

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

<b>OHIO REPUBLICAN PARTY, et al.</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	<b>Case No. 2:08-cv-913</b>
<b>v.</b>	)	
	)	<b>Judge Smith</b>
<b>JENNIFER BRUNNER,</b>	)	
<b>Secretary of State of Ohio</b>	)	<b>Magistrate Judge King</b>
	)	
<b>Defendant.</b>	)	

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**BRIEF OF *AMICUS CURIAE* ACLU OF OHIO, PROJECT VOTE, NEOCH,  
1MATTERS, DANIEL GEORGE, SHERIE PENIX IN OPPOSITION TO PLAINTIFFS’  
RENEWED MOTION FOR A TEMPORARY RESTRAINING ORDER**

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**INTRODUCTION**

Plaintiffs’ renewed motion for a temporary restraining order represents yet another last-ditch effort to persuade a federal court to overturn a state official’s interpretation of applicable election law, in a manner that would retroactively cast doubt on the validity of thousands of voter registrations properly submitted by Ohio residents since January 1, 2008. Plaintiffs base their latest foray on the provisions of the Help America Vote Act of 2002 (“HAVA”), 42 U.S.C. § 15301 et seq. Their claim for relief, however, finds no support in HAVA and, indeed, would violate a specific HAVA prohibition. Moreover, their claim is directly contradicted by the only case they cite with regard to the manner in which courts have construed the substantive provisions of HAVA.

Plaintiffs claim that HAVA requires the Ohio Secretary of State to attempt to retroactively match certain registration records, by computer, with records contained in the

state's driver's license database and the Social Security Administration database, as a means for verifying registrants' eligibility to vote. Plaintiffs ask this Court to order state election officials to: a) conduct computer matching with regard to the identified class of voter registrants; b) attempt to then resolve all instances where the computer is unsuccessful in finding a match; c) flag on the registration lists delivered to the polls the registration of all unmatched registrants for whom election officials were unable to resolve the matching discrepancy; d) deny such flagged registrants a regular ballot unless they are able to determine why the computer match was unsuccessful; and e) require flagged registrants who do not resolve the computer problem to vote a provisional ballot which would be counted only if the computer discrepancy is resolved in the limited time available after the election.

There are two fundamental errors in plaintiffs' reasoning. First, although HAVA does include a limited database matching requirement, HAVA does not require that database matching be utilized to determine whether registration applicants are eligible to vote. Instead, HAVA instituted database matching generally for the unrelated goal of providing states with the technical means for identifying duplicate registration records (which may occur, for example, when a person moves within a state and updates his or her voter registration).

Second, both HAVA and the National Voter Registration Act of 1993, 42 U.S.C. 1973gg *et seq.* (NVRA) impose specific restrictions on the authority of states to remove persons from the registration rolls, so as to ensure that persons who are eligible to vote, and are registered to vote, are not mistakenly deleted from the rolls. The limitations that plaintiffs would have this Court impose on the right to vote of computer-mismatched registrants – based on the alleged invalidity of their voter registration – would inevitably result in many Ohio registrants being precluded from voting in the November 4 election, and thus would effectively remove these individuals

from the registration rolls for purposes of this election. The removal restrictions enacted by HAVA and the NVRA, and applicable to the State of Ohio, do not permit the removal of registered voters based on the inability of a state computer to match an individual's registration record with a record contained in some other database. Therefore, the relief requested by plaintiffs would violate HAVA and the NVRA.<sup>1</sup>

## **I. OVERVIEW OF HAVA'S VOTER REGISTRATION REQUIREMENTS AND THE PROBLEMS INHERENT IN COMPUTER MATCHING**

### **A. HAVA's Voter Registration Requirements**

In 2002, Congress enacted the Help America Vote Act to respond to the serious problems with the administration of elections in the United States revealed by the 2000 presidential election. *Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1155 (11th Cir. 2008). HAVA includes a wide variety of remedial measures, including: the establishment of the United States Election Assistance Commission (with the responsibility for taking specific steps to improve the voting process), 42 U.S.C. §§ 15321, 15322; the provision of funding to the states to enable them to improve their administration of elections, 42 U.S.C. § 15301; the specification of minimum standards for voting systems and the establishment of a provisional voting mechanism, 42 U.S.C. §§ 15481, 15482; and the specification of minimum standards for improving the accuracy and reliability of voter registration lists. 42 U.S.C. § 15483.

At the center of HAVA's voter registration reform effort is the requirement that all states (except those that do not conduct voter registration) implement a single, statewide, computerized

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<sup>1</sup> Another significant difficulty with plaintiffs' claim concerns the question whether they have a right of action to enforce the computer matching provisions of HAVA. Plaintiffs correctly note that HAVA itself does not create a private right of action, but assert that they are authorized to enforce HAVA's matching provisions pursuant to 42 U.S.C. § 1983, citing the Sixth Circuit decision in *Sandusky Dem. Party v. Blackwell*, 387 F.3d. 565 (2004). However, the court in *Sandusky* only held that private plaintiffs have a right of action under § 1983 "[w]ith respect to the right to cast a provisional ballot under the circumstances described in HAVA § 302(a)." *Id.* at 572. The instant case, of course, does not involve an effort to vindicate the right to cast a provisional ballot.

database of registered voters. 42 U.S.C. § 15483(a)(1)(A). HAVA specifies various standards for creating and maintaining these databases, including three basic principles that must guide the states.

First, “the name of each registered voter [must] appear[] in the computerized list.” 42 U.S.C. § 15483(a)(1)(B)(i). In order to ensure that this is accomplished, HAVA provides that “[a]ll voter registration information obtained by any local election official . . . 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).

Second, “only voters who are not registered or who are not eligible to vote [may be] removed from the computerized list.” 42 U.S.C. § 15483(a)(1)(B)(ii). In order to ensure that only ineligible voters are removed, HAVA includes specific restrictions on the authority of states to remove persons from the registration list. All states must provide “[s]afeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.” 42 U.S.C. § 15483(a)(4)(B). In addition, in Ohio and other states covered by the National Voter Registration Act, 42 U.S.C. § 1973gg, et seq., ineligible voters may be removed under HAVA only “in accordance with the provisions of the National Voter Registration Act of 1993.” 42 U.S.C. 15483(a)(2)(A)(i).

Third, “duplicate names [must be] eliminated from the computerized list.” 42 U.S.C. § 15483(a)(1)(B)(iii). To facilitate this, HAVA provides for a two-step maintenance system. States begin by assigning “a unique identifier [in the database] . . . to each legally registered voter in the State.” 42 U.S.C. § 15483(a)(1)(A)(iii). The identifier is either: the registrant’s driver’s license number (supplied by the registrant on the voter registration application); the last four digits of the registrant’s social security number, for those applicants without a driver’s

license (again supplied by the registrant on the registration application); or another number generated by the state, for those who lack both a driver's license and a social security number. 42 U.S.C. § 15483(a)(5)(A). Next, in order to make sure that the identifying numbers are correctly entered into the registration database, states must "coordinate" their voter registration database with the state driver's license database and the Social Security Administration database. 42 U.S.C. §§ 15483(a)(1)(A)(iv), 15483(a)(5)(B).

**B. Computer Matching Does Not Provide a Reliable Means for Reviewing Voter Eligibility**

It is well recognized that database matching is an inherently flawed process that routinely fails to identify records for the same individual that in fact are contained in both of the databases being compared. *See generally Making the List: Database Matching and Verification Processes for Voter Registration, available at <http://tinyurl.com/66t6r8>.* Accordingly, database matching does not provide a reliable means for reviewing voter eligibility.

Database matching often fails because of trivial data errors that prevent the computer from recognizing that the databases being compared actually do contain records for the same person. These errors include typos, data entry errors made when processing registration forms, use of married and maiden names in different databases, and inconsistent treatment of hyphenated or compound last names. *Id.*<sup>2</sup>

The end result is that database matching generates a high rate of putative "no matches."

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<sup>2</sup> The former Commissioner of the Social Security Administration noted that matches with the social security database often fail because of "name change[s] after a marriage or divorce, . . . incomplete, transposed or missing names . . . in SSA records[,] . . . [and] discrep[an]cies created by use of multiple or compound names." *American Federation of Labor v. Chertoff*, No. 07-4472, Decl. of Kenneth S. Apfel, ¶ 7 (N.D. Cal. Aug. 29, 2007) available at <http://tinyurl.com/4jbsbg>. In November 2007, the Social Security Administration reported that of 2.3 million voter applications it had processed, nearly half — fully 44.5% — were not successfully matched. Pete Monaghan, SSA Help America Vote Act Powerpoint 14, Nov. 29, 2007, available at <http://tinyurl.com/4dp663>.

In the first six months of 2006, before its “no match, no vote” law was enjoined, Washington’s matching system had a failure rate of 16 percent statewide, with up to 30 percent in King County where Seattle is located.<sup>3</sup> Through April of 2006, 18 percent of applications in Los Angeles County did not yield a successful computer match.<sup>4</sup> Nearly 20 percent of an audit sample of 15,000 applications submitted in New York City in September 2004 could not be matched due to typos and other data entry errors.<sup>5</sup> And in the first three weeks after Florida renewed enforcement of its matching program (on September 8, 2008), approximately 15 percent of attempted matches failed, keeping at least 5,000 voters off the registration rolls.<sup>6</sup>

Preconditioning registration and voting on successful matching is particularly problematic because failed matches occur more frequently among members of certain racial and ethnic groups. Latino citizens are susceptible to problems matching compound last names, and African Americans are frequently not matched because of their use of unique names, or derivative spellings of common names. Thus, for example, in Florida, under the matching program in effect in 2006 and 2007, Latinos constituted 15 percent of the total registration applications but 39 percent of those blocked due to a computer mismatch, and African American voters made up 13 percent of the applicants but were 26 percent of those not matched. White

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<sup>3</sup> See *Fla. NAACP v. Browning*, No. 07-402, Decl. of Andrew Borthwick, ¶ 47 (N.D. Fla. Sept. 17, 2007) (“Borthwick Decl.”), available at <http://tinyurl.com/4k69sm>.

<sup>4</sup> See *Fla. NAACP v. Browning*, No. 07-402, Decl. of Conny McCormack, ¶ 13 (N.D. Fla. Sept. 17, 2007), available at <http://tinyurl.com/4z66bc>.

<sup>5</sup> See Borthwick Decl. ¶ 12 & Ex. F.

<sup>6</sup> Aaron Deslatte and Mary Shanklin, *ID-match law stalls 5,000 voter applications*, Orlando Sentinel, Oct. 1, 2008, available at <http://www.orlandosentinel.com/news/local/state/orl-novote0108oct01,0,6794080.story>.

voters, on the other hand, constituted 66 percent of the applicant pool but only 17 percent of the mismatched applicants.<sup>7</sup>

**C. The Significant Negative Impact of Computer Matching Errors on Ohio Voters Should This Court Grant Plaintiffs' Requested Relief**

In light of the high rate of mismatched records produced by computer matching, the injunction sought by plaintiffs could result in depriving a large number of Ohio residents who registered on or after January 1, 2008 of the right to vote in the November 4, 2008 election. Such an injunction also could significantly interfere with the ability of Ohio election officials to conduct the November 4 election in an orderly fashion and promptly tally the results. The reasons for this are as follows.

First, given the mismatch percentages cited above, it is highly likely that the Ohio computer will be unable to successfully match a significant percentage of the persons who registered during the time period at issue, thus (as plaintiffs would have it) calling into question the registration of thousands of Ohio registered voters.

Second, given the very limited time left before the November 4 election, the many tasks that Ohio election officials must undertake between now and November 4 in order to properly conduct this election, and the very large number of registration records that likely would not yield a successful match, it is unlikely that election officials themselves would be able to resolve more than a small fraction of the computer mismatches. As a result, if the order requested by plaintiffs is entered, it would be almost entirely up to the voters to resolve the computer discrepancies in order to be able to cast a regular ballot on election day or vote absentee.

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<sup>7</sup> See Daphne Eviatar, *Florida 2000 Redux?*, Washington Independent, Oct. 1, 2008, available at <http://tinyurl.com/4d5ux5>.

Third, affected voters would have little or no ability at the polls to resolve the computer snafus that resulted in the computer mismatches since these voters would not have access to the databases being used as the comparators. Accordingly, these voters would be required to cast a provisional ballot.

Finally, since (as plaintiffs would have it) provisional ballots also would not be counted unless the computer mismatches were resolved, voters and/or election officials would be faced with resolving thousands of individual mismatches in the limited time available for Ohio to declare the results of the presidential election. This likely would produce chaos, and the disenfranchisement of thousands of voters.

**II. HAVA DOES NOT OBLIGATE THE STATE OF OHIO TO UTILIZE COMPUTER MATCHING TO REVIEW THE ELIGIBILITY TO VOTE OF OHIO VOTER REGISTRANTS**

Contrary to plaintiffs' assertions, HAVA's database "coordination" provision does not require that Ohio (or any other state) use database matching to determine whether persons who register to vote are eligible to vote in elections. Instead, HAVA generally only requires Ohio (and other states) to utilize database matching for the limited purpose of ensuring that accurate identifying numbers are assigned to registered voters.

The HAVA section that addresses the obligation of each state to create and maintain a statewide registration database, 42 U.S.C. § 15483, does not include any language stating that computer matching should be used to test the validity of a voter registration application. The only provision cited by plaintiffs specifies that registration records should be compared with driver's license records "to the extent required to enable [state officials] to verify the accuracy of information provided on applications for voter registration." 42 U.S.C § 15483(a)(5)(B)(i). However, as demonstrated below, this language simply means that state officials should conduct

computer matching in order to ensure that the correct driver's license numbers are entered into the registration database (so that they may be used, in turn, to weed out duplicate registrations). This language does not mean that computer matching should be used to verify the identity or qualifications to vote of Ohio residents who submit registration applications.

Plaintiffs' flawed reading of HAVA is demonstrated by the language of HAVA itself. Specifically, Congress explicitly linked computer matching and voter eligibility with regard to one narrow group of voters, while not doing so with regard to voters in general. The affected group consists of those persons who register by mail and have not voted previously in an election for federal office in the voter's state. HAVA provides that these voters generally must provide certain documentary proof of identity at the time of registering or voting, but are excused from this requirement if election officials are able to match their voter registration data with a driver's license record or a record that contains at least the last four digits of the registrant's social security number. 42 U.S.C. § 15483(b). Thus, Congress clearly understood that database matching potentially could be linked with voter eligibility, understood how to write specific language that links the two, and chose not to require such a link except with regard to a narrow group of voters.<sup>8</sup>

Moreover, plaintiffs' reading of HAVA was specifically rejected by the one case they cite with regard to the manner in which the HAVA database matching provisions should be construed. In *Florida State Conference of the NAACP*, 522 F.3d at 1172, the Eleventh Circuit flatly stated that "[t]here is nothing at all in [HAVA] that discusses the requirements and procedures for establishing eligibility and identity of in-person registrants" (as opposed to mail-

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<sup>8</sup> It also should be noted that HAVA does not require any matching at all for registration applicants that lack a driver's license number or a Social Security number, 42 U.S.C. § 15483(a)(5)(A)(ii), and does not require matching in states that specify that voters must provide their full (and more reliably unique) Social Security number. 42 U.S.C. § 15483(a)(5)(D).

in registrants who are first-time voters). *Accord, Washington Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1268 (W.D. Wash. 2006) (“It is clear from the language of [HAVA] and by looking at legislative history that HAVA’s matching requirement was intended as an administrative safeguard for ‘storing and managing the official list of registered voters,’ and not as a restriction on voter eligibility.”).<sup>9</sup>

The absence of any “database-matching, voter eligibility” requirement in HAVA (except with regard to the aforementioned narrow group of voters) means that the Secretary of State’s actions do not, under HAVA, raise any specter that persons ineligible to vote have been included in the state’s voter registration database. Plaintiffs’ assertion to the contrary is simply their own personal and unsupported opinion.

Finally, the invalidity of plaintiffs’ legal claim is illustrated by the fact that the states have followed a variety of approaches with regard to whether, or to what extent, the occurrence of a database mismatch affects the validity of an individual’s voter registration. Only a handful of states require a match as a prerequisite to registration. Some accept registrations from mismatched voters but require that they provide additional information, some specify that a mismatch is relevant only with respect to whether first-time voters who registered by mail must produce identification, and some do not provide for any consequence with respect to voter registration when a mismatch occurs. Levitt, Weiser & Munoz, *Making the List: Database*

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<sup>9</sup> Both cases dealt with challenges to state statutes (in Florida and Washington, respectively) that specified that in order to successfully register to vote in the state, state officials had to first match the applicant’s voter registration record with a state driver’s license record or a Social Security Administration record. Plaintiffs argued that this linkage was prohibited by HAVA on the ground that HAVA does not include any such requirement and preempts state law on this subject. The Eleventh Circuit held that HAVA is not preemptive and that Florida was permitted – but, significantly, was not required – to create this linkage, *Florida State Conference of the NAACP*, 522 F.3d at 1167-1172, while the District Court for the Western District of Washington found HAVA to be preemptive. *Washington Ass'n of Churches*, 492 F. Supp. 2d at 1269-70. Since plaintiffs’ interpretation of HAVA is faulty regardless of whether HAVA is deemed to be permissive or preemptive, this Court need not resolve the preemption question and we do not address that question here.

*Matching and Verification Processes for Voter Registration* (2006), 16-17, available at <http://tinyurl.com/66t6r8>.<sup>10</sup>

### **III. THE REMOVAL OF OHIO VOTER REGISTRANTS FROM THE ROLLS BASED ON COMPUTER MATCHING VIOLATES HAVA AND THE NVRA**

As noted above, HAVA restricts the authority of states to remove registrants from the voter rolls in order to ensure that eligible voters are not wrongly deleted. As applied to Ohio, HAVA specifically provides that voter removal must be conducted “in accordance with the provisions of the National Voter Registration Act of 1993.” 42 U.S.C. 15483(a)(2)(A)(i).

The essence of plaintiffs’ claim is that this Court should order that certain voter registrations be invalidated for purposes of conducting the November 4 election, i.e., those which do not yield a computer match and which thereafter are not rehabilitated by election officials or by the voter affirmatively determining that the mismatch was the result of computer database snafu. Certain registrants, in other words, would have their voter registration removed from the registration list utilized for purposes of conducting the November 4 election.

There is nothing, however, in the National Voter Registration Act that permits the removal of registered voters from the registration list based on computer matching. 42 U.S.C. § 1973gg-6. Indeed, precisely to guard against disfranchisement through hasty removals of voters from registration lists, the NVRA requires that “any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters” must be completed at least 90 days prior to a federal election. 42 U.S.C. § 1973gg-6(c)(2)(A).

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<sup>10</sup> Since this report was issued, a number of states have further amended their practice with regard to the use of database matching. Cal. Code Regs., tit. 2, §§ 20108.38(c), 20108.65(e), 20108.71; Md. Regs. Code tit. 33, §§ 33.05.04.04(A)(3), (B)(3)-(4), 33.05.04.05(C)(5); N.C. Gen. Stat. § 163-166.12(b2); Alert Re: Driver’s License and Social Security Data Comparison Processes Required by the Help America Vote Act (HAVA), available at <http://tinyurl.com/36o2lt> (Pennsylvania); Election Advisory No. 2006-19, at <http://tinyurl.com/2stlcp> (Texas); Washington Ass’n of Churches, No. CV06-0726 (W.D. Wash. 2006) (stipulated final order and judgment), available at [http://www.brennancenter.org/page/-/d/download\\_file\\_48236.pdf](http://www.brennancenter.org/page/-/d/download_file_48236.pdf).

*See Association of Community Organizations for Reform Now v. Ridge*, 1995 WL 136913, at \*9 (Pennsylvania law permitting removal of voters' names up to 15 days before election violated NVRA). Accordingly, the relief requested by plaintiffs is prohibited by HAVA and the NVRA.

**IV. GRANTING THE REQUESTED RELIEF COULD SIGNIFICANTLY INTERFERE WITH OHIO'S CONDUCT OF THE NOVEMBER 4, 2008 ELECTION**

There not only are strong legal reasons for denying the requested temporary restraining order, there are strong equitable reasons as well.

Election officials are in the final stages of preparing for the November 4, 2008 election and, if they were required now to undertake computer matching for all persons who registered on or after January 1, 2008 they likely would be forced to divert significant resources to the matching effort. This would not only involve triggering a computer matching routine for the registrants at issue, but also would involve individual review of thousands of computer mismatches to attempt determine the reason for the mismatches, and further could involve a massive effort to notify thousands of individual registrants of the matching issue that has arisen with regard to their voter registration. This diversion of resources could well leave election officials unprepared on election day to administer this most important election.

Ohio voters also would likely be significantly confused about their right to vote if an eleventh hour effort were undertaken to match registration records and restrict the right to vote of registrants who are the subject of a computer mismatch. Many of the affected voters participated without hindrance in the Ohio presidential primary earlier this year. The sudden imposition of any restriction on their right to vote, with little or no notice, would inevitably cause much confusion and consternation, and could lead to chaos at the polls.

After the election, Ohio election officials would have a limited time to declare the final results. However, this effort would be significantly hindered if they were faced with deciding whether to count thousands of provisional ballots cast in that manner solely because of computer matching problems, and thus, in turn, were potentially obligated to attempt to review the reasons for the thousands of computer mismatches.

The Supreme Court has recently warned about the danger to the election process that may arise when a court orders a change in election procedures immediately prior to an election. *Purcell v. Gonzalez*, 127 S.Ct. 5 (2006). The Court stated: “Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.” *Id.* at 7.

#### CONCLUSION

For the foregoing reasons, plaintiffs’ renewed motion for a temporary restraining order should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing service on this 7<sup>th</sup> day of October, 2008.

/s/Carrie L. Davis  
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