

No. 39995-4-II

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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ROBERT EDELMAN,

Appellant,

v.

SECRETARY OF STATE,

Respondent.

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BRIEF OF APPELLANT

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## **I. INTRODUCTION**

This is a judicial review of an agency order brought under the Administrative Procedure Act (APA), RCW 34.05. Appellant Robert Edelman filed a complaint against the Secretary of State alleging that the Secretary's practices concerning voter registration and maintenance of the statewide voter registration list have resulted in multiple violations of the federal Help America Vote Act (HAVA), 42 U.S.C. §§ 15301 - 15545.

Mr. Edelman alleges that the Secretary and county auditors are accepting voter registration applications from individuals who will not be of voting age by the next election. These underage registrations are creating inaccuracies in the statewide voter registration list in violation of HAVA, and in some cases underage applicants have received and cast ballots. Additionally, Mr. Edelman alleges that the State's mail-in voter registration form omits statements required by HAVA.

The matter was assigned to an Administrative Law Judge (ALJ) who denied the complaint. Upon administrative review, the Reviewing Officer issued a Final Determination adopting, with minor modifications, the findings and conclusions of the ALJ, and dismissed the complaint. Mr. Edelman sought judicial review by the Thurston County Superior Court under the APA. After additional briefing and arguments by counsel, Judge Anne Hirsch affirmed the order of the Secretary.

## II. ASSIGNMENTS OF ERROR

### (1) Assignments of Error

1. The Thurston County Superior Court erred in denying the Petition for Review and entering its Order Affirming Administrative Decision of October 23, 2009.

2. The Secretary of State, through its Reviewing Officer, erred in denying Mr. Edelman's complaint in its Final Determination of September 12, 2008.<sup>1</sup>

3. The Secretary erred in making Finding of Fact No. 3.7.

4. The Secretary erred in making Finding of Fact No. 3.9.

5. The Secretary erred in making Finding of Fact No. 3.11.

6. The Secretary erred in making Findings of Fact 25(b)-(d).

7. The Secretary erred in entering Conclusion of Law No. 4.3.

8. The Secretary erred in entering Conclusion of Law No. 4.4.

9. The Secretary erred in entering Conclusion of Law No. 4.6.

10. The Secretary erred in entering Conclusion of Law No. 4.8.

### (2) Issues pertaining to the Assignments of Error

1. Does the Secretary of State's practice of accepting and pending underage voter registration applications until the voter reaches the age of eligibility violate the mandate in the Help America Vote Act that

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<sup>1</sup> The Initial Decision and Final Determination are attached in the Appendix.

the chief elections officer maintain an accurate statewide voter registration list? (Assignments of Error Nos. 1, 2, 3, 5, 7, 8.)

2. Does the Help America Vote Act require the Secretary of State to prevent entry of ineligible voters to the statewide voter registration list and do the Secretary's list maintenance efforts satisfy the requirement of an accurate list? (Assignments of Error Nos. 1, 2, 4, 6, 8.)

3. Does the Secretary of State's practice of "pending" underage voter registration applications violate the requirement in the Help America Vote Act that elections officials enter voter applications to the statewide list on an expedited basis, or does it require that underage applications be rejected? (Assignments of Error Nos. 1, 2, 9.)

4. Does the Washington State mail-in voter registration form violate the Help America Vote Act? (Assignments of Error Nos. 1, 2, 10.)

### **III. STATEMENT OF THE CASE**

#### **A. Facts**

Robert Edelman is a registered voter from Black Diamond, Washington, and volunteers as a senior research analyst for the Evergreen Freedom Foundation, a not-for-profit public policy organization. Administrative Record ("AR") 0001. Among its activities, the Foundation publishes research and recommendations for ensuring the accuracy of the

electoral process, and Mr. Edelman devotes his time to reviewing election procedures to identify flaws that reduce the accuracy of voting results. Clerk's Papers (CP) 40.

In a review of the statewide voter registration database, Mr. Edelman discovered 16,085 underage registrations between January 2000 through March 2008. AR 0003. An "underage registration" is one where the registrant will not turn 18 on or before the day of the next election. Further analysis revealed 127 votes cast by probable underage individuals between January 2000 and February 2008. AR 0004.

The processing of voter registration applications is handled by county auditors. AR 0952. Counties sometimes receive registration applications from applicants who will not turn 18 before the next election. *Id.* The Secretary has allowed auditors to accept these underage applications. *Id.* The auditor will "pend" the underage application in one of two ways: physically placing the registration application in a drawer, or adding the applicant to the local election management system under a "pending" status.<sup>2</sup> AR 0431, 0953. When the applicant is of voting age, the auditors are expected to either add the information from the registration application into the county election system, or if the applicant

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<sup>2</sup> The Secretary uses the word "pend" to mean placing a record in "pending status." "Pending status" is defined to mean a voter registration record is not yet complete, and the applicant is not yet a registered voter. WAC 434-324-005(10).

has been already entered electronically, place the applicant on “active” status. AR 0432, 0953.

Among its provisions, the Help America Vote Act (HAVA) requires each state’s chief election officer to create and maintain a computerized statewide voter registration list. 42 U.S.C. § 15483. This section provides minimum guidelines for the maintenance of voter registration records.

HAVA requires states to establish a state-based administrative complaint procedure to allow any person who believes there is a violation of HAVA to bring a complaint. 42 U.S.C. § 15512. The Washington Legislature directed the Secretary of State to adopt rules governing the complaint procedure. The State’s administrative complaint procedures for HAVA violations are found in chapter 434-263 WAC. Complaints filed under WAC 434-263 are treated as brief adjudicative proceedings under the APA. WAC 434-263-030.

On June 13, 2008, pursuant to WAC 434-263-020, Mr. Edelman through counsel filed an administrative complaint against the Office of the Secretary of State, alleging multiple violations of HAVA. AR 0001-09. Specifically, Mr. Edelman’s complaint alleged: (1) allowing county election officials to add ineligible, underage voters to the official statewide voter registration list as active voters violates the duty to maintain an

accurate list, 42 U.S.C. § 15483(a)(4); (2) allowing county election officials to delay entry of registration information into the statewide voter registration list violates the obligation to enter registration information on an “expedited basis,” 42 U.S.C. § 15483(a)(1)(A)(vi); and (3) Washington State’s official mail-in voter registration form does not include a statement required by 42 U.S.C. § 15483(b)(4)(A)(iii). AR 0002.

The complaint requested the following remedies be required of the Secretary of State: (1) establish a written procedure requiring staff to examine all mail-in registration forms received by the Secretary of State’s office and reject those where the applicant will not reach the age of eighteen by the next election; (2) advise county auditors in writing that it is illegal to register an applicant who will not reach the age of eighteen by the next election, it is illegal to delay entry of registration data for eligible applicants, and that applications from ineligible registrants should be rejected; (3) add automatic controls to the voter registration list so that no underage registration can be given active status; (4) add the statement required in 42 U.S.C. § 15483(b)(4)(A)(iii) to the State mail-in registration forms, and destroy existing non-compliant forms; and (5) take any other action that shall be deemed necessary to bring the State of Washington into compliance with HAVA’s voter database requirements. AR 0008.

## **B. Procedural History**

The Secretary of State scheduled the matter for a brief adjudicative proceeding and Administrative Law Judge Rebekah R. Ross was designated as the presiding officer pursuant to WAC 434-263-050(1)(e). AR 0010-12. After each party presented its views in written argument and exhibits, oral argument was conducted by telephonic conference on August 15, 2008. AR 1132. On August 19, 2008, Judge Ross issued an Initial Decision, entered findings of fact and conclusions of law, and dismissed the complaint. AR 0951-59.

On September 5, 2008, Mr. Edelman requested an administrative review of the ALJ's Initial Decision. AR 0961-63. Pursuant to WAC 434-263-070 the Secretary of State designated Director of Elections Nick Handy as the Reviewing Officer. AR 1035. In his request for administrative review, Mr. Edelman requested that the Secretary and his elections staff be disqualified for prejudice and a neutral officer be appointed to conduct the review. AR 0963. Mr. Edelman also filed a request to admit new evidence to the record, most of which became available through public records requests after the ALJ's Initial Decision issued. AR 1050-55.

On September 12, 2008, the Reviewing Officer issued a Final Determination, granting in part and denying in part the requested relief.

AR 1091-1104. Before addressing the substance of the complaint, the Final Determination addressed the two preliminary matters. First, the Reviewing Officer denied Mr. Edelman’s request to disqualify himself. AR 1094.<sup>3</sup> Second, the Reviewing Officer agreed to supplement the record and admit five new exhibits into evidence, in the interest of creating a more complete record. AR 1097. The Reviewing Officer entered several findings of fact based upon the additional exhibits. AR 1098.

The Reviewing Officer then turned to the substantive claims raised in the complaint, adopting by reference all findings of fact and conclusions of law set forth in the Initial Decision. AR 1102, ¶ 32.

The Final Determination made two modifications to the Initial Decision. AR 1102. First, the Reviewing Officer concluded—“as a matter of policy, not legal requirement”—that there was merit to modifying the voter registration form to include the statement in 42 U.S.C. § 15483(b)(4)(A)(iii). AR 1102, ¶ 33. The Reviewing Officer instructed the staff of the Elections Division to consider the matter and provide him with written analysis and recommendations for modifying the form.<sup>4</sup> *Id.*

In the second modification to the Initial Decision, the Reviewing Officer concluded that “practices and procedures designed to both

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<sup>3</sup> This issue is not raised on appeal.

<sup>4</sup> The subsequent recommendation developed by the Election Division is not contained within the record. A judicial review of agency action is generally confined to the record developed before the agency. RCW 34.05.558.

minimize registration and voting by ineligible voters and to maximize registration and voting by eligible voters could be improved by developing carefully written practices and procedures.” AR 1102, ¶ 34. The Reviewing Officer directed the staff of the Elections Division to develop by January 5, 2009, written practices and procedures for use in screening voter registrations, checking for and removing underage voters from the registration list, and communicating with county auditors and prosecutors regarding potential or actual underage voting. AR 1102-03. He did not, however, direct staff to begin rejecting underage registrations, and made no determination that such rejections would be legally mandated.

Pursuant to the Administrative Procedure Act, RCW 34.05, Mr. Edelman timely filed a Petition for Judicial Review in Thurston County Superior Court on October 8, 2008. CP 14-37. After additional briefing and argument by counsel, Judge Anne Hirsch affirmed the order of the Secretary and entered her Order Affirming Administrative Decision on October 23, 2009. CP 99-100. Judge Hirsch admitted no new evidence to the record.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

In a judicial review under the Administrative Procedure Act, the appellate court “sits in the same position as the superior court and reviews

the [administrative] decision by applying the standards of review in RCW 34.05.570 directly to the agency record.” *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000). This Court reviews “the agency’s findings of fact and not the superior court’s findings.” *Kelly v. State*, 144 Wn.App. 91, 95, 181 P.3d 871, *review denied*, 165 Wn.2d 1004 (2008). The burden of demonstrating the invalidity of agency action is on the party asserting invalidity. RCW 34.05.570(1)(a).

Mr. Edelman argues that the Secretary “erroneously interpreted [and] applied the law,” and that “[t]he order is not supported by evidence that is substantial when viewed in light of the whole record before the court . . . .” RCW 34.05.570(3)(d) and (e).

On review of administrative interpretation and application of law, the court determines the meaning and purpose of a statute *de novo*, although courts give substantial weight to an agency’s interpretation if the statute the agency administers is ambiguous. *Pub. Utility Dist. No. 1 v. State Dep’t of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002). A statute is ambiguous if it is susceptible to more than one meaning. *In re Sehome Park Care Ctr., Inc.*, 127 Wn.2d 774, 778, 903 P.2d 443 (1995). However, an agency’s interpretation of a statute will not be accorded deference if it conflicts with the statute. *Postema*, 142 Wn.2d at 77.

Findings of fact are reviewed under the “substantial evidence” standard. RCW 34.05.570(3)(e). Neither an appellate court nor the superior court crafts its own findings on the administrative record, *Kelly*, 144 Wn.App. at 95, but looks to determine whether the agency’s order is “supported by evidence that is substantial when viewed in light of the whole record . . . .” RCW 34.05.570(3)(e). Substantial evidence is “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.” *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995) (citations omitted). Resolving a mixed question of law and fact requires “establishing the relevant facts, determining the applicable law, and then applying that law to the facts.” *Tapper v. State Employment Sec. Dep’t*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993).

**B. The Secretary of State’s Practice of Accepting and Pending Underage Voter Applications is a Violation of HAVA’s Requirement to Maintain an Accurate Statewide Voter Registration List**

The fundamental question here is whether HAVA, specifically 42 U.S.C. § 15483, places an affirmative duty on the Secretary of State to *prevent* ineligible registrations. Mr. Edelman argues that it does. Mr. Edelman further argues that the Secretary’s failure to prevent underage registrations has resulted in adding thousands of ineligible voters to the

system, and some of those individuals have voted in past elections. The Secretary contends that HAVA only requires reasonable efforts to correct inaccuracies in the voter registration list.

The duty to prevent ineligible registrations can be understood in light of Congress' motivation when enacting HAVA. HAVA was passed in 2002 in response to the controversy surrounding the 2000 presidential election—specifically the protracted litigation and vote recounts in Florida. Sen. Christopher Dodd (D-CT), one of the principal Senate authors of HAVA, spoke of the “deep embarrassment” this chaos brought to a nation that is viewed as a “beacon light of self-government.” 148 Cong. Rec. S10413 (daily ed. Oct. 15, 2002). Rep. Robert Ney (R-OH), the prime sponsor of HAVA, observed that the problems in Florida revealed “widespread” problems across the nation. 148 Cong. Rec. H7837 (daily ed. Oct. 10, 2002).

This bipartisan concern led Congress to mandate a major upgrade of states' electoral systems. A primary objective was to protect the integrity of the electoral process. Sen. Dodd said the credibility of Congress depended on “the American people's belief in the integrity of the election system . . . .” 147 Cong. Rec. S13681 (daily ed. Dec. 19, 2001). Rep. John Lewis (D-GA), a HAVA co-sponsor and civil rights leader, spoke of the tragedy of denying the right to vote with inaccurate

voting lists, confusing ballots, and out-of-date voting machines, and he called HAVA “the most important voting rights bill since the passing of the Voting Rights Act in 1965.” 147 Cong. Rec. H9290 (daily ed. Dec. 12, 2001).

The resulting legislation identified three specific purposes: (1) to “provide funds to States to replace punch card voting systems”, (2) to “establish the Election Assistance Commission to assist in the administration of Federal elections”, and (3) to “establish minimum election administration standards for States . . . .” Public L. No. 107-252, 116 Stat. 1666 (2002).

**1. HAVA requires the Secretary to create and maintain an accurate statewide voter registration list, which includes the duty to prevent ineligible registrations**

As a first line of defense against election error and fraud, HAVA required states to create a “single, uniform, official, centralized, interactive computerized statewide voter registration list . . . that contains the name and registration information of every legally registered voter in the State.” 42 U.S.C. § 15483(a)(1)(A). This list serves as the “single system for storing and managing the official list of registered voters throughout the State.” 42 U.S.C. § 15483(a)(1)(A)(i). HAVA charges states with the duty to maintain an “accurate” voter list, 42 U.S.C. § 15483(a)(4), including

“[a] system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote.” 42 U.S.C. § 15483(a)(4)(A).

Washington State gives the Office of the Secretary of State the responsibility for creating and maintaining the statewide voter registration list and complying with HAVA. RCW 29A.08.125(1).

Among other eligibility factors, the voting age in Washington is 18.<sup>5</sup> Individuals, however, can register to vote at the age of 17 provided they will be 18 by the next election. RCW 29A.08.210(9). Mr. Edelman contends that the Secretary has violated HAVA by allowing county elections officials to accept and process applications from individuals who will not be 18 by the next election.

The State’s voter registration practices were identified by the uncontested findings of the Administrative Law Judge (subsequently adopted by the Reviewing Officer). As discussed above, county auditors sometimes receive registration applications from applicants who will not turn 18 before the next election. AR 0952. The auditor will pend the underage application by either physically placing the registration

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<sup>5</sup> “QUALIFICATIONS OF ELECTORS. All persons of the age of eighteen years or over who are citizens of the United States and who have lived in the state, county, and precinct thirty days immediately preceding the election at which they offer to vote, except those disqualified by Article VI, section 3 of this Constitution, shall be entitled to vote at all elections.” WASH. CONST. art. VI, § 1.

application in a drawer, or adding the applicant to local election management system under a pending status. AR 0431, 0953.

The ALJ concluded that the practice of pending does not violate HAVA, and found there is no evidence the State's procedures actually place underage applicants on the voter list.

I conclude that the Complainant has not shown a violation of HAVA with respect to allowing counties to accept registrations form [sic] underage applicants, and then pend these for processing until the applicant will be 18 years old by the next election. There is no evidence that this procedure allows underage applicants to actually show up on the computerized database as registered voters. They should not appear on the database until after they have reached the required age. If, despite precautions put in place, some applicants slip through the cracks, there are processes to remove them from the database.

Conclusion of Law 4.3, AR 0957.

The ALJ also concluded that HAVA requires only the duty of removal—rather than prevention—of ineligible registrants, and found that the Secretary is not failing to make reasonable efforts to remove ineligible registrants.

Moreover, HAVA requires only that the Secretary of State make a reasonable effort to *remove* registrants who are ineligible to vote. It does not discuss steps to prevent erroneous registration of underage voters, other than the provisions of the Mail-In Registration Form, discussed below. There is no evidence that the Secretary of State is failing to make reasonable efforts to remove registrants who are ineligible to vote, or is failing in any duty with respect to list maintenance.

Conclusion of Law 4.4, AR 0957.

Conclusions of law are reviewed de novo, and the agency's interpretation of HAVA should not be accorded great weight as HAVA is unambiguous when addressing the duty to maintain an accurate voter list. *Postema*, 142 Wn.2d at 77. The conclusion that HAVA does not require the prevention of erroneous registrations is not supported by the plain text of the statute, HAVA's legislative history, other cases, and other statutes.

HAVA expressly requires the Secretary of State to maintain "accurate" voter registration records." 42 U.S.C. § 15483(a)(4). There is no authority for adding ineligible voters to this list. In fact, HAVA suggests the opposite.<sup>6</sup> The duty to maintain accurate voter records certainly includes the duty to remove ineligible registrants, but this requirement is a non-exclusive obligation for maintaining an accurate voter database:

**Minimum standard for accuracy of State voter registration records**

The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:

- (A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote . . . .

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<sup>6</sup> See 42 U.S.C. § 15483(a)(5)(A) (requiring verification of applicant's identity); 42 U.S.C. § 15483(b)(2)(A) (requiring identification to register by mail); 42 U.S.C. § 15483(b)(4)(A)(iii) (advising ineligible applicants to not complete a registration form).

42 U.S.C. § 15483(a)(4) (emphasis added).

The ALJ apparently views this as a case of *expressio unius est exclusio alterius* (“the expression of one thing is the exclusion of another”) by only emphasizing the Secretary’s responsibility to remove erroneous registrations. But HAVA’s use of the word “including” suggests that the methods of file maintenance are not limited to the methods listed.<sup>7</sup> Moreover, the Supreme Court has repeatedly cautioned that the maxim of express mention and implicit exclusion is not to be used as “a means of defeating the apparent intent of the legislature.” *State v. Williams*, 94 Wn.2d 531, 537, 617 P.2d 1012 (1980).

HAVA’s legislative history also helps clarify the Secretary’s duty to reject ineligible applications. The members of Congress identified “vastly inaccurate and bloated registration rolls” as a significant factor in cases of voter fraud and inaccurate election results. 147 Cong. Rec. H9262 (daily ed. Dec. 12, 2001). Voter rolls across the country, said Rep. Christopher Bond (R-MO), were in a “state of crisis.” 148 Cong. Rec. S10490 (daily ed. Oct. 16, 2002).

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<sup>7</sup> See *West v. Gibson*, 527 U.S. 212, 217, 119 S.Ct. 1906 (1999) (Congress’ use of the word “including” made “clear that the authorization is not limited to the specified remedies there mentioned”); *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100, 62 S.Ct. 1 (1941) (“the term ‘including’ is not one of all-embracing definition, but connotes simply an illustrative application of the general principle”); *Adams v. Dole*, 927 F.2d 771, 776 (4th Cir. 1991) (“‘including’ is perhaps more often than not the introductory term for an incomplete list of examples”).

During the debates over HAVA, the members of Congress repeatedly emphasized their desire to prevent fraud and ensure accurate election results. Sen. Mitch McConnell (R-KY) said HAVA's new registration and database requirements are the "core of the new protections against fraudulent registration and fraudulent voting" and Congress' intent was "to provide a centralized list of registered voters to help guard against fraud." 148 Cong. Rec. S10492-93 (daily ed. Oct. 16, 2002). Not only would a statewide registration system clear false registrations from the voters rolls, said Sen. Bond, but it would help "verify the identity and eligibility of individuals and reduce fraudulent voter registrations from being added to our voter rolls." 148 Cong. Rec. S10492 (emphasis added).

In addition to HAVA's legislative history, a United States District Court has recognized the preventive mandate in HAVA.

HAVA imposes several measures that decrease the danger of voter fraud, including (1) standardizing the voter rolls so that the eligibility of existing voters can be more easily verified, (2) eliminating duplicative registrations and removing individuals who become ineligible, and (3) preventing the registration of new ineligible or fictitious individuals by requiring that each voter's qualifications by [sic] verified before they are added to the rolls.

*Democratic Nat'l Comm. v. Republican Nat'l Comm.*, \_\_ F.Supp.2d \_\_, 2009 WL 4268392, 35 (D.N.J. 2009) (emphasis added).

The Washington Legislature also contemplates the rejection procedure in its instructions to state agencies that are designated to accept voter registrations:

If the applicant chooses to register or transfer a registration, the service agent shall ask the following:

(a) “Are you a United States citizen?”

(b) “Are you or will you be eighteen years of age on or before the next election?”

If the applicant answers in the affirmative to both questions, the agent shall then provide the applicant with a voter registration form and instructions and shall record that the applicant has requested to register to vote or transfer a voter registration. If the applicant answers in the negative to either question, the agent shall not provide the applicant with a voter registration form.

RCW 29A.08.330(3) (emphasis added).

The accuracy of the statewide voter registration database is of paramount importance under Washington’s predominantly vote-by-mail system, because all active voters in vote-by-mail jurisdictions receive a ballot in the mail, making it easy for an improperly-registered voter to cast a ballot. HAVA was intended to combat this danger by requiring states to ensure only eligible voters are in the database.

Mr. Edelman’s position is that the duty to maintain an accurate voter list includes rejecting ineligible applications. One of the best ways to ensure the accuracy of any database is to verify the accuracy of

information when it is entered. Underage voters are a readily-identifiable category of ineligible voters, both when they register and when they are added to the database. The Secretary should prevent these registrations by instructing auditors to reject ineligible registrants, and by automatically preventing entry of underage applicants into the database.

This is consistent with Congress' intent to prevent fraudulent registrations from being added to the voter list, 148 Cong. Rec. S10492, it is mandated by HAVA, which advises ineligible voter applicants "do not complete this form," 42 U.S.C. § 15483(b)(4)(A)(iii), and it is consistent with other cases and statutes. Ironically, HAVA's voter registration procedures were intended to correct the types of inaccuracies that the Secretary of State now allows.

**2. The Secretary's practice of accepting and pending underage voter registrations have resulted in a violation of HAVA by placing inaccurate information on the voter list**

The Secretary's practices have resulted in adding inaccurate information into the voter database, and this constitutes a violation of the duty to maintain an accurate list under HAVA. 42 U.S.C. § 15483(a)(4).

The ALJ determined that the process of accepting and pending underage registrations was not a violation of HAVA, and found: "There is no evidence that this procedure [of pending] allows underage applicants to

actually show up on the computerized database as registered voters.” AR 0957, Conclusion of Law 4.3.

The ALJ made several other factual determinations to find that underage voters have not been added to the voter database.

When the applicant is put in active status, the registration date that shows on the VRDB is the date the voter registration is mailed or received. Accordingly, *after* the voter is of age, it might appear from a review of the database that the voter was registered too early.

AR 0953, Finding of Fact 3.7.

Furthermore, “[t]he fact that the database does not accurately reflect the date of registration, but instead the receipt date of the application, does not mean that the registration is actually happening prematurely.” AR 0953, Finding of Fact 3.11.

In other words, the ALJ found that underage voters are not being entered into the database—it only appears this way because counties hold the registration form until the voter is eligible, and the registration date in the database is the date the county *received* the application from the underage voter.

These findings of fact are not supported by substantial evidence when viewed in light of the entire record. RCW 34.05.570(3)(e). If these findings were accurate, underage voter registrations would be a mere clerical anomaly. Yet Mr. Edelman supplied evidence that underage voters

are listed as “active” in the database, and that 17-year-olds are receiving and casting ballots.

Specifically, Exhibit 3 (AR 0927-30) is a list of 127 votes cast by underage voters between January 2000 and February 2008.<sup>8</sup> The Secretary has no explanation for how these individuals were able to cast ballots. Next, Exhibit 9 is a list of 49 underage individuals who were listed as “active” in the voter database in the months of May, June, and July of 2008—several months after Mr. Edelman had alerted the Election Division of this problem. AR 0949-50. The Secretary had no explanation for why 18 of the 49 underage registrations were still listed as active after Mr. Edelman filed his complaint. AR 0435. Underage registration and voting continued after Washington State created its statewide voter registration database. Since 2006, when the statewide voter list was created, some 3,700 underage individuals have been registered. AR 0515. As the ALJ found, 13 individuals voted in 2006 elections before they turned 18, and four underage individuals voted in 2008. AR 0953, Finding of Fact 3.9.

The Secretary argues—without supporting data—that instances of underage registrants should be discounted because “nearly all instances of

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<sup>8</sup> HAVA’s voter registration list requirements became effective in Washington State on January 1, 2006. CP 71. While Mr. Edelman’s complaint focused on violations that would occur during the 2008 primary and general elections, he submitted evidence from earlier years to demonstrate the long-standing nature of the violations complained of.

underage voters apparently being placed on the active voter database are illusory.” CP 73. The Secretary cites RCW 29A.08.110 as requiring county auditors to enter, as the registration date, the date an applicant submits or mails the application, which appears as an underage registration. *Id.* The Secretary’s explanation is unpersuasive for several reasons.

First, nothing in HAVA or state law permits auditors to hold completed voter applications from ineligible individuals, and the Secretary has cited no such authority. Both, however, contemplate the rejection of ineligible voters, as discussed above. See 42 U.S.C. § 15483(b)(4)(A)(iii), RCW 29A.08.330(3), and RCW 46.20.155(1).

Second, RCW 29A.08.110 is designed to give auditors a procedure to follow when processing applications, but it does not permit election officials to pre-date registration applications from ineligible applicants. The statute states that if an application form is not complete, the auditor is to mail a deficiency notice to the applicant, but if the applicant fails to respond, the name “shall not be placed on the official list of registered voters until the application is complete.” RCW 29A.08.110(2). If an application is eventually completed, the date of mailing or the date of delivery is used as the registration date. *Id.* This statute does not permit

auditors to hold applications from ineligible applicants in a “no man’s land” until the person becomes eligible.

Finally, assuming *arguendo* that underage registrations are “illusory,” the Secretary has no explanation for how these illusory voter registrations have resulted in underage individuals receiving ballots and casting votes. The Secretary has offered no evidence to support his claim that underage registrations are a clerical illusion (e.g., evidence that underage applicants were activated after turning 18).

The administrative findings of fact regarding underage registrations are not supported by the record. Instead, Mr. Edelman has offered substantial evidence that, whatever the Secretary’s procedures may be, underage individuals are being placed as “active” in the voter database. These individuals are receiving ballots, and in some cases these underage individuals are casting ballots illegally. Using the *Heinmiller* test, a “fair-minded person” would conclude that a substantial number of underage voters have been and are being entered into the registration database, and that the Secretary has allowed this to occur. 127 Wn.2d at 607.

The Secretary has failed to safeguard against underage registrations, allowing thousands of inaccurate entries into the voter registration database, which is a violation of the Secretary’s duties under the Help America Vote Act.

**3. The Secretary's efforts of list maintenance are insufficient to satisfy the requirement to maintain an accurate voter list**

The ALJ determined as a matter of law that the Secretary has satisfied the obligations under HAVA and state law to ensure database accuracy. "There is no evidence that the Secretary of State is failing to make reasonable efforts to remove registrants who are ineligible to vote, or is failing in any duty with respect to list maintenance." AR 0957, Conclusion of Law 4.4. The ALJ determined the Secretary "is actively working with the counties to prevent any reoccurrence" of voting by 17-year-olds. AR 0953, Finding of Fact 3.9. Additionally, the Reviewing Officer determined that several exhibits provided by Mr. Edelman did not contradict assertions the Secretary had made regarding his actions to address underage registrations and voting. AR 1098-1100, Findings of Fact 25(b)-(d).

As previously mentioned, the Secretary has an obligation to ensure that voter registration records are "accurate and are updated regularly," 42 U.S.C. § 15483(a)(4), and to make a "reasonable effort" to remove ineligible registrants. 42 U.S.C. § 15483(a)(4)(A). The duty to comply with HAVA is reiterated in state law. RCW 29A.08.125(9)(a). The conclusion that the Secretary is satisfying his obligation to prevent,

discover, and correct errors is not supported by substantial evidence when viewed in light of the entire record.

**a. Underage registration and voting occurred even after Mr. Edelman alerted elections officials**

The evidence provided by Mr. Edelman demonstrates that the Secretary's efforts to identify and remove underage voters are not part of a reasonable system of file maintenance, but are merely a reaction to problems uncovered by Mr. Edelman.

This can be seen in the sequence of events laid out in Exhibits 2-5. AR 0923-39. Mr. Edelman discovered the existence of underage voters and communicated it to Mr. Paul Miller, the Secretary's Technical Services Manager. At no point in their communication does Mr. Miller indicate that the Secretary had any procedures to scan the database for underage voters. He says that with the voter database he is "now able to track and warn counties about underage voting registrations," but never confirms this actually occurs. AR 0934. Mr. Edelman notified the Secretary of the problem of underage registrations on December 17, 2007, and continued to follow up on the problem for the next month. AR 0932. Despite these warnings, the Secretary admits at least four underage votes were cast in the February 2008 presidential primary. AR 0930.

Additionally, Exhibit 9 shows a steady stream of underage registrations added to the database through July 2008. AR 0949-50. Nineteen of the 49 underage voters identified in the exhibit were active voters on the database for the entire three-month period. The Secretary professed to have dealt with these underage voters identified by Mr. Edelman (AR 0435), but the fact remains that these errors were flagged by Mr. Edelman, rather than by any effort the Secretary had in place to identify and correct ineligible registrants.

Prior to the filing of this action, the Secretary assured Mr. Edelman that the statewide voter registration database had “significantly improved” the State’s ability to prevent underage registrations. AR 0004. Yet Exhibit 8 shows that the rate of underage voter registrations has not decreased—but continues to rise in non-presidential elections year—since the creation of the statewide voter database.<sup>9</sup> AR 0947. Merely relying on the voter registration database as a safeguard is not a “reasonable” effort on the part of the Secretary. There is no evidence that any of the underage voters would have been discovered by the Secretary if Mr. Edelman had not brought the matter to his attention.

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<sup>9</sup> Underage registrations in non-presidential election years before and after adoption of the database: 1,024 in 2001; 1,281 in 2002; 1,529 in 2003; 785 in 2005; 1,566 in 2006; and 1,548 in 2007. AR 0947.

**b. The Secretary of State fails to adequately follow up with county auditors when errors in the database are discovered**

The Secretary's efforts to identify and remove ineligible voters can further be characterized as unreasonable upon closer examination of the Secretary's process. Although HAVA places the primary duty for list maintenance on the chief election officer, 42 U.S.C. § 15483(a)(1)(A), the Secretary is not removing underage registrants. When an underage registrant appears, the Secretary merely "refers the matter to the county auditor for appropriate action." AR 0432. The evidence submitted by Mr. Edelman shows the inadequate response by election officials. AR 1068-69. Four votes were cast by underage individuals in the February 2008 presidential primary. Upon notification from the Secretary of State, three of the four counties (Whitman, Thurston, and King) took no new corrective action to prevent ineligible votes, but indicated their intention to rely on existing procedures.

**c. Contrary to his assertions, the Secretary of State had no procedure in place to identify underage voters**

As stated above, HAVA requires a "reasonable" system of file maintenance and provisions to ensure the accuracy of voter records. The Secretary has asserted throughout this adjudicative process that his efforts

have been reasonable, and that he “continues to work . . . to develop solutions to prevent these problems . . . .” AR 0436.

Yet the Secretary was unable to produce any such written procedure. Mr. Edelman filed a formal public records request (AR 1057) seeking:

1. All formal, documented procedures established by the Office of the Secretary of State (OSOS) for the processing of voter registration applications received from applicants who will not attain the age of 18 by the next election (underage applicants).
2. All documented direction to county auditors from the OSOS for processing applications from underage applicants.
3. All internal documented procedures established by the OSOS for disposition of registrations from underage applicants if and when such registration information is entered into the Voter Registration Database (VRDB). . . .

On September 3, 2008—after the Initial Decision issued—the Secretary of State’s public disclosure officer responded: “We do not have any records for your items 1, 2, and 3 below.” AR 1056.<sup>10</sup> The lack of a procedure for handling or discovering underage registrations demonstrates that the Secretary’s efforts to correct this particular inaccuracy are not part of a regular, on-going system of file maintenance.

Furthermore, evidence submitted by Mr. Edelman demonstrates that the Secretary of State’s practices for preventing underage vote are

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<sup>10</sup> The public record request and the Secretary’s response were among the evidence subsequently entered into the record by the Reviewing Officer. AR 1097.

anything but reasonable. AR 1058-61. On February 19, 2008—the day of Washington State’s presidential primary—Voter Services Manager David Motz sent an email to county auditors in which he included a list of 115 active voters who were not yet 18, and were thus ineligible to vote in the primary. This notice, unfortunately, was too little, too late. In reply to a phone conversation with Stevens County Auditor Beverly Lamm, Mr. Motz acknowledged: “My mistake was that I sent the email too late. In order to be completely effective, I should have sent it before your ballots went to print.” AR 1058.

Indeed, Mr. Motz’ list contained the names of the four underage individuals who successfully cast ballots in the February 2008 presidential primary (AR 0930)—a strong indication that the Secretary’s practices are woefully inadequate. Notifying county auditors of ineligible voters on the day of an election—*after* ballots had been mailed to voters—when auditors are presumably busy with administering the day’s election, is hardly a “reasonable” process.

\* \* \*

Given the weight of this evidence, the Secretary of State’s efforts to maintain the voter database have not been reasonable. The Secretary’s inadequate efforts have not satisfied his obligations under HAVA to maintain an accurate database. Any conclusions of law or findings of fact

to suggest otherwise are not supported by a clear reading of HAVA and in light of the substantial evidence Mr. Edelman has submitted.

**C. The Secretary of State’s Practice of Pending Underage Registrations Violates HAVA’s Requirement that Election Officials Process Voter Registrations Expeditiously**

The practice of pending underage voters presents a separate violation of the Help America Vote Act. HAVA states, in pertinent part: “All voter registration information obtained by any local election official in the State shall be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official.” 42 U.S.C. § 15483(a)(1)(A)(vi) (emphasis added). The mandate for expedited entry helps reduce confusion and inaccuracy in the registration process.

The ALJ concluded that HAVA’s mandate to expedite registrations is not violated by the procedure of pending underage registrations.

I reject the Complainant’s argument, because HAVA only requires registration of applicants who are eligible and who submit complete applications. Indeed, it clearly does not require processing of incomplete forms, but instead requires that the applicant be given the opportunity to complete the form in a timely manner. 42 U.S.C. § 15483(b)(4)(B). It would be an absurd reading of the statute to require an expedited processing of an application from an ineligible applicant, where the application on its face shows that the applicant will become eligible through the mere passage of time.

Conclusion of Law 4.6, AR 0957.

This interpretation should not be afforded great weight as the statute is unambiguous as to an election official's responsibility when a voter registration is received.

Neither federal or state law permit the county auditors to set completed registration applications aside for eventual entry. The Secretary's interpretation of 42 U.S.C. § 15483(a)(1)(A)(vi) ignores the mandate that registration information be added into the database "on an expedited basis." There is nothing in that section or any other part of HAVA that allows the current practice of holding completed applications from underage voters for months before entering them into the database.

The ALJ said it was "absurd" to conclude that HAVA requires election officials to add ineligible underage voters to the database. AR 0957. This mischaracterizes Mr. Edelman's position. HAVA requires all registrations to be expeditiously processed at the time an official receives them, and if a registration is submitted by an ineligible applicant, that registration should be rejected. State law grants officials the authority to delay processing only if an application is incomplete, which should be distinguished from an ineligible applicant. RCW 29A.08.110. Moreover, similar to HAVA, state law mandates the rejection of registration forms from ineligible applicants. *See* RCW 29A.08.330(3) and RCW 46.20.155(1).

Any delay between submission of the registration application and entry into the system increases the likelihood that the information may become inaccurate. During the delay a voter may move, commit a felony, change his or her name, or any number of things that will affect eligibility and decrease the accuracy of the database. For example, Rachel Jones cast a vote on February 7, 2006—a full 17 months before her 18<sup>th</sup> birthday on July 24, 2007. AR 0930. The Secretary, by permitting auditors to pend registrations, increases the likelihood of an inaccurate voter list.

Both HAVA and state law provide a bright line to reduce confusion and inaccuracy in the registration process. That bright line is at the time of registration, when election officials must quickly process registrations from legal applicants and reject those from ineligible applicants. The agency decisions below erred in concluding that HAVA is not violated by allowing auditors to delay the entry of registrations from underage voters.

The Secretary defends the State's practice by emphasizing the public policy of encouraging all eligible voters to participate fully in elections. "[N]ot only should the rolls of registered voters *not* include ineligible individuals, but they *should* include eligible voters who submit completed and timely applications for registration." AR 1101. The

Secretary expressed concern that rejecting underage registrations would drive young people from the electoral process. AR 0436. This is purely speculative, and the Secretary presented no evidence that a 16- or 17-year-old would be incapable or unwilling to register when eligible. The Secretary argues that rejection of underage applications is problematic because not all 17-year-olds will know when the next election will occur. CP 80. This is precisely why election officials should take an active role in advising 17-year-olds as to when they will become eligible.

Any number of practices would satisfy HAVA while accommodating the Secretary's emphasis on civic involvement. The Secretary could instruct auditors to maintain a list of individuals who were rejected as being too young, and auditors could mail a registration application to these individuals upon reaching the age of eligibility. Alternatively, auditors could give underage applicants a registration form with a date notation advising the applicant when it is appropriate to mail in the completed form.

The Secretary's interest in encouraging young people to participate in elections is commendable, and is shared by the Appellant, but the Secretary's practices could actually have a deleterious effect on new applicants. Rather than advising applicants to register when eligible, the Secretary allows an ineligible person to register, exposes that person to the

possibility of committing voter fraud, and may eventually remove the young voter from the voter list. Which process is more likely to cause confusion and dishearten young people?

**D. Washington State’s Voter Registration Form Omits a Statement Required by HAVA**

The Secretary also erred by determining there is no legal mandate to include a specific statement from HAVA on the state’s voter registration form. 42 U.S.C. § 15483(b)(4)(A) states in relevant part:

The mail voter registration form . . . shall include the following:

(i) The question “Are you a citizen of the United States of America?” and boxes for the applicant to check to indicate whether the applicant is or is not a citizen of the United States.

(ii) The question “Will you be 18 years of age on or before election day?” and boxes for the applicant to check to indicate whether or not the applicant will be 18 years of age or older on election day.

(iii) The statement “If you checked ‘no’ in response to either of these questions, do not complete this form.” ...

The voter registration form in use by the State at the time of the complaint, however, does not include required statement (iii) above. AR 0945. The ALJ determined the statement is not required on the state voter registration form. AR 0958, Conclusion of Law 4.8. The Reviewing Officer admitted, however, as a matter of policy there was merit to including the statement and directed the elections staff to make a

recommendation. AR 1102, ¶ 33. Regardless of any policy concessions, Mr. Edelman appeals the determination that the statement is not legally mandated.

The Secretary relies on voluntary guidance from the U.S. Election Assistance Commission (EAC) to support his position. AR 0456. The EAC guidance states, “HAVA requires that the federal mail-in registration form include check-off boxes for citizenship and being 18 years of age by Election Day” (emphasis added). *Id.* Later the guidance document adds, “HAVA does not require states to redesign their state voter registration forms to include check-off boxes” (emphasis added). *Id.* The ALJ concluded that if the check-off boxes are not required, then the “do not complete” statement is unnecessary. AR 0958.

The EAC guidance can be disregarded for several reasons. First, the clear language of HAVA says voter registration cards should include the “do not complete” statement. Second, the EAC guidance dealt with an entirely different subject—what to do when a voter left a checkbox blank. Nothing in the EAC guidance suggests that states can leave the “do not complete” statement off forms prepared in compliance with federal requirements. Third, the EAC guidance merely suggests that states need not alter their own registrations forms. But the ALJ failed to note the significance of the distinction between state and federal forms: 42 U.S.C.

§ 15483(b)(4)(A) concerns registration forms developed to comply with the National Voter Registration Act. Some states may have separate state voter registration forms which do not fall under this federal mandate. Washington uses only one form, and state law requires that it be in compliance with the NVRA. RCW 29A.08.220(1).

By failing to add the “do not complete” statement to Washington’s voter registration form the Secretary violates HAVA and weakens the security and accuracy protections provided by the form.

**E. The Appellant is Substantially Prejudiced by the Administrative Order**

This Court may grant relief “only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.” RCW 34.05.570(1)(d). As a registered Washington voter, Mr. Edelman is substantially prejudiced by the Secretary’s failure to prevent ineligible underage voters from registering and voting. Mr. Edelman has cast ballots in previous state and federal elections, and will continue to vote in subsequent elections.<sup>11</sup>

The U.S. Supreme Court recently held, “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”

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<sup>11</sup> The Secretary did not dispute that Mr. Edelman is substantially prejudiced in this case. CP 68.

*Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S.Ct. 5 (2006) (citations omitted).

The Supreme Court has explicitly affirmed that states have important interests in preventing voter fraud and enhancing the public's confidence in the electoral process. *Crawford v. Marion County Election Board*, 553 U.S. 181, 128 S.Ct. 1610 (2008).

Every voter's interest in participating in accurate elections should be contemplated by the Secretary when operating the state voter registration system. The system was intended to increase the accuracy of elections, thus decreasing disenfranchisement of voters and dilution of votes. A judgment in his favor would substantially eliminate the prejudice to Mr. Edelman by reducing inaccurate registrations, thus protecting his vote from dilution and increasing his confidence in the accuracy of the electoral process.

Furthermore, the harm that can come from the Secretary's lax practices is substantial, especially when weighed against the remedies Mr. Edelman advocates. The harm allowed by the Secretary is found not only from illegal votes, but in the systemic inaccuracies in the voter registration database. Any inaccuracies that are known and encouraged increase the likelihood of inaccurate election results. The Secretary well knows that the outcome of an election can be influenced by just a few votes. HAVA was

intended to clean up bloated voter rolls; the Secretary's practices result in new bloating.

**F. The Appellant is Entitled to Attorney Fees**

Under RAP 18.1, a prevailing party may be awarded attorney fees when allowed by applicable law. Mr. Edelman challenged an agency action and is therefore entitled to attorney fees under the Equal Access to Justice Act, RCW 4.84.340 - .360, which authorizes awards of reasonable attorney fees and other expenses for qualified parties who prevail in a judicial review of agency action when an agency's action is not substantially justified. RCW 4.84.350(1).

“Agency action” means licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits. RCW 4.84.340(2); RCW 34.05.010(3). The Secretary of State's Final Determination qualifies as an agency order.

A “qualified party” is “an individual whose net worth did not exceed one million dollars at the time the initial petition for judicial review was filed . . . .” RCW 4.84.340(5). Mr. Edelman is a qualified party under this definition.

The Secretary of State's actions were not substantially justified. The violations of HAVA resulted in thousands of improper voter

registrations, not to mention numerous illegal votes by underage individuals. Even after Mr. Edelman brought these issues to the attention of Elections Division staff, the Secretary failed to take adequate measures to prevent future instances of underage registration. Furthermore, the Secretary's Reviewing Officer admitted in several instances that Mr. Edelman's requested remedies were advisable from a policy perspective, though the Reviewing Officer did not concede a legal obligation to implement such procedures. AR 1102.

Therefore, Mr. Edelman should be entitled to attorney fees and expenses in this action.

## V. CONCLUSION

For the foregoing reasons, the Court should reverse the superior court's order and remand for the setting aside of the Secretary's order.

RESPECTFULLY SUBMITTED this 1st day of February, 2010.

EVERGREEN FREEDOM FOUNDATION

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