

**STATE OF WISCONSIN      CIRCUIT COURT      COUNTY OF DANE**  
**BRANCH 2**

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**J.B. VAN HOLLEN,**  
**In his official capacity as**  
**Attorney General of the State**  
**Of Wisconsin,**

**Plaintiff,**

**REPUBLICAN PARTY**  
**OF WISCONSIN,**

**Intervenor Plaintiff,**

**Vs.**

**Case No. 08CV4085**

**GOVERNMENT ACCOUNTABILITY**  
**BOARD, THOMAS CANE, GERALD**  
**NICHOL, MICHAEL BRENNAN,**  
**WILLIAM EICH, VICTOR MANIAN,**  
**GORDON MYSE, KEVIN J. KENNEDY**  
**and NATHANIEL E. ROBINSON,**

**Defendants,**

**THE DEMOCRATIC PARTY OF**  
**WISCONSIN, MADISON TEACHERS**  
**INC., AMERICAN FEDERATION OF**  
**TEACHERS-WISCONSIN, MADISON**  
**FIREFIGHTERS LOCAL 311,**  
**MILWAUKEE BRANCH OF THE NAACP,**  
**and MILWAUKEE TEACHERS'**  
**EDUCATION ASSOCIATION,**

**Intervenor Defendants.**

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**ORDER**


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For the reasons stated in the attached transcript of oral decision issued October 23, 2008, the defendants' motions to dismiss are granted. The complaints of Plaintiff Attorney General J.B. Van Hollen and Intervenor Plaintiff Republican Party of Wisconsin are hereby DISMISSED.

This is a final order that disposes of the entire matter in litigation between the parties and is intended to be an appealable order within the meaning of § 808.03(1), Wis. Stats.

Dated this 23<sup>rd</sup> day of October, 2008.

BY THE COURT

  
\_\_\_\_\_  
Maryann Sumi, Judge  
Circuit Court Branch 2

Cc: AAG Steven Means  
Atty. Lester Pines  
Atty. James Troupis  
Atty. Robert Friebert  
Atty. Edward Garvey  
Atty. Richard Saks  
Atty. John Skilton



**APPEARANCES (Continued):**

**MATTHEW O'NEILL, FRIEBERT, FINERTY & ST. JOHN, S.C.,**  
Two Plaza East, 330 Kilbourn Avenue, Milwaukee,  
WI 53202, appearing on behalf of intervening  
defendant The Democratic Party of Wisconsin;

**EDWARD GARVEY and CHRISTA WESTERBERG, GARVEY McNEIL  
& MCGILLIVRAY, S.C.,** 634 West Main Street, Suite  
101, Madison, WI 53703, appearing on behalf of  
intervening defendants Madison Teachers, Inc.,  
American Federation of Teachers-Wisconsin, and  
Firefighters Local 311;

**RICHARD SAKS and JEFFREY SWEETLAND, HAWKS QUINDEL EHLKE  
& PERRY, S.C.,** 700 West Michigan, Suite 500, PO  
Box 442, Milwaukee, WI 53201-0442, appearing on  
behalf of intervening defendants Milwaukee Branch  
of the NAACP and Milwaukee Teachers Education  
Association.

1 (Transcript of Court's Decision)

2  
3 THE COURT: Once again, thank you, counsel,  
4 for your arguments which have, as Mr. Troupis said,  
5 been civil, and I appreciate that, especially in  
6 something like this, that is so politically charged.  
7 So with that, I will decide the motions to dismiss that  
8 are before me today.

9 As you know, we're here because Wisconsin is  
10 late in complying with the federal Help America Vote  
11 Act requirement that Wisconsin implement a computerized  
12 voter database list. This requirement was effective as  
13 of January 1st, 2006, and it has only recently been put  
14 into full operation. What caused, I think, the  
15 attorney general to file the complaint was the  
16 Government Accountability Board's plan, which it  
17 adopted in the summer and has put into effect, to  
18 conduct and provide what are so-called HAVA checks on  
19 all new voter registrations entered after August 6,  
20 2008.

21 The board declined, at least prior to the  
22 November 4th election, to run HAVA checks or coordinate  
23 information with other agency databases, like Social  
24 Security, like the Department of Transportation, on  
25 those voter registrations received between January 1,

1 2006 and August 6th. And it is that decision that  
2 causes the attorney general to come into court.

3 The Wisconsin attorney general has filed  
4 really a three-part action, one that asks that the  
5 court order a writ of mandamus. Basically that's a  
6 writ directed to a public official or a board directing  
7 that board or public official to comply with the law.  
8 The attorney general has also asked that the court  
9 declare, through what's called declaratory judgment,  
10 that the board has violated the law; and that the court  
11 enjoin or issue an injunction against further  
12 violations of the law, essentially the flip side of  
13 asking for the writ of mandamus.

14 In its request for mandamus relief, the board  
15 asks that I require, that I order the -- I'm sorry.  
16 The attorney general asks that I order the board to  
17 take all steps necessary to ensure that prior to  
18 November 4th that the statewide computerized voter  
19 registration list is brought into compliance with HAVA  
20 and state law. And at a minimum, says the attorney  
21 general, that requires that ineligible voters be  
22 identified and removed, and that for individuals who  
23 registered on and after January 1, 2006 and prior to  
24 August 8, 2008, that their eligibility to vote must be  
25 verified by the same steps as applied to individuals

1 registering on or before August 6th, 2008, including  
2 HAVA checks where applicable.

3 Now, the attorney general has modified that  
4 request for immediate relief somewhat, but I think the  
5 complaint can still be read as asking that the court  
6 order HAVA checks for everyone. It is correct that the  
7 attorney general is not telling, asking the court to  
8 tell the board what to do in the event of a mismatch.  
9 It seems that at this point the attorney general agrees  
10 that that is something that is within the board's  
11 discretion.

12 Now, the Republican Party of Wisconsin is  
13 asking for something a little bit different. It  
14 intervened, adopted the attorney general's complaint,  
15 but made a separate request for mandamus relief. One  
16 is that the Republican Party is saying don't force this  
17 obligation on local officials; make it the obligation  
18 of the Government Accountability Board.

19 The second thing that the Republican Party is  
20 asking is that for any nonmatch registrations for which  
21 no corrective action can be taken, that such  
22 registrations remain on the voter list but be flagged  
23 as "needs identification" on election day, and that  
24 they proceed that way at the polls.

25 As an alternative, if this court would decide

1 that that's not practically doable, the Republican  
2 Party asks that I simply single out registrations  
3 conducted through deputy registrars. In its brief, the  
4 Republican Party clarifies that this means HAVA checks  
5 in parts of Wisconsin "where there is knowledge that  
6 criminal activity has taken place."

7 Of course, there is no evidence before this  
8 court, nor is this the time for there to be evidence  
9 before the court as to criminal activity. So I think  
10 that's something for which there is no competent  
11 evidence before the court at this time.

12 Now, all defendants have moved to dismiss the  
13 complaint on multiple grounds, the first of which is  
14 failure to state a claim upon which relief can be  
15 granted. On a motion to dismiss the court accepts as  
16 true the factual allegations of the complaint, not the  
17 legal statements in the complaint, but the facts, and  
18 then decides whether, given those facts, the complaint  
19 can be supported under the law.

20 The attorney general's complaint is premised  
21 on §5.07 of the Wisconsin Statutes which authorizes the  
22 attorney general to sue for violations of law relating  
23 to the conduct of elections, whether those violations  
24 are occurring, have occurred, or are about to occur.  
25 So to decide whether the Wisconsin AG has stated a

1 claim, it is necessary for me to address Wisconsin law  
2 on voter qualifications, federal law, and particularly  
3 HAVA, and then determine where federal law and state  
4 law intersect.

5 First, Wisconsin law. The Wisconsin  
6 Constitution guarantees, and Wisconsin Statutes  
7 protect, the right to vote in Wisconsin. The right to  
8 vote is so fundamental because it is the gateway for  
9 citizens to preserve other basic civil and political  
10 rights. Wisconsin's progressive tradition of  
11 protecting the franchise goes back to statehood. In  
12 one of the earliest State Supreme Court cases, called  
13 *Wood v. Baker*, the court set the tone for the next  
14 century and a half. And the court said, "The  
15 constitution," the Wisconsin Constitution, "vests and  
16 warrants the right to vote at the time of election, and  
17 everyone having the constitutional qualifications then  
18 may go to the polls vested with this franchise, of  
19 which no statutory condition precedent can deprive  
20 him."

21 The court went on to note in that case and in  
22 later cases that even errors of election officials in  
23 compiling voter lists can't defeat the right to vote in  
24 this state. I won't take you on a forced march through  
25 the decades of Wisconsin voter law because I think the

1 Supreme Court four years ago pretty cogently summarized  
2 what the law is. The court did walk through all of  
3 those cases and concluded in *Roth v. LaFarge School*  
4 *District Board of Canvassers* in 2004, this is Justice  
5 Crooks speaking for a unanimous court: It is evident,  
6 the court said, noting Wisconsin's proud history of  
7 protecting the right to vote, "It is evident that this  
8 court has consistently placed a premium on giving  
9 effect to the will of the voter." And not just the  
10 will of the voter with respect to whether there's a  
11 checkmark in the right place, whether, if we were in  
12 Florida, hanging chads, or any other formal problem,  
13 but the will of the voter in terms of the ability to go  
14 to the polls, vested with the franchise.

15 This respect for the right to vote, the  
16 franchise, appears in the very first provision of our  
17 elections statutes. §5.01(1) says, "Chapters 5 through  
18 12," which are the voter and election and campaign  
19 laws, "shall be construed to give effect to the will of  
20 the electorate if that can be ascertained,  
21 notwithstanding informality or failure to fully comply  
22 with some of these provisions."

23 We see Wisconsin's presumption in favor of  
24 the free exercise of the vote again in the Wisconsin  
25 registration procedure, and that's contained in

1 Chapter 6. Wisconsin is unusual among the states in  
2 that it permits same day registration at the polls. In  
3 the Republican Party's August 14, 2008 request to the  
4 Government Accountability Board that laid the basis for  
5 this action, the Republican Party was critical of  
6 Wisconsin's statutes permitting same day registration,  
7 and labeled it "Wisconsin's exceptionally lax  
8 registration rules." But this in fact is how the  
9 Wisconsin legislature has chosen to protect Wisconsin's  
10 fundamental right to vote.

11 Now, who is eligible to vote in Wisconsin?  
12 Mr. Saks touched on a few of the qualifications. There  
13 are a few others. Article III, Section 1 of the  
14 Wisconsin Constitution says every Wisconsin citizen age  
15 18 or older who is a resident of an election district  
16 is a qualified elector. Section 2 then of that  
17 constitutional provision states, the legislature may  
18 enact laws excluding convicted felons and people who  
19 have been found by a court to be incompetent, and  
20 defining what residence means. And the Wisconsin  
21 legislature has done this in §6.02 and §6.03. So  
22 truly, convicted felons who have not been restored  
23 their civil rights cannot vote in this state, nor can  
24 incompetent people.

25 I was surprised to learn that the legislature

1 also said that no one can vote if he or she has made a  
2 bet about the outcome of the election. I hope that  
3 none of you in this room have done that.

4 Notably, though, there is no requirement in  
5 Wisconsin law that there be a driver's license or a  
6 Social Security number for registration. There is no  
7 state law requirement that data in a voter list must  
8 match data kept by any other agency as a precondition  
9 to voting.

10 So we look then to federal law. As I've  
11 said, this lawsuit is about HAVA, Help America Vote  
12 Act, and this is, as you all know, a federal law passed  
13 following the tumultuous 2000 national election. Its  
14 purpose is to improve election administration among the  
15 50 states, and the primary vehicle to do this is the  
16 funding program that HAVA established. And Wisconsin  
17 has been the beneficiary of millions of those federal  
18 dollars to set up its own system.

19 HAVA itself does not mandate voter  
20 qualifications, except in one limited instance for  
21 voters who register by mail. It leaves voter  
22 qualifications to the states pursuant to HAVA §15485.  
23 And by the way, there have been some confusing  
24 references to different provisions of HAVA. I'm  
25 relying on the United States Code, 42 U.S. Code, and

1 they're all five-digit numbers, kind of mind-numbing  
2 after you look at them for awhile, but they're  
3 contained in 42 U.S. Code, beginning at, the pertinent  
4 provisions, §15485, or 83.

5 HAVA does in §15483 require each state  
6 through its chief election official, here the  
7 nonpartisan Government Accountability Board, to  
8 implement and maintain a "single, uniform, official,  
9 centralized, interactive, computerized statewide voter  
10 registration list."

11 With respect to maintenance of this list,  
12 HAVA is explicit that removal of names occurs only in  
13 accordance with state law for states, like Wisconsin,  
14 which permit voter registration at the polls on the day  
15 of election. HAVA is also quite clear on each state's  
16 discretion. For purposes of HAVA's election technology  
17 and administration requirements, which include the  
18 voter list requirement, the law provides, HAVA  
19 provides, "The specific choices on the methods of  
20 complying with the requirements of this subchapter  
21 shall be left to the discretion of the state."

22 Now, to make sure that each state is  
23 accountable to its electorate, to any who might be  
24 watching, HAVA requires states to establish an  
25 administrative complaint procedure. And the state, as

1 I'll go into a little bit later, has done that.

2 It's important that we not read HAVA in  
3 isolation though. HAVA has to be read in its context  
4 and its history, beginning with the Voting Rights Act  
5 of 1965. Most of us, through all of our lives -- most  
6 of us don't know life before the Voting Rights Act of  
7 1965. It was an ugly situation, and I think those of  
8 you who do remember it understand why it was passed.  
9 It is part of our history, and it's part of the  
10 backdrop for HAVA.

11 One of the key provisions of the Voting  
12 Rights Act of 1965 is this: "No person, acting under  
13 color of state law, shall deny the right of any  
14 individual to vote in any election because of an error  
15 or omission on any record or paper relating to any  
16 application, registration, or other act requisite to  
17 voting, if such error or omission is not material in  
18 determining whether such individual is qualified under  
19 state law to vote in such election." And of course the  
20 purpose of that provision was to make sure that people  
21 didn't walk into the polling place and have them say  
22 oh, you know, there's a slight problem with your  
23 registration. I'm sorry, you won't be able to vote.  
24 And it will turn out, and did turn out over and over,  
25 that the mistake, the omission, was insignificant, but

1 noneththeless, these people were denied the right to  
2 vote.

3 HAVA recognizes the Voting Rights Act of  
4 1965, and in its very last section, §15545, explicitly  
5 states that, "Nothing in HAVA authorizes conduct that  
6 would otherwise be prohibited under the Voting Rights  
7 Act of 1965."

8 Now, how has Wisconsin chosen to implement  
9 HAVA? There are four primary ways. First, §6.36 of  
10 the Wisconsin Statutes states that the Government  
11 Accountability Board shall compile and maintain  
12 electronically the official registration list.  
13 Subsection (2)(c) of that same statute provides that  
14 proof of residency at the polls is only required if the  
15 voter has registered by mail and has never previously  
16 voted in any election in this state. So that's  
17 statutory.

18 The second way that Wisconsin has chosen to  
19 implement HAVA. Our legislature in §5.05(10) has  
20 directed the Government Accountability Board to adopt a  
21 state election administration plan that meets HAVA so  
22 as to enable participation by this state in federal  
23 financial assistance programs. And because that deals  
24 with money, that plan, that state plan has to be also  
25 approved by the legislature's Joint Finance Committee.

1                   Third. §5.061 of the Wisconsin Statutes  
2                   again. Following HAVA's command that the state create  
3                   an administrative process, the legislature adopted a  
4                   statute, and it's titled "Compliance with Federal  
5                   HAVA," which authorizes any person who believes a HAVA  
6                   violation has occurred to file a written verified  
7                   complaint with the board." The statute then provides  
8                   that the board must conduct a trial type hearing before  
9                   the board, followed then by judicial review under  
10                  Chapter 227 of the Wisconsin Statutes.

11                  Judicial review procedures and the  
12                  availability of Chapter 227 of the statutes is  
13                  important here. It is the route. It is the check. It  
14                  is the check and balance, the separation of powers,  
15                  that prevents the Government Accountability Board from  
16                  utilizing unchecked power and to taking matters into  
17                  its own hands and deciding what it's going to do under  
18                  HAVA or anything else without accountability to any  
19                  citizen.

20                  The fourth primary way that Wisconsin has  
21                  chosen to implement HAVA is this, and it's most  
22                  pertinent here. In accordance with HAVA's explicit  
23                  provision that specific choices on the methods of  
24                  complying with its requirements fall within the  
25                  discretion of the state, the state, through the

1 Government Accountability Board, has exercised that  
2 discretion and determined that, at least at this time,  
3 it will match databases only from August 6, 2008  
4 forward. That is exactly the kind of discretionary  
5 decision-making the Government Accountability Board was  
6 created to do. It is exactly the kind of discretion  
7 HAVA left with the states in HAVA §1.5485.

8 On November 4th each qualified voter in  
9 Wisconsin will go to the polls, as our Supreme Court  
10 said in 1875, vested with the franchise. It doesn't  
11 matter if the DOT has misspelled his name or if her  
12 middle initial is missing on the voter list. Neither  
13 HAVA nor state law require a database match as a  
14 precondition to voting. Nor do they require that the  
15 voter show any proof of eligibility, essentially to  
16 reregister, in the event of a mismatch.

17 Hundreds of pages of paper have been filed,  
18 and they boil down to this one reality. Nothing in  
19 state or federal law requires that there be a data  
20 match as a condition on the right to vote. HAVA does  
21 not supplant Wisconsin's constitutionally protected  
22 right to establish its own voter eligibility standards.

23 The attorney general's lawsuit against the  
24 Government Accountability Board is completely based on  
25 §5.07, which authorizes the attorney general to sue for

1 an injunction or writ of mandamus whenever a violation  
2 of the laws regulating the conduct of elections or  
3 election campaigns occurs or is proposed to occur.  
4 What I have just told you in my opinion shows that no  
5 violation of state or federal law regulating the  
6 conduct of elections is about to occur or has occurred.  
7 And the attorney general has presented no other basis  
8 upon which this court could act.

9 For a court to issue a writ of mandamus, a  
10 plaintiff needs to show a clear legal right to relief  
11 and a positive, plain duty on the part of the official  
12 to whom the writ would be directed. This is sometimes  
13 characterized as a ministerial duty, and by that it  
14 means a duty for which there's no discretion. The  
15 board, the official, has to do it. It's a no-brainer.  
16 No discretion involved. And that is the kind of duty  
17 that's required before a writ of mandamus can issue.  
18 And so the attorney general's complaint, even if I take  
19 the factual allegations to be true, has not stated a  
20 clear legal right to relief or a positive and plain  
21 duty.

22 The complaint must therefore be dismissed for  
23 failure to state a claim upon which relief, whether by  
24 mandamus, injunction, or declaration of rights, may be  
25 granted.

1                   Although I am dismissing the complaint for  
2 failure to state a claim and need not consider other  
3 grounds for dismissal, I do address, as an alternative  
4 basis for this decision today, the defendants' motions  
5 to dismiss for lack of standing, both as to the  
6 Wisconsin attorney general and the Republican Party of  
7 Wisconsin. I think it goes without saying, before I  
8 reach the standing issue, that what I have said about  
9 failure to state a claim with respect to the attorney  
10 general is also true for the Republican Party of  
11 Wisconsin's claim. It essentially repeats the  
12 allegations of the attorney general's complaint and  
13 simply asks for a different form of relief. That  
14 complaint has failed to state a claim as well.

15                   Nevertheless, I do discuss standing.  
16 Standing is basically the right of an individual or  
17 entity to file a lawsuit, to come to court. In  
18 Wisconsin and in most other states there's a separate  
19 but related principle that provides that where a  
20 statute provides a method for getting a court to act in  
21 a matter, that's the method you're stuck with. No one,  
22 not you, not me, or the attorney general, can disregard  
23 or ignore the method that's been established by the  
24 legislature. And here, both HAVA and state law  
25 instruct on what to do if a person believes that HAVA

1 has been violated.

2 First, in HAVA §15511, HAVA has authorized  
3 the United States attorney general to bring a civil  
4 action against any state in federal court as may be  
5 necessary to carry out the election administration  
6 provisions of HAVA. The very next section of HAVA  
7 requires that states create an administrative process,  
8 which Wisconsin has done, in §5.061. The attorney  
9 general did not use the process established in §5.061,  
10 and went directly to what he believed his powers were  
11 under §5.07. As I've already decided though, that  
12 section does not give the attorney general power to  
13 enforce HAVA or the Wisconsin laws related to HAVA.

14 By way of contrast, the legislature has  
15 treated violations of the Voting Rights Act of 1965  
16 differently. Mr. Saks mentioned this in his argument  
17 this morning. And it did so by directly authorizing  
18 the attorney general to commence an action on behalf of  
19 any voter in this state whose rights have been  
20 violated.

21 The conclusion to be drawn here is that the  
22 legislature knows how to give the attorney general  
23 authority to sue. And the legislature did so for the  
24 Voting Rights Act but not for HAVA. The attorney  
25 general is without standing in this action.

1                   The Republican Party makes a different  
2                   argument to support its standing to enforce HAVA.  
3                   Until September -- until about a week ago it was at  
4                   least arguable that political parties could sue on  
5                   behalf of their members to enforce HAVA. And that's  
6                   what the Sixth Circuit Court of Appeals seemed to be  
7                   deciding when it granted a temporary restraining order  
8                   in *Ohio Republican Party vs. Brunner*.

9                   Three days after the Sixth Circuit issued its  
10                  decision, the United States Supreme Court in that same  
11                  case confirmed that HAVA did not create a private right  
12                  of action that would allow individuals or groups who  
13                  would represent them to file lawsuits enforcing HAVA.  
14                  And the court vacated the restraining order that had  
15                  been entered there.

16                 Now, timing is everything. Parties were in  
17                 the midst of their briefing schedules and were aware,  
18                 as I was too, that the *Brunner* case had come out. And  
19                 acknowledging *Brunner*, the Republican Party of  
20                 Wisconsin, I think rather deftly, changed its focus and  
21                 invoked the citizens' right to use mandamus to compel a  
22                 public official's compliance with law. But that simply  
23                 takes us back to the beginning. There's no right to  
24                 mandamus relief without a positive, plain duty under  
25                 the law. And I have already determined that the

1 Government Accountability Board has no positive, plain  
2 duty upon which the Republican Party's or the attorney  
3 general's request for relief could be granted. And  
4 certainly, there is no basis upon which the Republican  
5 Party of Wisconsin could bypass the procedure for HAVA  
6 complaints in §5.061.

7 The argument has been made in the briefs that  
8 compliance with that administrative complaint process  
9 up to and including judicial review under 227 is  
10 futile. And when time is running out, how can we make  
11 people go to a complaint process that could take months  
12 to complete. But Chapter 227 accounts for that and  
13 allows stays under §227.54. Courts can intervene when  
14 necessary, even under Chapter 227, which appears to set  
15 up a laborious process. Believe me, we've all seen  
16 cases where Chapter 227 was fully utilized to provide  
17 immediate and effective relief by a court, and thereby  
18 making sure that government action, government agency  
19 action was not left unchecked.

20 And so in the absence of any federal or state  
21 law requirement conditioning the right to vote on a  
22 HAVA check or having people flagged to reregister at  
23 the polls, the court is without authority to create  
24 such a requirement. To do so would be substituting a  
25 judge's opinion as to who can vote and how and when for

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the eligibility criteria actually established by the  
constitution and by state law.

For all of these reasons, the motions to  
dismiss are granted and the complaints are dismissed.

(WHICH CONCLUDES REQUESTED PORTION OF TRANSCRIPT)

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C E R T I F I C A T E

I, GERI HOLMES, Official Court Reporter, certify that the foregoing is a true and accurate partial transcript of proceedings held on the 23rd day of October 2008, before the Honorable **MARYANN SUMI**, Dane County Circuit Court Judge, Branch 2, in my presence and reduced to writing in accordance with my stenographic notes made at said time and place.

Dated at Madison, Wisconsin, this 23rd day of October 2008.

Ger i Holmes  
Geri Holmes  
Court Reporter