

Case No. 08-4322

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Ohio Republican Party, *et al.*,
Plaintiffs-Appellees,

v.

Jennifer Brunner,
Ohio Secretary of State,
Defendant-Appellant.

On Appeal from the United States District Court,
Southern District of Ohio
Case No. 2:08CV913

**BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL
OF LAW AS AMICUS CURIAE IN SUPPORT OF APPELLANT'S
EMERGENCY MOTION TO STAY OR VACATE TEMPORARY
RESTRAINING ORDER**

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The Brennan Center for Justice at NYU School of Law (“Brennan Center”) respectfully submits this brief amicus curiae in support of Appellant’s Emergency Motion to Stay or Vacate Temporary Restraining Order.

INTEREST OF THE AMICUS

The Brennan Center for Justice at NYU School of Law (the “Brennan Center”) is a nonpartisan institute dedicated to a vision of effective and inclusive democracy. Through its Voting Rights and Elections Project, the Brennan Center seeks to protect rights to equal electoral access and full political participation. The Brennan Center has extensively addressed issues relating to barriers that prevent citizens from registering and voting, and has participated as counsel or amicus in a number of federal and state cases involving voting and elections issues.

Of particular relevance here, the Brennan Center has extensively studied and litigated issues relating to the database matching procedure provided by the Help America Vote Act of 2002 (“HAVA”). The Brennan Center authored the only comprehensive study of the states’ implementation of HAVA’s data matching provisions, *see* Justin Levitt, Wendy R. Weiser & Ana Munoz, *Making the List: Database Matching and Verification Processes for Voter Registration* (2006), *available at* <http://tinyurl.com/66t6r8>, and has advised the elections agencies and legislatures of numerous states on developing HAVA-compliant matching policies. In addition, the Brennan Center served as plaintiffs’ counsel in the only two cases

to have considered the argument Appellees present here — whether HAVA requires a successful database “match” of a voter’s information before that voter’s ballot may be counted — an argument squarely rejected in both cases. *See Wash. Assoc. of Churches v. Reed*, 492 F. Supp. 2d 1264 (W.D. Wash, 2006); *Fla. NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008).

Amicus submits this brief to provide additional context in support of Appellant’s argument that the district court erred in concluding that HAVA requires a successful database “match” before a citizen’s vote may be counted.

ARGUMENT

Appellees argue, and the district court found, that the Help America Vote Act of 2002 “requires [computerized database] matching for the purpose of verifying the identity and eligibility of [a] voter before counting that person’s vote.” Op. at 8-9. That argument is wrong. Indeed, the argument was previously considered by two federal courts before it was presented to the district court here, and both courts squarely — and properly — rejected it.

In the first case to consider HAVA’s matching requirement, *Washington Association of Churches v. Reed*, plaintiffs challenged a Washington State law that made a successful database match a precondition to registering and voting. The State responded by arguing that its policy was “enacted specifically to comply with HAVA,” and that HAVA compelled states to condition registration and voting on

successful database matching. 492 F. Supp. 2d at 1266. The court unambiguously rejected the State’s position, holding not only that HAVA did not compel states to adopt such policies, but that, in fact, it prohibited them. *See id.* at 1268-70.

The *Reed* court noted, correctly, 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.*” *Id.* at 1268 (emphasis added). It explained that, under HAVA, a successful match is but one of two alternative means to verifying the identity of new voters who registered by mail. The other method, HAVA’s default verification mechanism, is to require documentary identification (“ID”). *See id.*; *see also* 42 U.S.C. § 15483(b)(2)(A), (3)(A). The court explained that making either method of identity verification — documentary ID or matching — the sole method by which a voter may verify her identity before her vote is counted would violate HAVA by eliminating the voter’s second option. *See id.* at 1269 (under HAVA “‘matching’ serves as a substitute for voter ID”); *see also id.* (noting that sections of “HAVA would be rendered moot if matching was a prerequisite to registering”).

Because Washington’s “no match, no vote” law violated HAVA — as well as Section 1971 of the Voting Rights Act — by conditioning the right to vote on a successful computer “match,” the court struck down the law. Rather than appealing, Washington entered a consent decree under which it abandoned its

policy of denying registration — and hence, the ability to cast a ballot that is counted — to voters who were not successfully matched. *See Washington Ass’n of Churches v. Reed*, No. CV06-0726 (W.D. Wash. 2006) (Stipulated Final Order and Judgment), *available at* http://www.brennancenter.org/page/-/d/download_file_48236.pdf.

In the second case to consider the issue before this Court, plaintiffs challenged a Florida law that, like Washington State’s, prevented voters who were not matched from casting ballots that were counted. *See Fla. NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008). Recognizing, as the *Reed* court did, that HAVA plainly did not compel states to make a successful match a precondition to casting a valid ballot, Florida conceded the point. *See Fla. NAACP v. Browning*, No. 07-402 (N.D. Fla. 2007) (Secretary of State’s Motion to Dismiss), at 9 (“Having established the matching process, Congress left each state free . . . to . . . prescribe the process following of [sic] a failed match.”). Thus, Florida argued that HAVA did *not* prescribe the consequences of a failed match, but instead “entrust[ed] these policy determinations to the states,” and “empower[ed] states to determine the consequences of a failure to verify an applicant’s identifying information.” *Id.* at 10. Abandoning any effort to argue that HAVA *required* states to reject voters whose information was not successfully matched, Florida argued simply that

HAVA did not *prohibit* states from doing so, as long as there was an independent basis for doing so under state law.

The Eleventh Circuit agreed with the State’s position. It concluded that HAVA permitted, but did not compel states to use database matches as a precondition for registration and voting. It noted that, under HAVA, “[a] voter can verify her identity *either* by presenting . . . acceptable identification *or* by matching up one of her identification numbers.” 522 F.3d at 1169. Thus, while the Eleventh Circuit accepted the argument that a state could, under state law, make a database match a precondition to registration or voting, it made amply clear that HAVA, itself, did not do so. *See, e.g., id.* at 1172 (“There is nothing at all in [HAVA] that discusses the requirements and procedures for establishing eligibility and identity of in-person registrants.”).

Though *Reed* and *Florida NAACP* came to different conclusions on whether HAVA *prevents* states from independently requiring that voters be matched before they cast ballots that are counted, they reached the same conclusion on the issue presented here, and unambiguously rejected the conclusion reached by the district court: that HAVA requires states to reject the ballots of unverified voters. As explained below, on this point of agreement, the *Reed* and *Florida NAACP* courts were unavoidably correct.

I. HAVA DOES NOT REQUIRE A SUCCESSFUL DATABASE MATCH AS A PRECONDITION TO COUNTING A VOTER’S BALLOT

HAVA was passed after the 2000 Presidential Election, in large part to ensure that eligible voters would not be left off the voting rolls by mandating certain uniform practices aimed at eliminating bureaucratic barriers to voting. It requires states to attempt to match numbers provided by applicants not as an eligibility requirement, but to facilitate orderly record keeping: one unique number for each voter. Under HAVA, voters need not be successfully matched in order to register and have their ballots counted: new voters without a driver’s license or Social Security number, and all of the existing voters on the rolls, are simply assigned a unique number by the state.

As demonstrated below, no provision of HAVA requires a state to reject a voter’s ballot if the “match” should fail or the voter’s record keeping number is not “verified.” In all but a handful of outlier states, matching and number verification are not preconditions to voting. And various states that initially misinterpreted HAVA by making such verification a precondition to registration have since changed their laws, either voluntarily or because of court order. *See Reed*, 492 F. Supp. 2d at 1271.¹

¹ *See also* 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

A. Under HAVA, Matching Serves an Administrative Record-Keeping Function, Not as an Eligibility Requirement

HAVA seeks to reduce the burdens on voting caused by sloppy and incomplete voter registration lists. For decades, voters were turned away from the polls or discouraged from voting due to neglected and poorly maintained voter registration lists. To remove this bureaucratic barrier to voting, Section 303(a) of HAVA (“Section 303(a)”), 42 U.S.C. § 15483(a), requires each state to implement a “single, uniform, official, centralized, interactive computerized statewide voter registration list” that is required to be “the single system for storing and managing the official list of registered voters throughout the State.” *Id.* § 15483(a)(1)(A) and (i).

To facilitate the orderly maintenance of the new registration lists, Congress required states to “assign[] a unique identifier to each legally registered voter in the State.” *Id.* § 15483(a)(1)(A). These unique identifiers help states keep track of voters who move and re-register in a new location, and reduce the possibility of duplicates. The easiest approach is to use an identifier that the individual already has. Therefore, HAVA states that an applicant for registration must provide her driver’s license number, or if she has none, the last four digits of her Social

at <http://tinyurl.com/36o2lt> (Pennsylvania); Election Advisory No. 2006-19, at <http://tinyurl.com/2stlcp> (Texas); *Washington Ass’n of Churches v. Reed*, No. CV06-0726 (W.D. Wash. 2006) (stipulated final order and judgment), *available at* http://www.brennancenter.org/page/-/d/download_file_48236.pdf.

Security number. *Id.* § 15483(a)(5)(A)(i)(I) and (II). Applicants without either are simply assigned a number, and are registered and permitted to vote without any further effort. *Id.* § 15483(a)(5)(A)(ii).

HAVA also directs states to attempt to “match” the number provided by a voter with records in other state databases, to ensure confidence that the numbers are accurately assigned; otherwise, in the event of a mistake, two records might end up labeled with the same “unique” number. *Id.* § 15483(a)(5)(B)(i).

This “matching” provision was intended as an administrative safeguard for “storing and managing the official list of registered voters,” and not as a restriction on voter eligibility. *See id.* § 15483(a)(1)(A)(i). That is why HAVA was written. It imposes an administrative function on the states: “a unique identifier is assigned to each legally registered voter in the State.” *Id.* § 15483(a)(1)(A)(iii). It does not, however, provide that the unique identifier must be verified before a voter’s ballot may be counted.

If the number provided by an eligible voter cannot be verified, the correct consequence is to assign the voter a different unique number, not to reject the registration. Thus, new registrants with no driver’s license or Social Security number are simply assigned a unique number and placed on the computerized list of registered voters, without any subsequent “matching.” *Id.* § 15483(a)(5)(A)(ii). As the court in *Reed* explained, it is the assignment of a unique identifying number

to each new voter — not the match or verification of the number provided on an application — that is required under Section 303(a). *See* 492 F. Supp. 2d at 1268.

“Legislative history confirms that it is the assignment of some kind of unique identifying number to the voter that is the requirement of § 15483(a)(1)(A)(i), not the ‘match.’” *Id.* at 1268-69. Senator Bond, the chief Senate Republican sponsor of HAVA, explained that a unique identifying number is assigned to each new registrant to create dependable lists, not to impose an obstacle to registering or voting:

The conferees agree that a unique identification number attributed to each registered voter will be an extremely useful tool for State and local election officials in managing and maintaining clean and accurate voter lists. It is the agreement of the conferees that election officials must have such a tool.

148 Cong. Rec. S10488-02, *S10490 (daily ed. Oct. 16, 2002) (emphasis added); *see also* H.R. Rep. 107-329(I), at 36 (2001) (unique identifier “will be used to assure that list maintenance functions are attributed to the correct voter”). Because Congress did not intend to create a new eligibility requirement when it enacted HAVA’s statewide registration list provision, the district court’s conclusion cannot stand.

B. HAVA's Identification Requirements Make Clear that It Does Not Mandate Database Matching as an Eligibility Requirement

In addition to its record keeping function, verifying the number on a registration form has another purpose under HAVA that proves it was not intended to be a precondition to counting a voter's ballot. Under Section 303(b) of HAVA ("Section 303(b)"), 42 U.S.C. § 15483(b), confirming the number provides an alternative means of verifying the identity of certain voters: first-time voters who register by mail. Any reading of HAVA that would make a successful match a precondition to counting a voter's ballot cannot be squared with the identification provisions of Section 303(b).

Section 303(b) requires that in all federal elections, a first-time voter who registers by mail must verify her identity before voting a regular ballot. She may do so by showing some form of identification. *See* 42 U.S.C. § 15483(b)(2)(A), (3)(A). Or her identity may be verified if the number on her registration application has been matched to an existing state record — in which case she need not show documentary identification. *Id.* § 15483(b)(3)(B).

Thus, matching "serves as a substitute for voter ID," *Reed*, 492 F. Supp. 2d at 1269, not a precondition to having a vote counted. Congress understood that some voters will not be matched — but still can cast a regular ballot that is counted by showing their ID. For those who do match, no ID is required. As Senator Bond put it, "[i]n lieu of the individual providing proof of identity, States may also

electronically verify an individual’s identity against existing State databases.” 148 Cong. Rec. S10488-02, *S10489 (daily ed. Oct. 16, 2002) (emphasis added). If Congress intended that every voter be matched as a prerequisite to counting their ballots, the ID provision would make no sense and would be superfluous — rendering the district court’s opinion untenable. Thus, the district court’s Order, compelling the Secretary of State to deny voters whose records have not been matched the right to cast a regular ballot that is counted, would result in a violation of the rights of first-time Ohio voters who registered by mail to have votes counted if they show identification.

That the district court’s analysis would require a successful match not just from first-time voters who registered by mail, but also from in-person registrants, demonstrates further that it is inconsistent with HAVA. HAVA prescribes a verification requirement (which may be accomplished by matching *or* documentary ID), only for first-time, mail-in registrants. *See* 42 U.S.C. § 15483(b)(2)(A), (3)(A). Appellees contend and the district court concluded, however, that HAVA imposes an absolute matching requirement on all registrants, whether they registered by mail or in person. This conclusion finds support nowhere in HAVA’s text, confirming again the district court’s serious mis-reading of the statute. *See Fla. NAACP*, 522 F.3d at 1172 (“There is nothing at all in

[HAVA] that discusses the requirements and procedures for establishing eligibility and identity of in-person registrants.”).

* * *

There is good reason why Congress chose not to make a successful database match a precondition to casting a ballot that counts, and why virtually all other states have rejected doing so: attempts to match voter data routinely fail — up to 30% of the time — for reasons unrelated to voter qualification. Matches fail even when records corresponding to the same person are present in both data sets being compared because of trivial errors like typos, data entry errors, inconsistent treatment of hyphenated last names, and the use of a married name in one database and a maiden name in another.

Since Florida recently re-implemented its no match, no vote policy on September 8th, approximately 15% of all attempted matches have failed, blocking at least 7,469 voters from the registration rolls.² In the first six months of 2006, before its “no match, no vote” law was enjoined, Washington had a failed match rate of 16% statewide, and up to 30% in King County, which includes Seattle.³ Through April of 2006, 18% of applications in Los Angeles County failed to

² Aaron Deslatte, *More Voters Snagged by No Match*, Orlando Sentinel, Oct. 6, 2008, at http://blogs.orlandosentinel.com/news_politics/2008/10/more-voters-sna.html.

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

“match.”⁴ Nearly 20% 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

CONCLUSION

The district court’s Order, by imposing a misguided matching policy in Ohio that is not compelled by HAVA, not contemplated by state law, and rejected by virtually every other state, would mean the disenfranchisement of thousands of eligible citizens as a result of typos and other minor mistakes. For the foregoing reasons, this Court should grant Appellant’s Emergency Motion To Stay Or Vacate Temporary Restraining Order.

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

⁵ See Borthwick Decl. ¶ 12 & Ex. F.

October 10, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Fed. R. App. P. 32(a)(7)(b), because it contains 2750 words of Times New Roman proportional type, in 14-point font, as determined by the word count function of Microsoft Word 2003, which was used to prepare this brief.

/s/ Christopher P. Thorman
Christopher P. Thorman

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed electronically on October 13, 2008. Notice of the filing will be sent by the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/ Christopher P. Thorman

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