration rolls. 42 U.S.C. § 1973gg-6(j). Under this definition, in New York, where voter registration records are maintained by each county board of elections, "jurisdiction" refers to "county."

As noted above, once a voter casts a provisional ballot, HAVA requires election officials at the polling places 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 verifying the provisional ballot determines that "the individual is eligible under State law to vote," HAVA mandates that the individual's provisional ballot "*shall be counted as a vote* in that election." *Id.* § 15482(a)(4) (emphasis added). In short, eligibility to vote under state law is the only permissible requirement for a provisional ballot to be counted. As also noted, under New York 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 New York for thirty days, and resides in the county, city, or village in which he or she seeks to vote.

⁹ 148 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) (HAVA "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").

B. New York Must Not Disenfranchise Eligible and Registered Voters Who, Through No Fault of Their Own, Cast Affidavit Ballots in the Wrong Election District

In order to prevent the disenfranchisement of eligible and registered voters as a result of administrative errors or hardship, the Coalition urges the legislature to enact a provision requiring the board of elections to count the votes on affidavit ballots for all offices for which the individual was eligible to vote, regardless of whether the individual appeared to vote in the correct election district or polling place. Specifically, the Coalition recommends that the Legislature adopt the following language or its equivalent:

The board of elections shall determine the validity of an affidavit ballot without regard to the election district or polling place at which it was cast and shall count the votes cast by all eligible and registered voters for all races for which those voters were eligible to vote.

The New York Court of Appeals has recently ruled that, under New York’s Election Law, the boards of elections must count provisional ballots cast in the wrong election district but in the correct polling place.¹⁰ It is important that the Legislature codify this ruling to ensure that future boards of elections are aware of the governing New York law. Moreover, a broader provision that also protects votes cast by affidavit ballot in the wrong polling place would serve HAVA’s purpose of preventing voters from being denied the right to vote as a result of errors by election officials, including errors in notifying voters of the election districts and polling places to which they have been assigned. Such a provision is also arguably mandated by HAVA.

HAVA requires states to count provisional ballots cast by an individual who is “eligible under State law to vote” in the election. While HAVA incorporates state laws governing who is “eligible ... to vote,” HAVA does not afford states any discretion to refuse to count provisional ballots cast by registered voters who *are* eligible under state law to vote. As the Iowa Attorney General correctly explained, “‘eligibility’ [under HAVA] is related to who is entitled to vote, not how or where the vote is to be cast.”¹¹ Thus, New York must count provisional ballots cast by all voters who meet the voting eligibility requirements under New York law.

Although New York maintains a precinct-based voting system, that system does not affect an individual’s eligibility to vote. Rather, the New York Constitution and Election Law make an individual eligible to vote in the “county, city or village” in which she resides without regard to the election district or polling place to which she may be assigned.¹² Indeed, election districts and polling places have nothing to do with voting eligibility; they are merely units of convenience for the administration of elections. Thus, by incorporation, HAVA requires New York to count all affidavit ballots cast in the “county, city or village” in which a voter resides, for all offices for which the voter was eligible to vote.

¹⁰ *Panio v. Sunderland*, 4 N.Y.3d 123 (2005). While the Court of Appeals also held that the board of elections may reject affidavit ballots cast at the wrong polling place, it did not hold that the Election Law prohibits the boards from counting those affidavit ballots. In addition, the Court of Appeals did not consider the requirements of HAVA or of the federal and state constitutions.

¹¹ Iowa Op. Att’y Gen., Letter from Iowa Attorney General Thomas J. Miller to Iowa Secretary of State Chester J. Culver (Oct. 22, 2004).

¹² See N.Y. Const. art. 2, § 1; N.Y. Elec. Law § 5-102.

It is important to note that this provisional balloting protection in no way threatens New York's election district-based system of election administration. The Coalition is informed that several local boards of elections in New York, including Nassau County, have counted affidavit ballots cast in the wrong polling place, and their policy has not undermined the administration of their elections. Indeed, New York may still validly require voters to vote in the correct polling place, and even penalize voters who knowingly and intentionally vote in the wrong polling place and could, without undue hardship, vote in the correct polling place. The affidavit ballots are merely a fail-safe to ensure that eligible and registered voters who are unable to vote at their assigned polling place through no fault of their own are not thereby completely disenfranchised.

The refusal to count affidavit ballots cast in the wrong polling place may also, under the system in place in New York, violate the fundamental right to vote guaranteed by the United States Constitution. Under New York's affidavit ballot system, when a registered and eligible voter inadvertently appears to vote at the wrong polling place, election officials do not notify the voter that she is in the wrong polling place and that if she casts an affidavit ballot in that polling place the board of elections will not count her votes. Nor do the election officials direct the voter to the correct polling place or otherwise instruct her how she can cast a ballot that will be counted. Rather, under the board's officially-sponsored procedure, election officials merely provide the voter with an affidavit ballot that is, under the board's current interpretation of the law, void on its face. Moreover, election officials provide affidavit ballots under circumstances that lead voters reasonably to believe that they are casting votes that will be counted.

The unfairness of this system is compounded by the facts that a significant number of voters in every election do not receive notice from the boards of elections indicating the location of their polling places; that the boards of elections frequently make mistakes in assigning voters or informing voters of their election districts and polling place; that poll workers often do not have accurate maps of or information relating to the election districts they serve; that polling places are subject to change; that many (perhaps most) voters who appear to vote in the wrong polling place do so through no fault of their own and are not aware that they are in the wrong polling place; and that there is no reliable method for voters to determine their correct polling places on their own.

By inducing voters who appear in the wrong polling place to believe that they are casting votes that will be counted, and by failing to provide a mechanism for eligible voters to cast meaningful ballots that will be counted, the current New York affidavit ballot system denies those who cast affidavit ballots in the wrong polling place the right to vote without due process of law. As a federal district court in New York explained when striking down a similar policy involving certain absentee ballots, "by providing ... ballots that voters rely upon in good faith to cast their vote, and then invalidating them, the Board has effectively taken away their guaranteed right to vote in the election."¹³

¹³ *Hoblock v. Albany County Bd. of Elec.*, 341 F. Supp. 2d 169, 176 (N.D.N.Y. 2004). Similarly, the First Circuit Court of Appeals struck down a policy under which election officials handed certain voters ballots that were invalid. *Griffen v. Burns*, 570 F.2d 1065 (1st Cir. 1978).

Further, by completely nullifying votes cast by citizens who are registered and eligible under New York law to vote, a policy of rejecting affidavit ballots cast in the wrong precinct imposes the most severe burden on the right to vote. Under the First and Fourteenth Amendments of the U.S. Constitution, such a burden is impermissible unless it is narrowly tailored to serve a compelling governmental interest.¹⁴ There is simply no justification for refusing to count affidavit ballots cast by a voter in the wrong polling place unless there is affirmative evidence that: (a) the voter was notified that she was in the wrong polling place and that any ballot she cast in that polling place would not be counted, (b) the voter was directed to the correct polling place or to a place where she could cast a ballot that would be counted, and (c) it would not be an undue hardship for the voter to vote at the correct polling place. In addition, it would be completely unfair to deny the votes of a voter who appeared to vote in the wrong polling place at the direction of election officials; additional protection for such voters is needed.

In short, the Coalition strongly urges the Legislature to require the boards of elections to count affidavit ballots cast by eligible and registered voters in the wrong polling place for all offices for which the voters are eligible to vote. At the very least, the Coalition asks that the Legislature adopt notice requirements, including provisions requiring election officials to (a) notify a voter that she is in the wrong polling place, that she may nonetheless cast a provisional ballot, but that the board will not count her ballot if it determines that she voted in the wrong polling place; and (b) direct voters to the correct polling place, as well as a protection to ensure that voters whom election officials are *unable* to direct to the correct polling place may still vote and have their votes counted, regardless of where they vote. Proof that election officials did not inform voters that they were in the wrong polling place and were unable to direct voters to the correct polling place can easily be obtained by a simple modification to the provisional ballot envelope, adding a space for poll workers and voters to sign a statement relating to this notice. These protections will help ensure that New York's affidavit ballot system does not mislead voters or prevent them from casting meaningful ballots.

¹⁴ As the Supreme Court has “repeatedly recognized that all qualified voters have a constitutionally protected right to vote ... and to have their votes counted.” *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). A severe burden on the right to vote, such as a rule preventing the counting of votes cast by eligible voters, is subject to strict scrutiny and must be narrowly drawn to advance a state interest of compelling importance.” *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (citation omitted).