10-0822-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN-JOSEPH FORJONE, the 42 USC 1983/Bivens/False Claims Act matter effecting the statewide distribution of HAVA funds requiring a 28 USC 2284 panel effecting New York Municipal People's Equity in Bottoms-up suffrage. Homerule autonomy and effecting real property tax levy, CHRISTOPHER EARL STRUNK,

Plaintiffs-Appellants

(For continuation of caption see inside)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS APPELLEE

THOMAS E. PEREZ
Assistant Attorney General

MARK L. GROSS
CHRISTOPHER C. WANG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-9115

WAYNE MACK, DAN DELPLATO, JR., GABRIEL RAZZANO, EDWARD M. PERSON, JR., AD HOC NYS People for Bottom-up Suffrage and INTRASTATE/INTERSTATE HAVA FUNDS DISTRIBUTION EQUITY NATIONWIDE,

Plaintiffs

v.

THE STATE OF CALIFORNIA, each by the Secretary of State and the Attorney General respectively, THE STATE OF OREGON, each by the Secretary of State and the Attorney General respectively, THE STATE OF NEW MEXICO, each by the Secretary of State and the Attorney General respectively, THE STATE OF NEVADA, each by the Secretary of State and the Attorney General respectively, THE STATE OF ARIZONA, each by the Secretary of State and the Attorney General respectively, THE STATE OF TEXAS, each by the Secretary of State and the Attorney General respectively, THE UNITED STATES ELECTION ASSISTANCE COMMISSION BY THOMAS R. WILKEY, THE UNITED STATES DEPARTMENT OF JUSTICE BY THE ATTORNEY GENERAL ERIC HOLDER, JR., THE SECRETARY OF THE STATE OF NEW YORK, NEW YORK STATE ATTORNEY GENERAL PER CPLR 1012, THE NEW YORK STATE BOARD OF ELECTIONS, by its counsel and every Municipal Board of Elections within 58 Municipalities, COUNTY OF ERIE, The New York State municipalities by each corporation counsel, COUNTY OF MONROE, the New York State municipalities by each corporation counsel, COUNTY OF ONONDAGA, The New York State municipalities by each corporation counsel, COUNTY OF ALBANY, The New York State municipalities by each corporation counsel, COUNTY OF DUTCHESS, The New York State municipalities by each corporation counsel, COUNTY OF ORANGE, The New York State municipalities by each corporation counsel, COUNTY OF ROCKLAND, The New York State municipalities by each corporation counsel, COUNTY OF WESTCHESTER, The New York State municipalities by each corporation counsel, CITY OF NEW YORK, The New York State municipalities by each corporation counsel, COUNTY OF NASSAU, The New York State municipalities by each corporation counsel, COUNTY OF SUFFOLK, The New York State municipalities by each corporation counsel, COUNTY OF NIAGARA, The New York State municipalities by each corporation counsel, COUNTY OF ORLEANS, The New York State municipalities by each corporation counsel, COUNTY OF GENESSE, The New York State municipalities by each corporation counsel, COUNTY OF WYOMING, The New York State municipalities by each corporation counsel, COUNTY OF ALLEGANY, The New York State municipalities by each corporation counsel, COUNTY OF CHAUTAUQUA, The New York State municipalities by each corporation counsel, COUNTY OF CATTARAUGUS, The New

York State municipalities by each corporation counsel, COUNTY OF CAYUGA, The New York State municipalities by each corporation counsel, COUNTY OF CHEMUNG, The New York State municipalities by each corporation counsel, COUNTY OF ONEIDA, The New York State municipalities by each corporation counsel, COUNTY OF CORTLAND, The New York State municipalities by each corporation counsel, COUNTY OF COLUMBIA, The New York State municipalities by each corporation counsel, COUNTY OF TIOGA, The New York State municipalities by each corporation counsel, COUNTY OF TOMPKINS, The New York State municipalities by each corporation counsel, COUNTY OF SCHUYLER, The New York State municipalities by each corporation counsel, COUNTY OF STEUBEN, The New York State municipalities by each corporation counsel, COUNTY OF BROOME, The New York State municipalities by each corporation counsel, COUNTY OF LIVINGSTON, The New York State municipalities by each corporation counsel, COUNTY OF ONTARIO, The New York State municipalities by each corporation counsel, COUNTY OF YATES, The New York State municipalities by each corporation counsel, COUNTY OF SENECA, The New York State municipalities by each corporation counsel, COUNTY OF WAYNE, The New York State municipalities by each corporation counsel, COUNTY OF OSWEGO, The New York State municipalities by each corporation counsel, COUNTY OF JEFFERSON, The New York State municipalities by each corporation counsel, COUNTY OF LEWIS, The New York State municipalities by each corporation counsel, COUNTY OF MADISON, The New York State municipalities by each corporation counsel, COUNTY OF HERKIMER, The New York State municipalities by each corporation counsel, COUNTY OF OTSEGO, The New York State municipalities by each corporation counsel, COUNTY OF ST. LAWRENCE, The New York State municipalities by each corporation counsel, COUNTY OF FRANKLIN, The New York State municipalities by each corporation counsel, COUNTY OF CLINTON, The New York State municipalities by each corporation counsel, COUNTY OF ESSEX, The New York State municipalities by each corporation counsel, COUNTY OF MONTGOMERY, The New York State municipalities by each corporation counsel, COUNTY OF WARREN, The New York State municipalities by each corporation counsel, COUNTY OF SARATOGA, The New York State municipalities by each corporation counsel, COUNTY OF WASHINGTON, The New York State municipalities by each corporation counsel, COUNTY OF RENSSELAER, The New York State municipalities by each corporation counsel, COUNTY OF GREENE, The New York State municipalities by each corporation counsel, COUNTY OF ULSTER, The New York State municipalities by each corporation counsel, COUNTY OF DELAWARE, The New York State municipalities by each corporation counsel, COUNTY OF PUTNAM, The New York State municipalities by each corporation counsel, COUNTY OF HAMILTON, The New York State municipalities by each corporation counsel, COUNTY OF FULTON, The New York State municipalities by each corporation counsel, COUNTY OF SCHENECTADY, The New York State municipalities by each corporation counsel,

COUNTY OF SCHOHARIE, The New York State municipalities by each corporation counsel, COUNTY OF SULLIVAN, The New York State municipalities by each corporation counsel, MARTY MARKOWITZ, The duly elected Borough President of Brooklyn,

Defendants-Appellees

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STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. 1331 and 28 U.S.C. 1343. The district court entered final judgment on February 19, 2010, and appellant John-Joseph Forjone filed a notice of appeal on March 8, 2010. Appellants filed an amended notice of appeal that added appellant Christopher-Earl Strunk on June 22, 2010. This Court has appellate jurisdiction pursuant to 28 U.S.C. 1291.

ISSUES PRESENTED

1. Whether appellants waived their claim predicated on the Help America Vote Act (HAVA), 42 U.S.C. 15301 *et seq.*, on appeal by insufficiently developing it in their pro se brief.

2. Whether the district court correctly dismissed appellants' HAVA claim for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

STATEMENT OF THE CASE

Appellants, citizens of the State of New York, take issue with the means by which (a) HAVA reimburses States for implementing its mandated improvements in election administration and voting technology, (b) the States implement HAVA, and (c) New York reapportioned its congressional, legislative, and judicial districts. Appellants brought suit in federal district court against approximately 70

defendants, including the United States Department of Justice (DOJ), the United States Attorney General, the United States Election Assistance Commission (EAC), and the EAC Executive Director (collectively, the federal defendants),[1] six States, 57 counties in the State of New York, and several State of New York defendants. Plaintiffs alleged that these schemes violated various provisions of the federal and state constitutions and statutes. The district court dismissed all claims against the federal defendants on procedural and standing grounds. This appeal followed.

STATEMENT OF THE FACTS

On February 6, 2006, appellants, proceeding pro se, filed a complaint in the Western District of New York asserting various injuries arising out of HAVA's funding scheme and its implementation by New York and several other States, and challenging the means by which New York reapportioned its legislative and judicial districts. App. 35-40.[2] HAVA distributes federal funds to the States to

[1] Appellants named former Attorney General Alberto Gonzales as one of the federal defendants. Pursuant to Federal Rule of Appellate Procedure 43(c)(2), current Attorney General Eric H. Holder, Jr., in his official capacity, "is automatically substituted as a party" for Alberto Gonzales.

[2] This brief uses the following abbreviations: "App. __" for the page number of appellants' appendix, "Br. __" for the page number of appellants'

(continued…)

pay for improvements in States' election administration and voting technology based in part upon each State's voting age population (VAP). Appellants appeared to contend, in relevant part, that HAVA violates their equal protection and substantive due process rights because it uses VAP rather than *citizen* voting age population (CVAP). App. 40. On its face, appellants' complaint presented claims very similar to those presented in *Loeber, et al.* v. *Spargo, et al.*, No. 04-cv-1193, a HAVA case they previously filed that was then pending in the Northern District of New York.[3] App. 66. In light of this similarity, and the district court's inability to discern precisely what appellants were alleging, the court directed appellants by order dated March 28, 2006 (the March 28 Order) to show cause why the action should not be dismissed or transferred to the Northern District of New York. App. 65-67. The March 28 Order also directed appellants to file an amended complaint by May 1, 2006, "that simply and concisely informs the Court and the defendants in plain terms what they *are* alleging the defendants did or did not do in relation to

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(…continued)
opening brief filed with this Court, and "Add. __" for the page number of the Addendum attached at the end of this brief.

[3] In *Loeber*, the district court dismissed all claims predicated on HAVA for lack of standing and all other claims against the federal defendants for failure to state a claim. This Court affirmed the district court on appeal. *Loeber, et al.* v. *Spargo, et al.*, No. 08-4323, 2010 WL 3374115 (2d Cir. Aug. 27, 2010) (unpublished).

HAVA and how those actions or inactions are a violation of HAVA or some other federal or state statute, law or constitutional provision." App. 66. The court warned appellants that failure to do so would result in dismissal with prejudice. App. 66-67.

Appellants filed a response to the district court's order to show cause that attached as an exhibit a proposed amended complaint that appeared to assert the same or similar claims as those in the original complaint, but was nearly twice as long. App. 68-82. The United States, on behalf of the federal defendants, moved to dismiss the amended complaint on June 1, 2006. Add. 1-25.

In its memorandum in support of its motion to dismiss, the United States first argued that the court should dismiss the amended complaint for failure to comply with Federal Rules of Civil Procedure 8 and 10 and the district court's March 28 Order, because the amended complaint did not set forth the claims against the federal defendants in a concise and comprehensible manner. Add. 5-7. The United States then asserted that the district court should dismiss the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) because appellants did not have standing to bring any claim asserted in the amended complaint against the federal defendants. Add. 8-14. Finally, the United States argued that the court should dismiss the amended complaint pursuant to Federal Rule of Civil Procedure

12(b)(6), because HAVA is a constitutional exercise of Congress's broad powers under the Elections Clause, and the amended complaint failed to state a claim against the federal defendants under any other federal statute. Add. 18-21.

By order dated August 17, 2006, the district court transferred the case to the Northern District of New York pursuant to the Second Circuit's "first-to-file" rule, because the court held, this case was "substantially similar, if not identical" to *Loeber*, then pending in the Northern District. App. 6-7. On February 19, 2010, the same district court judge who dismissed the *Loeber* amended complaint granted the federal defendants' motion to dismiss the amended complaint in this case. App. 7-9. The court first determined that appellants had neither filed the amended complaint required by the March 28 Order nor served it upon the federal defendants, and so dismissal of the action pursuant to the March 28 Order's directive was warranted. App. 8. The court then held that dismissal was further warranted by appellants' failure to comply with Federal Rules of Civil Procedure 8 and 10, which require a "coherent, streamlined complaint" rather than the proposed amended complaint "that is even longer and more convoluted than the original filing." App. 8. Finally, the court found that appellants lacked standing because they did not allege any concrete injury traceable to the federal defendants, and

lacked standing to bring claims pursuant to HAVA for the reasons the district court set forth in *Loeber*. App. 8-9.

STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal of a complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) and for lack of standing. See, *e.g.*, *Selevan* v. *New York Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009). In conducting such review, the court "construe[s] plaintiffs' complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in plaintiffs' favor." *Ibid.* (quoting *Holmes* v. *Grubman*, 568 F.3d 329, 335 (2d Cir. 2009)). This Court may affirm the dismissal on any ground supported in the record, regardless of whether it was relied upon by the district court. *McCall* v. *Pataki*, 232 F.3d 321, 323 (2d Cir. 2000).

SUMMARY OF ARGUMENT

Appellants' pro se brief appears to assert that the federal defendants violated appellants' rights to equal protection and substantive due process by directing that HAVA funds be distributed to States to pay for improvements in election administration and voting technology based in part upon voting age population rather than citizen voting age population. Because appellants fail to develop and brief this claim sufficiently to allow for reasoned appellate review, this Court

should deem this claim waived, despite appellants' pro se status. Deeming this claim waived, and declining to allow appellants oral argument, is particularly warranted because this claim is a rehash of an argument that this Court heard and rejected in *Loeber* for lack of sufficient development.

In any event, this claim is clearly without merit. Congress, not members of the Executive Branch responsible for HAVA enforcement, promulgated the reimbursement mechanism in the HAVA statute, and did so constitutionally pursuant to its broad authority to regulate federal elections as set forth in the Constitution's Elections Clause. Appellants also lacked standing to bring the HAVA claim because they cannot show an actual, concrete, and particularized injury from the statute's reimbursement scheme. The district court's dismissal of the amended complaint was proper.

ARGUMENT

I

APPELLANTS WAIVED THEIR HAVA-BASED CLAIM AGAINST THE FEDERAL DEFENDANTS ON APPEAL

A. Appellants Waived Their HAVA-Based Claim By Failing To Develop It Sufficiently In Their Pro Se Brief

Federal Rule of Appellate Procedure 28(a) sets forth the mandatory elements an appellant's brief must include. See Fed. R. App. P. 28(a); *Sioson* v. *Knights of*

Columbus, 303 F.3d 458, 459 (2d Cir. 2002) (per curiam) (Rule 28(a)'s requirements are "mandatory"). Rule 28(a)(5) requires a statement of the issues presented for review, and Rule 28(a)(9)(A) requires an argument to contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." It is well-settled in this Court that "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived," *Tolbert* v. *Queens College*, 242 F.3d 58, 75 (2d Cir. 2001) (quoting *United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir.), cert. denied, 494 U.S. 1082 (1990)), and "normally will not be addressed on appeal," *Norton* v. *Sam's Club*, 145 F.3d 114, 117 (2d Cir.), cert. denied, 525 U.S. 1001 (1998). Applying these principles, this Court has held that raising an argument in the Statement of Issues without developing the argument in the body of the brief is insufficient to satisfy Rule 28(a). See *Husain* v. *Springer*, 494 F.3d 108, 121 n.10 (2d Cir. 2007), cert. denied, 552 U.S. 1258 (2008); *Frank* v. *United States*, 78 F.3d 815, 833 (2d Cir. 1996), vacated on other grounds, 521 U.S. 1114 (1997).

This Court properly affords some latitude to pro se appellants in meeting Rule 28(a)'s formal requirements. See *Moates* v. *Barkley*, 147 F.3d 207, 209 (2d Cir. 1998); *LoSacco* v. *City of Middletown*, 71 F.3d 88, 93 (2d Cir. 1995). To this

end, this Court liberally construes pro se briefs and "reads such submissions to raise the strongest arguments they suggest." *Ortiz* v. *McBride*, 323 F.3d 191, 194 (2d Cir. 2003) (per curiam). This policy "is driven by the understanding that '[i]mplicit in the right of self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training.'" *Triestman* v. *Federal Bureau of Prisons*, 470 F.3d 471, 475 (2d Cir. 2006) (quoting *Traguth* v. *Zuck*, 710 F.2d 90, 95 (2d Cir. 1983)). Pro se status is not a license to totally disregard the Federal Rules, however, particularly where the pro se litigant is familiar with the court's specific requirements as a result of prior litigation experience. See *Tracy* v. *Freshwater*, 623 F.3d 90, 102 (2d Cir. 2010).

Even treating appellants' rambling and incoherent pro se brief with the leniency this Court traditionally grants to pro se litigants, the brief fails to satisfy Rule 28(a). Under the most generous interpretation of appellants' brief, their sole claim against the federal defendants – introduced in the Statement of the Case, Statement of Facts, and Questions Presented – is that the implementation of HAVA by the DOJ and the EAC violates appellants' rights to equal protection and substantive due process because it distributes HAVA funds to States based in part on voting age population (VAP) rather than citizen voting age population

(CVAP).[4] Br. 5-10, 13. In the body of their brief, however, appellants fail to develop this argument on the merits with contentions and citations to authorities and the record, instead asserting only that "EAC payment to states and territories with estimated VAP w/o CVAP enumeration violates the express mandate of HAVA to maintain the integrity of the State(s) Voter Registration Database(s), otherwise is equity denial by 14th Amendment State action under color of state law." Br. 17. Because this single conclusory sentence does not provide the government or this Court with sufficient factual or legal development to allow appellate review, this Court should deem appellants' HAVA-based claim waived and decline to address it on appeal.[5] See *Norton*, 145 F.3d at 117 ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal."). Waiver is particularly warranted because appellants are

[4] In their amended complaint and fifty-page statement of Racketeer Influenced and Corrupt Organizations Act (RICO) claims, appellants appear to assert against the federal defendants claims under the False Claims Act (FCA), RICO, and National Voter Registration Act of 1993 (NVRA). See App. 68, 73, 76, 81, 83-96. Appellants do not attempt to re-raise the FCA and RICO claims on appeal, and their brief's mentions of the NVRA (see Br. 6, 9, 13, 16-17) do not set forth a discernable and plausible claim based upon that statute. All these claims are thus waived. See *LoSacco*, 71 F.3d at 92-93.

[5] Because appellants do not develop in the body of their brief the issues they raise in their Questions Presented (see Br. 11-16), these claims, to the extent they concern the federal defendants, are waived for the same reason.

well aware of the consequences of insufficient briefing in this Court, having had their similar HAVA claim in *Loeber* dismissed on this basis. See *Loeber, et al.* v. *Spargo, et al.*, No. 08-4323, 2010 WL 3374115, at *1 (2d Cir. Aug. 27, 2010) (unpublished). Because appellants are essentially rehashing a claim that this Court has already heard and rejected, and present no additional factual or legal support for the claim, it follows that this Court should decline to allow appellants oral argument as well.

B. Manifest Injustice Would Not Result If This Court Declined To Consider Appellants' HAVA-Based Claim

The rule barring consideration of claims that are inadequately presented on appeal is neither jurisdictional nor absolute, and this Court has discretion to consider such claims to prevent manifest injustice. See, *e.g.*, *United States* v. *Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994); see also Fed. R. App. P. 2 (granting courts discretion to suspend most rules for "good cause"). No manifest injustice exists, however, where the district court fully considered, and properly disposed of, the waived claims in its opinion, see *Mehta* v. *Surles*, 905 F.2d 595, 598 (2d Cir. 1990), or where the waived claims are without merit, see *McCarthy* v. *S.E.C.*, 406 F.3d 179, 187 (2d Cir. 2005).

Manifest injustice would not result if this Court declined to consider appellants' HAVA-based claim, and certainly would not result if this Court

declined to grant appellants oral argument. As noted above, appellants failed to develop their HAVA argument on the merits. Instead, appellants' discussion of HAVA in the argument section is largely spent attempting to show that they possessed standing to bring the HAVA claim in the first instance. See Br. 16-20. This minimal additional development of the HAVA claim compared to what appellants presented in *Loeber* fails to establish that forgoing appellate review on appellants' HAVA claim would result in manifest injustice, as the district court correctly dismissed the claim for lack of standing in its order of February 19, 2010. See *Mehta*, 905 F.2d at 598. Manifest injustice would not result if this Court declined to review appellants' HAVA claim for the additional reason, shown below, that this claim is without merit. See *McCarthy*, 406 F.3d at 187. Because this Court has already heard and rejected appellants' claim in *Loeber*, manifest injustice would not occur if this Court decided not to hold another oral argument to rehear this claim.

II

THE DISTRICT COURT CORRECTLY DISMISSED APPELLANTS' HAVA-BASED CLAIM FOR FAILURE TO STATE A CLAIM

A. Appellants Failed To Allege Facts Showing They Have A Facially Plausible Claim For Relief Under HAVA

Under Federal Rule of Civil Procedure 12(b)(6), a complaint should be dismissed if it fails to state a claim upon which relief can be granted. To survive a motion to dismiss, a plaintiff's factual allegations, taken as true, "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). In other words, the complaint must contain factual allegations that "state a claim to relief that is plausible on its face." *Id.* at 570. The plaintiff's "obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions," *id.* at 555 (internal quotation marks omitted), and "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss," *Smith* v. *Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir. 2002) (internal quotation marks and citation omitted).

Even assuming that appellants properly preserved their HAVA-based claim for this Court's review, appellants did not allege facts that could in any way

support a facially plausible claim under HAVA.[6] Appellants appear to assert (Br. 5-9, 13) in their brief's Statement of the Case, Statement of Facts, and Questions Presented, that the implementation of HAVA by the EAC and DOJ violates their rights to equal protection and substantive due process because it distributes funds to States based in part on voting age population (VAP) rather than citizen voting age population (CVAP). In the Argument Section, appellants contend only (Br. 17) that the "EAC payment to states and territories with estimated VAP w/o CVAP enumeration violates the express mandate of HAVA to maintain the integrity of the State(s) Voter Registration Database(s), otherwise is equity denial by 14th Amendment State action under color of state law." Reading these sections together to create the strongest possible argument, appellants claim that the fact that the

[6] Although the district court's citation of Rule 12(b)(6) in its order granting the federal defendants' motion to dismiss for lack for standing is consistent with the practices of district courts in this Circuit, see *Rent Stabilization Ass'n* v. *Dinkins*, 5 F.3d 591, 594 (2d Cir. 1993), such a dismissal is more accurately characterized as a Rule 12(b)(1) dismissal for lack of subject matter jurisdiction. See, *e.g.*, *Selevan* v. *New York Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009). This distinction is not important given that Rule 12(b)(6) and Rule 12(b)(1) dismissals are subject to the same standards of review. See p. 6, *supra*. In any event, because appellants' failure to allege facts showing they are entitled to relief provides a clear basis for disposing of their HAVA-based claim, this Court may affirm based upon Rule 12(b)(6). See *McCall* v. *Pataki*, 232 F.3d 321, 323 (2d Cir. 2000).

EAC and DOJ implemented the scheme of reimbursing States based upon VAP, rather than CVAP, violates equal protection and substantive due process.

Neither premise supports a plausible HAVA claim. First, under HAVA, the EAC and DOJ have no role in determining the distribution of federal funding. Instead, HAVA's funding formula is set forth by HAVA itself, and provides no discretion to federal officials in its implementation. See 42 U.S.C. 15301 (Administrator of General Services "shall make a payment to each State" based in part on its voting age population for activities to improve administration of elections); 42 U.S.C. 15401, 15402 (annual payment to a State by the EAC for implementing improvements to voting technology "shall be equal" to figure calculated using State's voting age population).

The role of the United States Attorney General in HAVA's administration is to enforce HAVA, see 42 U.S.C. 15511, and appellants raise no claim under the statute's enforcement provision. The role of the EAC is, among other things, to develop voluntary guidance for the States on the minimum standards requirements of HAVA, to conduct studies on a number of election issues, to receive and assess state plans for HAVA compliance, and to disburse "requirements payments" to States to meet the minimum standards in HAVA. See 42 U.S.C. 15322-15472. Nothing in HAVA permits appellants to sue the federal government over its

interpretation or enforcement of that statute. See *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985) (holding that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion" and presumptively unreviewable). Appellants thus can state no claim against the EAC or the DOJ related to HAVA's administration.

The second half of appellants' claim – that HAVA's funding formula, as passed by Congress, violates equal protection and substantive due process – is equally implausible. Congress passed HAVA pursuant to the Constitution's Elections Clause, see H.R. Rep. No. 329(I), 107th Cong., 1st Sess. 57 (2001), which provides as follows: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. Art. I, § 4, Cl. 1. The Supreme Court has held that the Elections Clause gives Congress "comprehensive" authority to regulate the details of federal elections, including the power to impose "the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley* v. *Holm*, 285 U.S. 355, 366 (1932). Congress's exercise of this

plenary authority extends so long as it "does not offend some other constitutional restriction." *Buckley* v. *Valeo*, 424 U.S. 1, 132 (1976).

Congress acted constitutionally in enacting HAVA's reimbursement scheme pursuant to its broad Elections Clause authority. Congress has a fully legitimate interest in improving the States' administration of federal elections and their voting technology. See H.R. Rep. No. 329(I), 107th Cong., 1st Sess. 31 (2001) ("The circumstances surrounding the election that took place in November 2000 brought an increased focus on the process of election administration, and highlighted the need for improvements. The Help America Vote Act of 2001 will make it possible to implement needed improvements."). It implemented this interest in HAVA by requiring States, *inter alia*, to educate voters, train election officials and poll workers, and improve voting machines. See 42 U.S.C. 15301(b)(1); 42 U.S.C. 15481(a). Congress could have mandated these activities and forced the States to bear their costs pursuant to its Elections Clause power. See *Association of Cmty. Orgs. for Reform Now* v. *Miller*, 129 F.3d 833, 836-837 (6th Cir. 1997) (rejecting constitutional challenge to National Voter Registration Act of 1993, 42 U.S.C. 1973gg, *et seq.*); *Voting Rights Coal.* v. *Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995) (same), cert. denied, 516 U.S. 1093 (1996); *Association of Cmty. Orgs. for Reform Now* v. *Edgar*, 56 F.3d 791, 794 (7th Cir. 1995) (same). It follows that Congress's

decision to reimburse the States for the costs of these activities, see 42 U.S.C. 15301(d); 42 U.S.C. 15402, cannot be an unconstitutional exercise of its Elections Clause power.

Appellants offer no valid reason to believe that Congress overstepped its Elections Clause power in enacting HAVA's reimbursement scheme. The "right" appellants seek to enforce – and that they allege HAVA violates – is the right of the States to receive reimbursement from the federal government for activities they undertake pursuant to HAVA on the basis of their *citizen* voting age population. This right is not fundamental because, as noted above, the States' right to reimbursement has no constitutional basis. Congress's decision to reimburse States based in part upon VAP rather than CVAP also does not implicate a constitutionally suspect class. Because HAVA's reimbursement scheme is economic legislation that neither discriminates on the basis of an inherently suspect classification nor implicates a fundamental right, it is subject to rational-basis review against appellants' equal protection and substantive due process challenges, and passes constitutional muster if it is rationally related to a legitimate government interest. See, *e.g.*, *Hodel* v. *Indiana*, 452 U.S. 314, 331 (1981) (equal protection); *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (substantive due process), cert. denied, 467 U.S. 1259 (1984).

HAVA's reimbursement scheme easily satisfies the rational-basis test. Congress could have determined that the federal government possessed a legitimate interest in reimbursing States for the costs of implementing HAVA's mandated improvements in election administration and voting technology, and that a State's voting age population, determined by the decennial census, bore a rational relationship to the costs each State would bear. See *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 196 (1983) (holding that under the rational basis standard, "a statute will be sustained if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose"). Accordingly, this Court should reject appellants' constitutional challenge to HAVA's reimbursement scheme. See *United States* v. *Morrison*, 529 U.S. 598, 607 (2000) (holding that respect owed to coordinate branches "demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds").

B. Appellants Lacked Standing To Bring A HAVA-Based Claim

Dismissal of the HAVA claim against the federal defendants is warranted for the additional reason that appellants lacked standing to bring such a claim. The "core component of standing" is Article III's limitation of federal jurisdiction to actual cases and controversies. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560

(1992). At minimum, Article III standing requires a plaintiff to show that it suffered an "injury in fact" – *i.e.*, an "invasion of a legally protected interest" that is "concrete and particularized." *Ibid.* The injury, moreover, must be "actual or imminent, not 'conjectural' or 'hypothetical.'" *Ibid.* (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990)). A plaintiff also must show that the injury is "fairly. . . trace[able] to the challenged action of the defendant," and that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 560-561 (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 42 (1976)).

Appellants fail to make the required showing for Article III standing that they suffered an actual, concrete, and particularized injury resulting from HAVA's reimbursement scheme based upon VAP rather than CVAP. Appellants appear to allege in their amended complaint that New York receives less HAVA money than that to which it is entitled because its reimbursement under the statute is based upon CVAP while reimbursement to States with allegedly high non-citizen populations, such as California, is based upon their VAP. App. 71-72. Nowhere in their amended complaint is any explanation of how this allegation, even if true, caused appellants actual injury. Appellants have not alleged that they have been unable to vote or that their votes have been diminished because of New York's

allegedly lessened receipt of funding under HAVA, or that they have been subject to discriminatory procedures in the context of any federal election. See *Sandusky Cnty. Democratic Party* v. *Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (per curiam) (political parties and labor unions had standing to assert rights of voters under HAVA to cast provisional ballots in upcoming election). Indeed, appellants could not make a plausible claim based upon funding, as New York is required to implement HAVA's minimum standards regardless of whether it applied for, and received, HAVA money. See, *e.g.*, 42 U.S.C. 15481(a) ("[e]ach voting system used in an election for Federal office *shall meet* the following requirements"); 42 U.S.C. 15483(a)(1)(A) ("each State * * * *shall implement*" the computerized statewide voter registration list described therein) (emphasis added).

Appellants make no attempt in their brief to correct this shortcoming and allege actual injury to themselves as a result of HAVA's reimbursement scheme. Instead, they appear to claim that section 402(a) of HAVA, section 11 of the NVRA, and sections 209(b) through (e) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (1998 Appropriations Act), individually or in combination, give them standing to challenge HAVA's use of VAP rather than CVAP. Br. 16, 18-20.

Section 402(a) of HAVA requires States receiving HAVA funds to establish an administrative complaint procedure to allow any person who believes there is a possible violation of subchapter III of HAVA to file a grievance. 42 U.S.C. 15512(a). Section 11(b) of the NVRA establishes a private right of action for a person aggrieved by a violation of the Act. 42 U.S.C. 1973gg-9(b). Section 209(b) of the 1998 Appropriations Act – listed as an amendment to the Census Act of 1976, 13 U.S.C. 141 – provides a civil cause of action to "[a]ny person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law (other than this Act), in connection with the 2000 or any later decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress." Pub. L. No. 105-119, § 209(b), 111 Stat. 2481. Because appellants do not raise a discernable claim for relief under the NVRA or the Census Act in their brief, the latter two provisions they cite do not assist them in showing that they have standing to challenge HAVA's reimbursement scheme.[7]

[7] Appellants place particular emphasis on section 209, which they quote in full and describe as "controlling legal authority" for the proposition that they can challenge HAVA's reimbursement of states based upon VAP rather than CVAP. Br. 18-20. On its face, however, section 209 limits its cause of action to individuals challenging statistical methods used in the decennial census as such methods relate to congressional representation. See Pub. L. No. 105-119, § 209(b),

(continued…)

Appellants' argument for standing based upon the remaining statutory provision they cite – section 402(a) of HAVA – fails because this provision at best satisfies the *prudential* requirements of standing, not the *constitutional* requirements. "In addition to the immutable requirements of Article III, 'the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.'" *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997) (quoting *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-475 (1982)). In other words, a federal court may deny standing for prudential reasons even if a plaintiff has satisfied standing's constitutional requirements. See *Comer* v. *Cisneros*, 37 F.3d 775, 787 (2d Cir. 1994). "[C]ongressional legislation may expand standing to the full extent permitted by Article III, thereby proscribing judicial exercise of prudential considerations," *ibid.*, but "cannot waive the constitutional minimum of injury-in-fact," *United States ex rel. Kreindler & Kreindler* v. *United Techs. Corp.*, 985 F.2d 1148, 1154

(…continued)
111 Stat. 2481 (allowing civil action for "[a]ny person aggrieved by the use of any statistical method * * * to determine the population for purposes of the apportionment or redistricting of Members in Congress"); Pub. L. No. 105-119, § 209(d), 111 Stat. 2482 (defining "aggrieved person" in part as "any resident of a State whose congressional representation or district could be changed as a result of the use of a statistical method challenged in the civil action"). Accordingly, even if appellants had invoked the Census Act in their brief, it would not have provided them a cause of action to challenge HAVA's reimbursement system.

(2d Cir.), cert. denied, 508 U.S. 973 (1993). Accordingly, even assuming, *arguendo*, that section 402(a) expands prudential standing for claims for which it provides a complaint procedure to the full extent permitted by Article III, it does not resolve appellants' lack of constitutional standing to bring their HAVA-based claim.

In any event, appellants cannot even show that they satisfy the requirements of prudential standing to bring their HAVA-based claim. The relevant prudential inquiry "is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975). Appellants do not dispute that HAVA, the basis for their claim against the federal defendants, does not create a private right of action. See *Sandusky*, 387 F.3d at 572. Instead, appellants recognize that the sole means HAVA provides for an individual to enforce its provisions is section 402(a), which establishes a state-based administrative complaint procedure to hear grievances regarding a possible violation of subchapter III of HAVA.[8] See 42 U.S.C. 15512. Subchapter III

[8] In *Sandusky*, the Sixth Circuit held that HAVA creates a federal right to cast a provisional ballot that may be enforced against state officials under 42 U.S.C. 1983. 387 F.3d at 572-573. This holding provides no assistance to appellants on this point because Section 1983 applies only to *state officials* acting

(continued…)

addresses the *States*' implementation of HAVA's minimum standards for the administration of federal elections, see 42 U.S.C. 15481-15485, however, and nowhere in section 402(a) is there any suggestion that individuals may use the administrative complaint procedure to bring a *federal court* complaint against *federal* officials for their implementation or enforcement of HAVA. See p. 15, *supra*. Because appellants failed to state a claim upon which relief could be granted, and did not show injury sufficient to establish standing, the district court's dismissal was proper.

(…continued)
under color of state law who violate federal law. It does not apply to the federal defendants, who act under federal law. See *Belhomme* v. *Widnall*, 127 F.3d 1214, 1217 (10th Cir. 1997) (holding that a "claim under 42 U.S.C. § 1983 fails as a matter of law because this section applies to actions by state and local entities, not to the federal government"), cert. denied, 523 U.S. 1100 (1998).

CONCLUSION

For the foregoing reasons, this court should affirm the district court's decision granting the federal defendants' motion to dismiss appellants' amended complaint.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

s/ Christopher C. Wang
MARK L. GROSS
CHRISTOPHER C. WANG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-9115

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains no more than 5657 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I further certify that the electronic version of this brief has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney

Date: March 29, 2011

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2011, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the Appellate CM/ECF system. I also certify that on March 29, 2011, I filed six (6) paper copies of the brief with the Clerk of the Court via certified mail.

I further certify that all parties are CM/ECF registered, and will be served electronically, except for the following, who will be served two copies of the aforementioned brief by certified mail:

John-Joseph Forjone
141 Harris Avenue
Lake Luzerne, NY 12846

Christopher Earl Strunk
593 Vanderbilt Avenue # 281
Brooklyn, NY 11238

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney

ADDENDUM

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JOHN JOSEPH FORJONE, et al.	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 06-cv-0080
v.	)	
	)	District Judge Richard J. Arcara
THE STATES OF CALIFORNIA, et al.	)	
	)	
Defendants.	)	
	)	

MEMORANDUM BY FEDERAL DEFENDANTS IN RESPONSE TO MAY 4 ORDER AND IN SUPPORT OF MOTION TO DISMISS THE AMENDED COMPLAINT

The United States Department of Justice, the Attorney General of the United States, Alberto Gonzalez, the United States Election Assistance Commission (EAC), and the Executive Director of the EAC, Thomas Wilkey, (hereinafter the "federal defendants") respectfully submit the following memorandum in response to this Court's May 4, 2006, Order (Docket #27) and in support of the federal defendants' Motion to Dismiss.

I. Background

On February 2, 2006, plaintiffs filed their original complaint in this action (Docket #1). On March 29, this Court entered an Order (Docket #24) requiring plaintiffs to file an amended complaint by May 1, to show cause why this action should not be dismissed or transferred to the Northern District of New York, and to show cause why sanctions should not be imposed against plaintiffs. The Court's March 29 Order stayed further proceedings, including any further responses to the complaint by Defendants. On May 2 (Docket #26), plaintiffs filed their response to the show cause order, including an amended complaint. On May 4 (Docket #27), this Court entered an Order requiring defendants to file a reply by June 1 to plaintiffs' May 2

response.

Among many other issues, plaintiffs' Amended Complaint describes issues regarding: 1) the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. 1973gg et seq., 2) the Help America Vote Act of 2002 (HAVA), 42 U.S.C. 15301 et seq., and, 3) the April 2002 redistricting plans adopted by New York State.

HAVA, like the NVRA, was enacted pursuant to Congress' power to regulate elections for federal office pursuant to Article I, Section 4 (the "Elections Clause") of the United States Constitution. See S. Rep. 103-6, at 3-4 (1993); H.R. Rep. No. 107-329, Pt. 1, at 57 (2001). The Department of Justice has enforcement responsibilities for both statutes. 42 U.S.C. 1973gg-9(a); 42 U.S.C. 15511. While NVRA creates a private right of action with certain restrictions, 42 U.S.C. 1973gg-9(b), HAVA does not create a private right of action. Instead, Section 402 of HAVA requires states which receive funding under HAVA to establish and maintain administrative complaint procedures to deal with any complaints by persons regarding alleged violations of Title III. See 42 U.S.C. 15512

HAVA establishes a new independent federal agency, the EAC, which has certain administrative responsibilities regarding HAVA, and certain responsibilities for NVRA that EAC inherited from the Federal Election Commission. 42 U.S.C. 15321-15472, 15531-15534. Among other things, HAVA makes the EAC responsible for developing voluntary guidance for the states on the minimum standards requirements of HAVA, conducting studies on a number of specific election issues, receiving and assessing "state plans" for HAVA compliance, and disbursing "requirements payments" to states to meet the minimum standards in HAVA. Id.

NVRA requires covered states to adopt certain voter registration and voter list

maintenance procedures with respect to elections for federal office. 42 U.S.C. 1973gg-2 to 1973gg-6. HAVA likewise requires states to implement certain uniform and nondiscriminatory minimum election technology and administration requirements for federal elections. Title III of HAVA includes three requirements for states which went into effect in New York on January 1, 2004: 1) allowing voters to vote provisional ballots who assert that they are registered and eligible to vote, but whose names do not appear on the voter rolls at a polling place, or who are challenged as ineligible by a poll official, 42 U.S.C. 15482(a); 2) requiring the posting of specific voter information in polling places on election day, 42 U.S.C. 15482(b), and 3) specifying voter identification requirements for new voters who are registering to vote by mail, 42 U.S.C. 15483(b).

Title III of HAVA includes two additional complex requirements which went into effect in New York on January 1, 2006: 1) ensuring each voting system "used in an election for Federal office" meets several requirements concerning verification, audit capacity, error rates, accessibility to voters with disabilities, and accessibility to voters who speak languages other than English (where required), 42 U.S.C. 15481, and 2) creating a single, uniform, centralized and computerized statewide voter registration list, defined and maintained at the state level, which is to serve as "the official voter registration list for the conduct of all elections for Federal office in the State," 42 U.S.C. 15483(a) (HAVA allowed states to seek a waiver of the initial January 1, 2004, compliance date for the statewide list until January 1, 2006, and most did so).

Congress ultimately appropriated 3.01 billion dollars in federal funds for payments to States to assist in implementation of HAVA in Fiscal Years 2003 and 2004, less than the full amount authorized under HAVA. See Pub. L. No. 108-7, Div. N, at 537-538, 117 Stat. 11

(2003); Pub. L. No. 108-199, Div. E, F, and H, 1at 248-249, 327, 451, 18 Stat. 3 (2004). HAVA represents the first instance in the history of the United States where Congress has appropriated federal funds to pay for federally required election reforms. See H.R. Rep. No. 107-329, Pt. 1, at 32 (2001).

The States were required to comply with the requirements of Title III of HAVA whether or not they sought federal funding to cover the costs of compliance. The state decision whether to seek federal funds under HAVA was voluntary, and each of the 55 states and territories covered by HAVA chose to do so. HAVA gives the Attorney General no statutory role in federal funding decisions under HAVA, nor does the Attorney General have any role in granting approval under HAVA to state compliance plans.

Section 101 of HAVA provides “early money” funds to States to use for improving the administration of federal elections. 42 U.S.C. 15301. Section 102 provides funds to states for replacement of punch card and lever voting machines. 42 U.S.C. 15302. Sections 101 and 102 set forth specific formulas for distribution of Title I money to the states, and other specific conditions which states must follow in order to receive federal funds. The formula for Section 101 payments includes voting age population as reported by the U.S. Census in 2000, while the formula for 102 payments does not. 42 U.S.C. 15301-15303. Title II sets forth a specific formula for distribution of "requirement payments" funds to the states and other specific conditions for receipt of funds. 42 U.S.C. 15401-15408. The Title II requirements payments formula is based in part on a state's voting age population as reported by the U.S. Census in 2000. 42 U.S.C. 15402. The clear language of HAVA provides no discretion to the Administrator of the General Services Administration regarding the formula for distribution of

Title I funds. 42 U.S.C. 15301(d). Nor does the clear language of HAVA provide any discretion to the EAC in the formula for distribution of Title II requirements payments. 42 U.S.C. 15401. The only discretion in the formula for apportioning federal funds amongst the states in HAVA comes in the very substantially smaller program of payments to states for improving access to the election process by persons with disabilities, to be administered by the Department of Health and Human Services. 42 U.S.C. 15422(a).

In the Amended Complaint, plaintiffs spend much of their effort questioning the fact that voting age population (rather than citizen voting age population) under the 2000 Census is part of the formula for apportioning federal funds to the states under Sections 101 and 251 of HAVA.

II. A Three-Judge Court Need Not Be Convened To Dismiss The Complaint

Plaintiffs' Amended Complaint, at page 55, requests the convening of a three-judge court pursuant to 28 U.S.C. 2284. Only one of plaintiffs' many claims nominally falls within the three-judge court act -- their all-but-incomprehensible claim borrowed from the Loeber case regarding statewide legislative and congressional redistricting. Even as to this claim, however, a single judge can dismiss without convening a three-judge court if there is no subject matter jurisdiction, such as where plaintiffs lack standing. See Gonzalez v. Automatic Empl. Credit Union, 419 U.S. 90, 97 n.14, 100 (1974); Wertheimer v. Federal Election Com'n, 268 F.3d 1070, 1072 (D.C.Cir. 2001); Mendez v. Heller, 530 F.2d 457, 459 n.2 (2d Cir. 1976); Sharrow v. Peyser, 443 F. Supp. 321, 323-24 (S.D.N.Y. 1977). With respect to plaintiffs' remaining claims, a single judge may hear and determine such claims. 28 U.S.C. 132(c).

III. Plaintiffs' Amended Complaint Does Not Comply With The March 29 Order

This Court's March 29 Order (Docket #24) held that "Plaintiff's failure to file an

amended complaint that complies with Fed. R. Civ. P. 8 and 10, and sets forth in a comprehensible manner claims upon which relief can be granted, will lead to dismissal of this action."

In its March 29 Order, the Court determined that paintiffs' original complaint (Docket #1), which covered 24 pages and 62 numbered paragraphs did not comply with Rules 8 and 10, Fed. R. Civ. P. Despite the Court's Order, plaintiffs have responded with an amended complaint that runs to 57 pages and 221 numbered paragraphs (Docket #26-2 & 26-3). Plaintiffs' Amended Complaint is accompanied by an additional 50-page statement of RICO claims (Docket #26-4).

Plaintiffs' amended complaint is longer, more convoluted and more incomprehensible than their original complaint. Plaintiffs cite to a number of alleged facts, and a number of constitutional provisions, statutes, and even international treaties or agreements, without explaining the relationship between them. Nowhere does the complaint clearly set forth specific actions by specific federal defendants that allegedly violate specific federal laws or constitutional provisions to the detriment of specific rights by specific plaintiffs.

As true with the original complaint, the amended complaint continues to advance the claims made in Loeber v. Spargo, Civil Action No. 04-1193 (N.D.N.Y.). Similar to the original complaint in Forjone, where four of the six plaintiffs were also plaintiffs in Loeber, in the amended complaint in Forjone, four of the five plaintiffs are also plaintiffs in Loeber. Also like the original complaint, plaintiffs have sued at least 70 defendants (57 counties, New York City, 1 borough president, and 6 states, 3 New York state agencies/officers, and 2 federal agencies/officers) – though the actual number of defendants could be higher since plaintiffs

purport to name for each county, both the county and the county board of elections; for each state, both the Secretary of State and Attorney General; and for each federal agency, both the agency itself, and an executive officer. Cp. Amended Complaint, ¶¶ 10-18 and caption.

The amended complaint clearly does not comply with the Court's March 29 Order in that it is even less concise and more incomprehensible than the original complaint. Nor does the amended complaint comply with Rules 8 and 10, Fed. R. Civ. P. Plaintiffs' amended complaint should be dismissed for these reasons.

IV. The Amended Complaint Should Be Dismissed Under Rule 12(b)(1) &(6)

A. Standards on a Motion to Dismiss

"In determining the sufficiency of a pro se complaint, it is now axiomatic that a court must construe it liberally, applying less stringent standards than when a plaintiff is represented by counsel." Robles v. Coughlin, 725 F.2d 12, 15 (2d Cir. 1983). However, even under the "less stringent standards" which apply to a pro se plaintiff, "dismissal is nevertheless appropriate where 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Rodriguez v. Weprin, 116 F.3d 62, 65 (2d Cir. 1997), quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

On a motion to dismiss under Rule 12(b)(1) for lack of standing, a Court must "'accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'" Thompson v. County of Franklin, 15 F.3d 245, 249 (2d Cir. 1994), quoting Warth v. Seldin, 422 U.S. 490, 501 (1975). "Standing, moreover, like other jurisdictional inquiries, 'cannot be inferred argumentatively from averments in the pleadings . . . but rather must affirmatively appear in the record.'" Id., at 249, quoting FW/PBS, Inc. v. City of Dallas,

493 U.S. 215, 231 (1990) (internal quotation marks omitted). Similarly, on a motion to dismiss under Rule 12(b)(6), a Court "take[s] all well-plead factual allegations as true, and all reasonable inferences are drawn and viewed in a light most favorable to the plaintiffs." Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996). "While the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice." Id.

On a motion to dismiss under Rule 12(b)(1), the party seeking to invoke the jurisdiction of the court bears the burden of proof. Thompson, 15 F.3d at 249. On a motion to dismiss under Rule 12(b)(6), the moving party bears the burden of proof. Ragin v. New York Times Co., 923 F.2d 995, 999 (2d Cir. 1991).

B. The Face of the Complaint Shows Plaintiffs Lack Standing

Standing is "the threshold question in every federal case," Warth, 422 U.S. at 498, and "the party bringing the suit must establish standing." Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 11 (2004). Standing is analyzed in two ways. The first is "Article III standing" which "enforces the Constitution's case or controversy requirement." Newdow, 542 at 11-12. The second is "prudential standing," which embodies judicially self-imposed limits on the exercise of federal jurisdiction." Id. (citations and internal quotations omitted). Under both doctrines, it is clear that paintiffs do not have standing to bring whatever claims are, in fact, asserted against the federal defendants by the Amended Complaint.[1/]

[1/] In appropriate cases, courts have granted the federal government's motions to dismiss constitutional challenges against federal voting rights statutes based on failure to allege sufficient standing on the face of the complaint. See Giles v. Ashcroft, 193 F. Supp. 2d 258 (D.D.C. 2002) (challenge to Voting Rights Act dismissed); Amalfitano v. United States, 2001 WL 103437 (S.D.N.Y. Feb. 07, 2001) (challenge to NVRA dismissed); Kalsson v. United States Federal Election Commission, 356 F. Supp. 2d 371 (S.D.N.Y. 2005) (challenge to NVRA

1. There Is No Article III Standing

To establish Article III standing, a plaintiff must plead three elements: (1) "injury in fact," (2) a "causal connection" between the injury and the challenged act, and (3) that the injury "likely" would be "redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations and internal quotations omitted). "The party invoking federal jurisdiction bears the burden of establishing these elements." Id. at 561. In the standing context, the Supreme Court "presume[s] that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." DaimlerChrysler v. Cuno, 126 S.Ct. 1854, 1861 n.3 (2006), quoting Renne v. Geary, 501 U.S. 312, 316 (1991).

An "injury in fact" means "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560-61 (internal quotations and citations omitted). That injury "must affect the plaintiff in a personal and individual way." Id. at 560 n.1. See also Raines v. Byrd, 521 U.S. 811, 819 (1997) ("a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him").

In cases where "a constitutional question is presented," the Supreme Court has "strictly adhered to the standing requirements to ensure that our deliberations will have the benefit of adversary presentation and a full development of the relevant facts." Bender v. Williamsport Area School Dist., 475 U.S. 534, 541-42 (1986). The Supreme Court has observed that "The requirement of actual injury redressable by the court . . . tends to assure that the legal questions

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dismissed).

presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." Id. (internal quotations and citations omitted). In the instant case, the Amended Complaint fails, for several reasons, to plead an injury in fact to the individual paintiffs.

First, plaintiffs do not clearly allege any actual imminent specific harm which is individualized as to them in the Amended Complaint. They do not allege anything about themselves which is different from any other of the millions of persons living in the State of New York. The most that each of the individual plaintiffs clearly alleges about themselves is where each lives in the State of New York. Amended Complaint at ¶¶ 4-8. Plaintiffs do not allege any other facts about themselves as individuals. Plaintiffs do not even each individually allege that they are now registered to vote, have ever actually voted in an election, are U.S. Citizens, or pay any federal, state or local taxes. The furthest that plaintiffs go is to make certain generalized allusions to their status as a class. See, e.g., Amended Complaint at ¶¶ 57, 216, 221. Plaintiffs do not specifically allege how each of them individually is allegedly injured by the NVRA, HAVA, or redistricting plans in New York, or how any injury which each of them has suffered would be redressed by any remedial order. The amended complaint covers every topic imaginable except how plaintiffs personally and individually are specifically harmed by some alleged action of the federal defendants.

Second, plaintiffs have not alleged that they have suffered any injury as voters with respect to their claim about the HAVA funding formula, nor could they, because New York is required to implement HAVA whether or not additional federal funding is forthcoming. See, e.g., 42 U.S.C. 15481(a) ("Each voting system used in an election for Federal office *shall meet*

the following requirements: . . ."); 42 U.S.C. 15483(a)(1)(A) ("each State . . . *shall implement*" the computerized statewide list requirements contained therein) (emphasis added).

Third, paintiffs have failed to allege a causal nexus between any provision of HAVA and any supposed injury to their right to vote. See Lujan, supra, 504 U.S. at 560 ("there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly ... trace[able] to the challenged action of the defendant . . .'") (citation omitted). Stated differently, plaintiffs have failed to allege what voting harm, exactly, they suffered on account of New York's supposedly receiving less federal money. Plaintiffs can still vote, and have their vote counted.

Fourth, plaintiffs have not alleged facts which, if proven, would show that New York actually will, or should, receive more federal funds if the Court applies what plaintiffs view as the "correct" formula (based on citizen voting age population). Plaintiffs have not alleged how much money New York or any other state actually received under the existing statutory funding formulas set forth in HAVA, nor have they alleged how much money New York would receive under their proposed alternative formula. Plaintiffs' speculation regarding these issues is all but incomprehensible. Amended Complaint at ¶¶ 195-207. As well described in the New York Attorney General's original brief (Docket #5 at 13-14), plaintiffs' cursory conclusion that New York would be better off using their formula, even if true, is plainly insufficient to show a personal injury to them. Amended Complaint at ¶¶ 187, 189.

Sixth, plaintiffs have not alleged that overall the federal HAVA funds which New York has received are insufficient to cover all of the State's expenses in implementing HAVA. In other words, plaintiffs have not alleged a shortfall of funds in New York for HAVA-related

compliance that caused any specific injury to them as voters – nor, for that matter, have they alleged that any incremental increase in funding under the disbursement formula they favor would remedy any such injury.

Seventh, because Congress has plenary authority under the Elections Clause to alter regulations in elections for federal office, and to compel the State to pay for implementing those regulations, Assoc. of Comm. Org. for Reform Now v. Edgar, 56 F.3d 791 (7th Cir. 1995), plaintiffs can never claim that New York had any kind of a "right" to any funds the federal government chose to disburse. Accordingly, plaintiffs cannot base an injury on the absence of such funds.

Eighth, plaintiffs have failed to plead any particularized injury as to them stemming from the NVRA and/or its enforcement. Indeed, the "wherefore" clause in the amended complaint requests no relief regarding the NVRA whatsoever. Amended Complaint at pp. 55-57.

Ninth, plaintiffs have failed to plead any particularized injury resulting to them personally from any action by the federal defendants with respect to New York's redistricting in April 2002.

As a matter of law, plaintiffs' allegations by are so abstract, attenuated, and speculative that they fail on all three prongs of the test for standing – injury, causation, and redressibility, and plaintiffs have failed to meet their burden of articulating a ground for Article III standing to assert any claims against the federal defendants.

2. Plaintiffs Cannot Rest on Taxpayer Standing

As noted above, in the Amended Complaint, the individual plaintiffs have not even clearly alleged they are taxpayers. But even if they had so alleged, they could not rely on that

status to demonstrate standing, as is clear from the Supreme Court's most recent decision on this issue, some two weeks ago. In DaimlerChrysler v. Cuno, the Supreme Court noted that it has "on several occasions ... denied *federal* taxpayers standing under Article III to object to a particular expenditure of federal funds simply because they are taxpayers." 126 S.Ct. at 1862 (emphasis in original). Such a plaintiff must show that he will sustain "some direct injury" as a result of the challenged practice "and not merely that he suffers in some indefinite way in common with people generally." Commonwealth of Massachusetts v. Mellon, 262 U.S. 447, 488 (1923); Lujan v. Defenders of Wildlife, 504 U.S. 555, 575 (1992); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 217 (1974); Frothingham v. Mellon, 262 U.S. 447 (1923). The Supreme Court has held that the "rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers." Cuno, 126 S.Ct. at 1863; Doremus v. Board of Education, 342 U.S. 429, 434 (1952). The Second Circuit has noted that "an individual's status as a taxpayer, taken alone, is insufficient to give him standing" to challenge the actions of federal agencies in federal court. Gosnell v. F.D.I.C., 938 F.2d 372, 375 (2d Cir. 1991). The allegations in the Amended Complaint, to the effect that New York has not received HAVA funds that it would have received if the allegedly "correct" formula had been applied, can only be understood as a claim based on plaintiffs' status as taxpayers. This claim fails to state anything other than a generalized grievance.

3. Plaintiffs' Generalized Grievance Does Not Confer Standing

The "prudential standing" doctrine encompasses, inter alia, "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches." Newdow, supra, 542 U.S. at 12. The doctrine is intended to avoid courts being "called upon to

decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." Warth, 422 U.S. at 500. The Supreme Court has held that "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." Id. at 499.

The allegations of the complaint amount, even if it is read generously, to no more than a "generalized grievance" concerning the distribution of HAVA funds and the enforcement of the NVRA, regarding which plaintiffs do not claim any interest other than as members of the public. Because the Amended Complaint merely states a generalized grievance common to all members of the public, plaintiffs do not have standing to bring this action against the federal defendants.

Because the allegations of plaintiffs' amended complaint are insufficient to establish the required elements of standing, this Court should dismiss plaintiff's claims for lack of subject matter jurisdiction under Rule 12(b)(1).

C. There Is No Waiver of Sovereign Immunity To Sue Federal Defendants

It is elementary that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued ···, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Sherwood, 312 U.S. 584, 586, 61 S.Ct. 767, 769-770 (1941). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." United States v. King, 395 U.S. 1, 4 (1969). It is axiomatic that an individual cannot sue the United States, its agencies, or its officers in their official capacities, without an express waiver of sovereign immunity. See United States v. Mitchell, 445 U.S. 535, 538 (1980);

United States v. Testan, 424 U.S. 392, 399 (1976); United States v. Sherwood, 312 U.S. 584, 586 (1941). "The shield of sovereign immunity protects not only the United States but also its agencies and officers when the latter act in their official capacities." Dotson v. Griesa, 398 F.3d 156, 177 (2d Cir. 2005). Plaintiffs have not alleged any specific waiver of the United States' sovereign immunity here which would allow for subject matter jurisdiction of claims against the federal defendants.

Plaintiffs claim that this Court has jurisdiction over this matter under various federal and state laws and various provisions of the United States Constitution. However, none of the statutory or constitutional provisions relied upon by the plaintiffs actually confer jurisdiction upon this Court over the federal defendants.

Plaintiffs assert that jurisdiction is invoked pursuant to the United States Constitution, Articles I, III, IV, V, VI, and the First, Fourth, Fifth, Ninth, Tenth, Fourteenth, and Fifteenth Amendments. Amended Complaint at ¶1. Plaintiffs do not explain how these provisions have been violated, and clearly most of these provisions have no applicability to the situation at hand. Citation to constitutional provisions, by itself, is insufficient to waive the United States sovereign immunity. An independent statute that contains a waiver of sovereign immunity must be referenced to establish jurisdiction. Keene Corp. v. United States, 700 F.2d 836, 845 n.13 (2d Cir.), cert. denied, 464 U.S. 864 (1983); Lynn v. U.S. Dept. of Health and Human Services, 583 F.Supp. 532, 534 (S.D.N.Y. 1984); United States v. Article or Device Consisting of Biotone, 557 F. Supp. 141, 144 (N.D. Ga. 1982).

Plaintiffs throw in a cursory reference to "Bivens" in the caption of the Amended Complaint, without further explanation save for another passing reference in ¶ 213. However,

the Supreme Court has held that an action under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) cannot be brought against an agency of the federal government. F.D.I.C. v. Meyer, 510 U.S. 471, 486 (1994). Likewise, a Bivens action cannot be maintained against a federal officer in his/her official capacity. Armstrong v. Sears 33 F.3d 182, 185 (2d Cir. 1994); Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 510 (2d Cir. 1994).

The Second Circuit has held that an action under 42 U.S.C. 1981 cannot be maintained against a federal defendant acting under color of federal law. Dotson v. Griesa, 398 F.3d 156, 162 (2d Cir. 2005). Section 1982 likewise does not explicitly contain the requisite waiver of sovereign immunity by the federal government. Section 1983 does not contain a waiver of the federal government's liability, and does not provide a basis for claims against federal officials acting under federal law. Dotson, 398 F.3d at 162; Kingsley v. Bureau of Prisons, 937 F.2d 26, 30 n. 4 (2d Cir.1991) (holding that "[a]n action brought pursuant to 42 U.S.C. 1983 cannot lie against federal officers"); Yalkut v. Gemignani, 873 F.2d 31, 35 (2d Cir.1989).

It is also well-settled that Sections 1985 and 1986 do not reach actions of federal officials acting under color of federal law. Community Brotherhood of Lynn v. Lynn Redevelopment Authority, 523 F. Supp. 779, 782-83 (D. Mass. 1981); Hill v. McMartin, 432 F. Supp. 99, 101 (E.D. Mich. 1977). Section 1985 does not waive the United States' sovereign immunity. See Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949); Proffitt v. United States, 758 F.Supp. 342, 345 (E.D. Va. 1990); Haynes v. Federal Bureau of Investigation, 562 F.Supp. 319, 321, n.3 (S.D.N.Y. 1983). Section 1986 also does not create an independent substantive cause of action. Wheeler v. Swimmer, 835 F.2d 259, 261-62 (10th Cir. 1987).

No provision of HAVA or NVRA contains any waiver of the sovereign immunity of the United States to be sued, much less an explicit waiver.

Plaintiffs' effort to bring claims under the False Claims Act, 31 U.S.C 3729-3733 is not availing. Amended Complaint at ¶ 221. The FCA has not waived sovereign immunity to allow private plaintiffs to sue the United States, its agencies, or officers. Rather, it allows, in some instances, private plaintiffs to sue others in the name of the United States Government. 31 U.S.C. 3730(b)(1). However, Plaintiffs here have not followed the procedures set forth in the FCA for filing suit, i.e., the suit was not brought in the name of the federal government, it was not served first on the federal government, it was not filed in camera, it was not filed under seal for at least 60 days, it was not served on the defendants until the Court so orders, etc. 31 U.S.C. 3730(b)(2). Plaintiffs suggest a frivolous theory under which they claim some of the federal funds distributed to the states under HAVA for election reforms should be diverted to them. Plaintiffs' FCA claims are precluded by HAVA's own terms, which flatly bar use of federal HAVA funds to pay any judgments. See 42 U.S.C. 15301(b)(2), 15401(f). Moreover, because HAVA is constitutional, applications filed by states for federal funding under HAVA's statutory funding formula, are not "false claims" in the manner which plaintiffs' suggest.

Likewise, plaintiffs' effort to sue under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 et seq., cannot prevail. Amended Complaint at ¶ 1; RICO Statement (Docket 26-4). In RICO, the United States has not waived its sovereign immunity, and thus is not subject to suit under its provisions. See U.S. v. Bonanno Organized Crime Family of La Cosa Nostra, 879 F.2d 20 (2d Cir. 1989); Norris v. Department of Defense, 1997 WL 362495 (D.C. Cir. 1997).

While 28 U.S.C. 1331 and 1343(a)(3) confer jurisdiction on district courts to hear certain types of cases, neither statute contain a waiver of sovereign immunity. Claims brought under Section 1331 and 1343(a)(3) against the federal government are barred absent a consent to suit in another statute. Mack v. United States, 814 F.2d 120, 122 (2d Cir. 1987); Doe v. Civiletti, 635 F.2d 88, 94 (2d Cir.1980); Beale v. Blount, 461 F.2d 1133, 1138 (5th Cir. 1972); Royer v. INS, 730 F.Supp. 588, 590 (S.D.N.Y. 1990).

Likewise, while 28 U.S.C. 2201 and 2202 grant district courts authority to issue declaratory judgments. These statutes do not provide a jurisdictional basis for plaintiff's claims. Muirhead v. Mecham, 427 F.3d 14, 17 n.1 (1st Cir. 2005); Brownell v. Ketchum Wire and Mfg Co., 211 F.2d 121, 128 (9th Cir. 1954); Hatridge v. Aetna Casualty & Surety Co., 415 F.2d 809, 812 (8th Cir. 1969); Morpurgo v. Bd. of Higher Ed., 423 F.Supp. 704, 714 (S.D.N.Y. 1976).

D. Plaintiffs' Complaint Should Be Dismissed for Failure to State a Claim

1. Plaintiffs Have Failed to State a Claim Under NVRA or Against NVRA

Plaintiffs' First and Third Causes of Action in their Amended Complaint make allegations concerning the NVRA, 42 U.S.C. 1973gg et seq., and its enforcement by the federal defendants. Amended Complaint at ¶¶ 58, 130. Even so, plaintiffs' "wherefore" clause requests no relief regarding the NVRA. Amended Complaint at pp. 55-57.

To the extent that plaintiffs are seeking to file suit to enforce the NVRA against the State of New York or other state or county defendants, while the NVRA provides for a private right of action, there are mandatory pre-suit notice requirements specifically enumerated in the statute, which the amended complaint fails to allege that the plaintiffs have met. 42 U.S.C. 1973gg-9(b). To the extent that plaintiffs are seeking to sue the federal defendants under NVRA, Congress has

not waived the United States' sovereign immunity under that statute.

To the extent that Plaintiffs are seeking to challenge the constitutionality of the NVRA, every court that has considered the issue, including three federal courts of appeals, has held the statute to be a constitutional exercise of Congress' power to regulate federal elections under Article I, Section 4 of the United States Constitution. See Assoc. of Community Organizations for Reform Now v. Ridge, 1995 WL 136913 (E.D. Pa. March 30, 1995); Richmond Crusade for Voters v. Allen, Consolidated Civil Action Nos. 3:95-CV-357, 3:95-CV-531, 3:95-CV-532 (E.D. Va. Oct. 3, 1995) (unpublished); see also Virginia v. United States, 1995 WL 928433 (E.D. Va. October 18, 1995) (final order); Condon v. Reno, 913 F. Supp. 946 (D.S.C. 1995); Wilson v. United States, 878 F. Supp. 1324 (N.D. Cal. 1995); aff'd, Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995), cert. denied, 516 U.S. 1093 (1996); Assoc. of Comm. Organizations for Reform Now v. Edgar, 880 F. Supp. 1215 (N.D. Ill. 1995); aff'd, 56 F.3d 791 (7th Cir. 1995); Assoc. of Comm. Organizations for Reform Now v. Miller, 912 F. Supp. 976 (W.D. Mich. 1995), aff'd, 129 F.3d 833 (6th Cir. 1997).

2. Plaintiffs' Have Failed to State a Claim Either Under HAVA or Against HAVA

Plaintiffs' Second Cause of Action makes allegations concerning the standard under which the EAC and DOJ certified state HAVA compliance plans. Amended Complaint at ¶ 123. Plaintiffs offer much speculation about how a different funding formula might yield some different result in terms of HAVA funding distribution. Yet plaintiffs offer no legal theory for why their standard should be imposed instead of the one Congress chose. "[A]ll Acts of Congress ... bear[] a heavy presumption of constitutionality." Biller v. U.S. Merit Systems

Protection Bd., 863 F.2d 1079, 1085 (2d Cir. 1988). When Congress adopted HAVA, it was acting well within the plenary authority vested in it by the Elections Clause of the United States Constitution to regulate federal elections. Smiley v. Holm, 285 U.S. 355 (1932). Congress set forth in HAVA very specifically the funding formulas that it wished to use under the various funding programs in HAVA, and gave the federal agencies charged with the funding decisions no discretion in how the voting age population formula was to work in allocating funding amongst the states under Sections 101 and 251 of HAVA. Unless plaintiffs can prove HAVA is unconstitutional, the funding formula which Congress set forth in the statute is the one which must be enforced. Plaintiffs have offered no legal theory for why HAVA is not a constitutional exercise of Congress' plenary power to regulate federal elections. The cases which have within the last decade held the NVRA constitutional, likewise demonstrate that HAVA is constitutional for the same reasons. And, as noted above, plaintiffs have not demonstrated standing for challenging HAVA's constitutionality.

Plaintiffs' Fourth and Fifth causes of action make allegations concerning an alleged failure to maintain a statewide voter registration database in New York State. Amended Complaint at ¶¶ 166, 183. Section 303(a) of HAVA does require the State of New York to create a statewide voter registration database. This issue is the subject of an enforcement action brought by the United States on March 1, 2006 in the United States District Court for the Northern District of New York. United States v. New York State Board of Elections, Civil Action No. 06-cv-263 (N.D.N.Y.). Amended Complaint at ¶¶ 2(c), 47. Plaintiffs here sought, and were denied, intervention in that case. Id. Under Section 401 of HAVA, the Attorney General is the sole enforcement authority for HAVA's requirements. 42 U.S.C. 15511. HAVA

contains no private right of action for plaintiffs to bring suit here to enforce this statewide database requirement. As noted by the New York Attorney General in his original motion to dismiss, plaintiffs might assert that Section 1983 creates a cause of action for them to sue jurisdictions to enforce HAVA. (Docket #5 at pp. 12-14). However, the federal defendants agree that the funding provisions of HAVA, and the statewide database provisions of HAVA, are clearly directed at states and were not intended to confer rights on individuals, and thus would not give rise to a Section 1983 claim. In any event, the most recent decision has held Section 301 of HAVA does not create a private right of action under Section 1983. Taylor v. Onorato, ___F.Supp.2d ___, 2006 WL 1134637 (W.D. Pa. Apr. 28, 2006).

Plaintiffs' Sixth Cause of Action alleges that the six other States named as defendants in this action have failed to maintain an accurate voter registration database. Amended Complaint at ¶ 194. All of the plaintiffs in this action allege that they live in New York State. Amended Complaint at ¶ 4-8. Thus, plaintiffs lack standing to challenge the voter registration procedures utilized by other states, since they do not claim to live in those other states.

3. Plaintiffs Have Failed to State a Claim Regarding Redistricting

Finally, plaintiffs' allegations regarding redistricting in New York fail to state a claim against the federal defendants, because these federal defendants played no role in crafting such plans. Amended Complaint at pp. 55-56. Plaintiffs allege that New York redistricted its state legislative districts on April 22, 2002. Amended Complaint at ¶ 43. Plaintiffs allege HAVA was enacted subsequently, on October 29, 2002. Amended Complaint at ¶ 1. By its plain terms, HAVA authorized the creation of the EAC as a brand new federal agency, and thus EAC could have had no role in an earlier New York redistricting since the agency did not then exist. See 42

U.S.C. 15321-15330. Moreover, the only two statutes which EAC has any role in administering are HAVA and NVRA, and the language of these two statutes discloses no bearing on redistricting matters. Plaintiffs have thus failed to state a claim regarding the EAC and its Executive Director as regards redistricting.

The only very vague allegation which the plaintiffs make regarding the Department of Justice and redistricting are that "DOJ" put a "rubber stamp" on the April 2002 redistricting. Amended Complaint at ¶ 190. It is far from clear, but it may be that plaintiffs are referring to the Attorney General's role under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, in conducting preclearance reviews aimed at ensuring no retrogression in minority voting strength from voting changes affecting several counties in New York City. See 28 C.F.R. Part 51. Plaintiffs do not and cannot explain how the Attorney General's review and approval of redistricting plans could possibly have injured the Plaintiffs. In any event, the Supreme Court has made clear that the Attorney General's decision to preclear voting changes under Section 5 is not subject to judicial review. See Morris v. Gressette, 432 U.S. 491 (1977). Moreover, Section 14(b) of the Voting Rights Act itself provides that any challenges to the Act or to the Attorney General's administration of it must be brought in the federal court in the District of Columbia. See 42 U.S.C. 1973*l*(b). Hence, plaintiffs can state no claim against the federal defendants related to New York's redistricting matters. We likewise question whether plaintiffs' cursory allegations regarding redistricting are sufficient to state a claim against any federal defendants.

IV. Plaintiffs Have Failed to Properly Serve the Federal Defendants

Rules 4(i)(1) & (2), Fed. R. Civ. P., require that a plaintiff who seeks to sue the United States, an agency of the United States, or an officer of the United States in his or her official

capacity must effect service "by sending a copy of the summons and complaint by registered or certified mail" to two specific persons 1) "civil process clerk at the office of the United States attorney" and 2) "the Attorney General of the United States at Washington, District of Columbia." Rule 4(*l*) requires a plaintiff to make proof of service to the Court.

However, undersigned counsel has no indication that plaintiffs has properly served the original complaint and summons, or the amended complaint, on all the federal defendants in the manner required by Rule 4(i), Fed. R. Civ. P. In their May 2 filing, plaintiffs provided a certificate of service for the original complaint, which they indicate was sent by certified mail in two packages to "The US Election Assistance Corp" and "Alberto Gonzalez/US DOJ." See Docket #26-4, at 53, 56; Docket #26-5, at 8-9. However, there is no indication that plaintiffs served the original complaint on Thomas Wilkey, the Executive Director of the EAC, suggesting that he is, like the Attorney General, not actually a separate defendant. Nor is there any indication that plaintiffs served the original complaint on the United States Attorney for the Western District of New York.

Moreover, plaintiffs did not properly serve either their May response (Docket #26) to the Court's March 29 Order, or the amended complaint, on *any* of the federal defendants (though they emailed it to some counsel). Nowhere in the 172 pages of plaintiffs' May 2 response does *any* proof of service by the plaintiffs appear for either the response or the amended complaint.

In particular, plaintiffs' failure to properly serve either the original or amended complaint on the United States Attorney for the Western District of New York, in the manner required by Rule 4(i), is a jurisdictional defect. Under Rule 12(a)(3)(A), Fed. R. Civ. P., the date on which the United States Attorney is served marks the beginning of the 60-day period after which the

United States must serve an answer or file a motion to dismiss. Because plaintiffs have never properly served the United States Attorney, the time period for the federal defendants to answer or move to dismiss has never begun to run.

Compliance with Rule 4's requirements for service on the government is "mandatory." Light v. Wolf, 816 F.2d 746, 748 n.5 (D.C. Cir. 1987). Compliance with Rule 4(i) is a jurisdictional prerequisite to suit against the United States, its agencies and its officers, and failure to follow the requirements of Rule 4(i) is a proper basis for dismissal. Flory v. United States, 79 F.3d 24 (5th Cir. 1996); Peters v. United States, 9 F.3d 344 (5th Cir. 1993); Tuke v. United States, 76 F.3d 155 (7th Cir. 1996); McGregor v. United States, 933 F.2d 156 (2d Cir. 1991). If plaintiffs do not properly effect service, then this Court lacks personal jurisdiction over the federal defendants. See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 350 (1999) ("In the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant.").

Under Rule 4(m), Fed. R. Civ. P., plaintiffs have 120 days from filing the complaint to cure this defect in service. If plaintiffs do not cure this defect in a timely manner, then this action should be dismissed under Rule 12(b)(5), Fed. R. Civ. P.

V. Conclusion

Plaintiffs' amended complaint should be dismissed.

Dated: June 1, 2006

Respectfully submitted,

TERRANCE P. FLYNN
United States Attorney for the
Western District of New York

/s/ Mary E. Fleming
_____
MARY E. FLEMING
Assistant United States Attorney
U.S. Attorney's Office
Federal Centre
138 Delaware Avenue
Buffalo, NY 14202
Phone: (716) 843-5867
Fax: (716) 551-3196
Email: mary.pat.fleming@usdoj.gov

WAN J. KIM
Assistant Attorney General
Civil Rights Division

JOHN K. TANNER
Chief, Voting Section

/s/ T. Christian Herren Jr
_____
T. CHRISTIAN HERREN JR
Attorney, Voting Section
Civil Rights Division
U.S. Department of Justice
Room 7254 - NWB
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
Phone: (202) 514-1416
Fax: (202) 307-3961
Email: chris.herren@usdoj.gov