DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202	
COLORADO COMMON CAUSE, et al., Plaintiffs, v. DONETTA DAVIDSON, Defendant.	Case No. 04CV7709 COURTROOM 9
ORDER	

This election case is before me on Plaintiffs' "Motion for Temporary Restraining Order and Preliminary Injunction," filed September 20, 2004, which all parties have agreed is to be treated as a motion for preliminary injunction. Based on the motion and briefs, including the simultaneous post-hearing briefs filed on October 12, 2004,[1] and on the evidence and arguments presented at the hearing held on October 5-6, 2004, I find and conclude as follows.

I. INTRODUCTION

Plaintiffs are Colorado Common Cause ("CCC"), a not-for-profit Colorado corporation, and three registered Colorado voters who attempted to vote in the August 2004 primary election. Plaintiffs challenge the constitutionality of certain 2003 amendments to the Colorado Uniform

[1] In this regard, Plaintiffs' "Submission of Supplemental Authority," filed October 14, 2004, and Intervenors' "Submission of Supplemental Authority," filed October 13, 2004, are both STRICKEN AS UNTIMELY.

Election Code of 1992, §§ 1-1-101 et seq., and related rules promulgated by Defendant, the Colorado Secretary of State. In particular, Plaintiffs challenge the constitutionality of the following three sets of statutory and regulatory changes, arguing that separately and together they impose an impermissible, and impermissibly unequal, burden on the fundamental right to vote: 1) § 1-7-110 and Colorado Election Rule ("C.E.R.") 30.13,[2] which require all in-person voters to show identification; 2) § 1-9-301(4) and C.E.R. 26.12(A), which provide that votes cast in the wrong precinct will not be counted, except for votes for president and vice-president; and 3) C.E.R. 26.12(B), which provides that provisional ballots will not be counted if the voter applied for an absentee ballot.

In addition to these constitutional challenges, Plaintiffs claim that these three sets of changes also violate various provisions of the federal Help America Vote Act ("HAVA"), 42 U.S.C. §§ 15301 et seq. (2004).

Intervenors are four registered Colorado voters who object to Plaintiffs' challenge.

II. CONSTITUTIONAL, STATUTORY AND REGULATORY BACKGROUND

A. The Federal Constitution

Although today we tend to incant the "right to vote" as if it were a self-evident proposition with roots that go back beyond the founding, nothing could be further from the truth. In 18th century England and colonial America, the franchise was generally tied to the ownership of property, and under the Articles of Confederation the nature and extent of that tie, like everything else about voting, was left entirely to the states. Alexander Keyssar, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 21 (Basic Books 2000). One of the

[2] The Colorado Election Rules are found beginning at 8 C.C.R. 1501-1. They were admitted as Exhibit 15.

most significant compromises forged by Madison at the constitutional convention was that the anti-Federalists agreed not to insist on an express right to direct voting for the House of Representatives, in exchange for which the Federalists agreed not to insist on a national property requirement for voting. Id. at 21-25. *See also* FEDERALIST NO. 82 (Madison). The result was that the federal Constitution, even as amended by the Bill of Rights, is utterly silent about voting, with the single exception of the requirement in art. I, § 2, cl. 1 that members of the House of Representatives be elected by those people of each state who, by state law, are qualified to vote for members of "the most numerous branch of the state legislature." Even this single constitutional mention of voting is coupled with the proviso that "the Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ." U.S. CONST., art. I, § 4, cl. 1.

Voting was not referred to as a "right" in the text of the Constitution until the adoption of the Fifteenth Amendment in 1870, section 1 of which provides that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[3] Even this reference to the "right to vote" is oddly restrained. Like its offspring the Nineteenth Amendment (guarantying women's right to vote) and the Twenty-Sixth Amendment (guarantying 18-year olds' right to vote), the Fifteenth Amendment did not create any right to vote, it simply prohibited states from doling out the vote in a particular discriminating fashion. Similarly, the Twenty-Fourth Amendment outlawed poll taxes as an unacceptable infringement on the "right to vote," without creating any such right.

[3] The Fourteenth Amendment, adopted two years earlier in 1868, does contain the phrase "right to vote" in its so-called reduction-of-representation clause. U.S. CONST., amend. XIV, § 2, cl.2. This provision, unlike the Fifteenth Amendment, does not prohibit states from distributing the right to vote in a racially discriminatory manner; instead, it punishes states who do so by reducing their representation in the House of Representatives.

There simply is no federal constitutional right to vote grounded in any explicit provision of the Constitution's text. As Professor Keyssar has put it:

> By making the franchise in national elections dependent on state suffrage laws, the authors of the Constitution compromised their disagreements to solve a potentially explosive political problem [the property requirement].
>
> The solution they devised, however, had a legacy—a long and sometimes problematic legacy. The Constitution adopted in 1797 left the federal government without any clear power or mechanism, other than through constitutional amendment, to institute a national conception of voting rights, to express a national vision of democracy.

KEYSSAR, supra, at 24.

Despite this lack of "clear power," the United States Supreme Court has developed a federal constitutional right to vote under the Fourteenth Amendment in the context of equal protection. Though it has taken a long and circuitous route, the "right to vote," in the sense of universal suffrage, has finally been read into the federal Constitution as a kind of fundamental right, the unequal denial of which will generally trigger strict judicial scrutiny. *See, e.g., Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969) (striking down New York statute that limited right to vote in school elections to property owners); *Harman v. Forssensius*, 380 U.S. 528 (1965) (striking down Virginia's poll tax); *Carrington v. Rash*, 380 U.S. 89 (1965) (striking down Texas statute denying the franchise to non-Texan members of armed forces stationed in Texas).[4] *See generally* Richard Briffault, *The Contested Right to Vote*, 100 MICH. L. REV. 1506 (2002); Pamela

[4] And, of course, even this implied federal constitutional right of universal suffrage does not apply to presidential elections, the Constitution having specifically provided that the President is to be elected by members of the Electoral College. U.S. CONST., art. II, § 1. Nor does the Constitution mandate that members of the Electoral College be elected by popular vote; that decision is left entirely to the states. *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("[t]he individual

S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CINN. L. REV. 1345 (2003).

But the Court has also recognized that the right to vote, unlike some other individual rights that are exercised in essential opposition to the state, is a right that has meaning only in a highly regulated social context. A vote is not merely one individual's casual expression of political opinion at any particular time on any particular subject. Votes *count*, and because they count they must be sought and given in a structured environment that allows the votes of all other proper voters to count. Thus, the Court has said this about the role the state must be permitted to play in regulating elections:

> Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."

Burdick v. Takushi, 504 U.S. 428, 433 (1992), *quoting Storer v. Brown*, 415 U.S. 724, 730 (1974).

Maximizing voters' access to the process is just one part of the compelling interest the state has in regulating the architecture of elections. Preventing voters from voting more than once, preventing otherwise ineligible voters from voting, and preventing other kinds of election fraud, is part and parcel of this same compelling state interest, as the *Burdick* Court expressly recognized when it included the words "fair and honest" at the very beginning of its litany of state interests in structuring elections. Professor Chemerinsky had it only half right, and perhaps not even that, when, in the aftermath of the controversy of the 2000 election, he wrote "What good is the right to

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citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college").

There is a second exception to the federal constitutional right to vote: states may, and many do, deny the vote to convicted felons. Richardson v. Ramirez, 418 U.S. 24 (1974). Interestingly, this exception is grounded in the language

vote if every ballot isn't counted?" Erwin Chemerinsky, *Fairness at the Ballot Box*, 40 TRIAL—APRIL 32 (2004). A complete description of the state's interest in regulating elections should have included something like, "What good is the right to vote, even if every ballot is counted, if the votes of duly registered voters are diluted by the votes of people who had no right to vote?"

Obviously, any kind of state regulation that creates an election structure will necessarily "disenfranchise" some voters. The very fact that the next presidential election will take place on November 2, 2004, will "disenfranchise" voters who would like to wait until the end of the year to decide how to cast their votes. All registration requirements, whether or not they contain residency requirements, "disenfranchise" voters who would like to be able to vote without first registering. Wyoming voters for whom it might be more convenient to vote in northern Colorado will be "disenfranchised." And, as I discuss in more detail in Part VI.A below, any provision designed to deter voter fraud (such as the current federal requirement for identification) may have some chilling effect on fraudulent and non-fraudulent voters alike.

Despite the fact that these sorts of basic election regulations necessarily operate to "disenfranchise" or chill some voters, the state's important interest in holding structured elections will generally trigger only a rational relationship kind of judicial review. *Anderson v. Calabreeze*, 460 U.S. 780 (1983); *Burdick v. Takushi, supra*; *Storer v. Brown, supra*. *As* the *Burdick* Court held, as long as state election regulations are not too "severe" or discriminatory, they will be upheld. 504 U.S. at 434.

B. The Colorado Constitution

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of the Fourteenth Amendment itself, which allows states to deny the vote to persons who have committed a crime, without being subject to the reduction-in-representation penalty. U.S. CONST., amend XIV, § 2, cl.2.

Like most states, Colorado went considerably farther than the federal government in creating an explicit constitutional right to vote. Art. II, § 5 of the Colorado Constitution provides that "[a]ll elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." An entire article of the Colorado Constitution—Article VII—is devoted to suffrage and elections, and COLO. CONST. art. VII, § 1 establishes voter qualifications: a Colorado voter must be a citizen of the United States, at least 18 years old, a resident of the state for at least a year, duly registered as required by law and, in language that will become important to my resolution of one aspect of this case, must also be a resident of the "county, city, town, ward, *or precinct* such time as may be prescribed by law [emphasis added]."

Our Supreme Court, like the federal courts, has also written about the right to vote in the language of equal protection, describing it as a "fundamental right of the first order," which will admit of no discrimination that does not narrowly further a compelling state interest. *Jarmel v. Putnam*, 179 Colo. 215, 499 P.2d 603, 603-04 (1972). But our appellate courts, like the federal courts, have also recognized that elections need structure, and therefore that the state's reasonable, nondiscriminatory regulation of elections must be upheld despite the fact that such regulation necessarily impedes the right to vote. *See, e.g., Libertarian Party v. Secretary of State*, 817 P.2d 998 (Colo. 1991) (upholding now repealed one-year unaffiliation requirement for third-party candidates); *Bruce v. City of Colorado Springs*, 971 P.2d 679, 684 (Colo. App. 1998) (upholding constitutionality of mail ballots), *quoting Burdick,* supra. In an old case of particular interest to the circumstances here, the Colorado Supreme Court upheld a district court's jurisdiction to enjoin a county clerk's decision to certify a fraudulent registration list). *Aichele v. People ex rel. Lowry*, 40 Colo. 482, 90 P. 1122 (1907).

In fact, even though the state constitutional right to vote is express, and therefore might arguably admit to a broader, more protective, interpretation than the implied federal right to vote, our Supreme Court has expressly declined to read the state right any more broadly than the federal right. *MacGuire v. Houston*, 717 P.2d 948 (Colo. 1986). Thus, even though Plaintiffs bring their constitutional claims under both the federal and state constitutions, the federal analysis will suffice.

C. HAVA

Until 2002, Congressional intervention in the mechanics of election processes chosen by states focused primarily on the candidate and not the voter—campaign finance issues, for example—and continued to leave states virtually unfettered in their power to select the particular nondiscriminatory methods by which to organize elections for federal, state and local office. Of course, Congress was also quite active in advancing the goal of prohibiting the unequal application of the right to vote, including various iterations of the Voting Rights Act of 1965 and, in 1994, a statute that guaranteed the right of servicemen and servicewomen stationed overseas to vote by absentee ballot. Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff to –ff-6 (1994). But with very few exceptions, Congress has been virtually silent about the mechanisms states could choose to hold elections.[5]

That situation changed dramatically after the 2000 presidential election. In October 2002 Congress adopted the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. §§ 15301 et seq., which applies to all elections for any federal office. Under HAVA, Congress for the first time began to regulate in a significant way the manner in which states must conduct elections. HAVA

[5] One ironic exception—ironic because it may well have contributed to the pall of potential voter registration fraud that now hangs over the process—was the National Voter Registration Act of 1993, also known as the "Motor Voter Act." 42 U.S.C. § 1973gg-5(a) & (b) (2004).

provided funds to the states to improve their administration of elections, created a federal Election Assistance Commission to oversee its implementation, and established substantive requirements (some phased-in over time) that states must meet in the conduct of their federal elections. *See generally* Recent Developments, *Help America Vote Act*, 40 HARV. J. ON LEGIS. 579 (2003). In fact, Title III of HAVA is entitled "Uniform and Non-Discriminatory Election Technology and Administrative Requirements," and it imposes a rather comprehensive set of voting guidelines on states, including two provisions that are pertinent to this case.

Section 302(a) of HAVA requires all states (in federal elections) to create a system of provisional balloting, under which polling officials are required to notify voters who are rejected because their names do not appear on the polling place list of registered voters, of their right to cast provisional ballots, as long as the voters declare that they are in fact eligible. The provisional ballot must then be promptly reviewed for a determination of the voter's eligibility, and must be counted if that determination shows the voter was in fact eligible.

Section 303(b) of HAVA requires all states (in federal elections) to create a system to insure that first time voters who registered to vote by mail, and were not required at the time of registration to show identification, supply identification at the polling place or with a mail ballot the first time they vote after that registration.

These two provisions nicely illustrate HAVA's attempt to reconcile two sometimes competing goals: to insure that eligible voters are not denied the right to vote while at the same time preventing voter fraud. As Senator Bond put it, HAVA represents Congress's first comprehensive effort to "make it easier to vote and tougher to cheat." 149 Cong. Rec. S10488.

D. Colorado's Election Code Amendments and HAVA Regulations

1. Provisional Ballots/Absentee Ballots

The HAVA requirements relating to identification and provisional ballots were effective on January 1, 2004. 42 U.S.C. § 15534 (2002). Thus, the first federal election to which HAVA applied in Colorado was the primary election held in August 2004. Nevertheless, our General Assembly got the jump on the provisional ballot requirement by adopting §§ 1-9-301 et seq., which became effective for the general election in November 2002, and which created a statewide HAVA-compliant system of provisional balloting. Until that election, Colorado had never recognized provisional voting.

Section 1-9-301(1) listed the circumstances under which voters would be entitled to cast provisional ballots. In addition to those listed circumstances, § 1-9-304 originally provided that a voter may cast a provisional ballot when he or she had previously received an absentee ballot for the subject election, but nevertheless appears at the polls in person to vote. Under those circumstances, § 1-9-304 provided that the voter may vote provisionally, and that that provisional ballot will be counted in lieu of the absentee ballot, unless the absentee ballot was actually voted and returned, in which case the absentee ballot will be counted and the provisional ballot not counted.

But after the experience of the November 2002 election, in which, according to the testimony of several witnesses, the large number of provisional and absentee ballots may have contributed to delays in certifying elections,[6] the General Assembly repealed § 1-9-304. 2003 Sess. L., p. 989. This repeal meant that having requested and received an absentee ballot was no longer a listed circumstance in which a provisional ballot could be cast. In response to this statutory

[6] Especially in the race for Congress in the 7th congressional district, where the results were not certified for a month, and where the race was decided by a mere 121 votes.

change, Defendant promulgated C.E.R. 26.12(B), which lists having applied for an absentee ballot as an automatic ground for not counting the provisional ballot.

The General Assembly made two other significant changes after the 2002 election—one dealing with voters who vote in the wrong precinct and one with the identification requirement.

2. Voting in the Wrong Precinct

Effective beginning with the August 2004 primary, § 1-9-301 was amended to add subsection (4), which provides that a voter who moves from one precinct to another later than 30 days before the election may not vote a provisional ballot at the new precinct, but must vote in the old precinct. 2003 Sess. L., p. 987. Defendant then promulgated C.E.R. 26.12(A), which provides that no provisional ballots cast in the wrong precinct will be counted, except for president and vice-president. Defendant and others testified that this exception for president and vice-president was required by some other non-HAVA federal law.[7]

3. Identification

Also effective beginning with the August 2004 primary, § 1-7-110 requires that *all* voters show identification before they will be allowed to cast a vote at the polls, not just the first-time mail registrants who did not show identification at the time of registration, and who would be required in any event to show ID under § 303(b) of HAVA. 2003 Sess. L., p. 1277. Under the state identification requirement, there are ten forms of acceptable identification:

1. A valid Colorado driver's license;
2. A valid ID card from the department of revenue;
3. A valid U.S. passport;
4. A valid government employee ID, with photo;

[7] They were probably referring to 42 U.S.C. § 1973aa-1(a) of the 1970 Amendments to the Voting Rights Act of 1965, which specifically outlaws any durational residency requirements for voting for president and vice-president.

5. A valid pilot's license;
6. A valid U.S. military ID, with photo;
7. A copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the elector's name and address;
8. A valid Medicare or Medicaid card;
9. A certified copy of a birth certificate;
10. Certified documentation of naturalization.

§ 1-1-104(19.5)(a). If a voter appears at the polls without valid identification, the statute specifically allows him or her to cast a provisional ballot. § 1-7-110(4).

In response to HAVA and later to this state statutory amendment, Defendant promulgated C.E.R. 30, which governs voter identification. In particular, C.E.R. 30.13 repeats the new statutory requirement for in-person voter identification, and incorporates the ten forms of valid statutory ID.

It is these three sets of statutes and regulations—requiring identification of all polling place voters, not counting non-presidential votes cast in the wrong precinct and not counting the provisional ballots of voters who requested absentee ballots—that Plaintiffs claim violate HAVA, are unconstitutional, and must therefore be enjoined. Before I address the likely outcomes on the merits of these issues, let me address several threshold questions raised by Defendant and Intervenors.

III. THRESHOLD ISSUES

Defendants and Intervenors urge me to decline to reach Plaintiffs' statutory and constitutional arguments on the grounds that Plaintiffs lack standing, that their claims cannot proceed under either § 1-1-113 or 42 U.S.C. § 1983, that they have failed to exhaust their

administrative remedies under HAVA, and that their claims are moot. I reject each of these threshold arguments.

Although I agree with Defendant's and Intervenors' characterization in closing argument that none of the individual Plaintiffs has demonstrated any actual past injury as a result of the application of the subject statutes and rules to the August 2004 primary election (because in each of their cases the challenged provisions were *misapplied*), I find that the individual Plaintiffs have adequately demonstrated that their rights to vote in November 2004 may imminently be threatened by application of the subject statutes and rules. *See Mt. Emmons Min. Co. v. Town of Crested Butte*, 690 P.2d 231 (Colo. 1984) (plaintiff has standing to challenge statute that will have adverse effect on plaintiff's imminent conduct). This is especially true in a declaratory judgment context like this one, where the actual injury requirement is somewhat relaxed. *Mt. Emmons, supra,* at 240. *See also Greenwood Village v. Petitioners for the Proposed City of Centennial*, 3 P.3d 427 (Colo. 2000).

As for Plaintiff CCC, I conclude that it may properly assert its members' standing in this case. Of course, CCC is not itself a registered voter. But our courts have recognized the concept of "associational standing"—special circumstances in which a non-natural entity may accede to its members' individual standing. *See, e.g., Conestoga Pines Homeowners' Assoc. v. Black*, 689 P.2d 1176, 1177 (Colo. App. 1984), *citing Hunt v. Washington St. Apple Adv. Comm'n*, 432 U.S. 333 (1977). There are three prerequisites to associational standing: 1) the entity's members would otherwise have standing; 2) the interests the entity seeks to protect are germane to its organizational purposes; and 3) neither the claim asserted nor the relief requested requires the participation of the entity's individual members. *Conestoga Pines, supra,* at 1177.

Based on the testimony of CCC's executive director, I conclude that the first and second elements of the test for associational standing have been met by CCC. And although it is difficult for me to understand how an association may bring an *as applied* constitutional challenge without the participation of its individual members, here Plaintiffs have also made facial challenges to these statutes and rules. Accordingly, I conclude that CCC has standing.

Defendant's and Intervenors' arguments based on the interplay between § 1-1-113 and 42 U.S.C. § 1983 are also rejected. Plaintiffs have brought their complaint under both the state Election Code, specifically § 1-1-113(1), which creates a special emergency proceeding (and a right to direct, though discretionary, appeal to the Colorado Supreme Court), and under 42 U.S.C. § 1983. Defendant and Intervenors quite correctly argue that Plaintiffs' constitutional challenge is not cognizable under § 1-1-113, because that section is limited to claims that election officials are not complying with the law. Indeed, its title is "Neglect of duty and wrongful acts." In my judgment, § 1-1-113 does not embrace facial constitutional challenges to the very election laws that officials *are* enforcing.

But I believe § 1-1-113(1) does embrace Plaintiffs' statutory challenges—that is, Plaintiffs' arguments that the challenged state statutes and rules violate HAVA. Although it is true that § 1-1-113(1) is limited to circumstances in which election officials violate "this code," meaning the Colorado Uniform Election Code of 1992, our General Assembly has opted to participate in the enforcement of HAVA. Section 402 of HAVA gives states the choice of agreeing to adopt HAVA enforcement mechanisms (and thereby being entitled to receive federal funds) or opting out of state-based enforcement. Because our General Assembly has opted-in, and has agreed to construct, and indeed has constructed, state remedies for the enforcement of HAVA, §§ 1-1.5-101 et seq.,

HAVA has, in effect, become a part of the Colorado Unidorm Election Code, at least for purposes of § 1-1-113(1).

Moreover, 42 U.S.C. § 1983 is certainly broad enough to encompass Plaintiffs' constitutional claims. It provides that any person who alleges he or she has been deprived of any "rights, privileges or immunities secured by the Constitution" may bring a civil action in federal district courts (concurrent with state courts) for damages or an injunction. Id. Virtually all constitutional challenges to state election schemes have been brought under § 1983, and no court of which I am aware has ever held or even suggested that § 1983 is not a proper procedural vehicle through which to bring those substantive constitutional claims. *See, e.g., Rosario v. Rockefeller*, 410 U.S. 752, 756 (1973) (challenge to New York party registration laws brought under § 1983); *Muntaqim v. Coombe*, 366 F.3d 102 (2nd Cir. 2004) (challenge to New York felon disenfranchisement law brought under § 1983); *Niere v. St. Louis Cty.*, 305 F.3d 834 (8th Cir. 2003) (challenge to Missouri law allowing dis-incorporation of city without election brought under § 1983). Indeed, Plaintiffs' reliance on the general provisions of §1983 is probably unnecessary, Congress having specifically invested the federal district courts with (concurrent) jurisdiction to hear cases in which citizens seek damages or injunctions "for the protection of civil rights, *including voting rights*." 28 U.S.C. § 1343(a)(4) (2004) (emphasis added).

Thus, I am satisfied that Plaintiffs may bring their statutory claims under §1-1-113 and their constitutional claims under § 1983. As a result, I need not, and do not, reach the question of whether Congress intended a private right of action under HAVA.[8]

[8] The distinction between Plaintiffs' statutory claims and their constitutional claims is somewhat arbitrary, since even the statutory claims are bottomed on the Supremacy Clause. U.S. CONST. art. VI, cl. 2. Nevertheless, because the two kinds of constitutional inquiries are quite different, I will continue to follow the convention of labeling the claims that the state laws and rules violate HAVA as "statutory" claims, and the claims that the state laws and rules violate the implied federal constitutional right to vote as "constitutional" claims.

Defendant and Intervenors argue that Plaintiffs have failed to exhaust their state-created remedies under HAVA. Indeed, § 1-1-113(5) now provides that "the procedures specified in §1-1.5-105 shall constitute the exclusive administrative remedy for a complaint arising under title III of [HAVA]." But I reject this exhaustion argument for two reasons. First, it seems to me a "complaint" under title III of HAVA was intended to be something considerably narrower than a claim that an entire regime of state election laws and rules violate HAVA. More importantly, I am satisfied, based on the testimony I heard, that proceeding under § 1-1.5-105 would have been futile for Plaintiffs. Defendant was not about to invalidate her own rules, Defendant was without the power to invalidate any statute, and, finally, even if a remedy was theoretically possible, the likelihood that a complaint could be resolved administratively in time for the November 2, 2004 election, given the time lines in the HAVA complaint process, was minimal.

Finally, I reject the argument that Plaintiffs' claims are moot. Although it is of course true that the August 2004 primary is over, Plaintiffs' claims are not moot because they claim a threatened injury from application of the challenged statutes and rules to the impending November 2, 2004 general election.

IV. THE FACTORS FOR PRELIMINARY INJUNCTIVE RELIEF UNDER *RATHKE V. McFARLAND*

It is important to remember that this case comes before me on Plaintiffs' motion for preliminary injunction. Thus, even though the imminence of the November 2 election may, as a practical matter, mean that my ruling will in effect be permanent (at least for this coming election, and subject, of course, to any review by the Colorado Supreme Court), I believe Plaintiffs still bear the burden under C.R.C.P. 65 to show their entitlement to a *preliminary* injunction. To be entitled

to preliminary injunctive relief under C.R.C.P. 65, Plaintiffs must show 1) a reasonable probability of success on the merits; 2) a danger of real, immediate and irreparable injury that could be prevented by injunctive relief; 3) there is no plain, speedy and adequate remedy at law; 4) the granting of the preliminary injunction will not disserve the public interest; 5) the balance of equities favors the injunction; and 6) the injunction will preserve the status quo pending a trial on the merits. *Rathke v. McFarland*, 648 P.2d 648 (Colo. 1982).

Because, as discussed in detail below, I believe Plaintiffs are reasonably likely to prevail on only one of their statutory claims, and on none of their remaining constitutional claims, I need not, and do not, reach any of the other *Rathke* factors except as to that single statutory claim.

V. THE STATUTORY CLAIMS

Congress recognized that HAVA did not occupy the field of elections, a field traditionally left to the states, as discussed above. In fact, in § 304 it expressly indicated it was not only not occupying the field, but that its Title III requirements are:

> minimum requirements and nothing in this title shall be construed to prevent a State from establishing election technology and administrative requirements that are more strict than the requirements established under this title so long as such State requirements are not inconsistent with the Federal requirements under this title . . . .

Of course, as is sometimes the case with preemption language in statutes with competing purposes, it is not entirely self-evident what Congress meant by allowing states to be "more strict" than Title III of HAVA. Does being "more strict" mean that states may impose more restrictive barriers in the use of provisional ballots, for example, in order to be "more strict" about voter fraud? Or does it mean exactly the opposite—that states may be "more strict" on themselves by requiring provisional ballots in more situations than required by HAVA, in order to be "more strict" in insuring that all proper votes be counted?

The same potential ambiguity exists with respect to identification: is it "more strict" for states to require identification from every polling place voter even though HAVA requires it only for mail registrants who did not provide ID at the time of registration?

In the end, where, as here, Congress has not occupied the entire field, these particular preemption questions can only be answered by considering the purpose the particular federal provision, and measuring that purpose against the state provisions to determine whether a particular state provision does or does not conflict with the particular federal provision. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Nokes v. Aspen Aviation, Inc.*, ___ P.3d ___, 2004 WL 1351284 (June 17, 2004).

A. The State Identification Requirement Likely Does Not Violate HAVA

The purposes of the federal identification requirement and the state identification requirement are one and the same: to reduce voter fraud. In § 303(b) of HAVA, Congress chose to limit its actions in this regard to voters who registered by mail without providing identification. In § 1-7-110 and C.E.R. 30.13, Colorado chose instead to require identification from every voter at the polling place. The state statute and rule are thus stricter requirements vis-à-vis the goal of preventing voter fraud. These stricter identification requirements seem to me to be precisely the kind of "more strict" requirements Congress invited the states to impose. Thus, they likely do not violate HAVA, and Plaintiffs are not likely to prevail on that argument.

B. The "Wrong Precinct" Law and Rule Likely Do Not Violate HAVA

This is a slightly closer question, the resolution of which depends on the meaning of the word "jurisdiction" in § 302(a) of HAVA. In that section, Congress mandated that states give provisional ballots to every voter whose name does not appear on the polling place list of registered

voters, but who declares that he or she "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 . . . ." 42 U.S.C. § 15482(a) (2002) (emphasis added).

Plaintiffs argue that the word "jurisdiction" means "county," and therefore that voters who show up in the wrong precinct, but the right county, must be allowed to have the entirety of their provisional ballots counted on all county-wide issues, not just their votes for president and vice-president (assuming, of course, that the subsequent check of the county rolls show the voter is indeed registered in the county). Defendant and Intervenors argue that "jurisdiction" is at the very least ambiguous, and that Congress could never have intended by the use of this single word to displace the precinct-based voting system that has been in place in Colorado since its inception. I agree with Defendant and Intervenors.

First, in the context of the entire provision, Congress's use of the word "jurisdiction" is probably ambiguous. If, as Plaintiffs argue, the word must be given its ordinary meaning as a geographical area coupled with some degree of political self-governance, then the word might just as well mean "state" or "municipality" as "county." Yet Plaintiffs concede that HAVA does not require that provisional ballots voted in the wrong *county* be counted, and therefore that "jurisdiction" could not mean "state."

Second, it is worth mentioning not only that precinct voting is a long-standing tradition in this state, but also that the Colorado Constitution recognizes that the state may impose precinct-level residency requirements on voter *eligibility*, as I mentioned briefly in Part II.B above. COLO. CONST., art. VII, § 1. The precinct system is not just one way of organizing an election, in Colorado it is a constitutionally recognized way.

Moreover, it is the only sensible way, at least until 2006, when Colorado will, as required by HAVA, have a complete and integrated real-time statewide list of registered voters, hopefully coupled with the computer technology to print an appropriate ballot for any voter in any precinct or county. In this latter regard, it is important to remember that even in presidential-year elections, Colorado voters face a myriad of local issues that are *not* county wide, and therefore that ballots can and do vary precinct-to-precinct.[9] That is, the precinct is not just a convenient constitutionally-recognized way to organize elections (and, in the bargain, to help minimize fraud), it is the smallest unit within which a particular form of ballot will be used.[10] It is difficult for me to imagine that Congress intended to unravel such a fundamental system of voting with the use of the single word "jurisdiction."

The legislative history of § 302(a) supports this interpretation. The House version of the bill would have expressly mandated that states allow wrong-precinct voters, and indeed wrong county voters, to cast provisional ballots, and that those ballots be counted if the voters were registered anywhere in the state. H.R. 3295, § 502(3) (adopted December 12, 2002). The Senate adopted a different version, and the Senate's version is the one that became law. Senator Bond led the conference fight for the Senate version, and here's what he had to say about this "wrong-precinct" issue:

> [I]t 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 workers can direct the voter to the correct polling place. In most States, the law is specific on the polling where the voter is to cast his ballot. Again, this bill upholds state law on that subject.

[9] An election official from Jefferson County testified that they will be using more than 300 different types of ballots in the November 2004 election.

[10] Although in some far-flung counties, with large precincts, even a single precinct might have multiple forms of ballot. Jefferson County has one precinct that will have five different ballots in the upcoming election.

148 Cong. Rec. S10491.

For all these reasons, I conclude that by using the word "jurisdiction" in § 302(a) of HAVA, it is unlikely that Congress intended to force states to abandon precinct-based voting, and therefore unlikely that Plaintiffs will prevail in arguing that § 1-9-301(4) and C.E.R. 26.12(A) violate HAVA.

C. The Rule Precluding Provisional Ballots for Voters Who Have Requested an Absentee Ballot Likely Does Conflict with HAVA, and is Therefore Enjoined

Unlike § 303(b) of HAVA, which is designed to deter voter fraud by requiring some limited identification, and which is therefore probably not inconsistent with Colorado's stricter voter identification requirement, the purpose of § 302(a) of HAVA is to insure that registered and eligible voters are allowed to vote provisionally, even though their names do not appear on polling place voting rolls, in order to preserve their right to vote in the event their name is missing by mistake. Congress made no exception for voters who had previously requested or even received absentee ballots.

Yet C.E.R. 26.12(B) categorically precludes provisional ballots from being counted if the voter had requested an absentee ballot (even if the voter never cast the absentee ballot, and indeed even if the voter never actually received the absentee ballot). Given the purpose of § 302(a) of HAVA, I conclude that it is probable that C.E.R. 26.12(B) conflicts with the mandate of § 302(a).

Moreover, I am satisfied that Plaintiffs have demonstrated all the other elements necessary for preliminary injunctive relief as to this one issue. There is no doubt, and I find, that if I do not enjoin enforcement of C.E.R. 26.12(B): there will be a danger of real, immediate and irreparable injury (in the form of voters losing their HAVA-guaranteed rights to vote provisionally in the November 2, 2004 election); there is no plain, speedy and adequate remedy at law to address this

danger (since, as discussed above, the timelines in the state's HAVA complaint procedure are inadequate to guaranty resolution before November 2, 2004); the granting of this injunction will not disserve the public interest and the balance of equities favors the injunction (because the injunction will protect the public's interest, as set forth in HAVA, in having provisional ballots made available to them when HAVA says they should be made available); and the injunction will preserve the status quo (in the sense that the status quo required by § 302(a) of HAVA, and indeed extant under Colorado law immediately prior to the 2003 repeal of § 1-9-304, will be preserved).

VI. THE CONSTITUTIONAL CLAIMS

Because I have sustained Plaintiffs' motion as to C.E.R. 26.12(B) on statutory grounds, I need not, and do not, reach Plaintiffs' constitutional arguments about that rule. As for the remaining two sets of provisions—regarding identification and wrong-precinct voting—I find and conclude that Plaintiffs will likely not be able to prevail on their constitutional claims. In my judgment, neither of these sets of statutes and rules likely represents a significant, let alone severe, infringement on the right to vote, nor do they improperly discriminate between voters.

A. The Identification Requirement

Colorado's identification requirement is only marginally more intrusive than the already existing federal identification requirement under § 303(b) of HAVA, which, significantly, Plaintiffs do not challenge. In our modern world, all of us must show identification for the most mundane of reasons, and I do not believe it likely that Plaintiffs will be able to demonstrate that Colorado's identification requirement is a sufficiently "severe" intrusion on the right to vote to trigger strict scrutiny.

Ms. Davidson and others, including one local election official called by Plaintiffs, all testified that they were aware, in varying degrees, of problems with the current lists of registered voters, including many examples of multiple registrations under the same name and address, and many registrations with non-existent addresses. Ms. Davidson testified that she had never seen such registration irregularities in the thirty years she has been involved in the Secretary of State's office. It is clear to me, and I find, that there is a substantial probability that recent and unprecedented voter registration drives in this state have resulted in an unprecedented level of registration fraud.

It is also not just a matter of registration fraud. Several witnesses testified that many county registration lists have not been purged for many years, and therefore likely contain the names of many deceased and otherwise no longer eligible voters. The presence of those ineligible voters' names also raises the spectre of voter fraud.

It may or may not be true, as Plaintiffs claim, that as an historical matter actual voter fraud has been rare in Colorado. But the state has a legitimate, indeed compelling, interest in doing what it can to make sure that last month's fraudulent or no-longer-eligible registrant does not become next month's fraudulent voter. Ms. Davidson and local election officials testified that once a fraudulent regular ballot is cast, and the voter's identity forever divorced from the ballot, there is no way to remedy the fraud. The fraudulent vote will count. That is, election fraud must be detected before fraudulent regular ballots are cast and fraudulent provisional ballots are counted.

In my judgment, imposing on all Colorado voters an identification requirement that HAVA has already imposed on some is not likely to be deemed an unreasonable exercise of the state's well-settled powers to strike a balance between voter access and voter fraud.

My conclusions in this regard are bolstered by the fact that the so-called identification requirement, when push comes to shove, isn't really an identification requirement at all. In the first place, there are many forms of recognized identification that are not photo IDs. Registered Colorado voters who have no driver's license, passport, employee card or other acceptable photo ID can satisfy the identification requirement by showing any one of a number of non-photo forms of identification, including a utility bill, bank statement, paycheck, Medicare or Medicaid card, birth certificate or naturalization documents. Moreover, even for the rare voter who has absolutely none of these forms of identification, he or she will still be able to cast a provisional ballot, C.E.R. 26.2.3, and that provisional ballot will count as long as that person's name appears on any one of the three lists of registered voters used to test provisional ballots: the county list, the state's partial list or the Department of Motor Vehicle's motor-voter list. C.E.R. 26.8. This is hardly the kind of severe election regulation that will trigger strict scrutiny.

Nor do I think it likely that Plaintiffs will be able to demonstrate that the identification requirement is discriminatory or will have disparate impacts. As mentioned above, every registered voter, with or without ID, rich and poor alike, landed and homeless alike, will still have his or her vote counted. Plaintiffs' suggestion that the identification requirement will "chill" people without identification may be true (though there was absolutely no credible evidence of that), but then again it may also "chill" fraudulent voters. Whether one kind of chill justifies the other is precisely the kind of public policy choice that must be made by legislators, not by judges legislating under the cover of strict scrutiny.

B. The "Wrong Precinct" Provisions

Likewise, it does not seem to be much of an intrusion into the right to vote to expect citizens, whose judgment we trust to elect our government leaders, to be able to figure out their

polling place. The testimony from local election officials was uniform: when duly registered voters show up at the wrong precinct, election judges are trained to direct them to the right precinct. Not only that, but C.E.R. 26.15 dampens the impact of these provisions by allowing a voter who went to the wrong precinct at the direction of an election official to cast a provisional ballot, and directing that the provisional ballot will count for all votes that the voter could have cast had he been in the right precinct.[11]

On the other hand, the state's compelling interest in preventing voter fraud is palpably advanced by conducting elections in the smallest geographic units possible. This is not just a matter of "mere administrative convenience," as Plaintiffs have argued. It is a matter of constructing an election system where we increase the chances that election officials know voters and vice versa, and where we avoid the right hand in one precinct not knowing what the left hand is doing in another precinct. In what must surely qualify as one of the understatements of the year, even Plaintiffs' own witness, a Denver election official, testified that allowing voters to vote in any precinct they wished "could be problematic."

This situation will probably change by 2006, when we should have a complete state-wide registration list, all signatures of registered voters scanned, and perhaps even computer systems in place that will be capable of printing out any ballot in any precinct. But at the moment, if I were to try to design a system that maximizes the chances that fraudulent and ineligible registrants will be able to become fraudulent voters, I'm not sure I could do a better job than what Plaintiffs are asking me to do in this case—allow voters to vote wherever they want without showing any identification.

[11] The witnesses testified that in these circumstances a so-called "duplicate ballot" is created. A blank ballot form from the correct precinct is used to copy all the voter's votes that could have been cast had he or she originally voted on that correct ballot form. Obviously, these voters are "disenfranchised" to the extent they are unable to cast votes on candidates or issues unique to their correct precinct, a disenfranchisement even Plaintiffs concede is self-inflicted.

For all of these reasons, I believe it is highly unlikely that these "wrong precinct" provisions

will be found to be either severe or discriminatory, and therefore conclude that it is equally unlikely that Plaintiffs will prevail on their constitutional claim as to these provisions.

VII. CONCLUSION

For the reasons I have articulated, Plaintiffs' motion for preliminary injunction is GRANTED IN PART AND DENIED IN PART as follows.

It is GRANTED as to C.E.R. 26.12(B)—the rule that provides that provisional ballots will not be counted if the voter applied for an absentee ballot—and Defendant is HEREBY ENJOINED from enforcing that rule. Voters who appear in person at their correct polling place, but who requested absentee ballots, will nevertheless be permitted to cast provisional ballots upon their declaration that they have not returned the absentee ballot. The provisional ballot is then to be counted, once election officials determine that the voter did not in fact cast the absentee ballot.

The motion is DENIED in all other respects.

As I have previously indicated to counsel, because of the imminence of the election and the short period of time within which to seek review in our Supreme Court, my staff has on this date telephoned counsel and informed them of this Order, and e-mailed them a copy.

DONE THIS _____ DAY OF _____, 2004.

BY THE COURT:

_____

Morris B. Hoffman
District Court Judge

cc: M. Tierney
R. Daily
S. Gessler