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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

WASHINGTON ASSOCIATION OF CHURCHES,)	
et al.,)	
)	
)	Plaintiffs,
)	No. C 06-726 RSM
)	
v.)	Seattle, Washington
)	
REED,)	
)	
)	Defendant.
)	

BEFORE THE HONORABLE RICARDO S. MARTINEZ, DISTRICT JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JULY 28, 2006

APPEARANCES:

For the Plaintiffs:	ROBERT ATKINS
	JUSTIN LEVITT
	EVAN NORRIS

For the Defendant:	JIM PHARRIS
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Also present:	LOU PETERSON
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1 SEATTLE, WASHINGTON FRIDAY, JULY 28, 2006

2 HON. RICARDO S. MARTINEZ, DISTRICT JUDGE 1:33 P.M.

3 PROCEEDINGS:

4 THE CLERK: This is the scheduled oral argument
5 hearing on plaintiff's motion for preliminary injunction,
6 docket number 6, in Washington Association of Churches, et al.
7 versus Reed, cause number C 06-726 assigned to this court.

8 Will counsel please rise and make their appearances.

9 MR. ATKINS: Robert Atkins from Paul Weiss Rifkind
10 Garrison and Wharton, counsel for plaintiffs.

11 MR. LEVITT: Justin Levitt from Brennan Center for
12 Justice, also counsel for plaintiffs.

13 MR. PETERSON: Your Honor, Lou Peterson from Hillis
14 Clark Martin and Peterson.

15 MR. NORRIS: Your Honor, Evan Norris, Paul Weiss
16 Rifkind Wharton and Garrison.

17 THE COURT: Gentlemen.

18 MR. PHARRIS: Jim Pharris, Washington State Attorney
19 General's Office, counsel for defendant.

20 With me is Katherine Blinn, the assistant elections
21 director for the State.

22 THE COURT: Good afternoon.

23 All right, counsel. The Court has received and
24 reviewed the documents and declarations, the exhibits on this
25 motion for a preliminary injunction. I don't know if our clerk

1 has explained the rules for this afternoon's argument, but
2 basically I'll give each side half an hour maximum. If you
3 want to reserve any amount of time for any rebuttal, it's up to
4 you to keep track of that.

5 Because this is the plaintiff's motion, normally we'd
6 start out with the plaintiff arguing but, Mr. Pharris, maybe I
7 should ask you. Maybe we should flip that around a little bit
8 in today's case, because I'm not quite sure, counsel, after
9 having reviewed the defendant's supplemental response what the
10 State's current arguments are at this point.

11 MR. PHARRIS: Want me to talk about that?

12 THE COURT: Yeah. Let me have you start.

13 MR. PHARRIS: And, of course, at any time if you have
14 some questions about how this relates I would be glad to answer
15 them.

16 Our view has always been that the statute that is
17 being challenged here was enacted specifically for the purpose
18 of complying with the federal Help America Vote Act and that it
19 does serve that purpose and that, far from being inconsistent
20 with HAVA, it actually was -- we had to -- HAVA actually
21 required the State to enact either this statute or one very
22 like it.

23 It seems to me what the briefing has really gone to
24 is not the question whether there's any inherent conflict
25 between the state statute and HAVA but whether or not

1 implementation of this statute could conceivably lead under any
2 circumstances to a problem with matching which might result in
3 a delay in getting registered and being allowed to vote.

4 That goes to the implementation of the statute, to
5 the way that the Washington State's election system works. I
6 guess I would say this should not be a surprise. It's a
7 brand-new statute. For the very first time instead of running
8 their own systems the 39 counties have to adopt a uniform
9 system.

10 There are some initial glitches in the way it's being
11 done. They're not doing it all consistently, and we're trying
12 to fix that and we will -- excuse me -- I'm told you never use
13 the word "fix" around the word "election." But we are trying
14 to resolve that, trying to resolve any problems, and I think we
15 will.

16 However, I don't think there's anything in HAVA, in
17 the state statute itself, that is inherently inconsistent with
18 HAVA or the Voting Rights Act or the federal constitution for
19 that matter. HAVA Section 303 I think is the heart of the
20 argument. First of all, of course, it requires the State to
21 develop a state-wide voter registration system, a computerized
22 system. It requires the State to assign each voter an
23 individual identification number. That's been done. Nobody's
24 said that it hasn't.

25 And then there's HAVA Section A 5, which says that

1 there has to be verification of voter registration information.
2 This is new to the State of Washington, new to most states. It
3 says that an application for voter registration for an election
4 for federal office may not be accepted or processed by a state
5 unless the application includes: first choice, a driver's
6 license number; second choice, the last four digits of the
7 applicant's Social Security number; and then it provides an
8 alternative for people who have neither a driver's license nor
9 Social Security number. All that is exactly copied in the
10 state statute.

11 THE COURT: Mr. Pharris, under the state statute,
12 though, I can't choose one of those options.

13 MR. PHARRIS: Certainly you can.

14 THE COURT: So even if I have a Social Security
15 number and a driver's license I can simply check the box that I
16 have neither one of those.

17 MR. PHARRIS: Both the state law and the federal law
18 that you have to check the box only if you have neither of the
19 others. Now, the form does not state that explicitly, but I
20 should point out that our experience is less than 1 percent of
21 the people are checking the box.

22 Now, yes, we have a different system for people who
23 check the box. Because under HAVA we had to. We had to
24 provide for people who did not have a driver's license or
25 Social Security number and they can provide alternative I.D.

1 and -- but the difference is -- and again we see this as
2 required by HAVA 303 5, A 5, that those people we have to go
3 ahead and put on the rolls subject to the subsequent
4 requirement that they have to produce the identification upon
5 voting, if not sooner.

6 THE COURT: No. I understand that. I guess my
7 concern is that if I'm concerned as to whether or not there may
8 be no match for whatever reason I simply can't choose that
9 third alternative and say, hmm, I'll just check off that box.

10 MR. PHARRIS: Well, under Washington law we allow you
11 to check that box, and we don't check, we don't go to look and
12 find out if in fact you had a driver's license. HAVA says
13 you're supposed to put your driver's license number if you have
14 it. The state law is not being enforced in that manner. We're
15 basically saying, you can put whatever number you like. Many
16 people put both numbers, and we check them both, or you can
17 check the box.

18 But I do want to make it clear that we're not
19 treating people badly because they list a number, because what
20 we do is again what federal law requires, that's the next step,
21 is that you have to conduct a matching process. Federal law
22 requires the State to enter into an agreement to match driver's
23 licenses and into another agreement with the Social Security
24 Administration with respect to the Social Security numbers, and
25 we do that.

1 Now, we would be the first to admit that those are
2 not specific systems. The driver's license number works pretty
3 well because we can get a report from our own Department of
4 Licensing that says, no, there is no match, but the driver's
5 license in question is assigned to the following person. And
6 often you can tell that there's been a transposition of letters
7 or maiden name problem or date of birth issue and that it's the
8 same person. You can go ahead and register them.

9 Unfortunately, for people who list their Social
10 Security numbers we don't get the same information, and part of
11 that is again Congress's choice which presumably had good
12 policy basis of telling people to list the last four digits
13 because as many as 40,000 people share the four digits of the
14 number, and obviously Social Security Administration's not
15 going to give you a printout of the five or ten or 10,000
16 people that have those numbers, and so all you get is that
17 there is no match. That is not -- and the State is not happy
18 with that, but there's nothing the State can do. That's about
19 all we have.

20 As an example I want to use the two people who filed
21 affidavits with the plaintiff's supplemental registration and
22 point out that both of them I think can easily be resolved.
23 One of them was a person who, when she filled out the original
24 form, using the European style reversed the number for the
25 month and the day in her birth date. Now, the county people

1 caught that and reversed them again.

2 But they made another mistake. They changed the date
3 of birth, the year of her birth to another year. And then she
4 had given a Social Security number, so it didn't match, and
5 there's every reason to think the reason it didn't match, of
6 course, is that there was no person born on that date, which
7 was the wrong date with that number. And then, of course, when
8 she was contacted all her husband did was call and give the
9 same four digits back, which of course didn't help because that
10 wasn't the problem.

11 Now, we could have wished that the county had worked
12 more with this person, but I do want to point out that there
13 would be absolutely nothing to keep her, first of all, from
14 starting over -- and there's plenty of time for that now -- and
15 we also have a principle in state case law that says if the
16 error has been made by the election officials it can be fixed
17 right up to date of the election and in fact after the election
18 before the election results are certified.

19 So she can still vote. She can vote a provisional
20 ballot. She certainly also has time to reinstate her
21 registration. That's not an issue.

22 The other affidavit that was filed --

23 THE COURT: Mr. Pharris, before we leave that, using
24 that one as an example, how does someone know what the problem
25 is when you get a no match? If you use the Social Security

1 number as you've indicated isn't it State's -- it's the federal
2 government that's sending all this information, they say no
3 match, how do I know -- if I get this letter in response that
4 tells me there's no match, how do I know what to fix?

5 MR. PHARRIS: I would hope that the county would
6 explain to you what the problem is and that there could be then
7 some talk about how to fix it. In this case one way to fix it
8 would have been to come in and probably check over her whole
9 form again and see what the problem was, and I can quickly say
10 I think the county should have caught that. They should have
11 soon as they looked at her original form and then they looked
12 at what -- the data they had entered, they would have realized
13 they had messed up the year and she shouldn't been -- have had
14 to be contacted.

15 But I can't say mistakes will never happen. I think
16 this was a mistake and it was a mistake on the part of the
17 county officials who processed it. She would not necessarily
18 know, but she certainly could come in and say, here is my
19 driver's license, here is my actual Social Security card which
20 is accepted, here is some other I.D. that shows that I am a
21 real person and shows, you know, the basic facts about me. Any
22 of those would have worked, and ideally the county would have
23 informed her how that could be resolved.

24 I don't know what the -- exactly what was contained
25 in the letter that she received.

1 THE COURT: Well, I guess that's my concern. We've
2 got 39 different counties in the State of Washington. You come
3 to whatever county you're in to the appropriate person. Is
4 there anything in the state statute that mandates a procedure,
5 a process they are to follow to fix these things?

6 MR. PHARRIS: The State statute requires them to send
7 the letter. Now, the Secretary of State can fill in the gaps
8 with rules, and I think if that's the problem, that people are
9 not being adequately informed how to resolve the issue, that
10 can be fixed by -- without even changing the state statute.

11 As I say, this is the first year we've had to do
12 this. We're in a learning curve. And I think it would be
13 really no problem. Just since the first of the year we've
14 realized a number of things that can be done to try to resolve
15 these matching issues; because we've never had to do it before,
16 so now we're doing it we begin to realize how many tools are
17 available to help and how many possible pitfalls there could
18 be.

19 Moving just quickly to the other voter, I think
20 that's a little bit simpler situation. She registered under
21 her married name or filed an application for registration under
22 her married name; she then gave her driver's license number
23 which was still issued to her under her maiden name as I
24 understand it.

25 Now, anyone who looked at that number and understands

1 Washington State driver's licenses would have seen that there
2 was a sort of nonmatch there between the letters in the
3 driver's license and her name, and I think probably that could
4 and should have been resolved right then and there. Presumably
5 if they had run the match under the other name or they could
6 have found out who -- what person was issued that driver's
7 license, they would have found out that it was a person with
8 the same first name and the same date of birth and the same
9 address, just a different last name. And I think they could
10 probably pretty easily have figured out that this was a name
11 change problem and could have fixed it.

12 Again the voter, now that she knows this is an issue,
13 can also fix it. Excuse me. Resolve it. Bring in the
14 driver's license in question or I.D.

15 And I will admit early this year there was some
16 confusion and some counties taking the position that, because
17 their county databases couldn't handle the various categories,
18 that the voters had to go change the problem at the Department
19 of Licensing and couldn't fix it by then. But that has now, I
20 think, been resolved. I don't think there are counties that
21 are still taking that position.

22 So yes, can you find examples in which there have
23 been stumbles and problems since the first of the year? Yes,
24 you can. But first of all I would point out they're very few,
25 a very small number. And I should also point out we shouldn't

1 overemphasize the matching problem, particularly with the
2 Department of Licensing; the great majority are easily matched
3 and even with the Social Security a considerable majority do
4 match. So that's not a major issue.

5 In any case, as I say, these are not prospective
6 problems, inherent problems with Washington statutory scheme,
7 and the only thing that I can find in the statutory scheme that
8 isn't virtually a carbon copy of HAVA is the fact that
9 Washington does require registration, almost all states do, and
10 HAVA clearly allows that or they wouldn't have this complicated
11 registration system.

12 And the fact that the State does say that, if 45 days
13 pass after the notice is sent to the applicant and there's no
14 response, the phrase is the applicant shall not be registered
15 to vote. Now, what that means is open to some interpretation.
16 There's no question of that. Does it mean that applicant is
17 now out of luck, the application is torn up, thrown away,
18 cancelled, and the applicant's only choice is to start over?
19 We don't think that's what it means. That would be one way of
20 reading it.

21 Part of the reason we don't think it means that is
22 that this 45-day is not new language. Back before there was a
23 HAVA matching requirement and all we required were things like
24 name, date of birth, address, and there were problems with the
25 form, we had the same 45-day rule, and yet most of the county

1 auditors allowed far more than those 45 days, and no one has
2 ever taken the position that if you correct the problem on the
3 46th day somehow that's a violation of the statute or on the
4 90th day for that matter.

5 And that is the way we're viewing it even now, so
6 that if someone gets a letter and they don't come in till the
7 46th or the 50th or the 80th day, we've advised the counties
8 that they should not be in such a rush to cancel these
9 applications and should, if possible, resolve the issue.

10 Now, at this point, of course, as of today it
11 wouldn't matter. We're still well ahead of the time that you
12 would need to register even if you were registering anew. But
13 for people who get to the period less than 30 days before the
14 election and they didn't know about the problem or hadn't
15 bothered to try to solve it, that is something more of an
16 issue.

17 But I would say this: Even if you take the strict
18 view of a 45-day requirement, it's not inconsistent with HAVA,
19 and HAVA 304 and 305 seems to make it clear that the states
20 have considerable leeway in how they're enforcing it, that the
21 45-day requirement to ask people to come in and resolve the
22 issue is not an unreasonable requirement in light of the need
23 on the other hand to make sure that you don't have your voters
24 list cluttered up with people in various pending status.

25 Now, it might be a good idea to lengthen that 45

1 days. The Legislature maybe should look at it again, but I
2 don't think the 45 days in and of itself is unreasonable, and
3 that is the only factor I can see that makes a difference.

4 Now, the one other thing I want to address --

5 THE COURT: Well, counsel, before we leave that --

6 MR. PHARRIS: That's fine.

7 THE COURT: You're not telling me that someone who
8 cannot register to vote because they don't match would be
9 allowed to vote anyway.

10 MR. PHARRIS: No. They would not. Well, excuse me.
11 Anyone could vote a provisional ballot but I guess I would say
12 this: Sometimes they would be -- I mean they would certainly
13 be allowed to vote and sometimes their vote would count.

14 Let me give the example. One would be the woman we
15 were talking about where the problem was that the county
16 misentered her birth date. It seems to me if she, without
17 doing anything now, asks -- receives a provisional ballot in
18 September or November or both and votes them and the county is
19 made aware that the problem was theirs in the first place, she
20 will be registered, she will be registered as of the original
21 application she filed because it was not her fault, and her
22 vote will count, and she will be permanently registered so on
23 the following elections there's no issue. I don't want to
24 imply otherwise.

25 Now, there could be another category of people who --

1 where the problem was not with the election official and right
2 now the 45 days potentially could be a cut-off that would
3 direct termination of the application, which of course I should
4 point out remains indefinitely in the state system. They're
5 simply not on the official list of voters.

6 But that's a detail and a detail that I think could
7 be addressed and one that we will probably address no matter
8 what the result of this case is, because we share the view that
9 the plaintiffs do, which is that any real person who meets the
10 constitutional and statutory qualifications there should be a
11 way to register. We're trying to square that general policy
12 with the requirements we see in HAVA.

13 Now, what I was about to speak about was the
14 suggestion which again was repeated in the last supplemental
15 brief that somehow HAVA 303 B affects the situation. Now, we
16 read them together. What we understand is that 303 A relates
17 to registration and 303 B relates to certain additional
18 requirements for voters who have registered by mail, so they
19 fit together in that way that you have first of all the whole
20 issue of registration and, of course, both of them are written
21 for 50 states and several territories that have all sorts of
22 registration requirements and so they have to be very broad and
23 have to cover lots of possibilities.

24 303 B as we read it simply says if you have
25 registered to vote -- so that means the people who did

1 register, which would not include these people who didn't
2 match -- and you have not previously voted in a federal
3 election and you haven't previously provided any form of I.D.,
4 then you have to provide it either at the polls where you vote
5 or submit it with your mail-in vote.

6 And then there is a provision for those people for
7 failsafe voting which allows them to vote a provisional ballot.
8 It's not very clear about how you decide whether that ballot
9 counts, but under Washington law it could be counted in any one
10 of several ways, particularly if I.D. was supplied. We don't
11 read 303 B as entitling anyone to vote who has not been
12 registered.

13 Now, so the whole question is are these people
14 entitled to be registered. Yes, if they meet the
15 constitutional qualifications, they are. However, do they have
16 to meet the rather minimal requirement of filling out a form
17 and working out any problem with it? Yes. Is the State and so
18 far as I know the counties committed to working with these
19 people to work out any possible problems? Yes.

20 So I think the chance that we will actually get to
21 the election and there will be people falling into that
22 category are very, very small; and if they have got a case,
23 fine, but this is not that. This is a blanket attack on the
24 whole Washington statutory scheme with a request that
25 Washington be preliminarily enjoined from -- basically

1 injunction in the form that would make us allow people to vote
2 who didn't have a match without any resolution, and I think
3 that's more than -- not only more than HAVA requires, it strays
4 into what HAVA prohibits.

5 Because HAVA has numerous purposes. One of them is
6 to make sure that the people who are qualified to vote get to
7 vote, but another is to make sure that you don't have fraud or
8 people who are not qualified to vote being allowed to vote.

9 Unless there are questions --

10 THE COURT: I do. I have two quick questions.
11 Statute's brand new. Just came into being this year.

12 MR. PHARRIS: Now, the statute is several years old
13 but this part just came into effect. The state statute is
14 about a year old that just came into effect.

15 THE COURT: That's what I mean. What's the harm to
16 the State in not enforcing it when there may be apparent
17 problems with it at this point in time?

18 MR. PHARRIS: Well, first of all, there's no need to
19 enjoin the State from enforcing it. Seems to me there's no
20 need to get to there.

21 As to what's the harm, the harm is that we then are
22 potentially out of compliance with federal law, and I don't see
23 any need to go there. Now, if there's -- if we're simply
24 talking about changing procedures for how to work with people,
25 we're going to do that anyway, and we'd be happy to hear from

1 the Court on any need in connection with the implementation of
2 the statute. But there's absolutely no need to enjoin the
3 statute's implementation.

4 THE COURT: Well, would you agree with me that the
5 underlying effects of HAVA was basically to insure that
6 eligible voters would not be left off the voting rosters or
7 turned away from the polls? Wasn't that the whole purpose?

8 MR. PHARRIS: No. That was not the whole purpose.
9 That was part of the purpose.

10 THE COURT: Major --

11 MR. PHARRIS: HAVA was a very delicate compromise
12 between a group of people whose main purpose was to make it
13 clearer that people who were entitled to register to vote would
14 be able to do it and people who had what in many ways were the
15 opposite view, which is they were worried about voter fraud,
16 worried about (unintelligible) voters and duplicate voters and
17 dead people voting, and they wanted to tighten up the system
18 and make it so that there would be a way to catch and avoid
19 that.

20 Now, we don't -- we have never suggested that's a
21 serious problem in Washington. We don't purport to have some
22 independent state policy reason for enforcing this. But we do
23 regard ourselves as having to follow those parts of HAVA that
24 have to do with avoiding voter fraud, just like we also have to
25 follow and are much happier to follow those that have to do

1 with making it easy and possible for people who are qualified
2 to register.

3 THE COURT: Does your client the Secretary of State
4 have the authority in this case to order each of the auditors
5 in each of the counties to basically say, even if you get no
6 match, go ahead and let that person vote a provisional ballot?

7 MR. PHARRIS: Well, I think that's questionable. The
8 way Washington's governmental structure works, the county
9 auditors do not report to and are not in any way responsible
10 for their jobs to the Secretary of State.

11 Now, counsel has quoted some language -- it's been
12 there since statehood -- that says the Secretary of State is
13 the chief election official. Just what that means I don't
14 know.

15 I also will point out that the state statute itself
16 authorizes the Secretary of State to adopt rules to make sure
17 counties are uniformly implementing the statute. So that might
18 get us part of the way there. I'm not sure it would be in the
19 form of an order. The Secretary, however, could enact rules
20 that would set forth how the statute should be implemented, and
21 county auditors would presumably be subject to those rules.

22 THE COURT: Don't you think that if your client,
23 then, were able to order those county auditors to -- because
24 the statute's so new, because we don't want to disenfranchise
25 any legitimate voters while at the same time trying to stop

1 fictitious people from voting, wouldn't it make sense to have
2 kind of a failsafe system built into it and say, you know, for
3 this first time around we're going to allow everyone to do a
4 provisional ballot. Just check it later. Either count it if
5 it's legitimate or not count it if it turns out it's not.

6 MR. PHARRIS: Lot of things might make sense,
7 particularly if we were the Legislature or if we were Congress,
8 but Congress now says this is the requirement; so even though I
9 will grant that Congress was a bit naive in mandating this
10 matching system, it's still the federal requirement. So I'm
11 not here to make a policy or to decide what the best system
12 might be.

13 THE COURT: All right. Thank you, Mr. Pharris.

14 MR. ATKINS: Good afternoon, Your Honor. Robert
15 Atkins. I represent the plaintiffs.

16 In some ways we're very close to the State and in
17 some ways we're worlds apart. This is case is obviously not
18 about best efforts and good intentions, and we take the State
19 at their word that they're trying their darnedest, and so
20 that's where we're not very far apart.

21 But where we're worlds apart is that they have HAVA
22 upside-down and inside out, that they have made the matching
23 exercise a brand-new eligibility requirement to register to
24 vote in this state, which is extraordinary for two reasons:
25 Number one, we have 200 years of history in our country and in

1 this state of bringing down barriers to voting, to whittling
2 away obstacles to eligibility -- property ownership, class,
3 race, gender -- and so today in Washington, as in most states,
4 all you need to be is a citizen, to be 18 years or older, or to
5 be a resident in a county where you're registering. And those
6 are 200 years of very proud history.

7 And now, having come that far, gotten this close to
8 universal suffrage, the State has now taken what is intended to
9 be a bureaucratic chore of the State to make reliable,
10 dependable, computerized voter registration lists, and turned
11 that around to becoming a barrier to registration and voting,
12 when Congress intended the very opposite, that what HAVA is
13 about is fulfilling what the mission of the Voting Rights Act
14 is. And that's something that's gotten lost here, and we
15 haven't really heard from the State, so I'd like to focus on
16 that for a second.

17 Section 1971 of the Voting Rights Act passed in 1964
18 says that it is a violation of law for any state to deny
19 anyone, any individual the right to vote based on clerical
20 errors, omissions, mistakes that are not material to
21 eligibility.

22 THE COURT: What does that mean exactly? That wasn't
23 really fleshed out in the arguments here.

24 MR. ATKINS: What it means is -- and, of course, what
25 Congress had in mind -- and if you see the case of Condon v.

1 Reno, the South Carolina case from 1995, there's a discussion
2 of Congress's purposes in passing that provision. We all, of
3 course, know about the parts of the Voting Rights Act that
4 relate to eliminating racial discrimination.

5 But Congress observed that the real battleground in
6 protecting and promoting and facilitating the franchise was
7 getting people registered in the first instance and that there
8 was a long history of both pernicious but also unintentional
9 internal and bureaucratic interference with getting people
10 registered; and so in 1964 they created a provision which is
11 not tied to racism or racial animus but applies to all forms of
12 mistakes, errors, omissions in paperwork that will not stand in
13 the way of a person being registered.

14 So, for example, in the recent case, the Schwyer v.
15 Cocks case in Georgia, which was decided in 2005 and affirmed
16 by the Eleventh Circuit, the court held that a person who
17 declined to put their Social Security number -- coincidentally,
18 of course, this was pre this part of HAVA -- the State said, we
19 want you to write down your Social Security number.

20 The plaintiff said, I'm not going to write it down.
21 First of all there's a privacy right under Georgia law. I
22 don't have to tell you what it is. And it's not material to
23 eligibility. My eligibility is my citizenship and my age and
24 my residence.

25 And the court agreed that the -- that the ministerial

1 fact of the person not providing a Social Security number would
2 not prevent and could not prevent that person from being
3 registered under the Voting Rights Act.

4 Well, that's where we are today in Washington, that
5 they have taken HAVA, which is intended to provide mechanisms
6 and procedures to try to avoid what the Voting Rights Act
7 prohibits, and specifically -- and the legislative history on
8 this is abundant and it's clear -- that what Congress was
9 concerned about was folks being turned away from polls and
10 being turned off to voting because their names weren't on
11 lists, pollers couldn't find their names, they were improperly
12 taken off because somebody else was a felon who had a name that
13 looked like their name, and that's what Congress was concerned
14 about.

15 So it said to the states -- and it's a little -- it's
16 a little quaint because this, of course, should have happened
17 years ago. It said, we have a great idea in 2006. Why don't
18 we have a single, state-wide list, put it on a computer, and
19 give everybody a unique identifier number so that henceforth
20 and going into the future we'll be able to track people,
21 monitor people and we won't keep making these mistakes again.

22 And so with respect to folks who don't even have a
23 number, don't have a Social Security or driver's license
24 number, Congress said, give 'm a number, register them, and
25 send them to the front of the class so they can vote. So the

1 folks who are without a number, who -- folks that you would
2 anticipate would be somehow a little off the grid and out of
3 the system because they don't have a Social Security number or
4 a driver's license, Congress said, register them, let 'm vote.
5 If you're already registered give 'm a number.

6 But if you've got a Social Security number, for
7 example, you voted your entire life, you're the president of
8 the PTA, you're an upstanding, active citizen, let's use that
9 Social Security number as your unique identifier and, State,
10 please, match that against the existing database so we don't
11 give someone a unique identifier number by mistake so there are
12 different records in different places in the state and federal
13 government databases with different numbers for different
14 people. Just check it and make sure we get it right.

15 But the thought that that person, because of a typo,
16 a data entry error, the use of a maiden name rather than a
17 married name, a data entry person's entry of the middle name as
18 the last name -- that that person would be denied registration
19 and be denied the right to vote is not only inconsistent with
20 200 years of American history, it's the complete opposite of
21 the intention of HAVA and it's a direct violation of the Voting
22 Rights Act.

23 THE COURT: Now, Mr. Pharris says, now, we're talking
24 tiny numbers, not going to be a big percentage and even for
25 those tiny numbers we could work it out; we could simply work

1 it out.

2 MR. ATKINS: Well, the numbers are not tiny. The
3 evidence is as we had anticipated it, and is undisputed that
4 statewide the number of mismatches at the state level,
5 nonmatches, is 16 percent. In this county, in King County,
6 it's 30 percent. A third of the registrants in the largest
7 county in the state are being put in limbo because they do not
8 match. Not because they're not eligible, not because they
9 didn't fill out the application perfectly, but because of a
10 computer or human glitch or discrepancy unrelated to their
11 eligible.

12 Now, there is a process --

13 THE COURT: Did I understand you correctly, counsel?
14 I just want to make sure I understand correctly that 30 percent
15 of all of these people that are attempting to register in King
16 County, they will come back with a nonmatch and go into fatal
17 pending, whatever they call it?

18 MR. ATKINS: They will be put in a pending mode.
19 They will be sent to the county where the county has this
20 process to try to work it out. The evidence is overwhelming
21 that they cannot work it out in anything close to every case,
22 so, for example, the State has admitted and wants to stick with
23 this number that there are 135 registrants that have been
24 cancelled, that are dead.

25 But that number is the bare minimum, because what the

1 State doesn't know or didn't know until we undertook discovery
2 is that the majority of states -- indeed they concede in their
3 last brief it's most -- not states, counties -- most of the
4 counties are holding what would otherwise be these cancelled
5 registrants in some kind of computer purgatory. They're either
6 called purged in Thurston County or fatally pended in Pierce
7 and this county, in King County. Yakima County has just
8 started deleting them as if they never existed at all because
9 they're so uncomfortable with the process.

10 So this list of 135 is the tip of the iceberg. It's
11 just because most of the counties haven't reported in yet.

12 Secondly, 135 is greater than the margin of victory
13 in this state's 2004 gubernatorial election. Nothing could be
14 more important. Nothing could be more material. And that's
15 the bare minimum number.

16 What we have found in traveling counties to counties
17 and taking discovery here is that there are hundreds of such
18 voters who have now had their registration applications
19 rejected, and as a matter of state law -- and there is no
20 flexibility here -- as a matter of state law after the 45 days
21 have run and the person has not responded and there's been no
22 satisfactory, quote, fix, they will not be registered. The
23 Washington statute says that in two places, in Section 107 and
24 Section 110. They will not be on the rolls.

25 And the testimony from the State is unequivocal, if

1 you have been cancelled in such a matter and you go to the
2 polls, you will not be permitted to vote a regular ballot
3 because you will not be on the rolls. And the provisional
4 ballot is a hoax. It will not be counted. And that is the
5 state of the law. And no amount of good faith and civic-
6 mindedness is going to change that fact as long as this statute
7 is in place.

8 Let me address for a second, if I could, the
9 arguments about 303 B, because I think that's what takes this
10 conversation from being a debate about whether or not
11 Washington is merely interfering with HAVA, merely getting it
12 backwards. 303 B is being violated by the State of Washington.
13 303 B says that if you are registered -- if you have registered
14 by mail and are voting for the first time, you can vote not
15 only a provisional ballot, you can vote a regular ballot
16 without ever having been matched.

17 There is no way to make sense of that statute and
18 square it with the Washington statute. Voters have an absolute
19 right under HAVA if they're registering by mail and voting for
20 the first time to be given a regular ballot, whether they have
21 been matched or not. So it is absolutely impossible to square
22 the Washington statute with 303 B.

23 But more than that, the State is now in open
24 violation of 303 B, because the State's witnesses have
25 testified that people following that fact pattern will not be

1 given a regular ballot and they will not be given a provisional
2 ballot that will be counted.

3 So with 303 B there can be no debate that they've got
4 the purpose of HAVA upside-down and backwards and that they're
5 in fact making it impossible to comply with HAVA, either of
6 which is sufficient reason for the statute to be voided.

7 A comment on the two declarants that we presented to
8 the Court this week. I have no doubt that the State would do
9 its level best or the county would do its level best today to
10 help those folks, but that's not why we submitted the
11 declarations. The fact of the matter is that Marina Petrienko
12 is cancelled. Her registration is null and it's void and, but
13 for the fact that we reached out to her and told her what was
14 happening, she would have never known.

15 Frankly what would have happened is she would have
16 gone to the polls or submitted a ballot. If she had gone to
17 the polls, she would have been given a provisional ballot
18 because she's not registered. And the shame of it is that that
19 provisional ballot would never be counted, would have never
20 been counted. She would think she's registered, she would
21 think that she voted, and the chances are she would show up in
22 2008 and vote for her presidential candidate of choice, again
23 thinking she's registered and again given a provisional ballot
24 that won't be counted.

25 That is not a scenario that Congress intended by

1 adopting HAVA. Indeed it's the very opposite of what Congress
2 wanted to happen and meant to happen, which is why the
3 Washington statute needs to be enjoined.

4 Now, with respect to the relief, Your Honor, in
5 essence all we're asking is that the State go back to doing
6 what it did before January 1st, 2006. We're not upsetting the
7 apple cart. We're not imposing burden on the State, God knows.
8 We're asking that folks fill out the forms properly and who are
9 eligible -- and there is no evidence in this case that anybody
10 who's been mismatched, cancelled, purged, fatally pended is not
11 eligible to vote. We're just saying those folks just as
12 before, they fill out the application, they're registered --
13 that's the way it was -- and that the State simply now comply
14 with its burden, not the voter's burden, but its burden to give
15 folks a unique identifier number if they don't have one and, if
16 they provide a number, to match that with existing databases.

17 That's all we're asking. And it's plainly within the
18 Secretary's power to do so. He used to do it all the time.

19 Secondly with respect to the scope of his authority
20 vis-a-vis the counties, tomorrow morning a new matching
21 regulation is going into effect -- we've presented that to Your
22 Honor -- which provides some of these human overrides for
23 erroneous mismatches from driver license numbers. The
24 Secretary of State has issued a regulation directing the
25 counties that they can, if there's a typo, if names are

1 inverted, if nicknames are used -- in those instances, despite
2 the fact that there's no match at the State level, the county
3 upon visual inspection, if it looks like it's the same person,
4 they can go ahead and declare that person matched.

5 Now, that regulation is useful for two reasons. One,
6 it shows that there's no debate in this courtroom about how
7 there are errors and mistakes that need to be double-checked
8 and fixed.

9 Second, it shows that the Secretary of State indeed
10 has the power to issue rules to direct the counties what to do,
11 to comply with whatever statutory scheme is put in place for
12 governing registration and the administration of elections.

13 And the third thing that I would point out about that
14 regulation, Your Honor -- and little attention has been paid to
15 it -- is it says that at the end of the day the person doesn't
16 match that's part of this 16 percent and the county can't
17 figure out who the person is because they can't match up the
18 names or the numbers, let 'm show I.D. and you can register
19 them then.

20 Well, if that's the case, then why are we here? If
21 I.D. were sufficient, how can anyone stand up here and say that
22 Congress mandated matching? The Secretary of State by issuing
23 that regulation that goes into effect tomorrow morning has
24 proven every element of our case.

25 Matching doesn't work. There are typos and errors

1 and abbreviations and nicknames that result in people not being
2 registered, so we have to do something about that.

3 Secondly, after all, matching's not required.

4 And, thirdly, the Secretary of State has got the
5 power to direct the counties to do the right thing.

6 And on that record I think that I can say that
7 plaintiffs have simply met their burden of showing a likelihood
8 of success, not only under HAVA and the Voting Rights Act,
9 which I would ask the Court not to lose sight of, and, of
10 course, under the United States Constitution, because at the
11 end of the day the State has advanced no justification for a
12 system that will as sure as we're standing here today result in
13 eligible voters being denied the right to vote.

14 And whatever standard the Court deems appropriate to
15 apply, whether it's the strictest scrutiny or the more lenient
16 scrutiny, in the absence of any justification the denial of the
17 right to vote violates the First Amendment and the Fourteenth
18 amendments of the Constitution, and for all those reasons I
19 would respectfully request that plaintiff's motion be granted.

20 THE COURT: Thank you, Mr. Atkins.

21 MR. ATKINS: Thank you very much, Your Honor.

22 THE COURT: Mr. Pharris, you have a few minutes.

23 Rebuttal?

24 MR. PHARRIS: Thank you, Your Honor. Only a couple
25 of points.

1 First I really do -- I'm very disappointed that
2 counsel would bring up the Voting Rights Act. I don't think
3 it's relevant here at all. I don't think there's any question
4 of denying anyone the right to vote based on clerical error.
5 That's not what's going on here. And in any case our
6 justification is not -- again we don't have to justify
7 following federal law.

8 And again we have to point out we don't read HAVA the
9 way counsel does, and I disagree with counsel that the
10 legislative history -- the legislative history is abundant, but
11 it is but no means clear, and 50 states have been spending the
12 last four years trying to figure out with very little help from
13 the federal government what it means; so to say that it's clear
14 is simply wrong and to say that HAVA's only or overriding
15 purpose is to remove barriers to registration is at the very
16 most a half truth.

17 THE COURT: Counsel, I have a question about the
18 Voting Rights Act. When you're talking about citizenship, age,
19 and residency, what is material in this particular case? What
20 information does the State assert is material here?

21 MR. PHARRIS: The things you named. Those are the
22 only things that are material. We don't think we're denying
23 the right to vote based on any nonmaterial basis. But if
24 somebody doesn't complete the registration form, which is a
25 reasonable form and has -- and including those numbers which

1 are required by HAVA, they will not be registered. That does
2 not mean they're not citizens, they're not residents, but they
3 didn't fill out the registration form properly.

4 So I think in that sense HAVA supersedes anything in
5 the voter rights act because HAVA says you have to get the
6 voters to fill in those numbers if they have them and you have
7 to engage in the matching process. Now, what HAVA doesn't say
8 is --

9 THE COURT: Hang on. If I give you my form that's
10 got all my information, I fill it out correctly, and someone
11 receiving it transposes a digit, a number, whatever --

12 MR. PHARRIS: Then that could be corrected. What if
13 you don't fill it out correctly or what if you don't fill it
14 out completely? Those are the only people we're asserting
15 would be in danger of not getting registered, not the people
16 where the problem was clerical error or data entry or
17 misreading. Those can all be resolved.

18 It's the people who do not put the right information
19 down, who transpose the numbers themselves, who don't put the
20 adequate information about the spelling of their name, various
21 other things that make it impossible to be corrected. We have
22 not asserted that anyone will be fatally pended or not be
23 allowed to vote where the problem was with the election
24 officials. I want to be very clear about that. And that's
25 because of state law, quite aside from HAVA.

1 Now, I think you could make an argument based on
2 303 A 5 that HAVA does require a match and people give a
3 number. I hope that isn't what it means. The United States
4 has not, of course, joined in this so we don't know what they
5 think it means. We think that providing alternative
6 identification should be sufficient and we accept alternative
7 identification, so we're not in a different position from
8 counsel.

9 One fairly minor point where counsel told what
10 sounded like a sad story about what might have happened to
11 Mrs. Petrienko if they hadn't discovered her -- first of all I
12 don't know. She might have discovered it herself and she could
13 have gone to the polls and I think the problem probably would
14 be resolved. Certainly her problem could be resolved now.

15 But if she did vote a provisional ballot I do want to
16 point out that HAVA and state law both require the State to
17 tell her whether her ballot counted and, if not, why not; so
18 his suggestion that she would even get to the 2008 election or
19 the 2007 election without knowing that she had a problem is
20 simply incorrect.

21 So I don't really think we should get lost in the
22 details here. I think the question really is what does HAVA
23 require? What is the State doing that is somehow inconsistent
24 with what HAVA requires? And I would end again with 303 B and
25 simply say that if you read it counsel is simply wrong in his

1 assertion that 303 B entitles anyone who has not yet been
2 registered because there's not yet a complete form to come in
3 and vote a provisional ballot. It doesn't address that issue.

4 303 B, first of all, only addresses people who
5 registered by mail, so if you registered some other measure it
6 doesn't apply to you at all and if you did register by mail you
7 have to have registered. And so these people that we're
8 talking about don't fall into that category.

9 Now, we're -- I repeat our commitment to try to work
10 out all of these individual problems. I do want to talk a
11 little bit about the error rate and to indicate yeah, we're not
12 happy with the error rate either. The nonmatching rate is what
13 it is. But we are committed to try to work around that, which
14 we regard as a barrier placed in our laps by the federal
15 government, particularly when they had the not-so-brilliant
16 idea of including the Social Security numbers. That is not a
17 good system.

18 I think the numbers in terms of both nonmatching and
19 certainly in terms of being corrected are way better with the
20 Department of Licensing system, and I think eventually this
21 will be worked out. I don't think there's a need for any
22 interference by the Court with the way we're doing it in this
23 year, and this is, after all, just a preliminary injunction to
24 determine what will happen temporarily while we sort out the
25 final merits of the case.

1 Thank you, Your Honor.

2 THE COURT: Thank you, counsel.

3 All right. Counsel, my usual practice is to take the
4 arguments made here orally, go back, review the materials
5 submitted, review the arguments presented in writing as well,
6 review some of the case law, and then make a determination as
7 quickly as possible.

8 Let me ask this. Mr. Atkins, if the Court was
9 inclined to give you the relief that you're asking, when do you
10 need a ruling by, given the pendency of our primary coming up?

11 MR. ATKINS: We would need a ruling no later than
12 August 19th, which is the last day for registering by mail in
13 anticipation of a September 19th primary. So I guess I would
14 put that at the outer limit as August 19.

15 THE COURT: All right, counsel. Then thank you all
16 very much for your arguments this afternoon. For those of you
17 from the great city of New York, have a good flight back.

18 MR. ATKINS: Thank you very much, Your Honor.

19 THE COURT: We'll be in recess.

20 (At 2:25 p.m. proceedings were adjourned.)

21 --o0o--

22 I certify that the foregoing is a correct transcript
23 from the record of proceedings in the above-entitled matter.

24 \s\ Laurene Kelly

25 This 25th day of AUGUST, 2006.