No. 08-4323

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RONALD G. LOEBER, *et al.*,

Plaintiffs-Appellants

v.

THOMAS J. SPARGO, *et al.*,

Defendants-Appellees

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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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 July 31, 2008, and appellants filed a notice of appeal on September 2, 2008. 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 HAVA reimburses states for implementing its mandated improvements in election administration and voting technology, and the means by which New York reapportioned its legislative and judicial districts. Appellants brought suit in federal district court against the United States Attorney General, the United States Election Assistance Commission (EAC), and the EAC Executive Director (collectively, the federal defendants), and several State of New York and City of New York defendants, alleging that these schemes violated various provisions of the federal and state constitutions and statutes. 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. The district court subsequently dismissed the suit in its entirety. This appeal followed.

STATEMENT OF THE FACTS

1. On November 21, 2005, appellants, proceeding pro se, filed a Verified Amended Complaint in the Northern District of New York asserting various constitutional violations arising out of HAVA's funding scheme, and challenging the means by which New York reapportioned its legislative and judicial districts. App. 96-104.[1] HAVA distributes funds to the states to pay for improvements in election administration and voting technology based in part upon voting age population (VAP). Appellants contended, 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), and because Congress "unreasonably set a deadline for January 1, 2006 under HAVA for New York and the several states to implement regulations and a plan for acquisition of new voting machines for the US House Election in November of 2006." App. 99-100. Appellants requested, *inter alia*, that HAVA's January 1, 2006, compliance be stayed until the court "determines the constitutionality of the use of VAP funding

[1] This brief uses the following abbreviations: "App. ___" for the page number of appellants' appendix, "Br. __" for the page number of appellants' opening brief filed with this Court, and "Sp. App. _" for the page number of the United States' Special Appendix.

rather than CVAP without those adjudged civilly dead, and determines equity for reimbursement using CVAP nationwide accordingly." App. 103.

The United States, on behalf of the federal defendants, moved to dismiss the Amended Complaint. App. 57-63. In its motion to dismiss, the United States argued, pursuant to Federal Rule of Civil Procedure 12(b)(6), that the Amended Complaint failed to state a claim upon which relief can be granted because HAVA is a constitutional exercise of Congress' broad powers under the Elections Clause, and that the Amended Complaint failed to state a claim under the Constitution or any other type of claim against the federal defendants. App. 59-62. The United States also 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 HAVA or the federal defendants. App. 62-63.

2. On January 8, 2008, the district court granted the federal defendants' motion to dismiss. The court determined that plaintiffs' HAVA claims "failed to articulate any injury sustained by them because of New York's failure to receive certain federal funds." Sp. App. 9. The court stated that "New York is required to implement HAVA's minimum standards regardless of whether it applied for, and received, HAVA monies." Sp. App. 9-10. The court stated that "any allegation

that [p]laintiffs have been injured as a result of HAVA's funding scheme is implausible because New York's receipt of funding thereunder is irrelevant to [p]laintiffs' voting rights." Sp. App. 9. The district court thus concluded that plaintiffs did not have standing to assert any claims under HAVA and dismissed all such claims.[2] Sp. App. 10.

STANDARD OF REVIEW

The 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). *Patane* v. *Clark*, 508 F.3d 106, 111 (2d Cir. 2007). The 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).

[2] The district court also dismissed the apportionment and False Claims Act (31 U.S.C. 3729) claims appellants brought against the federal defendants on the ground that these claims were not supported by sufficient factual allegations to survive a motion to dismiss. Sp. App. 10-11 & n.3. Appellants do not attempt to re-raise these claims on appeal. In an order dated July 31, 2008, the district court dismissed all of appellants' claims against the defendants remaining in the case, thus dismissing the Amended Complaint in its entirety. App. 16-22.

SUMMARY OF ARGUMENT

It is extremely difficult to figure out the federal claims appellants are making against any federal defendant in their pro se brief. Because appellants fail to develop and brief any such claims sufficiently to allow for reasoned appellate review, this Court should deem these claims waived, despite appellants' pro se status. To the extent that appellants' federal claim against a federal defendant is that the Assistant Attorney General for the Civil Rights Division of the Justice Department has violated their 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, this claim is clearly without merit. Congress, not the Assistant Attorney General, promulgated the reimbursement mechanism in the HAVA statute, and did so constitutionally pursuant to its broad authority to regulate federal elections set forth in the United States Constitution's Elections Clause. The district court's dismissal of the Amended Complaint for failure to state a claim was proper.

ARGUMENT

I

APPELLANTS WAIVED THEIR HAVA-BASED CLAIM AGAINST A FEDERAL DEFENDANT ON APPEAL

A. Appellants' Pro Se Brief Makes Scant Mention Of Any HAVA-Based Claim Or Any Claim Against A Federal Defendant

Appellants' pro se brief, like their district court pleadings, contains pages of rambling, vague, and ambiguous allegations. As a result, the United States must guess as to what claims are asserted against any federal defendant, and what facts support those claims. This task is made more difficult by appellants' substitution on appeal of the Assistant Attorney General for the Civil Rights Division (AAG) as a federal defendant for the Attorney General, the United States Election Assistance Commission (EAC), and the Executive Director of the EAC.[3] As far as the United States can tell, the only mention in appellants' brief of any claim addressed by the district court's order of January 8, 2008, is in Issue 14 of their Statement of Issues (Br. 23). There, they appear to assert that HAVA violates their rights to equal protection and substantive due process because it distributes funds to states for

[3] Appellants named former AAG Wan J. Kim as the federal defendant. Pursuant to Federal Rule of Appellate Procedure 43(c)(2), current AAG Thomas E. Perez, in his official capacity, "is automatically substituted as a party" for Wan J. Kim.

implementing improvements in election administration and voting technology based in part on voting age population (VAP) rather than citizen voting age population (CVAP). Appellants' only mention in their brief of any federal defendant – the AAG – is at the beginning of the Argument Section (Br. 24), where they contend that the AAG "purports" that "[m]inors like aliens are * * * part of the PEOPLE" and that the AAG "somehow gives Congress authority that supplants the authority of the New York State Constitution Article III." As demonstrated below, these cursory references to HAVA and the AAG are insufficient to survive dismissal.

B. 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) (holding that 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 Coll.*,

242 F.3d 58, 75 (2d Cir. 2001) (quoting *United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)), and "normally will not be addressed on appeal," *Norton* v. *Sam's Club*, 145 F.3d 114, 117 (2d Cir. 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 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. This Court generally will not address an argument that a pro se litigant has failed to raise in his appellate brief, particularly when he or she raised the argument below. See *LoSacco*, 71 F.3d at 93.

Even treating appellants' pro se brief with the leniency this Court traditionally grants to pro se litigants, the brief fails to satisfy Rule 28(a). After raising a HAVA-based claim in the Statement of Issues, appellants fail to mention HAVA in the body of the brief, much less develop an argument with contentions and citations to some authority. Appellants thus have waived the HAVA-based claim. See *Husain*, 494 F.3d at 121 n.10; *Frank*, 78 F.3d at 833; *LoSacco*, 71 F.3d at 93. Appellants' claim against the AAG in the Argument section fails to cite any federal statutory or constitutional provision that the AAG allegedly violated, much less develop an argument in support of this claim. By "advert[ing]" to an unspecified claim against the AAG in a "perfunctory manner," appellants have waived this claim as well. See *Tolbert*, 242 F.3d at 75.

Under the most generous interpretation of appellants' pro se brief – that the brief asserts in the Argument section that the AAG has authorized or implemented HAVA's allegedly unconstitutional reimbursement provisions referenced in the Statement of Issues – the brief still fails to satisfy Rule 28(a). Appellants do not develop the argument beyond two unsupported contentions that the AAG

"purports" that "[m]inors like aliens are * * * part of the PEOPLE" and that the AAG "somehow gives Congress authority that supplants the authority of the New York State Constitution Article III." These assertions do not provide this Court with sufficient factual or legal development to allow appellate review. 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."). Appellants' perfunctory mention of HAVA and the AAG on appeal, after their extensive discussion of HAVA below, indicates that they did not inadvertently forfeit their HAVA-based claim, warranting more lenient treatment from the Court. Accordingly, this Court should deem appellants' HAVA-based claim waived and decline to address it on appeal.

C. 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 where abandonment of a claim is a strategic choice rather than an inadvertent error, see *LNC Invs., Inc.* v. *National Westminster Bank, N.J.*, 308 F.3d 169, 176 n.8 (2d Cir. 2002), or 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); see also *McCarthy* v. *S.E.C.*, 406 F.3d 179, 187 (2d Cir. 2005) (no manifest injustice where waived claims are without merit).

Manifest injustice would not result if this Court declined to consider appellants' HAVA-based claim. First, as noted above, appellants made a perfunctory mention of HAVA and the AAG in their brief without developing an argument relating to either. This action suggests that their abandonment of their HAVA-based claim on appeal was a strategic choice to focus on other arguments they believed had a greater chance of success rather than an inadvertent forfeiture of this claim. See *LNC Invs.*, 308 F.3d at 176 n.8. Moreover, as discussed in more detail below, the district court correctly disposed of this claim in its order of January 8, 2008. Because this Court could not possibly reach a different outcome on this claim than the district court, forgoing appellate review on this issue would not result in manifest injustice. See *Mehta*, 905 F.2d at 598.

II

THE DISTRICT COURT CORRECTLY DISMISSED APPELLANTS' HAVA-BASED CLAIM FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED

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). A plaintiff's "obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions," *ibid.* (internal quotations 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 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 claim under HAVA.[4] Appellants appear to assert (Br. 23) in their brief's Statement of Issues that HAVA violates their rights to equal protection and substantive due process because it distributes funds to states to pay for improvements in election administration and voting technology based in part on

[4] Although the district court cited Rule 12(b)(6) in its order granting the federal defendants' motion to dismiss, its dismissal of appellants HAVA-based claims on the ground of lack of standing 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). Because Rule 12(b)(6) provides a clear basis for disposing of appellants' HAVA-based claim, this Court may affirm on this ground. See *McCall* v. *Pataki*, 232 F.3d 321, 323 (2d Cir. 2000).

voting age population (VAP) rather than citizen voting age population (CVAP). In the Argument Section, appellants contend (Br. 24) that the AAG "purports" that "[m]inors like aliens are * * * part of the PEOPLE" and that the AAG "somehow gives Congress authority that supplants the authority of the New York State Constitution Article III." Under the most generous interpretation of appellants' brief, appellants' HAVA-based claim is that (1) the AAG authorized or implemented (2) the scheme of reimbursing states based upon VAP rather than CVAP in violation of equal protection and substantive due process.

Neither premise of appellants' argument supports a valid HAVA claim. First, under HAVA, the AAG has 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 Election Assistance Commission 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 (and by delegation of authority, the AAG for Civil Rights) 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. Nothing in HAVA permits appellants to sue the federal government over its interpretation or enforcement of that statute. Appellants thus can state no claim against the AAG related to HAVA's administration.

Appellants' true claim – that HAVA's funding formula, as passed by Congress, violates equal protection and substantive due process – is without merit as well. 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 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' 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."); cf. *McConnell* v. *Federal Election Comm'n*, 540 U.S. 93, 187 (2003) (upholding Congress' authority to enact restrictions on soft money expenditures under Elections Clause as implementation of Congress' "fully legitimate interest in maintaining the integrity of federal officeholders and preventing corruption of federal electoral processes"), overruled on other grounds by *Citizens United* v. *Federal Election Comm'n*, 130 S. Ct. 876 (2010). 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, 42 U.S.C. 1973gg); *Voting Rights Coal.* v. *Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995) (same); *Association of Cmty. Orgs. for Reform Now* v. *Edgar*, 56 F.3d 791, 794 (7th Cir. 1995) (same). It follows that Congress' 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' 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 Guarantee Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) (substantive due process).

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").

CONCLUSION

For the forgoing reasons, this court should affirm the district court's decision granting the federal defendants' motion to dismiss appellants' Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains no more than 3,837 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
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Date: May 6, 2010

Special Appendix

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RONALD G. LOEBER, et al,

Plaintiffs,

v. 1:04-CV-1193 (LEK/RFT)

THOMAS J. SPARGO, et al.,

Defendants.

LAWRENCE E. KAHN
Senior United States District Judge

DECISION and ORDER

On October 15, 2004, Plaintiffs filed a Complaint asserting various constitutional violations arising out of the Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666, 42 U.S.C. § 15301-15545 (2002) ("HAVA") and, as best as the Court can decipher, the means by which New York reapportioned its legislative and judicial districts in April 2002. Among other things, Plaintiffs appear to claim that Defendants wrongfully counted the voting age population, rather than using the citizen voting age population, thereby using imprecise numbers in redistricting and determining eligibility for funds under the HAVA.

On October 29, 2004, this Court dismissed the Complaint. On appeal, the Second Circuit dismissed all election claims pertaining to the November 2004 elections and rejected Plaintiffs' claims of judicial bias. The Second Circuit remanded the case with respect to the redistricting claims "with instructions to permit the filing of an amended complaint that omits unnecessary detail." The Circuit also directed this Court to consider whether this case necessitated a three judge panel pursuant to 28 U.S.C. § 2284.

On November 21, 2005, Plaintiffs filed an Amended Complaint. Shortly thereafter, Plaintiffs filed a motion for injunctive relief. That motion is pending. Also, pending before the Court are Motions to dismiss filed by the federal and City of New York Defendants. Dkt. Nos. 64,65.

I. STANDARD OF REVIEW

As the Supreme Court has recently explained:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . . a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007) (internal quotations, alterations and citations omitted).

"Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." Id. at 1965 n.3. "'[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.'" Id. at 1967 (quoting Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528, n. 17, 103 S. Ct. 897, 74 L.Ed.2d 723 (1983)).

As the Second Circuit has elaborated, "the [Supreme] Court's explanation for its holding [in Bell Atlantic] indicated that it intended to make some alteration in the regime of pure notice pleading that had prevailed in the federal courts ever since Conley v. Gibson, 355 U.S. 41, (1957). . . . [T]he [Supreme] Court expressly disavowed the oft-quoted statement in Conley of 'the accepted rule that a complaint should not be dismissed for failure to state a

claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007). Thus, to survive a Rule 12 motion, Plaintiffs must pass the "'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." Id. at 157-58.

With this standard in mind, the Court will now address the pending motions.

II. DISCUSSION

a. Three-Judge Panel

In accordance with the Second Circuit's Mandate, the Court must first address whether it is necessary to convene a three-judge panel pursuant to 28 U.S.C. § 2284(a). That section provides that "[a] district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284(a). "When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determine whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute. Idlewild Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962) (discussing pre-1976 version of § 2284).

A single judge "in the first instance may consider those claims that do not require three judges and then call for the convening of a three-judge court only if the claims he has initially considered do not dispose of the case." 17A C. Wright & A. Miller, Federal Practice and Procedure § 4235, at 223 (2007). A single judge may dismiss a claim if the claim is

insubstantial. Bailey v. Patterson, 369 U.S. 31 (1962). A "single judge can also dismiss if the plaintiff lacks standing or the suit is otherwise not justiciable in the district court." 17A C. Wright & A. Miller, Federal Practice and Procedure § 4235, at 213 (2007); see also Long v. District of Columbia, 469 F.2d 927, 930 (D.C. Cir. 1972); Puerto Rico Intern. Airlines, Inc. v. Colon, 409 F. Supp. 960, 966 (D. P.R. 1975) ("[S]tanding . . . is a ground upon which a single judge can decline to convene a three judge court and order dismissal of the complaint. . . ."); Am. Commuters Ass'n v. Levitt, 279 F. Supp. 40, 45-46 (S.D.N.Y. 1967).

Plaintiffs first challenge the funding scheme under the HAVA. HAVA was passed in 2002 to improve the administration of elections for federal office. HAVA "was enacted in response to problems identified during the 2000 presidential election, and requires, inter alia, that states create and maintain a computerized statewide voter registration list and create a provisional ballot system for people whose names do not appear on a particular polling station list." Espada v. New York Bd. of Elections, 2007 WL 2588477 (S.D.N.Y. 2007). HAVA authorizes financial assistance to states to improve the administration of elections, improve election systems, educate voters, train election officials, improve accessibility to elections systems, etc. 42 U.S.C. § 15301.

Title I of HAVA provides for payments to states for election administration improvements and replacement of punch card and lever voting machines. See 42 U.S.C. §§ 15301-15306. The amount of money provided to states under Title I is based, in part, upon the census determination of the "voting age population of the State." 42 U.S.C. § 15301(d). Title II established the Election Assistance Commission to serve as a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of federal elections. See 42 U.S.C. §§ 15321-15472. Certain funding is

available under Title II which, again, is based, in part, upon "voting age population of the State" as determined by the census. 42 U.S.C. § 15402. Title III establishes certain minimum requirements for the administration of federal elections. 42 U.S.C. §§ 15481-15512. The requirements imposed by Title III are unrelated to whether a state receives funding under Titles I or II. See, e.g., 42 U.S.C. § 15481(a) ("Each voting system used in an election for Federal office shall meet the following requirements. . . ."). Under Title IV, 42 U.S.C. §§ 15511-15512, the "Attorney General may bring a civil action against any State or jurisdiction . . . for such declaratory and injunctive relief . . . as may be necessary to carry out the uniform and nondiscriminatory election technology and administration requirements under sections 15481, 15482, and 15483 of this title [the Title III minimum requirements for the administration of federal elections]."

Nothing about HAVA, or Plaintiffs' claims thereunder, implicate the three-judge panel requirement under 28 U.S.C. § 2284. HAVA is unrelated to the apportionment of congressional districts or the apportionment of any statewide legislative body and no other act of Congress otherwise requires Plaintiffs' HAVA-related claims to be heard by a three-judge court. Further, for reasons to be discussed, the Court finds that Plaintiffs lack standing to assert claims under HAVA and their claims fail to state a claim upon which relief can be granted.

Plaintiffs do, however, assert claims concerning the constitutionality of New York's April 2002 redistricting plan. Section 2284 expressly requires a three-court judge for claims "challenging the constitutionality of the apportionment of congressional districts or . . . any statewide legislative body." Thus, Plaintiffs' claims appear to fall squarely within § 2284's requirement of a three judge panel. The federal defendants assert that a three-judge panel

is not necessary because Plaintiffs' claims are insubstantial. "A constitutional question is insubstantial only if prior decisions render the issue inescapably frivolous and leave no room for any inference of controversy." Loeber v. Spargo, 04-5720-cv, at p.3 (2d Cir. Aug. 15, 2005) (citing Goosby v. Osser, 409 U.S. 512, 518 (1973)). The federal defendants' motion sheds little light on the substantiality of Plaintiffs' apportionment claim. It does not cite to any prior decisions that render Plaintiffs' Amended Complaint inescapably frivolous. Further, the federal defendants were not involved in New York's redistricting plan and, thus, have little knowledge concerning these claims.

The Court does note, however, there are insufficient factual allegations in the Amended Complaint concerning the federal or City of New York Defendants to assert a plausible claim that they were involved in the State of New York's 2002 apportionment scheme. As will be discussed, prior decisions make it inescapably clear that to be held accountable in a 42 U.S.C. § 1983 action, the named defendant must have had some involvement in the alleged constitutional or statutory deprivation. Absent any factual allegations of involvement by the federal or City of New York Defendants in the 2002 apportionment, the claims against them are frivolous and leave no room for any inference of controversy. Accordingly, a three judge court is not necessary to dismiss the apportionment claims as to these Defendants.

The state defendants, on the other hand, were involved in the apportionment plan and are the appropriate parties to address the substantiality and merits of these claims. The state defendants have not moved to dismiss the Amended Complaint and have not otherwise addressed the applicability of § 2284. Because the constitutionality of the redistricting plan is not before the Court in connection with the pending motions and the state defendants have

not yet been heard on this issue, the Court defers decision on whether the redistricting-related claims require a three-judge court until such issues are squarely presented for adjudication and the state defendants have an opportunity to be heard on the issue.

b. Standing

Having found that a three judge panel is not necessary at this time, the Court proceeds to review the pending motions. Defendants claim that Plaintiffs lack standing to assert claims under HAVA and that their claims otherwise fails to state a claim upon which relief may be granted.

As the Supreme Court recently stated:

> Federal courts must determine that they have jurisdiction before proceeding to the merits. Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L.Ed.2d 210 (1998). Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." One component of the case-or-controversy requirement is standing, which requires a plaintiff to demonstrate the now-familiar elements of injury in fact, causation, and redressability. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992). "We have consistently held that a plaintiff raising only a generally available grievance about government-claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large-does not state an Article III case or controversy." Id., at 573-574, 112 S. Ct. 2130. See also DaimlerChrysler Corp. v. Cuno, 547 U.S. ----, ----, 126 S. Ct. 1854, 1862, 164 L.Ed.2d 589 (2006) (refusing to create an exception to the general prohibition on taxpayer standing for challenges to state tax or spending decisions, and observing that taxpayer standing has been rejected "because the alleged injury is not 'concrete and particularized,' but instead a grievance the taxpayer 'suffers in some indefinite way in common with people generally' " (citation omitted)).

Lance v. Coffman, 127 S. Ct. 1194, 1196 (2007).

In their Amended Complaint, Plaintiffs appear to express dissatisfaction with the passage of HAVA, the funding mechanism established thereunder, and the amount of

monies received by the State of New York. Plaintiffs also may be contending that HAVA constitutes an unfunded mandate on the State of New York.[1]

The Election Clause of the United States Constitution provides that "[t]he 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 1. § 4. HAVA is a law that imposes certain requirements upon states with respect to the elections for senators and representatives. Under the Election Clause, New York was required to implement HAVA's requirements. This is so regardless of whether HAVA's mandates may be unfunded. See Assoc. of Comm. Org. for Reform Now v. Miller, 129 F.3d 833, 837 (6th Cir. 1997); Assoc. of Comm. Org. for Reform Now v. Edgar, 56 F.3d 791, 794 (7th Cir. 1995); see also Smiley v. Holm, 285 U.S. 355, 366-67 (1932) (noting that "[i]t cannot be doubted that these comprehensive words [in Article I § 4] embrace authority [in Congress] to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. . . . The phrase 'such regulations' plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with

[1] It is extremely difficult to decipher from Plaintiffs' Amended Complaint what their claims are and which Defendants are the subject of particular claims.

respect to congressional elections. In exercising this power, the Congress may supplement these state regulations or may substitute its own.").

While Plaintiffs appear to suggest that New York has been denied certain funding under HAVA, Plaintiffs are not acting on behalf of, and do not have the right to asserts claims on behalf of, the State of New York. Further, Plaintiffs have failed to articulate any injury sustained by them because of New York's failure to receive certain federal funds. There are no allegations that they have been unable to vote, that their votes have otherwise been diminished because of the non-receipt of funding under HAVA, or that they have been subjected to discriminatory or otherwise unfair registration laws or procedures in the context of any federal election. In Sandusky County Democratic Party v. Blackwell, 387 F.3d 565 (6th Cir. 2004), by contrast, the Sixth Circuit held that the plaintiffs had standing to assert claims under 42 U.S.C. § 15482 (HAVA Title III § 302) because they were asserting their individual rights under HAVA to cast provisional ballets - something for which HAVA specifically provides. See 42 U.S.C. § 15482 ("If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote . . . but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot. . . ."). Here, Plaintiffs are not asserting any such clear, individual right under HAVA. Rather, they are challenging the general funding scheme thereunder. Espada, 2007 WL 2588477, at *4.

More importantly, any allegation that Plaintiffs have been injured as a result of HAVA's funding scheme is implausible because New York's receipt of funding thereunder is irrelevant to Plaintiffs' voting rights. New York is required to implement HAVA's minimum

standards regardless of whether it applied for, and received, HAVA monies. See 42 U.S.C. §§ 15481-15485. Finally, there is no basis upon which to conclude that HAVA created a private cause of action with respect to the administration of funds authorized under the Act. See Paralyzed Veterans of Am. v. McPherson, 2006 WL 3462780 (N.D. Cal. 2006). Plaintiffs are unable to demonstrate any injury resulting from the passage of the HAVA or the funding mechanism established thereunder, causation between any alleged injury and the HAVA funding mechanism, or redressability. Accordingly, Plaintiffs do not have standing to assert any claims under HAVA, and have failed to state a claim upon which relief can be granted. Accordingly, all claims brought under HAVA are DISMISSED.[2]

c. City of New York and Federal Defendants' Motion to Dismiss the Apportionment Claims

The federal and City of New York Defendants move to dismiss the apportionment claims against them on the ground that they had no involvement in any of the complained of actions. A defendant in a case brought pursuant to 42 U.S.C. § 1983 can only be held responsible for constitutional deprivations caused by its acts or failures to act. Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995) (requiring personal involvement as a prerequisite to an award of damages under 42 U.S.C. § 1983); Reynolds v. Giuliani, 506 F.3d 183, 190 (2d Cir. 2007); Wray v. City of New York, 490 F.3d 189 (2d Cir. 2007); Zahrey v. Coffey, 221 F.3d 342, 349-352 (2d Cir. 2000) (discussing causation in § 1983 claims). To be held

[2] Plaintiffs' motion for a preliminary injunction is denied because: (1) it is moot (it sought to enjoin certain 2006 deadlines which have now passed), see Independence Party of Richmond County v. Graham, 413 F.3d 252, 256 (2d Cir. 2005); and (2) it is predicated upon HAVA. As discussed, the Court has found that Plaintiffs do not have standing to assert claims under HAVA and have failed to state a claim upon which relief can be granted.

accountable, the defendant must have been involved in causing the claimed constitutional violation. Id.

The Amended Complaint asserts claims concerning New York's 2002 redistricting plan. There are no factual allegations linking the federal or City of New York Defendants to the apportioning of districts throughout New York State. Accordingly, any constitutional claims against these Defendants concerning the apportionment claims are not plausible and must be dismissed.[3]

d. Cross-Motion to Change Venue

Plaintiffs cross-move to change venue to the Western District of New York where a similar action was pending. This motion must be denied because: (1) venue is appropriate in this District, see 28 U.S.C. § 1391(b), (2) there is no basis for a transfer under 28 U.S.C. § 1404; (3) although an identical action was pending in the Western District of New York, this action was filed first, see Kellen Co., Inc. v. Calphalon Corp., 54 F. Supp.23 218, 221 (S.D.N.Y. 1999), and Plaintiffs have failed to articulate an exception to the "first filed" rule; and (4) the Western District of New York transferred venue of its case to this District and, thus, there is no longer any related action pending in the Western District of New York.

[3] For similar reasons the Amended Complaint must be dismissed as to Defendant National Association of Secretaries of State. There are no allegations of any involvement by this Defendant in any of the conduct alleged in the Amended Complaint.

Although Plaintiffs make reference in their Amended Complaint to the False Claims Act, 31 U.S.C. § 3729, the reason for this reference is unintelligible. There are insufficient factual allegations in the Amended Complaint making a False Claims Act claim plausible. Accordingly, all claims against the federal defendants and all claims under the False Claims Act must be dismissed.

III. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED, that the federal defendants' motion to dismiss the Amended Complaint against it in its entirety is **granted**; and it is further

ORDERED, that all claims predicated upon the HAVA are **dismissed**; and it is further

ORDERED, that all claims against the City of New York are **dismissed**; and it is further

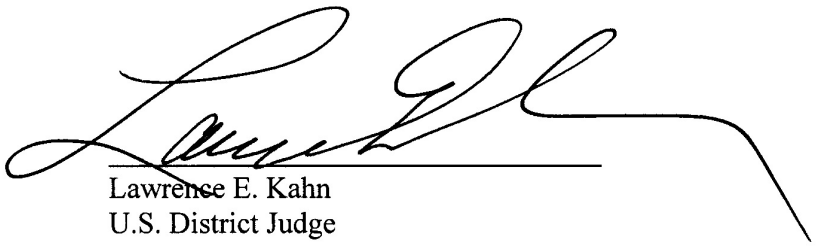
ORDERED, that all claims under the False Claims Act and all claims against the National Association of Secretaries of State are **dismissed**; and it is further

ORDERED, that unless Plaintiffs name and properly serve the John and Jane Doe Defendants within thirty days of the date of this Order, this action shall be dismissed as to them; and it is further

ORDERED, that the Clerk serve a copy of this Order on all parties

IT IS SO ORDERED.

Dated: January 08, 2008
Albany, New York



Lawrence E. Kahn
U.S. District Judge

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2010, I submitted for filing a PDF version of 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 to the designated electronic mailbox, prosecases@ca2.uscourts,gov. I also mailed six paper copies to the Court, pursuant to Local Rule 31.1, via Federal Express, overnight delivery.

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