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Kevin J. Kennedy
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Wisconsin Government Accountability Board
17 West Main Street, Suite 310
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Re: Proposed Emergency Rule re Provisional Ballots and Failed HAVA Checks

Dear Kevin,

We are writing with respect to the proposed amendments to GAB administrative rules 3.01 and 3.05 (set forth at p. 42 of the board materials), which we understand are to be discussed at tomorrow's meeting. We are concerned that the proposed amendments, which implement changes not required under the Help America Vote Act of 2002 ("HAVA"), could result in a significant number of eligible voters not having their votes counted in November.

The board materials suggest that the proposed rule changes would prevent voters from casting a regular ballot if there is no "complete match" between the voter's name, date of birth, and identifying number (either driver's license number, state ID number, or Social Security number) and the corresponding record in the state motor vehicle or Social Security database, and the voter is unable to present proof of residence. "Unmatched" voters who don't have a current proof of residence would only be eligible to cast a provisional ballot, and that ballot would not be counted unless the voter was able to present proof of residence to election officials by 4:00 pm the day after the election.

As a legal matter, this procedure is not required by HAVA. True, Section 303(a) of HAVA, 42 U.S.C. § 15483(a)(5), requires that states attempt to "match" information submitted by new registration applicants against records in the state motor vehicle or Social Security Administration databases. But Section 303 does not require that voters be denied registration (and a regular ballot) if there is no successful match: the provision is

internal recordkeeping requirement for states, not a measure intended to penalize voters when the state cannot match the information on their applications. This conclusion is confirmed by HAVA's Section 303(b), 42 U.S.C. § 15483(b), which imposes an identification requirement on a select, narrow group of "unmatched" voters – those who are first-time voters who registered by mail. Voters in this narrow category are registered, and entitled to cast a regular ballot if they present any of a broad range of documentary identification. Only if they are unable to present any identifying information are they required to cast a provisional ballot. The fact that Congress prescribed an identification requirement on a limited category of voters indicates that it didn't mean to require ALL voters whose information can't be matched, and who lack identifying information when they appear at the polls, to be relegated to provisional voting status. In contrast, the board materials imply that all voters – not simply first-time, mail-in registrants – will be subjected to HAVA's matching regime and prevented from casting regular ballots if they do not match.

As a practical matter, imposing such a requirement is likely to result in significant problems. As explained in the Brennan Center's 2006 report *Making the List*,¹ there are several reasons why, even when a voter is eligible, provides complete and accurate information, and lives at his or her stated address, attempts to "match" the voter produce "false negatives" – i.e., matches that fail even though there is a record in the motor vehicle database that corresponds with the applicant. Among the reasons for these failed matches are data entry errors, typos, the use of married and maiden names, the transposition of names (e.g., Yao Ming instead of Ming Yao), transliteration inconsistencies (e.g., Mohammed instead of Muhammed), the use of nicknames (e.g., Sam instead of Samuel), and difficulties with hyphenated or compound last names (e.g., Gabriel Marquez instead of Gabriel Garcia-Marquez). Because of the flaws inherent in all matching protocols, a federal judge struck down a Washington State law that prevented unmatched voters from registering and casting regular ballots, after concluding that the statute violated HAVA and the Voting Rights Act.²

Many of the errors associated with matching are more likely to occur with ethnic minority voters, raising the risk of differential impacts if access to a regular ballot is tied to matching. And although there is a backstop for voters who don't match under the proposed rule changes – their right to show proof of residence – many voters will not understand they must present such evidence to have their votes count, some voters will not have such proof at hand, and voters who have been on the rolls for a while without incident will not anticipate that they must bring proof of residence to the polls in order to

¹ Justin Levitt, Wendy R. Weiser and Ana Munoz, *Making the List: Database Matching and Verification Processes for Voter Registration* (2006), at <http://tinyurl.com/66t6r8>.


² See *Washington Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1271 (W.D. Wash. 2006). A federal judge in Florida reached a similar conclusion regarding Florida's matching law, see *Fla. State Conference of the NAACP v. Browning*, No. 07-402, *Order Granting Preliminary Injunction* (N.D. Fla. Dec. 18, 2007), and while a divided panel of the Eleventh Circuit concluded that HAVA did not prohibit Florida's "no match/no vote" law, it left open the possibility that the statute was unconstitutional, see 522 F.3d 1153 (11th Cir. 2008).


cast a regular ballot that will be counted. Making a second trip to election offices by 4:00 p.m. the next day will be difficult or impossible for some.


As you know, Wisconsin got relatively high marks in the report that Professor Tokaji and his colleagues at the Moritz College of Law published last year, *From Registration to Recounts: The Election Ecosystems of Five Midwestern States*.³ Part of the reason was the very small number of provisional ballots cast in the state. We are concerned that, if the proposed rules are adopted, it could result in a significant increase in the number of provisional ballots. This in turn would have two negative consequences: *First*, it would mean a greater likelihood that eligible voters won't have their votes counted. *Second*, it would increase the likelihood of contested elections, since provisional ballots present one of the biggest opportunities for post-election litigation in the post-HAVA world. With Wisconsin sure to be a battleground state in this year's presidential election, an increase in provisional ballots is something that should be avoided, particularly when (as here) it is easily avoided. We fear, however, that the proposed amendments will have the opposite effect.

Please feel free to contact any of us if you'd like to discuss these issues any further. We apologize for this last minute communication, but we only learned of the proposed amendments recently, and wanted to get you our thoughts as quickly as possible. If possible, we would appreciate your sharing this communication with the GAB before tomorrow's meeting.

Very truly yours,


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³ Steven F. Huefner, Daniel P. Tokaji & Edward B. Foley with Nathan A. Cemenska, *From Registration to Recounts: The Election Ecosystems of Five Midwestern States* (2007), at <http://tinyurl.com/6cce6w>.