

The Honorable Ricardo S. Martinez

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON ASSOCIATION OF CHURCHES,
as an organization and representative of its
members; WASHINGTON ASSOCIATION OF
COMMUNITY ORGANIZATIONS FOR
REFORM NOW (ACORN), as an organization and
representative of its members; ORGANIZATION
OF CHINESE-AMERICANS – GREATER
SEATTLE CHAPTER, as an organization and
representative of its members; CHINESE
INFORMATION & SERVICE CENTER, as an
organization and representative of its clients;
FILIPINO AMERICAN POLITICAL ACTION
GROUP OF WASHINGTON, as an organization
and representative of its members; KOREAN
AMERICAN VOTERS ALLIANCE, as an
organization and representative of its members;
SERVICE EMPLOYEES INTERNATIONAL
UNION (SEIU) – LOCAL 775, as an organization
and representative of its members; and
WASHINGTON CITIZEN ACTION, as an
organization and representative of its members,

Plaintiffs,

vs.

SAM REED, in his official capacity as Secretary of
State for the State of Washington,

Defendant.

NO. CV06-0726 RSM

**PLAINTIFFS’
SUPPLEMENTAL MOTION
FOR A PRELIMINARY
INJUNCTION**

**ORAL ARGUMENT:
JULY 28, 2006, 1:30 p.m.**

*Plaintiffs’ Supplemental Motion for a
Preliminary Injunction (CV 06-0726 RSM)*

HILLIS CLARK MARTIN &
PETERSON, P.S.

500 Galland Building, 1221 Second Ave
Seattle WA 98101-2925
206.623.1745; fax 206.623.7789

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PRELIMINARY STATEMENT

1
2 Discovery has demonstrated precisely what plaintiffs said would require injunctive
3 relief: Washington State’s voter registration “matching” law has caused the unnecessary
4 and arbitrary disenfranchisement of eligible citizens. After deposing ten election officials
5 and examining piles of state and county voter registration records, there is no dispute that
6 Washington’s “no match, no vote” law is an error-ridden process that prevents eligible
7 citizens from being registered to vote – and will continue to do so right through Election
8 Day.

9 Defendant does not contest the evidence of data entry errors, computer glitches,
10 bureaucratic mistakes, and false negatives that was submitted with plaintiffs’ motion. He
11 cannot contest that evidence. His own representatives have now admitted that “matching”
12 information from registration applications with information in the driver’s license and Social
13 Security databases is an unreliable exercise that cannot be trusted when eligibility is at stake.
14 While the State has implemented some human “override” measures, no amount of double-
15 checking can overcome the errors built into the system. If a data entry operator mis-typed
16 Your Honor’s name on a registration application, as defendant has done on the cover of his
17 brief, there would be no “match” and the application would be forwarded to the county for
18 follow-up – along with the other 16% of applications that the State has failed to match.

19 But defendant has done more than just admit the problems created by making
20 database matching a precondition to registration. On June 28, 2006, the Secretary of State
21 announced a new regulation that seeks to mitigate the harm being caused to the franchise.
22 Unfortunately, it is a band aid, not a cure. It grants county officials discretion to override
23 erroneous computer “mismatches,” but only in some cases and only for some applicants. It
24 also permits county officials, in some situations, to accept a utility bill or other form of ID in
25 lieu of matching – thereby undermining defendant’s argument that HAVA compels the State
26 to use matching as a requirement for registration. Thus, while this new regulation is no
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1 solution to the matching problem, it is a striking admission that matching does not work and
2 that there is no federal mandate to make matching a barrier to registration.

3 The counties too have been scrambling to find ways to avoid rejecting “un-matched”
4 registrants, as the State law now requires. Some are simply not complying with the law.
5 Some are going to extra lengths to try to clear up mistaken mis-matches. Some are bending
6 the rules or inventing new ones. Some are just improvising and waiting to see what
7 happens. All of this testimony goes to show that no one on the State or county level is
8 comfortable with database matching as a prerequisite to voter registration. And despite
9 good intentions and best efforts, the Washington matching requirement is leading to a
10 patchwork of inconsistent county practices, none of which is adequate to prevent the
11 disenfranchisement of eligible voters. Indeed, the lack of any uniform state policy for
12 dealing with the fallout from the matching process creates the additional problem of unequal
13 access to voter registration across the State, an outcome forbidden both by HAVA and *Bush*
14 *v. Gore*, 531 U.S. 98 (2000).

15 Defendant has two principal responses. Neither is correct. And neither is a ground
16 for denying a preliminary injunction.

17 *First*, defendant argues that the State has no choice because HAVA requires the
18 states to reject applicants who do not match, and that the U.S. Department of Justice
19 (“DOJ”) has said so. But defendant’s statutory interpretation consists of a single sentence
20 that is demonstrably false. Defendant contends, purporting to quote the text of HAVA, that
21 a registrant whose information is not matched “may not be accepted or processed.” (Def.
22 Br. at 7.) Those quoted words do appear in HAVA, but not in connection with matching.
23 Defendant lifted those words from a different provision relating to incomplete applications.
24 Defendant offers no other defense based on the text of HAVA. Nor does defendant respond
25 to plaintiffs’ text-based interpretation, which is supported by HAVA’s legislative purpose
26 and history.

27
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1 As for defendant's heavy reliance on the supposed views of the DOJ, the Court
 2 already knows that the U.S. Government claims no interest in this case or its outcome. As is
 3 now clear, the DOJ did not tell the State what to do. And it is increasingly apparent that
 4 there is no DOJ policy mandating "matching" as a hurdle to voter registration. HAVA
 5 speaks for itself. As defendant's Assistant Director of Elections admitted when asked
 6 whether the text of HAVA compels the State to reject un-matched applicants: "It does not
 7 spell that out." (Ex. 1 (Blinn) at 132:15.¹)

8 *Second*, defendant argues that the number of citizens adversely impacted is
 9 insignificant – only 135. Apart from the fact that defendant has under-counted and the true
 10 number of disenfranchised voters is much higher, an individual's vote may not be brushed
 11 aside so lightly. The Constitution forbids it. The case law forbids it. And HAVA – passed
 12 after the razor thin margin in the 2000 Presidential Election – forbids it. After certifying a
 13 gubernatorial election two years ago decided by only 133 votes, the Secretary of State
 14 cannot dismiss the denial of his fellow citizens' right to vote. No error rate is acceptable
 15 when the only reason for it is a misinterpretation of a federal law that was adopted for the
 16 very purpose of ensuring that voters are protected against ministerial errors.

17 The question on this motion is whether HAVA, the Voting Rights Act and the
 18 Constitution permit Washington to use failed database matches as a reason for preventing its
 19 residents from registering and voting. The answer lies in the State's actual experience, and
 20 its feeble legal argument. In adopting HAVA, Congress did not intend for the fundamental
 21 right to vote to founder on the vagaries of computer technology and a hodgepodge of
 22 arbitrary and ineffective stop-gap measures at the local level. Congress intended just the
 23 opposite: for the states to create uniform, centralized and computerized voter registration
 24 lists which, over time, would minimize the historically unpredictable practices of local

25 _____
 26 ¹ Unless otherwise noted, all documents and deposition transcript excerpts are annexed as exhibits to the
 27 Supplemental Declaration of Sarah A. Dunne in Support of Plaintiffs' Supplemental Motion for a Preliminary
 Injunction and are cited as "(Ex. __ at __)" and "(Ex. __ ([witness's name or county name]) at __)," respectively.

1 officials that at times cause the disenfranchisement of eligible voters. Yet now, six years
 2 after the tumultuous Presidential Election of 2000, four years after Congress responded by
 3 enacting HAVA, and two years after this State experienced the closest governor's race in
 4 history, the people of Washington are faced with a fall election season in which an
 5 unworkable and arbitrary set of State and county responses to the Legislature's misguided
 6 attempt to comply with HAVA will deny eligible citizens the right to vote. As the abundant
 7 record evidence developed in discovery shows, plaintiffs are more than likely to succeed on
 8 the merits of their claims and will be irreparably harmed if a preliminary injunction is not
 9 granted.

THE FACTS

10 Pursuant to the Court's expedited discovery order, plaintiffs have so far deposed ten
 11 state and county election officials, including representatives of the Secretary of State, and
 12 collected registration related documents from the State and seven counties (Clark, King,
 13 Pierce, Spokane, Thurston, Whatcom and Yakima). This is what the State is doing:

- 15 • An eligible citizen timely submits a complete registration form, and the
 16 information on the form is entered into the county registration system.
- 17 • If the citizen has "checked the box" indicating that she does *not* have a
 18 driver's license number or Social Security number, she is registered.
- 19 • If not, defendant attempts to match the county's record to information on
 20 the Department of Licensing ("DOL") or Social Security Administration
 21 ("SSA") database. Any record that does not match exactly is placed in a
 22 "fatal pend" status until the match is resolved, and returned to the county.
- 23 • 16% of all records across the State are initially "fatally pended." The rate
 24 is as high as 30% in King County.²
- 25 • Counties review the "fatal pend" records for typos. If the driver's license
 26 number matched a number in the DOL system, the county *may* be able to
 27 resolve minor discrepancies in other fields (inconsistencies like maiden
 28 names may still be impossible to resolve). If the DOL number did not

26 ² See data files of registrations produced at the deposition of Samreth Sam on July 13, 2006. A CD-ROM of
 27 the data files containing confidential information was produced at the deposition. The CD-ROM was
 28 designated as Exhibit 59 and has been retained by counsel for plaintiffs.

1 match, or if the applicant submitted Social Security digits, counties will
2 not be able to see the source of any error.

- 3 • Counties have the discretion to use additional tools, like a Lexis-Nexis
4 database, to attempt to resolve errors. Some do, some do not. (Ex. 1
5 (Blinn) at 43:21-45:13; *id.* 46:6-14.) Sometimes they are successful,
6 sometimes not.
- 7 • Counties mail a notice to applicants who remain in “fatal pend” status;
8 *some* notices ask the voter to complete a new form, which sends the voter
9 back to step 1. *Some* counties will also attempt to contact voters by
10 phone or email, if such information is provided. (Starting July 29, “fatal
11 pend” voters *may* also be informed that they may provide alternative
12 identification to resolve a mismatch.)
- 13 • If a county cannot establish contact with the voter *in 45 days*, the
14 registration is invalid. Whether a county processes the record for
15 cancellation by the State or not, State law prohibits the county from
16 resolving any error thereafter.

17 **A. The Harm to Washington’s Would-Be Voters Has Been Established**

18 Washington’s matching law, RCW 29A.08.107, has already resulted in the rejection
19 of hundreds of applications from eligible voters. Having looked at only one small part of the
20 whole picture, defendant concludes that 135 such “cancellations” have already occurred –
21 and, in an “abundance of caution,” rounds that figure up to 200. (Def. Br. at 3 & n.2.) Were
22 the number of wrongfully rejected applicants *only* 135, that would *exceed* the margin of
23 victory in Washington’s 2004 gubernatorial election. As a matter of law, that number of
24 disenfranchised voters cannot be dismissed as a meaningless “handful.” (*Id.* at 19.)

25 But the number of disenfranchised voters is much higher. Defendant has only
26 counted the “cancelled” applicants that have been brought to his attention. And those only
27 come from select counties. (*E.g.*, Ex. 2 at SOS 001640 (e-mail from Island County to
28 Secretary of State requesting cancellation of six applicants); Ex. 3 at SOS 001655 (same;
five applicants from Clark County).) Discovery from seven of the 39 counties has revealed
that each county has a different way of naming and treating its ultimately “unmatched.”
Thurston County calls them “purged” (Ex. 4 (Thurston) at 17:25-18:9); King County calls
them “fatal pended” (Ex. 5 (King) at 31:16-20); and Spokane County calls them “not

1 registered 45 days” (Ex. 6 (Spokane) at 64:9-14). Whatever their name, and whatever their
2 final tally, the record is clear that hundreds of registrants are being rejected all over the State
3 and will not be permitted to vote on election day.

4 *First*, we already know that 43 additional “cancellations” have been processed by the
5 State as of June 22, 2006, bringing the defendant’s number to 178. (*See supra* note 2.)

6 *Second*, we know that some counties, frustrated that matching is a precondition to
7 registration, have refused to notify the State of applicants who do not respond to a
8 verification notice after 45 days. (Ex. 7 (Pierce) at 44:19-24, 61:14-24; Ex. 5 (King) at
9 92:13-22.) These applicants remain in pending status but could be cancelled – legally for
10 now – at any moment. However their status is labeled by the counties, such individuals may
11 not become actively registered without starting the process all over again. (Ex. 1 (Blinn) at
12 77:9-20, 78:8-12.)

13 *Third*, we know that rather than submit “unmatched” voters to the State for
14 cancellation (Ex. 8 (Sam) at 85:19-86:12), some counties have begun deleting the
15 application record of unmatched voters after the lapse of the 45-day period as if they never
16 existed. (Ex. 10 (Yakima) at 25:24-26:4; Ex. 4 (Thurston) at 17:21-18:2; Ex. 6 (Spokane) at
17 36:13- 37:4.) Such “deleted” applications are not represented in the State’s number of
18 “cancelled” applications. (Ex. 8 (Sam) at 88:7-16, 104:3-8.)

19 *Fourth*, we know that the flood of applications that arrives in the weeks before the
20 registration deadline has not begun. (McDonald Decl. ¶ 14.) This evidence, based on
21 Washington’s experience in 2004, is also uncontested. From this alone, we know the
22 number of “cancelled” and “deleted” applicants will at least double by election day.³

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26 ³ In addition to under-counting the rejected registrants, defendant has depressed his “error rate” by
27 overstating the total number of first-time applications. The “approximately 70,000” applications (Def. Resp. 7)
28 is way too high, as it includes some unknown number of voters who have transferred their registrations within
a county, or from another county. (Ex. 9 (Floyd) at 45:1-4; *see also* Ex. 8 (Sam) at 134:14-17.)

1 **B. There Is No Evidence of Hundreds of “Fictitious” Voters**

2 Defendant argues that using matching as a precondition to registration, as he wrongly
3 believes HAVA requires, prevents “fictitious persons” from voting. But there is zero
4 evidence that Washington has a significant problem to combat. There certainly is no
5 evidence that there are hundreds of “fictitious persons” being exposed by Washington’s
6 matching process. On the contrary, the Assistant Director of Elections, Catherine Blinn,
7 admitted that there is no history of such a problem:

8 Q. To your knowledge has Washington state had an extensive history
9 with people who have attempted to register fictitious names?

10 A. No.

11 Q. To your knowledge does Washington state have an extensive
12 history with people who – fictitious voters actually voting ballots?

13 A. No.

14 (Ex. 1 (Blinn) at 109:20-110:2.) Even if this imaginary problem were real, matching is not
15 the tool to fix it. As the record demonstrates, such a method would be vastly over-inclusive
16 since a failed match is much more likely to reflect an administrative error than registrant
17 wrongdoing. Moreover, to the extent matching serves an identity verification aim, that aim
18 is already taken care of by Washington’s statutory requirement that *all voters* must show ID
19 at the polls. RCW 29A.44.205.⁴

20 **C. Defendant’s Purported “Alternatives” Do Not Exist**

21 To convey the impression that the problems wrought by the matching law can be
22 ameliorated, defendant says there are two “alternatives” to get registered and vote. He states
23 that the people of Washington “can simply *check a box* and provide a copy of a utility bill”
24 or “vote a provisional ballot” to “escape the matching system.” (Def. Br. at 17 (emphasis in
25 original); *see also id.* at 3, 15, 18.) This is not true.

26

27 ⁴ As explained in plaintiffs’ moving papers (at p. 15), HAVA independently imposes an identification
28 requirement – to be satisfied either at registration or when voting, no matter how that vote is cast – on first-
time voters who register by mail, in the event that an attempted “match” should fail. 42 U.S.C. § 15483(b).

1 What defendant calls the “check-box utility-bill alternative” (*id.* at 3) is no
2 alternative at all. The “box” on the application is for citizens who have no driver’s license
3 or Social Security number and, therefore, cannot be subject to matching. The box says:
4 “Check here if you do not have a WA Driver’s License, ID Card, or SSN.” Checking the
5 box is not an option for those who *do* have a number. It would be a felony for such a citizen
6 to check the box. The applicant must sign the application and declare under penalty of
7 perjury “that the facts on this registration form are true.” (Overstreet Decl., Ex. H.)

8 Defendant’s other suggestion, that another “escape” from matching is “to vote a
9 provisional ballot,” is also not a real alternative. The Secretary of State makes the same
10 suggestion in a June 2, 2006 press release posted on his website: “If an [unmatched]
11 applicant who never responded to the County Auditor’s efforts to contact him or her shows
12 up at the polls on Election Day, he or she may vote a provisional ballot.” (Ex. 11.) The
13 Assistant Director of Elections clarified that such a would-be voter may *request* a
14 provisional ballot, but if the mismatch has not been resolved, the ballot will never be
15 counted:

16 Q. In Washington if an individual who has not been matched and for
17 whom time has elapsed shows up at the polls or votes a ballot by mail
will that ballot count if they provide ID?

18 A. If that person – if the person’s DOL number or Social Security
19 number never matched they were not registered so they will not
20 receive a ballot through the mail. They can show up at the poll site
and vote a provisional ballot.

21 Q. Is it fair to say that that provisional ballot won’t count if they were
22 never registered?

A. And the 45 days has run, yes.

23 (Ex. 1 (Blinn) at 131:6-15.) In that case, a provisional ballot is a hoax, not an alternative.

24 **D. Defendant Admits That Matching Is Unreliable**

25 Plaintiffs submitted with their preliminary injunction motion the declaration of a
26 leading authority in the field of data matching, Andrew Borthwick, outlining the countless
27 ways “false negatives” occur. That testimony is uncontested. Moreover, in depositions,

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1 witness after witness for the Secretary of State and from the counties admitted that matching
2 is error-prone and unreliable. Here are just a few examples:

- 3 • Paul Miller, the State’s Voting Systems Manager, testified about the
4 errors he has witnessed in his 17 years as a systems administrator in King
5 County and Olympia. (Ex. 12 (Miller) at 102:21-23, 103:6-12, 103:20-
6 22, 104:6-16 (typos in all fields, even after post-data entry review);
7 24:11-26:4 (misreading information; nicknames; transposition of first and
8 last name, especially with East Asian registrants; punctuation).)
- 9 • Samreth Sam, the State’s Voter Registration Database Project Manager,
10 testified about the improper separation of fields and other errors. (Ex. 8
11 (Sam) at 79:19-21 (splitting a compound last name into middle and last
12 names); 82:5-7 (splitting a single first name into first and middle names);
13 22:23-23:16 (transmission errors between State and county databases);
14 93:1-16 (more data transmission errors).)
- 15 • The county auditors’ testimony is to like effect. (*E.g.*, Ex. 5 (King) at
16 48:12-49:17 (typographical errors, including in the DOL database and
17 with the SSA), 53:15-20 (transposition of first/last name and confusion
18 with middle names, especially with East Asian registrants), 54:19-20
19 (confusing two-part last names, especially with Hispanic registrants); Ex.
20 7 (Pierce) at 33:15-21 (typographical errors), 48:7-17 (maiden names);
21 Ex. 10 (Yakima) at 22:1-11 (nicknames), 32:13-35:11 (Hispanic and East
22 Asian names, maiden names, typographical errors, date transpositions,
23 bad handwriting and number inversions all pose a greater likelihood of
24 failing to match); Ex. 6 (Spokane) at 23:8-25 (transpositions, initials and
25 hyphenated names), 24:12-25 (maiden names); Ex. 4 (Thurston) at 37:15-
26 38:9 (most failures to match are in names).)

27 **E. Defendant’s Effort to Mitigate the Harm**
28 **Proves There Is a Problem, But Does Not Solve It**

On June 28, 2006, the Secretary of State promulgated a new rule that acknowledges
the problems created by RCW 29A.08.107. (Ex. 9 (Floyd) at 27:22-29:2 (“We were very
concerned that it was difficult for the counties to get some records matched through the
Department of Licensing because of typos or because I might have my driver’s license under
Pamela A Floyd and register as Pam Floyd so we wanted to – it was clear that these records
were the same people and we wanted to give the auditors the ability to override the machine
rejecting it.”).) This new rule, WAC 434-324-040, which goes into effect the day after oral
argument, does two things:

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1 First, it permits the counties to use some discretion when matching one sub-set of
2 registrants, which can allow them to “override the automated failure” at the State level.⁵ It
3 applies only to some of those registrants who provide a driver’s license number. Where the
4 State computer finds a registrant’s driver’s license number in the DOL database, but does
5 not find an exact match for the name and date of birth, the new rule permits the counties to
6 override the automated failure if “it is clear that the information on the application describes
7 the person on the department of licensing record.” WAC 434-324-040(4). The rule then
8 sets out four matching discrepancies the counties might detect and override: nicknames,
9 obvious typos, abbreviated names, and a transposition of the month and date of the date of
10 birth. WAC 434-324-040(4)(a)(d).

11 This regulation just confirms the existence – indeed, the prevalence – of the types of
12 glitches that lead to “false negatives.” Since this new override process does not apply to all
13 applications, and does not address all the glitches, it does not solve the matching problem. It
14 is completely unavailable for registrants who provide a Social Security number. The State is
15 unable to provide any information to the county from the Social Security Administration
16 other than “no match.” (Ex. 12 (Miller) at 120:24-121:7.) It does not even address all the
17 mismatches involving driver’s license numbers. If there is a typo in the number, no further
18 information will be provided to the county other than “no match.” (*Id.* at 135:1-7.)
19 Furthermore, despite the State’s attempt to arrive at a complete list of fixable errors, the
20 State’s Elections Systems Officer acknowledged that the types of glitches listed the
21 regulation do not include many common reasons for mismatches, including the transposition
22 of first and last names. (*Id.* at 148:2-25; 176:10-178:24.)

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25 ⁵ WAC 434-324-040(3) first requires the counties “to confirm the accuracy of the information entered in the
26 county election management system from the voter registration application. The county must correct any
27 errors and again attempt to verify the applicant’s identity automatically.” Such an auditing procedure is a
28 helpful step, to be sure, but it cannot capture all inconsistencies that cause a mismatch (including
inconsistencies between records that do not result from any individual’s error), and, as shown above, is not
even fool-proof with respect to typos.

1 *Second*, realizing the trouble caused by the matching statute, the new rule creates a
 2 limited alternative to matching. For applicants who are not matched, the counties must send
 3 a “verification notice” to the applicant. If the applicant actually receives the notice – *i.e.*, *if*
 4 the applicant is home and *if* there is no typo that prevents delivery (*id.* at 171:10-18) – then
 5 the counties “may” tell those applicants that they can submit an alternative form of ID in
 6 order to register (*id.* at 186:1-4, 185:15-21).

7 This semi-alternative to matching is really an end-run around the clear text of the
 8 State’s own matching statute. It thus exposes the flaws in defendant’s legal position, as well
 9 as the arbitrariness and irrationality that Washington’s matching law has engendered.

10 **F. The State’s Interpretation of HAVA Is**
 11 **Leading to Absurd and Unlawful Results**

12 Based on the testimony of election officials, the combined effect of the State’s
 13 matching statute (RCW 29A.08.107) and the new matching regulation (WAC 434-324-040)
 14 is to create an incoherent and indefensible voter registration regime, which further evidences
 15 that this could not be what Congress had in mind when it adopted HAVA.

16 For no reason any official could explain or justify:

- 17 • A new registrant who claims to have no driver’s license or Social
 18 Security number, gets easily registered, gets assigned a unique identifying
 19 number, and gets to vote with no fuss about matching. (Ex. 13 (Excell) at
 20 81:9-23 (“[Such applicants are on] the path of least resistance.”).)
- 21 • Applicants who submit Social Security numbers are less likely to get
 22 registered than those who submit driver’s license numbers. (Ex. 12
 (Miller) at 156:19-157:2; *see also supra* note 2.⁶)
- 23 • A citizen with a compound last name (*e.g.*, “John Dos Passos”) who tries
 24 to register using his Social Security number will not be registered, and

25 ⁶ State officials expected that approximately 70-80% of new forms contained driver’s license numbers, and
 26 20-30% contained Social Security digits (Ex. 12 (Miller) at 108:8-14), which was borne out by defendant’s
 27 own data. *See supra* note 2 (showing that of the records that failed to match exactly with the DOL or SSA
 28 databases, 82% had driver’s license numbers and 18% Social Security digits). However, while only 37% of the
 records still pending on June 22, 2006 contained a driver’s license number, 63% contained Social Security
 digits. (*Id.*) Moreover, of the pending records that had last been “modified” more than 45 days before June 22
 – the records presumably pending for the longest time – only 17% contained driver’s license numbers, while
 83% contained Social Security digits. (*Id.*)

will not be allowed to vote, if his Social Security record contains an error – e.g., incorrectly identifies “Dos” as a middle name – and a county with a strict cutoff cannot make contact within 45 days. (Ex. 13 (Excell) at 170:9-171:12; cf. Ex. 14 at SOS 001642 (Manuel Beltran Sotelo).)

- A recently-married woman who submits an accurate driver’s license number will not be registered, and will not be allowed to vote, if her driver’s license is still issued in her maiden name, and she is unavailable for 45 days after notice is sent. (Ex. 13 (Excell) at 164:20-165:6.)
- A registrant who checks the box affirming that he does not have a driver’s license or a Social Security number can cast a “provisional ballot” that will be counted if his signature matches, but a registrant with a number that is not matched and who has not shown alternative ID will be given a provisional ballot that will never be counted, even if her signature matches. For no reason, these voters “are treated differently.” (Ex. 1 (Blinn) at 85:13-24.)
- A last-minute registrant is better off than someone who registers months in advance because she is less likely to be shut out by the 45-day rule: “[R]eally, there’s an advantage to the voter who attempts to register at the last minute because . . . if the election occurs within that 45-day [verification notice] period, they’re actually in a better position than someone who attempts to register back in February.” (Ex. 1 (Blinn) at 57:19-58:4.)
- Once 45 days pass without contact, there is no form of identification – no matter how robust – that an eligible citizen with a complete and timely application can show in order to resolve the state’s failure to find matching information. (Ex. 1 (Blinn) at 68:15-69:9; Ex. 9 (Floyd) at 73:9-17.) And although such a citizen will be given a provisional ballot, that ballot is void at the time it is cast. (Ex. 9 (Floyd) at 74:24-75:12.)

To make this more concrete, here are several scenarios in which none of the applicants is successfully “matched” at the State or county level, each is given some kind of ballot, but only some of those ballots will count:

- A senior citizen named Dorothy moves from Oregon into Klickitat County, and in August sends in a new voter registration application with her Social Security digits. A county data entry operator types a “0” instead of the “O” in her first name, and so when the State attempts to match her information with the SSA database, a “no match” message is sent back. The county misses the mistake when it double-checks its data entry, and sends her a verification notice. She doesn’t respond. On the 46th day, her application is cancelled. When she goes to the polls to vote, because she is not on the registration list, she receives a provisional

1 ballot. Although she shows the poll worker her valid passport, her
2 provisional ballot is *not* counted because she is *not* registered.

- 3 • The same woman sends the same voter registration application in
4 October, and the same data entry error occurs. When she goes to the
5 polls to vote, she is still within the 45-day period; she receives her
6 provisional ballot and shows her passport, but there is no place for the
7 poll worker to note that she has shown identification. Her provisional
8 ballot is not counted because she is not registered.
- 9 • The same woman sends the same voter registration application in
10 October, and the same data entry error occurs. When she goes to the
11 polls to vote, she is still within the 45-day period; she receives her
12 provisional ballot and shows her passport, and the poll worker is able to
13 communicate to the county auditor that she has shown identification. Her
14 registration is complete, and her provisional ballot is counted.
- 15 • The same woman cannot remember her Social Security digits and does
16 not have a State driver's license or ID card, and so she checks off the box
17 indicating that she has none of these forms of identification. She never
18 provides any form of identification. At the polls, she votes a provisional
19 ballot because she has not shown ID, and because the signature on her
20 registration form matches the signature on the outside of her provisional
21 ballot envelope, the ballot is counted.

15 **G. The Counties Are Trying Disparate Ways to Cope**

16 The county auditors around the State have been working hard to invent ways to cope
17 with the nonsensical and unfair consequences of the matching regime. Even where the State
18 has adopted clear rules, they are not always uniformly followed by the counties; where the
19 rules are not clear, the counties have simply had to improvise. In applying the “override”
20 process set forth in WAC 434-324-040, in sending out verification notices and otherwise
21 corresponding with voters pursuant to RCW 29A.08.107 and WAC 434-324-040, and in
22 deciding whether and how to “cancel” applicants after the close of the 45-day verification
23 period mandated by RCW 29A.08.107, the record shows some counties taking a strict
24 approach (Ex. 6 (Spokane) at 30:15-20), others taking a permissive approach (Ex. 5 (King)
25 at 92:13-94:2; Ex. 7 (Pierce) at 44:19-24, 61:14-24), and others going to extraordinary
26 efforts to avoid taking either (Fernandez Decl. at 1-2).

27 In a nutshell, here is what the counties are saying:

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- 1 • **Yakima.** Mismatched applicants are notified that they may present
2 alternative identification, but only if they have no driver’s license. (Ex.
3 10 (Yakima) at 50:5-12.) Periodically, the county will purge from their
4 system (but not denote as “cancelled” (*id.* at 48:3-13)) applicants who
5 have not responded within 45 days of the day the notice is sent. (*Id.* at
6 25:7-11, 25:24-26:4.)
- 7 • **King.** Mismatched applicants are asked to complete a new voter
8 registration form; if the form is completed, it will be sent once again
9 through the verification process. (Exs. 15 & 6 (King) at 79:13-81:13.) If
10 the form is not completed, the county will accept alternative identification
11 to complete registration. (Ex. 5 (King) at 79:7-16.) Although some
12 applicants have failed to respond within 45 days of notice, no applicant
13 has thus far been “cancelled” for failure to respond. (*Id.* at 92:13-93:14.)
- 14 • **Spokane.** Mismatched applicants must provide matchable information or
15 show their driver’s license or Social Security card; alternative
16 identification is not accepted. (Ex. 6 (Spokane) at 13:11-14, 39:4- 41:9.)
17 If incorrect information on the SSA database precludes a match, *that*
18 information must be corrected before the voter can be registered. (*Id.* at
19 52:5-14.) If the applicant does not respond within 45 days from the date
20 the registration form is *signed*, her application will be invalidated. (*Id.* at
21 30:9-20, 36:13-37:4.)
- 22 • **Pierce.** Mismatched applicants are notified that they must provide
23 matchable information (Ex. 7 (Pierce) at 47:12-16); alternative
24 identification may be accepted once WAC 434-324-040 is effective, but
25 the need for additional clarification was specifically noted during the
26 deposition. (*Id.* at 57:5-16.) Pierce County also declared that, despite
27 State law, it will not cancel the applicants of any applicant who fails to
28 respond to notice within 45 days. (*Id.* at 43:15-18, 44:19-24, 61:9-24.)

Despite the counties’ hard work and good intentions, the Washington matching law is leading to a hodgepodge of non-uniform practices, none of which is adequate to prevent eligible Washington voters from being disenfranchised.

ARGUMENT

I. DEFENDANT’S ARGUMENT THAT HAVA REQUIRES THE STATES TO REJECT APPLICANTS WHO DON’T MATCH, AND THAT THE JUSTICE DEPARTMENT AGREES, IS WRONG

Defendant’s legal justification for the “no-match, no-vote” policy in RCW 29A.08.107 is that HAVA, as interpreted and enforced by DOJ, requires the State to make matching an absolute precondition to voter registration. In truth, neither the statute nor the

1 federal government compels a policy such as Washington's. On the contrary, that policy is
2 directly at odds with and preempted by HAVA, and violates the Voting Rights Act and the
3 Constitution.

4 **A. Defendant's Construction of HAVA Is Inconsistent with the**
5 **Text and Structure of the Statute and the Intent of Congress**

6 Defendant's position is that "Washington's statutes are designed to comply with
7 HAVA." (Def. Br. at 9.) Yet all defendant offers in support of his interpretation of HAVA
8 – *i.e.*, that HAVA mandates a successful match as a precondition to registration – is a single
9 sentence. Defendant argues that HAVA "requires that applicants providing driver's license
10 or Social Security numbers that do not match 'may not be accepted or processed.'" (Def.
11 Br. at 7) That is *not* what HAVA says.

12 The phrase "may not be accepted or processed" comes out of HAVA, but not from
13 the matching provision. Defendant has copied that forceful language from the section
14 dealing with the provision of information by applicants (Section 303(a)(5)(A)) and
15 superimposed it on the section relating to the requirements for state officials (Section
16 303(a)(5)(B)). Section 303(a)(5)(A) prohibits states from processing applications that do
17 not include an identifying number. It states, "an application for voter registration for an
18 election for Federal office may not be accepted or processed by a State *unless the*
19 *application includes*" a driver's license or Social Security number. 42 U.S.C.
20 § 15483(a)(5)(A)(i) (emphasis added). Thus, if a registrant fails to write down her driver's
21 license number or indicate that she does not have one, or if the state is not otherwise able to
22 determine that number, the application "may not be accepted or processed."

23 Nowhere in Section 303(a)(5) does it say that the number must be "matched" before
24 the applicant may be registered. Defendant's representatives have conceded that Section
25 303(a)(5) says nothing about matching as a precondition to registration. (*E.g.*, Ex. 1 (Blinn)
26 at 132:13-15.) Nor does any other section of HAVA. That is what is most instructive about
27 the compulsory language defendant has focused on: Congress *did* mandate that incomplete
28 applications be rejected, but did *not* mandate that un-matched applications be rejected. That

1 defendant had to cut-and-paste the statute to defend Washington’s matching law – and cites
2 no other statutory text in favor of his interpretation – illustrates just how wrong he is about
3 HAVA.

4 Defendant also ignores those provisions of HAVA that directly contradict
5 Washington’s matching requirement. Most obvious is the provision for first-time mail-in
6 registrants, Section 303(b), which makes clear that matching *cannot* be a precondition to
7 registration under HAVA.

8 Section 303(b) requires, with respect to first-time voters who register by mail, that
9 the state verify those voters’ identities before they vote – but not before they register. Such
10 voters may verify their identity by showing some form of documentary identification, either
11 at the time of registration or when voting for the first time. 42 U.S.C. § 15483(b)(2)(A),
12 (3)(A). Alternatively, Congress provided that a voter need not show ID if his application
13 was successfully matched. *Id.* § 15483(b)(3)(B). In either case, HAVA permits that voter to
14 cast a regular ballot. *Id.* § 15483(b)(1).

15 Accordingly, under Section 303(b), matching is merely a substitute for voter ID. If,
16 as defendant contends, matching were a prerequisite to registration, Section 303(b) would
17 make no sense. It presupposes that voters can be registered *without* matching. It would
18 have been pointless for Congress to have provided an ID alternative to matching if the lack
19 of a match prevented these voters from being registered in the first place.

20 Defendant’s opposition brief is silent on Section 303(b). Worse yet, since defendant
21 cannot reconcile Section 303(b) with his reading of HAVA, the State is set to violate that
22 provision of HAVA. Assistant Director of Elections Catherine Blinn testified that first-time
23 voters who register by mail, but who have not been matched within the 45-day notice period,
24 may be given provisional ballots, but those ballots will not count – even if the voter presents
25 ID. (Ex. 1 (Blinn) at 131:6-15.) That violates Section 303(b) of HAVA because such voters
26 not only are permitted to vote, but they are entitled to vote by regular (not provisional) ballot
27 – and those votes are, obviously, intended to count.

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206.623.1745; fax 206.623.7789

1 Thus, rather than using Section 303(b) to illuminate the meaning of HAVA – *i.e.*,
 2 that matching is not a precondition to registration – defendant pretends that the provision
 3 doesn’t exist and presumably intends on acting as if it doesn’t exist.⁷

4 **B. Defendant’s Claim that the Department of Justice Requires**
Matching as a Precondition to Registration Is False

5 Given defendant’s inability to find any support in the text of HAVA, defendant
 6 insists that Washington’s matching requirement was, in effect, imposed by the Department
 7 of Justice. That was the premise of defendant’s motion to compel the joinder of the United
 8 States. And, notwithstanding DOJ’s stated lack of interest in this matter, defendant
 9 maintains that the DOJ has considered plaintiffs’ arguments “and comes to the opposite
 10 conclusion.” (Def. Br. at 8.) Defendant also represents that, “The Department of Justice has
 11 advised that ... an ultimately mismatched applicant cannot be registered.” (*Id.*)

12 The DOJ’s decision to affirmatively oppose joinder is hard to square with
 13 defendant’s assertion that the DOJ has rejected plaintiffs’ construction of HAVA and
 14 embraced the State’s. Likewise, it turns out that the suggestion made to the Court that
 15 “representatives” of the DOJ told the Secretary of State’s office that “the registration should
 16 be rejected” when there is no match, was not the full or accurate story. (Blinn Decl. ¶ 4.)
 17 Quite the opposite was true: the DOJ expressly declined to give the State any guidance on
 18 the issue of matching. Mr. Excell, the Assistant Secretary of State, testified that not only did
 19 the DOJ not tell Washington it needed to reject unmatched applicants, but the DOJ refused
 20 to offer such an opinion:

21 I think we asked [DOJ] several times for some guidance, and – and
 22 Sam and I even talked to Hans von Spakovsky when he was still at
 23 DOJ, asking for some guidance. And he said, “Put it in writing.”
 24 We’d put it in writing. And then it would come back, “We don’t opine
 25 on a case unless it’s a case in controversy. When there’s a
 26 controversy, we’ll let you know” kind of answer.

27 ⁷ As plaintiffs set forth in their moving papers (at pp. 14-15) and complaint (at ¶¶ 84-85), the legislative
 28 history bears out what the text and structure of HAVA make plain.

1 So we – we ran that circle a couple of times and figured out we
2 weren't going to get much guidance. So we kind of were stuck
3 reading HAVA at night and then trying to define what the legislature
4 ultimately gave us and go from there.

5 (Ex. 13 (Excell) at 116:9-20.)

6 Thus, as recently as June 1, 2006, Catherine Blinn, the Assistant Director of
7 Elections, wrote to the Secretary of State that the DOJ only “*appears* to agree with
8 [Washington’s] interpretation of HAVA.” (Ex. 16 at SOS 001666 (emphasis added).) Of
9 course, that is not what Ms. Blinn declared to Court in support of defendant’s joinder
10 motion. Nor did she tell the Court what she subsequently admitted in her deposition: when
11 asked whether HAVA states that an un-matched individual should not be registered, she
12 conceded, “It does not spell that out.” (Ex. 1 (Blinn) at 132:15.)

13 The only basis defendant has, and ever had, for claiming that the DOJ supports
14 Washington’s matching law is a letter written by a former DOJ employee to a Maryland
15 official. (Def. Br. at 8 (citing Overstreet Ex. F (Letter from Hans A. von Spakovsky to
16 Judith A. Arnold, dated Sept. 8, 2003)).) That is the same letter defendant cited in the
17 joinder motion. And it is written by the same former DOJ employee who expressly declined
18 to give guidance to Washington. (Ex. 13 (Excell) at 116:9-20.) The letter is no more
19 compelling now than it was on the joinder motion. On its face, the letter makes clear that
20 “[t]he opinions expressed in this letter are not binding and would not prevent the
21 Department from taking a different position in any future litigation under HAVA.”
22 (Overstreet Ex. F at 1.) Buried in a footnote, defendant now concedes that the letter “is not
23 necessarily the official position” of the DOJ. (Def. Br. at 8 n.6.)

24 Were that not enough to demonstrate that the DOJ has not adopted Washington’s “no
25 match, no vote” policy, the actions of the State of Maryland – the recipient of the letter –
26 and the State of New York confirm it. After this lawsuit was commenced, Washington’s
27 Deputy Solicitor General wrote to other states to find out about their matching policies. (Ex.
28 17 at SOS 000523.) An official of Maryland’s State Board of Elections responded, making
clear that in Maryland, matching is not a precondition to registering or voting:

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PETERSON, P.S.

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206.623.1745; fax 206.623.7789

1 If the DL#/SS# does not match, we provide the applicant with the
 2 opportunity to show identification to get registered to vote. The
 3 acceptable forms of identification are the HAVA ID forms (i.e., photo
 4 ID, utility bill, etc.). The applicant can provide the ID during early
 voting, on Election Day, or by the day of provisional ballot
 canvassing. If the applicant provides it, s/he is registered; if not, s/he
 is not registered to vote.

5 (Ex. 18 at SOS 000529.) The regulations implementing HAVA in Maryland are equally
 6 clear that the identity of new applicants can be verified by multiple forms, up to and
 7 including election day, and therefore matching is not required for an applicant to be able to
 8 vote. (Ex. 19.) New York adopted similar verification regulations – with the DOJ’s
 9 consent. (Exs. 20 at 4, 21 at 12, 22 at 1.)⁸

10 **II. DEFENDANT’S ARGUMENT THAT THE NUMBER**
 11 **OF REJECTED VOTERS IS ACCEPTABLY LOW**
 12 **CANNOT BE ACCEPTED UNDER THE CONSTITUTION**

13 Defendant’s claim that the number of disenfranchised voters is “tiny” excuses neither
 14 the preemptive effects of HAVA nor the violations of the First and Fourteenth Amendments
 15 to the Constitution. Because there is no adequate justification for Washington’s matching
 16 law, the rejection of “unmatched” eligible voters – whether it is 135 voters or, as the record
 17 establishes, a significant multiple of that number – violates the Constitution.

18 The Constitution requires that all regulations that impact citizens’ voting rights be
 19 scrutinized carefully to ensure they are reasonable and proportional responses to the state
 20 interests advanced to justify them. As explained in plaintiffs’ moving papers (at pp. 18-22),
 21 an election regulation that leads to the disenfranchisement of eligible voters will be struck
 22 down unless a state’s justification outweighs the burden on citizens’ voting rights. *See also*
 23 *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1376 (N.D. Ga. 2005). For those
 24 citizens who are not “matched” and are unable to resolve mismatches, the law imposes the
 25 severest of burdens: the utter denial of their right to vote and have their vote counted.

26 ⁸ Notwithstanding the fact that the DOJ has not taken the position defendant ascribes to it, the DOJ’s
 27 interpretation of HAVA is not binding on this Court or on defendant. Nor is the DOJ entitled to any deference
 to its interpretation for the reasons stated in plaintiffs’ response to defendant’s joinder motion (at pp. 5, 8).

1 Whether or not the burdens imposed by RCW 29A.08.107 are considered “severe,”
 2 defendant cannot meet his burden of justifying those burdens under the Constitution. No
 3 state interest is served by the disenfranchisement of eligible citizens whose information
 4 cannot be matched by an admittedly error-prone process. Defendant’s misreading of HAVA
 5 provides no justification. Nor does the state’s interest in preventing “fictitious persons” –
 6 which defendants’ representatives concede is not a serious problem in Washington.⁹ The
 7 unreliability of the matching process, however, means that it does not adequately serve that
 8 function. What is more, if defendant’s interest is in identifying voters, then there is no
 9 interest served by his practice of refusing to allow un-matched voters to cast ballots that will
 10 count if they present valid alternative forms of ID. As the Supreme Court has stated, “if
 11 there are other, reasonable ways to achieve [the state’s] goals with a lesser burden on
 12 constitutionally protected activity,” as there are here, “a State may not choose the way of
 13 greater interference.” *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

14 Although the State’s estimate of the number of voters impacted by RCW 29A.08.107
 15 is unrealistically low, none of the foregoing violations would be excused even the number of
 16 voters impacted were as low as the State contends. There is no *de minimus* “safe harbor” for
 17 laws that disenfranchise few voters; it is no defense to contend that “only” 200 applicants
 18 will be denied the franchise. The Sixth Circuit recently found that, “precise mathematical
 19 formulas . . . have never been a part of voting rights cases A judicially imposed
 20 mathematical formula for evaluating voting rights cases would be purely arbitrary. We
 21 simply cannot say that x% error rate raises constitutional concerns but y% error rate does
 22 not.” *Stewart v. Blackwell*, 444 F.3d 843, 876 (6th Cir. 2006). So too here.

23
 24 ⁹ The fact that the law leaves open substantial loopholes for a would-be wrongdoer, including the ability to
 25 bypass the matching process by indicating on his application form that he does not have a driver’s license or
 26 Social Security number, further undermines defendant’s purported fraud prevention justification. “[A] law
 27 cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction” on a
 28 fundamental right “when it leaves appreciable damage to that supposedly vital interest unprohibited.” *Florida
 Star v. B.J. F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in judgment) (internal quotation marks and
 citation omitted)); *see also Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (quoting same).

1 Moreover, the attempts of well-meaning county officials to mitigate the effects of
2 defendant's misguided matching policy do not save it from constitutional infirmity. Rather,
3 they have created a patchwork of disparate practices in which the right to vote is conditioned
4 on irrelevant factors including the identifying number a citizen submits with an application,
5 where she resides, and when she registers. The differential treatment of voters based on
6 arbitrary categories, including the county they live in, not only violates the "uniformity"
7 provisions of RCW 29A.04.610 and HAVA, 42 U.S.C. § 15483(a)(1)(A), it also runs afoul
8 of the Equal Protection principles articulated in *Bush v. Gore*, 531 U.S. 98 (2000).

9 **III. THE RECORD IS UNCONTESTED THAT PLAINTIFFS**
10 **HAVE DEMONSTRATED A STRONG LIKELIHOOD**
11 **OF SUCCESS ON THEIR VOTING RIGHTS ACT CLAIM**

12 As a separate and independent cause of action, plaintiffs have alleged that RCW
13 29A.08.107 violates the materiality provision of the Voting Rights Act, 42 U.S.C. §
14 1971(a)(2)(B). The record evidence supports plaintiffs' claim that nonmaterial errors or
15 omissions on records or papers relating to voter registration will result in the denial of the
16 right to vote. Defendant has offered no response. Accordingly, plaintiffs have shown a
17 strong likelihood of success on their Voting Rights Act claim.

18 **IV. DEFENDANT'S OTHER LEGAL ARGUMENTS ARE MERITLESS**

19 Defendant raises a number of other alleged infirmities with plaintiffs' preliminary
20 injunction motion. None has any merit.

21 **A. Plaintiffs Have Alleged a Sufficient and Remediable Injury**

22 Defendant argues that the injury to plaintiffs' voting rights is too "speculative" to
23 warrant injunctive relief. (Def. Br. at 14.) It is true that injunctions generally are not
24 available to forestall future violations of law or prevent unthreatened or speculative injuries.
25 That is not the case here. Plaintiffs alleged that prospective registrants, including plaintiffs'
26 members, constituents and clients, will be unable to register to vote, and discovery has borne
27 out these claims, revealing that hundreds of eligible voters have been denied registration and
28 will not be able to vote. These injuries are not speculative or remote; they are present, real,

1 continuing, and unavoidable absent an injunction. Such immediate injuries are sufficient to
2 establish plaintiffs' entitlement to injunctive relief. *See, e.g., Stewart*, 444 F.3d at 855;
3 *Sandusky Democratic Party v. Blackwell*, 387 F.3d 565, 573-74 (6th Cir. 2004); *Florida*
4 *Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1079 (N.D. Fla. 2004) (“[A] voter cannot
5 know in advance that his or her name will be dropped from the rolls . . . [but it] is inevitable
6 . . . that there will be such mistakes. The issues plaintiff raises are not speculative or remote;
7 they are real and imminent.”).

8 The case defendant relies on, *Southwest Voter Registration Educ. Project v. Shelley* ,
9 344 F.3d 914 (9th Cir. 2003), is about a different situation. That case was about an effort to
10 enjoin an election that was already underway (the 2003 recall of the California governor).
11 The Ninth Circuit held that the law applicable to stopping an election is “different from
12 ordinary injunction cases” and “[i]nterference with impending elections is extraordinary, . . .
13 and interference with an election after voting has begun is unprecedented.” *Id.* at 919 (citing
14 *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)). The unprecedented injunction was denied
15 because the “citizens will suffer material hardship” and, given that hundreds of thousands
16 had already voted by absentee ballot, “the status quo that existed at the time the election was
17 set cannot be restored.” *Id.* Only for purposes of weighing the hardship to the plaintiffs did
18 the Court note that the prospect of the challenged “punch-card” machines influencing the
19 result of the election “is merely a speculative possibility.” *Id.*

20 This case is not about stopping an election, but protecting the rights of voters before
21 the election begins. And the harm at issue is not the hypothetical possibility of a different
22 election result, but the very real and immediate impact on new registrants who will not be
23 permitted to participate in the election at all.¹⁰

24
25
26 ¹⁰ Defendant's reliance on *Bloodgood v. Garraghty*, 783 F.2d 470 (4th Cir. 1986), is completely inapposite.
27 There, the court refused an injunction because there was no basis to believe that the officials would enforce the
28 unconstitutional law. *Id.* at 475-76. Here, defendant admits that he is enforcing the challenged law.

1 **B. This Case Is Not Moot**

2 Defendant devotes a single sentence to arguing that this case “might be” moot
3 because he has adopted the new registration regulation (WAC 434-342-040). (Def. Br. at
4 16.) As explained above, since the new regulations will not prevent eligible voters from
5 being wrongfully rejected, the case is not moot.

6 **C. Plaintiffs Have No Effective Remedy at Law**

7 In arguing that injunctive relief is inappropriate because plaintiffs have other
8 available remedies, defendant misapprehends the meaning of “adequate remedy at law.” An
9 alternative remedy at law renders injunctive relief inappropriate when a plaintiff’s injuries
10 may be remedied by non-injunctive means – *e.g.*, monetary damages. The doctrine cannot
11 be invoked to defeat an injunction by arguing that the plaintiff could have avoided the injury
12 in the first instance by having done something different. Here, defendant argues that eligible
13 voters who are wrongfully disenfranchised could register or vote by “alternative” means.
14 Even if that were true, that would not be an adequate legal remedy. In any event, as we have
15 explained, the “alternatives” defendant has identified do not exist.

16 **D. The Court Can Fashion Effective Relief**

17 Finally, defendant argues that effective relief cannot be granted in the absence of the
18 counties because, he says, if the Court enjoins the Secretary of State from requiring
19 matching as a precondition to registration, “nothing would change.” (Def. Br. 16-17.)
20 Defendant contends that he has “no direct control” over what the counties do. (*Id.*)

21 Defendant undersells his authority. Under Washington law, he is the chief elections
22 officer of the State and has supervisory control over local election officials, including the
23 power and responsibility to issue instructions and promulgate rules to ensure that elections
24 are conducted in a “uniform manner,” and the power to instruct and compel county elections
25 officials to comply with the laws, rules and guidelines governing elections. RCW
26 29A.04.230, 610-611, and 530. The new matching regulations (WAC 434-324-040) –
27 which tell counties what to do with un-matched registration applications – were promulgated
28 by defendant under that authority. And, of course, the matching statute plaintiffs seek to

1 enjoin, RCW 29A.08.107, is directed to defendant and entitled “Review by secretary of
2 state.” Thus, the Secretary’s representative testified: “The county acts as our agent for
3 registering voters.” (Ex. 12 (Miller) at 125:5-6.)

4 Similarly, HAVA requires “each State, *acting through the chief State election*
5 *official*” to “implement, in a uniform and nondiscriminatory manner, a single, uniform,
6 official, centralized, interactive computerized statewide voter registration list defined,
7 maintained, and administered at the State level.” 42 U.S.C. § 15483(a)(1)(A) (emphasis
8 added). Washington’s own laws provide:

9 The secretary of state through the election division shall be the chief
10 election officer for all federal, state, county, city, town, and district
11 elections that are subject to this title. The secretary of state shall . . .
coordinate those state election activities required by federal law.

12 RCW 29A.04.230; *see Borders v. King County*, No. 05-2-00027-3, 4 Election L.J. 418, 422
13 (2005) (oral decision) (attached as Ex. 23) (Wash. Super. Ct. Chelan Cty. June 6, 2005)
14 (“The Secretary of State is the chief elections officer of the State of Washington and
15 provides oversight, training and direction to the Elections Department of each county.”).

16 **CONCLUSION**

17 For the foregoing supplemental reasons, plaintiffs respectfully request that this Court
18 grant their motion for a preliminary injunction.

1 DATED this 17th day of July, 2006.

2 HILLIS CLARK MARTIN & PETERSON, P.S.

3 /s/ Louis D. Peterson

4 Louis D. Peterson, WSBA #5776
5 Sarah A. Dunne, WSBA #34869
6 1221 Second Avenue, Suite 500
7 Seattle, WA 98101-2925
8 206-623-1745; 206-623-7789 (fax)
9 lpd@hcmp.com; sad@hcmp.com

10 *Attorneys for Plaintiffs Washington Association*
11 *of Churches, et al.*

12 OF COUNSEL:

13 PAUL, WEISS, RIFKIND, WHARTON &
14 GARRISON LLP

15 Robert A. Atkins (admitted *Pro Hac Vice*)
16 Evan Norris (admitted *Pro Hac Vice*)
17 J. Adam Skaggs (admitted *Pro Hac Vice*)
18 Patricia E. Ronan (*Pro Hac Vice* pending)
19 Peggy S. Chen
20 Sarah A. Nolan
21 1285 Avenue of the Americas
22 New York, New York 10019-6064
23 (212) 373-3000

24 BRENNAN CENTER FOR JUSTICE
25 AT NYU SCHOOL OF LAW

26 Wendy R. Weiser (admitted *Pro Hac Vice*)
27 Justin Levitt (admitted *Pro Hac Vice*)
28 161 Avenue of the Americas, 12th Floor
New York, New York 10013
(212) 998-6730

29 *Plaintiffs' Supplemental Motion for a*
30 *Preliminary Injunction (CV 06-0726 RSM)*

HILLIS CLARK MARTIN &
PETERSON, P.S.

500 Galland Building, 1221 Second Ave
Seattle WA 98101-2925
206.623.1745; fax 206.623.7789

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of July, 2006, I electronically filed this PLAINTIFFS' SUPPLEMENTAL MOTION FOR A PRELIMINARY INJUNCTION with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

James K. Pharris
Greg Overstreet
Jeffrey T. Even
Attorney General of Washington
1125 Washington Street SE
Post Office Box 40100
Olympia, WA 98504-0100
jamesp@atg.wa.gov
grego@atg.wa.gov
jeffe@atg.wa.gov

Counsel for Defendant

DATED this 17th day of July, 2006 at Seattle, Washington.

/s/ Sarah A. Dunne
Sarah A. Dunne, WSBA #34869

- 7/17/06

Plaintiffs' Supplemental Motion for a Preliminary Injunction (CV 06-0726 RSM)

HILLIS CLARK MARTIN &
PETERSON, P.S.

500 Galland Building, 1221 Second Ave
Seattle WA 98101-2925
206.623.1745; fax 206.623.7789