IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPUBLICAN PARTY OF OHIO, et al.)
)   **Case No. 08-4322**

Plaintiff-Appellee,   )

)

v.   )

)

JENNIFER BRUNNER,   )
Ohio Secretary of State   )

)

Defendant-Appellant.   )

BRIEF OF AMICUS CURIAE ACLU OF OHIO, PROJECT VOTE, NEOCH, 1MATTERS, DANIEL GEORGE, AND SHERIE PENIX IN SUPPORT OF APPELLANT BRUNNER'S EMERGENCY MOTION TO VACATE OR STAY THE DISTRICT COURT'S TEMPORARAY RESTRAINING ORDER

INTRODUCTION

This is an appeal from an unprecedented order entered by the District Court for the Southern District of Ohio which, with less than four weeks remaining before the November 4, 2008 election, would retroactively cast doubt on the validity of thousands of voter registrations properly submitted by Ohio residents since January 1, 2008. The district court asserts that its order was made necessary by the purported failure of the Ohio Secretary of State to comply with the database matching provisions of the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15301 *et seq*. Specifically, the district court's order is premised on its conclusion that HAVA requires that states utilize database matching to verify the eligibility to vote of voter registrants, something the State of Ohio has declined to do. This reading of HAVA is flatly incorrect and, indeed, the relief ordered by the district court will place the State of Ohio in violation of HAVA and the National Voter Registration Act ("NVRA"), 42 U.S.C.§ 1973gg *et seq*.

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 to address a different and unrelated concern that Congress identified when it enacted this statute: the fact that state registration lists often included numerous instances of duplicate registration entries for the same individuals. In expanding HAVA's database matching requirement to apply to voter eligibility, the district court ignored the language of the statute as well as the holdings of other federal courts that have considered the specific question presented by this case. Indeed, the one decision that the district court cited in support of its holding, *Washington Ass'n of Chuches v. Reed*, 492 F. Supp.2d 1264 (W.D. Wash. 2006), actually ruled in a manner diametrically opposed to the decision of the district court below.

Moreover, federal statutes 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 the district court's order would 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 ordered by the district court will place the State of Ohio in violation of HAVA and the

NVRA.[1]

Amici respectfully urge this Court to grant Appellant Brunner's request to vacate or grant

an emergency stay of the district court's order.

ARGUMENT

I.   THE DISTRICT COURT'S ORDER REQUIRES THAT THE STATE OF OHIO UTILIZE DATABASE MATCHING TO VERIFY THE ELIGIBILITY TO VOTE OF EXISTING REGISTRANTS, AND TO SET IN MOTION A PROCESS BY WHICH EXISTING REGISTRANTS MAY BE DENIED THE RIGHT TO VOTE

The Temporary Restraining Order entered by the district court takes dead aim at the

eligibility to vote in the November 4, 2008 election of thousands of Ohio residents who have

registered to vote since January 1, 2008, many of whom voted without hindrance in the state's

presidential primary earlier this year. It requires the Ohio Secretary of State, in the next seven

days, to review the voter registration of all Ohio residents who have registered since January 1,

2008 by identifying all instances in which a state computer is unable to match these voters'

registration records with computer records contained in the state's driver's license database or

contained in the Social Security Administration database. The district court order further

specifies that, once mismatches are identified by the computer, the county boards of election are

to "take appropriate action." The court does not explicitly state what that action should be, but

the court, in its Opinion, concluded that HAVA "requires matching for the purpose of verifying

the identity of the voter before counting that person's vote." Slip op. at 11. Accordingly, it

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[1]   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.

appears that the district court is suggesting that the State of Ohio preclude from counting the votes of all persons who registered since January 1, 2008 with respect to whom there exists an unresolved mismatch between the voter's registration record and a record for the same voter located in either the state's driver's license database or the Social Security Administration database. This would be the case whether or not the affected registrants are allowed to cast provisional ballots.

Thus, the district court's order will lead to confusion and intimidation among newly registered voters by questioning the validity of all registrations since January 1, 2008, possibly including those of voters whose registrations have been <u>confirmed</u> by election officials and of voters who have lawfully voted in the primary election and/or through absentee ballots in this election in compliance with state and federal law.

II. **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.

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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

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* Brennan Center for Justice, *Making the List: Database*

Matching and Verification Processes for Voter Registration, available at

http://tinyurl.com/66t6r8 (last accessed October 10, 2008). 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.*[2]

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[2] 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] discrepanc[ies] 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*

The end result is that database matching generates a high rate of putative "no matches." 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.[3] Through April of 2006, 18 percent of applications in Los Angeles County did not yield a successful computer match.[4] 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.[5] 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.[6]

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

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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.

[3] *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.

[4] *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.

[5] *See* Borthwick Decl. ¶ 12 & Ex. F.

[6] 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 made up 13 percent of the applicants but were 26 percent of those not matched. White

voters, on the other hand, constituted 66 percent of the applicant pool but only 17 percent of the

mismatched applicants.[7]

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

Contrary to the district court's 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 the district court 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.

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

The district court's 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.[8]

Moreover, the district court's reading of HAVA has been specifically rejected by the two courts that previously have addressed the HAVA database matching provisions. 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-in registrants who are first-time voters). Similarly, in *Washington Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1268 (W.D. Wash. 2006), the district court stated that "[i]t 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

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[8] 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).

as a restriction on voter eligibility." The district court below sought to enlist the *Washington Ass'n of Churches* decision to its side, quoting that district court as saying that "'HAVA requires matching for the purpose of verifying the identity of the voter before casting or counting that person's vote.'" Slip op. at 9. While this is an accurate quotation from the opinion, what the district court below failed to acknowledge is that the Washington district court was referring only to the narrow class of voters who registered by mail and are first-time voters, and did so to buttress its conclusion that HAVA does not require that states conduct database matching to verify voter eligibility for voter registrants in general.[9]

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. Any assertion to the contrary by the district court below is simply the personal and unsupported opinion of that court.

Finally, the invalidity of the district court's holding 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

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[9] 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 the interpretation of HAVA by the district court below 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.

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

Matching and Verification Processes for Voter Registration* (2006), 16-17, *available at*

http://tinyurl.com/66t6r8.[10]

**IV.   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 the district court's order is that Ohio should invalidate the voter

registrations of certain Ohio residents for purposes of conducting the November 4 election, i.e.,

those registrations which do not yield a computer match where the state is unable to

affirmatively conclude 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

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[10] 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.

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). *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 ordered by the district court would place the state of Ohio in violation of HAVA and the NVRA.

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

Not only are there strong legal reasons for vacating or granting an emergency stay of the 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 review all computer mismatches for all persons who registered since January 1, 2008, they likely would be forced to divert significant resources to the matching effort. Given the mismatch percentages cited above, it is highly likely that the Ohio state computer will be unable to successfully match a significant percentage of the persons who registered since January 1. Local election officials would then need to individually review the thousands of computer mismatches to attempt to determine the reason for the mismatches. Furthermore, they may then need to engage in 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, *amici* respectfully request this Court grant Appellant Brunner's motion to vacate or stay the district court's order.

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 10th day of October, 2008.

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