IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

ARKANSAS VOTER INTEGRITY INITIATIVE, INC., *et. al.*	PLAINTIFFS	
vs.		Case No: 4:23-CV-00479
JOHN THURSTON, *et. al.*	DEFENDANTS	

MOTION TO REMAND

COMES NOW the plaintiffs, by and through their attorneys, and for their motion state:

1. That the State of Arkansas removed this case to this Court and Election Systems and Software has consented to removal.

2. That the case involves questions of state statutory construction, an illegal exaction under the state constitution, and two causes of action related to state torts.

3. That, as a basis for removal, the State invoked the federal question doctrine relating to the interpretation of the Help America Vote Act.

4. That the amended complaint filed by the plaintiffs does not state a cause of action which arises under the federal Constitution or an act of Congress, a civil rights claim, or an action sufficient to invoke this Court's subject matter jurisdiction.

5. That, for the reasons set forth in the accompanying brief, there is no substantial federal issue to be litigated.

6. That, for the reasons set out in the brief in support, this Court should remand the case back to state court.

WHEREFORE, the plaintiffs' move this court to remand; for attorney's fees and costs; and for all other just and proper relief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

By my signature above, I certify that a copy of the foregoing has been delivered by the below method to the following person or persons:

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All attorneys of Record

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BRIEF IN SUPPORT OF MOTION TO REMAND

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Overview

The State of Arkansas removed this case to federal court on May 24, 2023. Doc. 1. The State argues that resolution of this case is so intertwined with an interpretation of the Help America Vote Act (HAVA) that it raises a substantial federal question. *Id.* at pp. 5–10. However, the State has mischaracterized the plaintiffs' causes of action to allege that they are seeking to an entirely different type of relief than is pled for and sought. According to the State, the plaintiffs want to restrain or effect the Election Assistance Commission's (EAC) certification of these machines to "implicate the entire election process across the country" as well as

[1]For the convenience of the Court, the .pdf copy of this brief filed with the Clerk of the Court is bookmarked to its individual sections.

examine "national voting standards." *Id.* at p. 7, ¶¶ 25, 26. The amended complaint contains no such request because the plaintiffs are not seeking that type of coercive relief. Doc. 6. The State also overlooks that Arkansas has codified has its own, unique language about how voting machines must perform. *Compare* Ark. Code Ann. § 7-5-504(6)[2] (no make of voting machine shall be approved for use in elections unless it is so constructed that it "shall permit the voter to verify in a private and independent manner the votes selected by the voter on the ballot before the ballot is cast" and "[q]ualified by an authorized federal agency or national testing and standards laboratory acceptable to the Secretary of State") *with* Ark. Code Ann. § 7-5-301 (c)(1)(3) (any voting system chosen by the quorum court of each county for use "in elections for federal office shall comply with the requirements of the federal Help America Vote Act of 2002").

The State argues for removal because it sees the suit as the plaintiffs' attempt to "impact elections and machines beyond Arkansas" which "implicates the entire election process across the country." However, no such broad relief is pled or even sought. *Compare* doc. 1 at p. 7, ¶ 25 *with* doc. 6. The State is also attempting to raise a federal defense as a basis for jurisdiction—the EAC has interpreted HAVA and certified these machines as compliant. Doc. 1 at ¶¶ 25, 27. But the plaintiffs do not even mention the EAC, its certification of the machines, or the use of these machines in any other state except Arkansas in their amended complaint. Doc 6.

[2] The section of Arkansas Code Annotated that describes the requirements for voting machines to be used in this State does not even mention HAVA.

Finally, the State argues, without support, development, evidence, or elaboration, that the plaintiffs' amended complaint "implicates the conflicting rights of the states ***and*** our relations with foreign nations." Doc. 1 at p. 9, ¶ 32 (emphasis added). To be clear, while the plaintiffs are not happy with the fact that the computer components in voting machines appear to be made in China, they did not raise any international implication or seek redress which would impact relations with a foreign nation. In fact, the issues raised by the plaintiffs do not even impact interstate commerce as it only seeks to enjoin the use of these machines in Arkansas. The State has failed to develop an argument that federal common law controls these causes of actions, and it has failed to point to a federal cause of action in the amended complaint that exists under HAVA.[3]

The plaintiffs timely filed a motion to remand. Election Systems and Software, LLC, (ESS) has consented to the removal. *Id.* at p. 1. The issue before the Court is a question of subject matter jurisdiction. This brief argues that this Court lacks subject matter jurisdiction because:

I. There is no substantial federal question at issue.

A. The causes of action in the amended complaint do not arise under the federal Constitution or an act of Congress, this is not a § 1983 case; and the amended complaint fails to meet the *Wullschleger* elements.

Argument

I. There is no substantial federal question at issue.

[3]To not hide any balls, there is no private right of action in HAVA. *See* Arg. § 1(A), *infra*.

The State based its removal on a federal question—an interpretation of HAVA. However, the mere fact that a federal question of some nature lurks in the background of a case is insufficient to establish this Court's removal jurisdiction. *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. California*, 463 U.S. 1, 12 (1983); *Stanturf v. Sipes*, 335 F.2d 224, 229 (8th Cir. 1964). The crux of the plaintiffs' argument is that the federal question the State based removal upon is not substantial enough to invoke this Court's subject matter jurisdiction.

Federal district courts have limited subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). They possess only that power authorized by the Constitution and statute. *Id.* (citing *Willy v. Coastal Corp.,* 503 U.S. 131, 136–137 (1992); *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 541 (1986)). The initial presumption is that a cause of action filed in state court lies outside this limited federal court jurisdiction. *Id.* (citing *Turner v. Bank of North America,* 4 U.S. (4 Dall.) 8, 11, 1 L.Ed. 718 (1799). The burden of establishing subject matter jurisdiction for a substantial federal question in this case rests upon the the State. *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178, 182–183 (1936). A court does not obtain subject-matter jurisdiction just because a plaintiff raises a federal question in his or her complaint. *Biscanin v. Merrill Lynch & Co.*, 407 F.3d 905, 907 (8th Cir. 2005) (citing *Hagans v. Lavine,* 415 U.S. 528, 537–38 (1974); *Bell v. Hood,* 327 U.S. 678, 682–83 (1946)). Instead, the federal question must be "substantial," which means that "the plaintiff's right to relief must ***depend[] necessarily***" on that substantial question. *Wullschleger v. Royal Canin U.S.A., Inc.*,

953 F.3d 519, 521 (8th Cir. 2020) (quoting *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804 (1986)) (emphasis in original).

Looking at the plaintiffs' amended complaint, it is devoid of a substantial federal question. Instead, it contains only state law claims relating to an illegal exaction (a state law tax action based on the Arkansas Constitution), a declaratory judgment action pursuant to state statute, a deceptive trade practices claim (again, arising under state statute), and common law fraud—another state law issue.

The only federal implication in the plaintiffs' amended complaint is a declaratory judgment action related to HAVA and allegations that the ESS voting machines, as configured and approved for use in Arkansas elections, do not comply with HAVA or state statute. None of these are federal constitutional issues or seek to attack HAVA. Instead, these claims only request that the state court construe the state-approved voting machines to make determinations about a localized state issue.

It is important to the federal jurisdiction issue to remark about the declaratory judgment action as it pertains to HAVA. At first blush, asking for a declaratory judgment about an act of Congress might seem to be a substantial federal question. The Eighth Circuit has already considered such a quandary and established a bright line standard: declaratory judgment actions are procedural and do not expand federal court jurisdiction. *Dakota, Minn., & E. R.R. Corp. v. Schieffer*, 711 F.3d 878, 881 (8th Cir. 2013) (citing *Reciprocating Engine Div. v. U.A.W.,* 523 U.S. 653, 660 n. 4 (1998)). A declaratory judgment can invoke this Court's subject matter jurisdiction related to a federal question only if the declaratory judgment seeks a coercive action to enforce

its rights. *Id.* (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 19 (1983)).

This bright line standard is not met in the case at bar. Neither the plaintiffs nor the defendants are seeking any coercive action to enforce any federal rights or control the actions of a federal government agency or official, much less any rights under HAVA. The declaratory judgment count fails to carry a jurisdictionally qualifying burden. The lack of federal jurisdiction is bolstered by the absence of a private right of action in HAVA.

A. The causes of action in the amended complaint do not arise under the federal Constitution or an act of Congress, this is not a § 1983 case; and the amended complaint fails to meet the *Wullschleger* elements.

One thing that several of the circuit courts agree upon is that HAVA does not itself create a private right of action. *Belitto v. Snipes*, 935 F.3d 1192, 1202 (11th Cir. 2019) (citing 52 U.S.C. §§ 21111) (HAVA creates no private cause of action as Congress established only two HAVA enforcement mechanisms: (1) a civil action brought by the Attorney General, and (2) a state-based administrative complaint procedure); *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir. 2004); *Morales-Garza v. Lorenzo-Giguere*, 277 F. App'x 444, 446 (5th Cir. 2008); *Am. C.R. Union v. Philadelphia City Comm'rs*, 872 F.3d 175, 184–85 (3d Cir. 2017). Instead, there *may be* a cause of action for a civil rights violation related to HAVA.[4] *Am. C.R. Union v. Philadelphia City Comm'rs*, 872 F.3d 175, 185 (3d Cir. 2017) (citing

[4] "May be" is used related to a § 1983 claim because the Eighth Circuit does not appear to have addressed the issue, there is a circuit split, and the Supreme Court passed on the question in *Brunner v. Ohio Republican Party*, *infra*).

Am. Civil Rights Union, 2016 WL 4721118, at *5 (comparing *Colon-Marrero v. Velez*, 813 F.3d 1, 13 (1st Cir. 2016) (recognizing there is no private right of action under HAVA, but permitting a § 1983 suit); *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir. 2004) (same); with *Crowley v. Nevada ex rel. Nevada Sec'y of State*, 678 F.3d 730, 735 (9th Cir. 2012) (recognizing there is no private right of action under HAVA and foreclosing a § 1983 suit)). Even if a § 1983 claim related to HAVA exists, which this case is not one, the Supreme Court has been clear that such a cause of action lies as to the violation of rights only, and not the failure to comply with the language of HAVA. *Brunner v. Ohio Republican Party*, 555 U.S. 5, 6 (2008) (per curiam) (citing *Gonzaga Univ. v. Doe,* 536 U.S. 273, 283 (2002); *Alexander v. Sandoval,* 532 U.S. 275, 286 (2001)) (granting a stay of the enforcement of a TRO related to HAVA because there were no civil rights at issue, only the failure to comply with the language of the statute). It is important to note that the plaintiffs have made no allegations of a federal civil rights violation in their amended complaint. Doc. 6.

The absence of a private right of action tends to indicate that a case is appropriate for remand. *See Wullschleger*, 953 F.3d at 521 (finding a substantial federal question exists only when the complaint is a class action for a federal law violation, calls for a finding of a violation of federal law, an injunction to prevent a violation of federal law, and attempting to create a definition that did not exist in the federal Food and Drug Cosmetic Act). *See also Eastman v. Marine Mech. Corp.*, 438 F.3d 544, 551–52 (6th Cir. 2006) (finding no substantial federal question exists when the complaint alleges a state law violation of a federal act due to drug misbranding).

Accord Marshall v. Conway Regional Medical Center. 2020 WL 5746839 (slip opinion).

The absence of a private right of action in this case goes to the heart of removal because a defendant can only remove a case to federal court if the plaintiff's claim could have been brought in federal court, as determined by reference to the "well-pleaded complaint." *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (citing 28 U.S.C. § 1441(b)). "In other words, 'the presence of a claimed violation of [federal law] as an element of a state cause of action' is insufficient on its own to confer federal jurisdiction." *Wullschleger*, 953 F.3d at 521 (citing *Merrell Dow* at 814).

Removal jurisdiction for a federal question must be squared with the well pleaded complaint at issue in this case. Subject matter jurisdiction in this Court depends on the amended complaint containing:

1. A cause of action that arises under the United States Constitution or an act of Congress related to HAVA;

2. An allegation of a § 1983 civil rights violation resulting from a HAVA violation (if such a cause of action even exists); or

3. A federal issue surrounding the state law claims that is necessarily raised, actually disputed, substantial, and capable of resolution in federal court without disrupting the federal-state balance approved by Congress.

Bellitto v. Snipes, 935 F.3d 1192, 1202 (11th Cir. 2019) (citing 52 U.S.C. §§ 21111); *Wullschleger v. Royal Canin U.S.A., Inc.*, 953 F.3d 519, 522 (8th Cir. 2020) (citing *Gunn v. Minton*, 568 U.S. 251, 258 (2013)); *Am. C.R. Union v. Philadelphia City Commissioners*, 872 F.3d 175, 185 (3d Cir. 2017).

There are no such causes of action contained in the amended complaint. Instead, the allegations and causes of actions are:

A. State law declaratory judgment related to state and federal statute; Doc. 6, ¶¶ 35–49;

B. An illegal exaction (specifically, an illegal or improper use of taxpayer dollars); *Id.* at ¶¶ 50–62;

C. A violation of a state law—the Arkansas Deceptive Trade Practices Act; *Id.* at ¶¶ 63–70; and

D. Common law fraud. *Id.* at ¶¶ 71–81.

It is true, a federal question lurks in the background of the instant case related to HAVA. However, that lurking question does not impart removal jurisdiction because it does not arise under the Constitution, an act of Congress (no private right of action and this is not a civil rights case), and it is simply not a substantial federal question as that term is defined by the progeny of § 1441 cases. *See Merrell Dow Pharms. Inc. v*, 478 U.S. at 814 ("[g]iven the significance of the assumed congressional determination to preclude federal private remedies, the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system" and "[w]e simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial" to confer federal-question jurisdiction"). *See also Eastman*, 438 F.3d at 551–52 (citing 28 U.S.C. § 1331) ("[w]e conclude that a complaint alleging a violation of a federal statute as an element of a state cause of

action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States").

Conclusion and Requested Relief

The instant case is analogous to this Court's opinion in *Marshall v. Conway Regional Medical Center*. 2020 WL 5746839 (slip opinion). As in *Marshall*, this case was removed based on a federal question and not diversity or 28 U.S.C. § 1453. Just like *Marshall*, the plaintiffs have brought state law claims in their amended complaint. Also, like *Marshall*, the plaintiffs' amended complaint mentions federal law but does not seek its enforcement. Finally, exactly like *Marshall*, there is no private right of action under the federal laws mentioned in the plaintiffs' amended complaint and this case fails to meet the *Wullschleger* requirements.

Ultimately, this is a case deeply rooted in state law claims. It is not seeking anything from the federal government. It is not attempting to force the federal government to change how it is operating relating to the voting machines at issue. It is not asking, much less trying to force, the EAC to take some action. It is not seeking any federal relief whatsoever. Instead, it seeks remedies that arise only under state law and the Arkansas Constitution.

Lacking a substantial federal question in the case, this Court lacks subject matter jurisdiction. This Court should remand this case back to the state court from whence it came.

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CERTIFICATE OF SERVICE

By my signature above, I certify pursuant to Ark. R. Civ. P. 5(e) that a copy of the foregoing has been delivered by the below method to the following person or persons:

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All attorneys of Record