

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

CLAUDE HAWKINS, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 04-4177-CV-C-RED
)	
MATT BLUNT, Secretary of State, in his official capacity, et al.,)	
)	
Defendants.)	

ORDER

Now before the Court are the Motion for Summary Judgment filed by Plaintiffs Hawkins, Morahan, and Schilling (“Individual Plaintiffs”) and Plaintiff Missouri Democratic Party (Doc. 45) and Defendants Blunt, Byers, and Vandelicht’s Motion for Summary Judgment (Doc. 47). Both of the Motions have been fully briefed, including a brief filed by Jon Brax, Gerald Barker, Mary Ellen Young, Gayle Morris, and Kimberleigh McArthur-Fernandez as *amicus curie*. This case presents an issue of first impression, that is, whether the provisional voting requirements of Missouri’s state provisional voting law, Missouri Revised Statute section 115.430, conflicts with and is preempted by the Help America Vote Act (“HAVA”), Pub. L. No. 107-252, 116 Stat. 1666 (2002). For the reasons below, the Court **DENIES** Plaintiffs’ Motion and **GRANTS** Defendants’ Motion.

I. Factual Background and Procedural Posture

This case raises the question of whether the Missouri state provisional voting procedure meets the requirements of federal law. In Missouri, a provisional ballot is limited to federal and statewide office and issue elections. In its simplest form a provisional ballot is cast by an individual who arrives at a polling place

and discovers that he or she is not on the official list of eligible voters for the polling place, or an election official asserts that the individual is not eligible to vote. The individual is required to affirm that the individual is a registered voter and is eligible to vote in the election. The individual then casts a provisional ballot, which is sealed and kept separate from the rest of the ballots. Later, the election authority examines each of the provisional ballots cast in the election to determine whether each vote should be counted. If the election authority determines that the person was eligible under state law to vote, then the provisional ballot will be counted. If not, then the ballot will not be counted and the information must be made available to the voter as to why the vote was not counted.

The controversy over Missouri's provisional ballot system arises out of events during the August 3, 2004, Missouri state primary election. On the statewide ballot were primary elections for federal and state offices and statewide constitutional amendment questions. The rest of the ballot, known as "down the ballot," varied throughout the state with local issues and primary elections.

Individual Plaintiffs are Kansas City residents who each discovered that they were not on the official list of eligible voters when they arrived at their selected polling place for the August 3 election. In each case they were not referred to the polling place for the precinct where they resided, although Plaintiff Hawkins was directed to other polling places. Ultimately, they each cast provisional ballots. Initially, Plaintiffs believed that there was a "significant and imminent risk" that the Kansas City Election Board, a Defendant that has previously been dismissed, would refuse to count their provisional ballots because they were not cast at the polling place for the precinct where they resided. Although this Court had temporarily enjoined the Kansas City Board from certifying the results of the election, the Board did meet to consider whether

provisional ballots casts in the Board’s jurisdiction would be counted. The Board determined that all three of the Individual Plaintiffs’ ballots should be counted, and that the

provisional ballots of other voters, who were registered within the jurisdiction of the Kansas City Election Board, who voted a provisional ballot in a polling place where they did not reside, and where there was no evidence that the voters were directed to the polling place where they reside or to a central location, should be counted.

Aff. of David Raymond, ex. 1 to Memo. in Support of the Kansas City Board of Election Commissioners’ and Individual Commissioners’ Mot. to Vacate T.R.O. and for Dismissal (Doc. 30) at 2 ¶ 6.

This Court found that, because the Kansas City Board was going to count Individual Plaintiffs’ votes, “the only thing preventing Plaintiffs from receiving their requested relief (having their votes counted) is the injunction currently in place.” *Order* (Doc. 44). Thus, Plaintiffs’ claims against the Kansas City Board and its individual members were moot, the Temporary Restraining Order was lifted, and the Kansas City Board was allowed to certify its results to the state officials. The Kansas City Election Board, and the individual board members, were thereafter dismissed as Defendants herein.

Individual Plaintiffs’ remaining claims are identical to the claims of Plaintiff Missouri Democratic Party—that is, that the Missouri law is in conflict with HAVA because it allows the election authority to direct the voter to his correct polling place in lieu of providing a federal provisional ballot, it requires voter affirmation that he is eligible to vote at the polling place at which his ballot is cast, and it has a requirement that provisional ballots cast at the wrong polling place will not be counted.

A group of Missouri residents filed a Motion to Intervene (Doc. 15) on the grounds that Plaintiffs’ requested relief would violate their equal protection rights. This Court denied the Motion (Doc. 33),

holding that the State Defendants would adequately represent the putative intervenors' interests, but allowed the group to file a brief on dispositive motions as *amicus curie*. The parties filed Motions for Summary Judgment, the putative intervenors filed a brief supporting the State Defendants, and the parties have responded to the motions as provided by the Federal Rules of Civil Procedure and the relevant Local Rules.

II. Standard of Review

Rule 56(c) Federal Rules of Civil Procedure provides that summary judgment shall be rendered if the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Fry v. Holmes Freight Lines, Inc.*, 72 F. Supp. 2d 1074, 1075 (W.D. Mo. 1999). When ruling on a motion for summary judgment, the court should view the facts in the light most favorable to the adverse party and allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence. *See id.* (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Reed v. ULS Corp.*, 178 F.3d 988, 900 (8th Cir. 1999)).

Summary judgment is appropriate against a party who fails to make a showing sufficient to establish that there is a genuine issue for trial about an element essential to that party's case, and on which that party will bear the burden of proof at trial. *See Cunningham v. Kansas City Star Co.*, 995 F. Supp. 1010, 1014 (W.D. Mo. 1988) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

In the case where both parties have filed cross-motions for summary judgment, the legal standard does not change. Each motion must be evaluated independently, with facts viewed in a light most favorable

to the nonmoving party. *See, e.g., St. Luke's Methodist Hosp. v. Thompson*, 182 F. Supp. 2d 765, 769 (N.D. Iowa 2001).

III. Discussion

A. Background and Challenged Statutes

After the presidential election of 2000, Congress passed the “Help America Vote Act,” or “HAVA,” Pub. L. No. 107-252, 116 Stat. 1666 (2002) in October 2002. *See Leonard M. Shambon, Implementing the Help America Vote Act*, 3 Election L.J. 424, 424 (2004). As stated by Senator Bond, HAVA was enacted to “make it easier to vote and tougher to cheat.” 149 Cong. Rec. S10,488 (Oct. 16, 2002) (statement of Sen. Bond). HAVA provided funds to improve election administration and created a federal Election Assistance Commission to oversee the implementation of HAVA. *See Shambon, supra* at 428-29. HAVA also established requirements that states must adhere to for all federal elections.

Section 302 of HAVA, the section most relevant to this action, requires states to provide voters with the opportunity to cast a provisional ballot, to post certain voting information at the polling places on election day, and to cast provisional ballots if a court orders polls to remain open. HAVA § 302, 42 U.S.C. § 15482. The section’s requirements relating to the casting of provisional ballots are as follows:

a) Provisional voting requirements

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:

- (1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.

(2) The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is--

(A) a registered voter in the jurisdiction in which the individual desires to vote; and

(B) eligible to vote in that election.

(3) An election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual under paragraph (2) to an appropriate State or local election official for prompt verification under paragraph (4).

(4) If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) 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 (2000 & Supp. 2004).

The State of Missouri has implemented provisional voting laws, pursuant to HAVA. The relevant parts of Missouri Revised Statute section 115.430, state as follows:

1. This section shall apply to primary and general elections where candidates for federal or statewide offices are nominated or elected and any election where statewide issue or issues are submitted to the voters.
2. A voter claiming to be properly registered in the jurisdiction of the election authority and eligible to vote in an election, but whose eligibility cannot be immediately established upon examination of the precinct register or upon examination of the records on file with the election authority, shall be entitled to vote a provisional ballot after providing a form of personal identification required pursuant to section 115.427, or may vote at a central polling place as established in section 115.115 where they may vote their appropriate ballot upon verification of eligibility or vote a provisional ballot if eligibility cannot be determined. The provisional ballot contained in this section shall contain the statewide candidates and issues, and federal candidates. The congressional district on the provisional ballot shall be for the address contained on the affidavit provided for in this section. If the voter declares that the voter is eligible to vote and the election authority determines that the voter is eligible to vote at another polling place, the voter shall be directed to the correct polling place or a central polling place as established by the election authority pursuant to subsection 5 of section 115.115. If the voter refuses to go to the correct polling place or a central polling place, the voter shall be permitted to vote a provisional ballot at the incorrect polling place, but such ballot shall not be counted.

3. . . .The provisional ballot envelope specified in this section shall contain a voter’s certificate which shall be in substantially the following form:

. . .
I so solemnly swear (or affirm)
. . .
that I am registered to vote in _____ County or City. . .
that I am a qualified voter of said County (or City). . .
that I am eligible to vote at this polling place. . .
that I have not voted in this election.

. . .
4. Prior to certification of the election, the election authority shall determine if the voter is registered and entitled to vote and if the vote was properly cast. The provisional ballot shall be counted only if the election authority determines that the voter is registered and entitled to vote. Provisional ballots voted in the wrong polling place shall not be counted. If the voter is not registered but is qualified to register for future elections, the affidavit shall be considered a mail application to register to vote pursuant to this chapter.

. . .
Mo. Rev. Stat. § 115.430 (2000 & Supp. 2004).

Finally, the section provides that the Secretary of State may promulgate rules to ensure the uniform application of the section. *Id.* § 115.430.6.

Plaintiffs claim that the Missouri state statute violates HAVA.

B. Statutory Construction

The United States Constitution mandates that the Constitution and “the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. Art. VI cl. 2. Thus, a state law that conflicts with an act of Congress, which is validly enacted pursuant to the Constitution, is a nullity. *See M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427, 4 L. Ed. 579 (1819). Congress can preempt state action in a particular area if it expressly does so in a statute, if Congress “occupies the field” through a deep and broad congressional

scheme, or by implication if a state action conflicts with congressional action. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540-41, 121 S. Ct. 2404, 2414, 150 L. Ed. 2d 532 (2001). HAVA does not contain an express preemption clause, and there is no evidence that Congress attempted to “occupy the field” of federal election requirements. *See, e.g.*, HAVA §§ 304, 305, 42 U.S.C. §§ 15484, 15485 (allowing the states to establish election technology and administration requirements that are more strict than set forth in HAVA, so long as they are not inconsistent with HAVA’s requirements, and leaving the methods of implementing Title III of HAVA to each state’s discretion). Thus, the ultimate question before the Court is whether the mandates in Missouri Revised Statute section 115.430 are in conflict with the requirements in § 302 of HAVA, 42 U.S.C. § 15482.

An actual conflict between state and federal law occurs when “it is impossible to comply with both state and federal law, or the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.” *Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987) (quotations and citations omitted). “The purpose of Congress is the ultimate touchstone of pre-emption analysis.” *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)) (further quotation and citations omitted).

When attempting to determine Congress’s intent through a statutory enactment, the plain language of the statute should first be examined. *See, e.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). Statutes should be read as a whole, giving effect to the plain meaning of the words, while reading the provisions of the statute in context. *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993). Additionally, if there are ambiguities in the text or if the text would lead to an illogical result, the legislative history of a particular act may also be used in a “good-faith effort to discern legislative intent.” *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 610 n.4 (1991).

1. Statutory Requirements to Count Provisional Ballots

The Missouri statute was written to comply with the requirements of HAVA. Thus it is not surprising that the procedural requirements for casting a provisional ballot are quite similar as illustrated below.

<u>HAVA § 302(a) (42 U.S.C. § 15482(a))</u>	<u>Mo. Rev. Stat. § 115.430</u>
1. Voter declares he is registered to vote in the jurisdiction and eligible to vote in an election.	1. Voter claims to be registered to vote in the jurisdiction and eligible to vote in an election. <i>1A. If election official determines that the voter is eligible to vote at another polling place, the voter shall be directed to the correct polling place or the central polling place.</i>
2. Voter is not on the official list of eligible voters for the polling place, or election official asserts voter is not eligible.	2. Voter's eligibility cannot be immediately established upon examination of the precinct register or records on file with the election authority.
3. Voter shall be entitled to cast provisional ballot at that polling place upon execution of written affirmation.	3. Voter shall be entitled to (1) cast provisional ballot upon execution of written affirmation, or (2) go to central polling place, where, if eligible, the voter can vote a full ballot, or if eligibility cannot be verified, voter may cast a provisional ballot, upon execution of written affirmation.
4. Affirmation required to cast a provisional ballot includes declarations that the voter is: a. Registered to vote in the jurisdiction; and b. Eligible to vote in the election.	4. Affirmation required to cast a provisional ballot includes declarations that the voter is: a. Registered to vote in the particular county or city; b. Qualified voter of said county or city; <i>c. Eligible to vote at this polling place; and</i> d. Has not voted in this election.

2. Additional Missouri Provisions

Missouri's provisional voting statute contains two provisions in addition to the requirements delineated in HAVA that appear to automatically disqualify a provisional ballot. The interpretations of these provisions are central to the issues in this case. In paragraph 2 of section 115.430, immediately after the sentence that provides that if the election authority determines that the voter is eligible to vote at another polling place he shall direct the voter to the correct polling place or a central polling place, it is provided that "[i]f the voter refuses to go to the correct polling place or a central polling place, the voter shall be permitted to vote a provisional ballot at the incorrect polling place, but such ballot shall not be counted." In paragraph 4 of section 115.430, it is provided, among other things, that "[p]rovisional ballots voted in the wrong polling place shall not be counted."

3. Claimed Conflicts

Individual Plaintiffs originally were concerned that their provisional ballots would not be counted by the Kansas City Election Board because of the provision in paragraph 4 of section 115.430 that, "[p]rovisional ballots voted in the wrong polling place shall not be counted." The Individual Plaintiffs did not cast their provisional ballots at their assigned polling places, which would be the precinct for their residence. The Kansas City Election Board, however, counted all of Plaintiffs' provisional ballots on the basis that section 115.430.4 was not applicable. The Election Board further stated that since there was not evidence that any of these Plaintiffs had been directed to the polling place for the precincts where they resided (i.e., their "correct" polling place under section 115.430.2), they were entitled to vote their provisional ballot at a polling place where they did not reside (i.e., outside their precinct). The Defendant Secretary of State has concurred in this interpretation of Missouri's provisional voting statute. The Court agrees with this interpretation and, therefore, considers this potential conflict as resolved. Individual

Plaintiffs' § 1983 claim summarized in paragraph 47, Count II, of their complaint, is based on said Plaintiffs perceived "real and imminent threat that Defendants will refuse to count the provisional votes" of Plaintiffs. Said votes have now been counted, thus, the issues raised in Count II are moot and will not be considered in this Order.

The second claimed conflict raised by Plaintiffs is that HAVA provides that once an individual declares that he is a registered voter in the jurisdiction where he desires to vote and is eligible to vote in that federal election, but the individual's name does not appear on the list of eligible voters for that polling place, or an election official has asserted that the individual is not eligible to vote,

an election official at the polling place *shall notify* the individual that the individual may cast a provisional ballot in that election.

HAVA § 302(a)(1), 42 U.S.C. § 15481(a)(1) (emphasis added).

Plaintiffs claim that this is a federal mandate that a voter in this situation must be immediately allowed to have the option of either voting a federal provisional ballot at that polling place or, if the voter's correct polling place can be determined, going to the correct polling place to vote a full ballot. In other words, Plaintiffs are claiming that in so far as a federal provisional ballot is concerned, the voter should have the option of whether or not to comply with Missouri's precinct voting requirements.

Plaintiffs claim that the Missouri statute violates the "mandate" of HAVA because the Missouri law provides that if you have a similarly situated individual in Missouri and the *election authority is able to determine the correct polling place for the individual*, the election authority shall direct the individual to the individual's correct polling place or a central polling place, rather than allowing the individual to cast a viable federal provisional ballot. Missouri further provides that if the voter has been directed to the

voter's correct polling place or a central polling place, but the voter refuses to go to his correct polling place or the central polling place, a provisional ballot cast by that voter will not be counted. Plaintiffs contend it is a violation of HAVA for individuals to be referred to their correct polling places or a central polling place in lieu of getting the option of voting a viable federal provisional ballot at the known incorrect polling place.

The third claimed conflict arises out of the additional matter required to be included in the Missouri provisional voter certification versus the HAVA affirmation. HAVA basically requires an individual requesting a provisional ballot to execute a written affirmation that the individual is (a) a registered voter in the jurisdiction and (b) eligible to vote in that election. Missouri requires an individual requesting a provisional ballot to execute a written certificate that the voter (a) is registered to vote in the jurisdiction, (b) is a qualified voter of said jurisdiction, (c) *is eligible to vote at this polling place*, and (d) has not voted in this election. The Missouri certificate further requires that the voter affirm that he or she understands that knowingly providing false information is a violation of law that subjects the voter to possible criminal prosecution.

Plaintiffs contend it is a violation of HAVA to require a voter to swear or affirm that he or she is "eligible to vote at this polling place" under penalty of criminal prosecution when the circumstances necessitating the provisional ballot are such that there is necessarily some doubt about the individual's eligibility at the particular polling place. Plaintiffs claim this provision runs counter to the purpose of provisional voting and could have a chilling effect on voters' desire to cast provisional ballots.

4. Respective Interests

In determining whether the Missouri statute frustrates the intent of HAVA, the Court must consider the interests of the various parties and interested entities. First, there is Congress's interest in making sure that voting is easier, but that fraudulent voting is tougher. The State of Missouri has, in addition to the federal interests, the interests of ensuring that every registered, eligible voter can cast a ballot that includes to the fullest extent possible all of the offices and issues for which the voter is eligible to vote, that the election is conducted in an efficient and orderly manner, and that the votes are counted accurately. Individual voters have an interest in the reasonable exercise of their constitutionally protected voting rights. That includes the right to cast a ballot, the right to vote on all issues and for all offices for which they are legally entitled to vote, and the right not to have their votes offset or diluted by fraudulently cast votes. Individual candidates, like those represented by *amicus* candidate Jon Calvin Brax, have an interest in the fair and accurate counting of votes. However, "down-the-ballot" candidates, such as Mr. Brax, also have an interest in maximizing voters' ability to vote a full ballot, including all regional and local races, rather than a provisional ballot limited to federal and statewide contests. Finally, political parties, such as Plaintiff Missouri Democratic Party, have an interest in full and fair voting. Especially in primary elections, political parties must ensure that their nominees most closely represent the views of a majority of their party's voters, which necessitates the encouragement of full ballot voting.

5. Discussion

Of the claimed conflicts noted above, the one that presents the core issue of this case resides in Missouri Revised Statute section 115.430.2, which provides if "the election authority determines that the voter is eligible to vote at another polling place, the voter shall be directed to the correct polling place or

a central polling place” in lieu of being given a provisional ballot. This is Step 1A in the chart in Section III.B.1, *supra*. This step essentially preserves precinct voting as it relates to the provisional balloting procedure. In other words, it provides a “weeding out” process to determine whether voters really need a provisional ballot or simply need guidance to their correct polling place. As noted in the chart, this step does appear to be a requirement in addition to those required in HAVA for voting a provisional ballot. Thus, to determine whether the procedure amounts to “an impermissible obstacle to the accomplishment of the full purposes and objectives of Congress,” *Cal. Coastal Comm’n*, 480 U.S. at 581, two questions must be asked. First: Can HAVA be read to include reasonable accommodations of state precinct voting practices in implementing provisional voting requirements? Second: If so, are Missouri’s practices reasonable?

a. HAVA’s Accommodation of Precinct Voting

The text of HAVA, as well as HAVA’s legislative history, convincingly prove that the answer to the first question is yes. First, the text of HAVA indicates that Congress intended that states be given flexibility when implementing the provisional balloting requirement. *See, e.g.*, HAVA § 302(a)(4), 42 U.S.C. § 15482(a)(4) (requiring states to count a provisional ballot if the person was “eligible under state law to vote”); *id.* § 304, 42 U.S.C. § 15484 (allowing states to establish “election technology and administration requirements that are more strict than the requirements established under” HAVA); *id.* § 305, 42 U.S.C. § 15485 (“The specific choice on the methods of complying with the requirements of this subchapter shall be left to the discretion of the state.”).

The word “eligible” is used in a number of ways in the relevant statutes. HAVA refers to the voter being “eligible to vote in an election for Federal office,” HAVA § 302(a), 42 U.S.C. § 15482(a), as part

of the threshold requirement for casting a provisional ballot. Later, as a prerequisite to counting the provisional ballot, HAVA requires that the state determine that the individual is “eligible under State law to vote.” HAVA § 302(a)(4), 42 U.S.C. §15482(a). Missouri state law adds an additional dimension to “eligible” in the certificate on the envelope containing the provisional ballot wherein the voter is required to affirm that he is “eligible to vote at this polling place.”

“Eligible” means “qualified or entitled to be chosen.” *American Heritage Dictionary of the English Language* (4th ed. 2000); accord *Oxford English Dictionary* (2d ed. 1989); *Webster’s Revised Unabridged Dictionary* (1998). Thus, a potential voter must be qualified to cast a ballot in a federal election, and such person also must be qualified under state law to cast the ballot in order for the ballot to be counted. When referring to state law in HAVA, Congress evidenced its intent to rely on states to define voter qualifications, including where a voter could cast a provisional ballot for it to be legally counted.

The intent of Congress is clearly demonstrated in the legislative history of HAVA. Statements of Senators Kit Bond, a Republican from Missouri, and Christopher Dodd, a Democrat from Connecticut, clearly indicate that Congress did not intend to overturn a state’s precinct system or to prevent states from directing voters to their correct polling place. *See* 148 Cong. Rec. S10,491 (Oct. 16, 2002) (statement of Sen. Bond) (“It is not the intent of the authors to overturn State laws regarding registration or State laws regarding the jurisdiction in which a ballot must be cast to be counted. Additionally it is inevitable that voters will mistakenly arrive at the wrong polling place. If it is determined by the poll workers that the voter is registered but has been assigned to a different polling place, it is the intent of the authors of this bill that the poll worker can direct the voter to the correct polling place. In most States, the law is specific on the polling place where the voter is to cast his ballot. Again, this bill upholds State law on that subject.”); *id.*

at 10,493 (statement of Sen. Bond) (“This provision is in no way intended to require any State or locality to allow voters to vote from any place other than the polling site where the voter is registered.”); *id.* at S10,508 (statement of Sen. Dodd) (“Any provisional ballot must be promptly verified and counted if the individual is eligible under State law to vote in the jurisdiction. Nothing in this conference report establishes a rule for when a provisional ballot is counted or not counted. Once a provisional ballot is cast, it is within the sole authority of the State or local election official to determine whether or not that ballot should be counted, according to State law.”).

Other evidence exists demonstrating that the states have discretion to implement the provisional voting provisions of HAVA, including requiring potential voters to be at their correct polling place. For example, in floor debates, Senator Susan Collins of Maine confirmed that her state’s system of same-day registration, automatic counting of provisional ballots, and exclusion of improperly filed ballots upon a recount if the provisional ballots would make a difference in the outcome of the election, would be consistent with the provisions of HAVA. *Id.* at S10,494 (statement of Sen. Collins). The District of Columbia’s election authority has stated that it will require voters to cast provisional ballots at the proper polling place. *Moving Elections Forward in the District of Columbia: A Plan for Implementing the Help America Vote Act in the District of Columbia* (Aug. 2003) at 13, *reprinted in* 69 Fed. Reg. 14,180, 14,186 (Mar. 24, 2004) (stating that “[s]ince voters casting special [provisional] ballots in the District of Columbia are required to cast these ballots in their assigned precinct, the Board will act to inform all voters of their assigned precinct in an election mailing prior to Election Day. As in the past, a trained poll worker will be designated to help a voter determine his or her assigned precinct and direct them to the appropriate polling place.”). The District of Columbia’s provisional balloting requirement is a direct

example of Congressional intent — if Congress had intended to require precinct-less provisional balloting, they certainly would have required the election board in the District directly under their control to allow provisional ballots throughout the city without regard to precinct boundaries. Just the opposite, however, was done.

Finally, Missouri is not alone in interpreting HAVA in this way. A significant number of states' provisional ballot statutes also specifically include a polling place requirement.¹

These examples are not examples of “entering a crowded cocktail party and looking over the heads of the guests for one’s friends,” as Plaintiff asserts. *Pls.’ Suggestions in Opp. to Defs.’ Mot. for Summ. J.* at 18 (quoting *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993)). Rather, the overwhelming tenor of the legislative history is supportive of Defendants’ position.

The position espoused by Plaintiffs does not accommodate the application of precinct voting to provisional ballots at all. Plaintiffs’ position requires a purely literal interpretation of HAVA § 302(a)(1) and a total disregard for the well-documented legislative intent. The Court finds the intent of HAVA is better served by reading the federal provisional voting procedure in conjunction with the recognition of the state’s right to determine the individual’s eligibility to vote under state law.

¹ See, e.g., Ala. Code § 17-10A-2(b) (1975 & Supp. 2003); Ariz. Rev. Stat. § 16-584C (2004); Colo. Rev. Stat. § 1-9-304.5 (2004); Fla. Stat. Ann. § 101.048 (West 2004); Mass. Gen. Laws ch. 54, § 76C (2004); Mich. Comp. Laws § 168.523a (2004); Mont. Code Ann. § 13-13-601 (2003); Neb. Rev. Stat. § 32-915 (2003); Nev. Rev. Stat. 293.3082 (2003); N.J. Stat. Ann. § 19:53C-20 (West 2003); Ohio Rev. Code Ann. § 3599.12 (West 2004); Okla. Stat. tit. 26 § 16-203 (2003); S.C. Code Ann. § 7-13-820 (Law. Co-op. 2003); S.D. Codified Laws § 12-18-40 (Michie 2003); Tenn. Code Ann. § 2-7-112 (2003); Tex. Elec. Code Ann. § 63.011 (2004); Va. Code Ann. § 24.2-653 (Michie 2002); W. Va. Code § 3-2-1 (2004); Wyo. Stat. Ann. § 22-15-105 (Michie 2002).

b. The Reasonableness of the Missouri Practices

Because this Court holds that HAVA contemplated that the implementation of its provisional voting requirements would be compatible with the states' interest in enforcing their precinct voting systems, and, given that Missouri's provisional voting statute incorporated provisions to allow election officials to try to get voters to their correct precinct before voters were allowed to cast provisional ballots, the remaining question is whether Missouri's statutory requirements are reasonable. The answer must be yes.

Any registered voter eligible to vote in an election who arrives at a polling place outside of the voter's assigned precinct will most certainly not appear on the list of eligible voters for that polling place. By Plaintiffs' contention, this voter, after declaring that the voter is eligible to vote and registered in the jurisdiction, must immediately be allowed to vote a federal provisional ballot with no additional requirements. The long and short of Missouri's statute (section 115.430.2) as applied to this same voter is that if the election official can determine the voter's correct polling place, the voter will be directed to the correct polling place or a central polling place to cast his ballot which, presumably, in most instances, will be a full ballot. On the other hand, if the election official is not able to determine the voter's correct polling place, the voter will then be allowed to cast both a state and federal provisional ballot at that polling place. It is clear to this Court that Plaintiffs' proposed interpretation of the law is the least satisfactory result for the above scenario. HAVA was intended to assist voters in exercising their right to vote in the fullest extent possible. As noted above, all parties have a strong interest in not only ensuring that ballots are cast, but that full ballots are cast. To effectuate HAVA's intent, and to protect that interest, it cannot be unreasonable to direct a voter to his correct polling place where a full ballot is likely to be cast. It is important to note that the alternative direction to a central polling place is still predicated on the ability of

the election authority to determine that the voter is eligible to vote at another polling place. The Court interprets this part of paragraph 2 of section 115.430 to mean that the direction to a central polling place pursuant to this provision shall always be coupled with a direction to the voter's correct polling place and not as a sole alternative to be selected by the election authority in lieu of directing the voter to his correct polling place. In other words, the voter shall have the option of going to the correct polling place or the central polling place.

Upon examination of HAVA's plain text, its legislative history, and other evidence, it appears clear that Congress did not intend to override states' abilities to enforce a precinct-based voting system or to require that any person residing within one congressional district be allowed to cast a provisional ballot at any polling place within that district. To read in such a requirement would be to ignore the important interest of the voters to vote a full ballot, the interests of candidates and political parties to have *all* issues resolved by the maximum number of eligible voters who cast ballots, and the interest of the state in conducting an orderly election.

c. Remaining Provisions

In light of the above finding, the remaining contested provisions of Missouri's state statute become non-issues. The provision in Missouri Revised Statute section 115.430.2, which provides that a provisional ballot will not be counted if voted at the incorrect polling place by a voter who refuses to go to his correct polling place or a central polling place after being directed to do so, is consistent with and necessary for the enforcement of precinct voting. The requirements in paragraph 3 of section 115.430, which require the voter to affirm in his certificate for the provisional ballot that he is "eligible to vote at this polling place," will not create a chilling effect or obstacle to that person's desire to vote as claimed by Plaintiff. In that

instance, a voter will either be (1) at the correct polling place, (2) a central polling place, or (3) at a polling place that the voter thinks is correct and one at which the election officials are unable to determine otherwise. In all three of these instances, assuming that the voter is able to declare he is registered and otherwise eligible to vote in the election, he is, in fact, eligible under Missouri law to vote a state and federal provisional ballot at that polling place.

The final contested provision, Missouri Revised Statute section 115.430.4, is certainly troublesome when interpreted literally and not in context with the other provisions. Taken literally, paragraph 4's requirement that "[p]rovisional ballots cast at the wrong polling place shall not be counted" would totally negate the provisional balloting procedure set forth in the first three paragraphs of section 115.430. Such an illogical result is not compatible with established statutory construction. This Court finds that this paragraph's reference to the "wrong polling place" must be construed to be a polling place that is "wrong" after giving effect to the provisional voting rights set forth in the first three paragraphs of the same section. In other words, a provisional ballot cast in accordance with the provisions of paragraphs 1, 2, and 3 of section 115.430 will be considered to have been cast at the right polling place. Such a construction gives effect to all the provisions of section 115.430 and avoids direct conflict with the federal statute. A purely literal reading of paragraph 4 – that is interpreting the "wrong" polling place to be any polling place other than the precinct in which the voter resides – would be an incorrect application of the law.

The Court finds that, subject to the interpretation of section 115.430 set forth in this order and affirmed by Defendants in their briefing herein, the Missouri state statute is a reasonable application of HAVA.

The events surrounding individual Plaintiffs' voting in Kansas City do not require a different result. First of all, the provisional ballots of Individual Plaintiffs and others similarly situated have now been counted. Any violations by local election officials in future elections can be reported and processed through the normal administrative grievance proceedings to the Secretary of State. *See* Mo. Code Regs. Ann. tit. 15 § 30-12.010 (2004) (defining the grievance procedure). The purpose of this opinion is to clarify the interpretation of the Missouri provisional ballot law. State and local election officials, with guidance from Defendants, will be expected to follow the law as set forth herein.

C. Equal Protection

Plaintiffs also argue in their brief that Missouri's law violates the Equal Protection Clause of the Fourteenth Amendment, in that the refusal to count provisional ballots cast at a (knowingly) incorrect polling place is an arbitrary and unconstitutional distinction. Most, if not all, of Individual Plaintiffs' equal protection complaints, grounded in the fact that their votes would not be counted, are moot because the Kansas City Election Board did, in fact, count their votes. However, to the extent that Plaintiffs' complaint can be read to argue that the Missouri provisional ballot law itself is an equal protection violation, Plaintiffs' claim fails.

“The right to vote *as the legislature has prescribed* is fundamental.” *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) (emphasis added). That means that a state shoulders the burden to provide “sufficient guarantees of equal treatment” when allowing citizens to cast and count votes. *Id.* at 107. Such a responsibility includes not only assurances that qualified voters be able to cast their votes and have them counted, but also that other proper votes are not diluted by improperly cast votes. *Id.* at 105. *Bush v. Gore* is a prime example. In that case, the State of Florida's recount procedure allowed each individual election board to use different standards to define what constituted the “intent of the voter” when

determining whether a vote was cast. *Id.* at 106. It was this standardless, post-vote determination that the Supreme Court found to deny individual voters guarantees of equal treatment. No such concerns exist here.

Unlike the situation in *Bush v. Gore*, the standards set by the Missouri state law, as implemented and interpreted by the Secretary of State, are definitive and related to legitimate state objectives. Missouri has a precinct-based voting system. Such a system guarantees that those entitled to vote on specific national, state, and local issues may do so. The standards set forth in the Missouri statute, as interpreted herein, are rationally related to the goals of ensuring a fair, and complete election. Because the State of Missouri, voters, parties, and candidates have an interest in ensuring that voters cast a full ballot, and because it is rational to require voters to go to a specific place to do so, Plaintiffs' equal protection rights are not violated by the simple requirement that before a voter will be allowed to cast a viable provisional ballot, the voter, provided the election official is able to determine the voter's correct polling place, will first be directed to his proper polling place. Plaintiffs' equal protection claim does not survive.

IV. Conclusion

While legislative history is not the "end all" analysis, the legislative history of HAVA, and HAVA's open-ended implementation provisions, clearly establish that the intent of Congress was not to abolish or impinge on the states' rights to enforce a precinct voting structure. The text and legislative history of HAVA demonstrate Congress's intent to provide the states flexibility in implementing provisional balloting. Congress clearly expected that provisional balloting would be effectuated through the framework of a precinct-based voting structure. The Missouri state statute, as construed herein and agreed to by Defendants, is a reasonable application of HAVA's requirements in this state. It balances the interests of all parties to ensure that it is easier to vote but harder to cheat, that all issues—both at the top of the ballot

and “down ballot”—are decided by as many voters as possible, and that the election is run in an orderly and reasonable manner.

In this case, we have two motions for summary judgment. Plaintiff requests a judgment that paragraphs 2, 3, and 4 of Missouri Revised Statute section 115.430 violate the provisions of HAVA. Defendant requests a judgment that those paragraphs are consistent with HAVA. It is clear to this Court that section 115.430 could have been written better—especially the seemingly blanket refusal to count provisional ballots cast at the wrong polling place in paragraph 4—to avoid the concerns and confusion that gave rise to this lawsuit. The Defendants, however, have cleared much of the confusion by their stated interpretation of the Missouri statute as expressed in their brief.

The Court finds these interpretations to be correct interpretations and is rendering this judgment with the expectation that Defendant Secretary of State will give instructions to the election authorities within the state to ensure that provisional voting in future elections will be processed in a uniform manner consistent with this opinion. Accordingly, it is hereby

ORDERED that Plaintiffs’ Motion for Summary Judgment (Doc. 45) is **DENIED** and Defendants Blunt, Byers, and Vandelicht’s Motion for Summary Judgment (Doc. 47) is **GRANTED**.

IT IS SO ORDERED.

DATE: October 12, 2004

/s/ Richard E. Dorr
RICHARD E. DORR, JUDGE
UNITED STATES DISTRICT COURT