No. 08 A 332

IN THE SUPREME COURT OF THE UNITED STATES

JENNIFER BRUNNER, OHIO SECRETARY OF STATE,
Applicant,

v.

OHIO REPUBLICAN PARTY, RHONDA L. COLVIN AND C. DOUGLAS MOODY,
Respondents.

ON APPLICATION FOR A STAY
FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE ACLU OF OHIO, PROJECT VOTE, NEOCH, 1MATTERS, AND DANIEL GEORGE IN SUPPORT OF APPELLANT'S APPLICATION FOR A STAY OF A TEMPORARY RESTRAINING ORDER

Meredith Bell-Platts (OH 72917)
Counsel of Record
Neil Thomas Bradley
ACLU Voting Rights Project
230 Peachtree Street, NW
Suite 1440
Atlanta, GA 30303
(404) 523-2721 (phone)
(404) 653-0331 (fax)
mbell@aclu.org
nbradley@aclu.org
Counsel for Amicus Curiae

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INTRODUCTION[1]

This matter is before the Court on an application for a stay of an order of the United States Court of Appeals for the Sixth Circuit, which affirmed a temporary restraining order entered by the United States District Court for the Southern District of Ohio. The TRO, entered less than three weeks remaining before the November 4, 2008 election, has raised substantial doubt as to whether thousands of Ohio residents who validly registered to vote since January 1, 2008 will be able to cast ballots that will be counted in the November 4, 2008 general election. In a sharply divided 9-7 opinion, the Sixth Circuit Court of Appeals has declined to stay this injunction.

The temporary restraining order, as well as the Sixth Circuit opinion are premised on a faulty understanding of the requirements of the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15301 *et seq*. At issue is whether HAVA requires that states utilize computer database matching, an inexact and error-prone process, to verify the voting eligibility of persons who are registered to vote and whose eligibility is otherwise unquestioned.

The temporary restraining order requires that the Ohio Secretary of State immediately identify all voter registration records that the state computer, for whatever reason, is unable to match up with a record for the same individual contained in the state's driver's license database or the Social Security

[1] No counsel for any party authored this brief in whole or in part nor made any monetary contribution intended to fund the preparation or submission of this brief.

Administration database. Thereafter, according to the TRO, the Ohio county boards of election are to "take appropriate action" with regard to the unmatched registrants.[2] Although the TRO does does not explicitly state what that action should be, the district court, in its Opinion, concluded that HAVA "requires matching for the purpose of verifying the identity of the voter before counting that person's vote." 6th Cir. En Banc Op. at 11. Thus, the order places fully qualified voters at risk of being purged and precluded from voting in the November election because of the inability of election officials to establish matches between two databases. Accordingly, the TRO may lead to the disfranchisement of thousands of Ohio residents, many of whom voted without hindrance in Ohio's presidential primary earlier this year.

The en banc opinion of the Sixth Circuit has only further confused the situation. On the one hand, the court left the TRO, as written by the district court, in full effect and fully supported the district court's conclusion that database matching appropriately may be used to verify voting eligibility. On the other hand, the court appears to have effectively atomized HAVA implementation in the State, specifying that every county is free to decide on its own whether to verify voter eligibility using lists of unmatched registrants provided to them by the Secretary of

[2] The temporary restraining order fails to comply with the requirements of Rule 65. As this Court has repeatedly held, "… the specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). Specificity is required: "Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Id.*

State. As the court stated: "All this order does is ensure that county boards may, *if they wish*, investigate voter registration discrepancies . . . – in part by using the SWVRD [the statewide registration database] (or information already derived from that database)." 6th Cir. En Banc Op. at 10 (emphasis added).

The opinions of the courts below fundamentally misconstrue the requirements of federal law, in three ways. First, HAVA does not require that database matching be utilized to determine whether registration applicants are eligible to vote. Although HAVA does include a limited database matching provision, that provision was included generally to enable states to address the different and unrelated problem of duplicate registration entries for the same individuals. Second, HAVA specifically requires that each state implement its registration list in a uniform manner throughout the state, not on a county-by-county basis. Moreover, different verification practices in different counties raises substantial concern under this Court's ruling in *Bush v.* Gore, 531 U.S. 98 (2000). Third, federal statutes impose specific restrictions on the authority of states to remove persons from the registration rolls, so as to ensure that persons who are eligible to vote, and are registered to vote, are not mistakenly deleted from the rolls. By setting in motion a process by which unmatched registrants may be precluded from voting, the district court's order will effectively remove these individuals from the registration rolls for purposes of the November 4 election. The removal restrictions enacted by HAVA and the National Voter Registration Act ("NVRA"), 42 U.S.C.§ 1973gg *et seq.*, do not permit such removals to occur. Therefore, even if the

Sixth Circuit were correct in its interpretation of HAVA, any meaningful use of the no-match information would violate the NVRA. Thus, the relief ordered by the district court and affirmed by the Sixth Circuit will place the State of Ohio in violation of HAVA and the NVRA.

Accordingly, *amici* respectfully urge this Court to grant the Secretary's application for a stay of the district court's temporary restraining order.

ARGUMENT IN FAVOR OF A STAY

I. THE DISTRICT COURT'S ORDER LEADS TO A RESULT THAT IS CONTRARY TO THE PURPOSE OF HAVA AND WOULD LIKELY VIOLATE EQUAL PROTECTION.

In 2002, Congress enacted the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15301 *et seq*., to respond to the serious problems with the administration of elections revealed by the 2000 presidential election. *Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1155 (11th Cir. 2008). The heart of HAVA's voter registration reform effort is the requirement that states create a single, uniform, statewide database of all registered voters. 42 U.S.C. § 15483(a)(1)(A). While Congress believed the database would probably prevent fraud, this was NOT their intent in creating the requirement. Prevention of fraud was at best an ancillary benefit to Congress's primary goal to prevent people from being incorrectly purged from the voting rolls. The district court's order and the en banc decision fail to recognize this purpose of Congress in enacting HAVA's database requirement. Furthermore, ordering all computer database matching data to be handed over to the counties "take appropriate action" flies in the face of Congress's purpose of

creating a *uniform* statewide list consistent with the NVRA requirement that any program to ensure accurate voter registration "be uniform." 42 U.S.C. § 1973gg-6(b)(1). The TRO could lead to the very Equal Protection problems found in *Bush v. Gore*, 531 U.S. 98 (2000) that it was designed to avoid.

The temporary restraining order mandated that the Secretary to share all mismatch data with the counties by the end of this week. It is silent as to what the counties may or may not do with the data. That creates a potential Equal Protection issue if each county board of election (Ohio has 88) can do what it wants with the mismatch data. Creating the potential for upwards of eighty-eight different treatments of the mismatch data is completely contrary to HAVA's stated goal of a *uniform* system to ensure that eligible voters are not wrongly removed because of mistakes in numerous different systems.

Furthermore, if the various county boards of elections do utilize the mismatch data in different ways to remove voters or require alternate provisional balloting, that could trigger the same mishandling concerns that led to this Court's having to intervene in *Bush v. Gore,* 531 U.S. 98 (2000).

Allowing the lower court's order to remain in effect would frustrate the mandate and goals of HAVA. Therefore, this Court should grant an emergency stay of the order below.

A. Congress' purpose in enacting HAVA was not exclusively to prohibit fraud, but also to ensure that all eligible voters would be able to vote and would not be improperly purged from the registration lists, and the prevention of fraud was an ancillary benefit not a primary goal.

In the aftermath of the 2000 election, Congress sought to craft a law to avoid a repeat of the many problems that surfaced in that election by enacting the aptly titled Help America Vote Act.[3]

One of the many reforms mandated was the creation of a uniform, statewide, computerized database to catalog all registered voters. 42 U.S.C. § 15483(a)(1)(A). Contrary to the Sixth Circuit holding and Ohio Republican Party's assertion, this database was designed to prevent voters from being unable to cast ballots due to confusion or errors by local election officials. The goal was to harmonize the numerous and often conflicting local voter rolls.

The U.S. House of Representative Report on HAVA bears out that, while Congress believed the system would probably prevent fraud, this was not the exclusive intent. The report reflects Congress's intent to prevent people from being incorrectly purged.

In explaining the minimum standards, the House initially notes why it is establishing a requirement for a statewide registration database.

The Minimum Standards are:

> (1) The State will implement a Statewide voter registration system networked to every local jurisdiction in the State….

[3] Amici assert the title is instructive as to the law's intention: to help people vote. It is telling that Congress did not choose to name it the "Help America Avoid Fraud Act" or the "Fraud Prevention Act," as that was not their primary purpose in enacting the law.

> Creation of such a system will make the registration lists more accurate, and easier to update. *It should reduce the incidence of voters appearing at a polling place only to discover that no record of their registration can be found.* When voters move from one jurisdiction to another within that state, the statewide system will be able to track that movement. If for some reason a voter remained registered at their old address, the election officials will be able to see that and take corrective action. Requiring states to develop statewide databases will modernize and improve registration nationwide.
>
> People are mobile, but more than three-quarters of all residential moves are in-state. An effective statewide database can therefore be quite useful, including its capacity to address such common issues as the registration of in-state college students and people with second homes within a state. But perhaps the most important beneficiaries of statewide registration systems will be members of lower-income groups, who are more likely to move than higher-income groups within the same state.
>
> The minimum standard requires states to create a single database that is official, centralized and administered at the state level. Databases which simply link existing local databases do not qualify as satisfying this requirement. Multiple databases linking various vendor or local government programs to a statewide system is not sufficient to satisfy this requirement. *The intent of the minimum standard is to establish one database that is identical and is the same program throughout the state and local jurisdictions* so that all training can be uniform, all records requirements are identical, and that the state has full authority for maintenance and quality matters related to the database. The intent is also to assure that there are not jurisdictional nor vendor issues in terms of operability, problem resolution, or other types of reasons for one part of the system not matching the other.
>
> It is likely that states will find it necessary to create a unique identifier to distinguish registered voters who happen to have the same name and/or birth date. The unique identifier so created *will be used to assure that list maintenance functions are attributable to the correct voter; so as to avoid removing registrants who happen to have the same name and birth date as a felon, for example*….

Committee on House Administration, Help America Vote Act, H.R. Rep. No. 107-329, at p.27 (emphasis added).

Second, the House notes the importance of maintaining accurate registration rolls to ensure that all eligible voters are able to cast a ballot.

> (2) The State election system includes provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:
>
> …(B) *Safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.*
>
> States must ensure that their registration list is accurate and is updated regularly.
>
> Leaving ineligible voters on the rolls leads to a number of problems. It increases costs … is a waste of vital resources … [and] lead[s] to the public perception that the process can be easily manipulated. When … ineligible voters are left on rolls indefinitely, it invites fraud…
>
> The minimum standard requires that removal of those deemed ineligible must be done in a manner consistent with the National Voter Registration Act. The procedures established by NVRA that guard against removal of eligible registrants remain in effect under this law. Accordingly, H.R. 3295 leaves NVRA intact, and does not undermine it in any way.

Committee on House Administration, Help America Vote Act, H.R. Rep. No. 107-329, at p.27-28 (emphasis added).

As the above passages indicate, Congress did recognize that the statewide registration database would help guard against voter fraud. However, fraud prevention was ancillary to the primary purpose of ensuring that all eligible voters were not wrongfully removed from the voting rolls. Respondents and the courts below emphasize voter removal undercutting the protection of voter access at the core of this part of HAVA.

This dual purpose is further supported by the United States Commission on Civil Rights' findings after the 2000 presidential election. The USCCR report states that "[r]ather than focusing efforts on purging lists, NCFER recommends that states undertake the objective of accurately registering every eligible voter." U.S. Commission on Civil Rights, Election Reform: An Analysis of Proposals and the Commission's Recommendations for Improving America's Election Systems, Ch. 3 (November 2001) available at http://www.usccr.gov/pubs/vote2000/elecref/ch3.htm. And, secondly, that a "statewide voter database would lessen the chance for fraud, particularly in jurisdictions that have a high percentage of ineligible voters on their lists, and make it less likely that voters will be wrongfully purged." *Id.*

B. HAVA's requirement for a statewide database was intended to create uniformity and consistency. The TRO could lead to results contrary to that goal and invites inconsistent application by 88 counties of what should be one voter registration list.

The district court asserts that its order was made necessary by the purported failure of the Ohio Secretary of State to comply with the database matching provisions of the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15301 *et seq*. The court erred in what it held was required by HAVA.

HAVA instructs that states must "coordinate" their voter registration database with the state driver's license database and the Social Security Administration database. 42 U.S.C. §§ 15483(a)(1)(A)(iv), 15483(a)(5)(B). But HAVA's "coordination" provision does not require that Ohio (or any other state) use database matching to determine whether persons who register to vote are eligible to

vote in elections. HAVA only requires states utilize database matching for the limited purpose of ensuring that accurate identifying numbers are assigned to registered voters and to enable states to more easily identify duplicate registrations. The relevant HAVA section, 42 U.S.C. § 15483, does not state that computer matching should be used to test the validity of a voter registration application.

The goal is uniformity. As the U.S. House report described it:

> The minimum standard *requires states to create a single database that is official, centralized and administered at the state level.* Databases which simply link existing local databases do not qualify as satisfying this requirement. Multiple databases linking various vendor or local government programs to a statewide system is not sufficient to satisfy this requirement. *The intent of the minimum standard is to establish one database that is identical and is the same program throughout the state and local jurisdictions* so that all training can be uniform, all records requirements are identical, and that the state has full authority for maintenance and quality matters related to the database. The intent is also to assure that there are not jurisdictional nor vendor issues in terms of operability, problem resolution, or other types of reasons for one part of the system not matching the other.

Committee on House Administration, Help America Vote Act, H.R. Rep. No. 107-329, at p. 27 (2001) (emphasis added).

The temporary restraining order and the *en banc* Sixth Circuit's decision focuses exclusively on the anti-fraud discussion and ignore this purpose. .

II. HAVA'S VOTER REGISTRATION REQUIREMENTS AVOIDED USING MATCHING AS A RELIABLE TEST OF ELIGIBILITY. THE PROBLEMS INHERENT IN COMPUTER MATCHING MAKE IT AN UNRELIABLE BASIS FOR REJECTING VOTES.

A. HAVA's Voter Registration Requirements

HAVA specifies various standards for creating and maintaining the statewide, computerized database, including three basic principles that must guide the states.

First, "the name of each registered voter [must] appear[] in the computerized list." 42 U.S.C. § 15483(a)(1)(B)(i). In order to ensure that this is accomplished, HAVA provides that "[a]ll voter registration information obtained by any local election official . . . shall be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official." 42 U.S.C. § 15483(a)(1)(A)(vi).

Second, "only voters who are not registered or who are not eligible to vote [may be] removed from the computerized list." 42 U.S.C. § 15483(a)(1)(B)(ii). In order to ensure that only ineligible voters are removed, HAVA includes specific restrictions on the authority of states to remove persons from the registration list. All states must provide "[s]afeguards to ensure that eligible voters are not removed in error from the official list of eligible voters." 42 U.S.C. § 15483(a)(4)(B). In addition, in Ohio and other states covered by the National Voter Registration Act, 42 U.S.C. § 1973gg, *et seq.*, ineligible voters may be removed under HAVA only "in accordance with the provisions of the National Voter Registration Act of 1993." 42 U.S.C. § 15483(a)(2)(A)(i).

Third, "duplicate names [must be] eliminated from the computerized list." 42 U.S.C. § 15483(a)(1)(B)(iii). To facilitate this, HAVA provides for a two-step maintenance system. States begin by assigning "a unique identifier [in the database] . . . to each legally registered voter in the State." 42 U.S.C. § 15483(a)(1)(A)(iii). The identifier is either: the registrant's driver's license number (supplied by the registrant on the voter registration application); the last four digits of the registrant's social security number, for those applicants without a driver's license (again supplied by the registrant on the registration application); or another number generated by the state, for those who lack both a driver's license and a social security number. 42 U.S.C. § 15483(a)(5)(A). Next, in order to make sure that the identifying numbers are correctly entered into the registration database, states must "coordinate" their voter registration database with the state driver's license database and the Social Security Administration database. 42 U.S.C. §§ 15483(a)(1)(A)(iv), 15483(a)(5)(B).

B. Computer Matching Does Not Provide a Reliable Means for Reviewing Voter Eligibility

Database matching is an inherently flawed process that routinely fails to identify records for the same individual that in fact are contained in both of the databases being compared. *See generally* Brennan Center for Justice, *Making the List: Database Matching and Verification Processes for Voter Registration,* available at http://tinyurl.com/66t6r8 (last accessed October 16, 2008). Accordingly, database matching does not provide a reliable means for reviewing voter eligibility.

Database matching often fails because of trivial data errors that prevent the computer from recognizing that the databases being compared actually do contain records for the same person. These errors include typos, data entry errors made when processing registration forms, use of married and maiden names in different databases, and inconsistent treatment of hyphenated or compound last names. *Id.*[4]

The end result is that database matching generates a high rate of putative "no matches." In the first six months of 2006, before its "no match, no vote" law was enjoined, the State of Washington's matching system had a failure rate of 16 percent statewide, with up to 30 percent in King County where Seattle is located.[5] Through April of 2006, 18 percent of applications in Los Angeles County did not yield a successful computer match.[6] Nearly 20 percent of an audit sample of 15,000 applications submitted in New York City in September 2004 could not be matched due to typos and other data entry errors.[7] And in the first three weeks after Florida renewed enforcement of its matching program (on September 8, 2008),

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[4] The former Commissioner of the Social Security Administration noted that matches with the social security database often fail because of "name change[s] after a marriage or divorce, . . . incomplete, transposed or missing names . . . in SSA records[,] . . . [and] discrepanc[ies] created by use of multiple or compound names." *American Federation of Labor v. Chertoff*, No. 07-4472, Decl. of Kenneth S. Apfel, ¶ 7 (N.D. Cal. Aug. 29, 2007) *available at* http://tinyurl.com/4jbsbg. In November 2007, the Social Security Administration reported that of 2.3 million voter applications it had processed, nearly half — fully 44.5% — were not successfully matched. Pete Monaghan, SSA Help America Vote Act Powerpoint 14, Nov. 29, 2007, *available at* http://tinyurl.com/4dp663.

[5] *See Fla. NAACP v. Browning*, No. 07-402, Decl. of Andrew Borthwick, ¶ 47 (N.D. Fla. Sept. 17, 2007) ("Borthwick Decl."), *available at* http://tinyurl.com/4k69sm.

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

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

approximately 15 percent of attempted matches failed, keeping at least 5,000 voters off the registration rolls.[8]

Preconditioning registration and voting on successful matching is particularly problematic because failed matches occur more frequently among members of certain racial and ethnic groups. Latino citizens are susceptible to problems matching compound last names, and African Americans are frequently not matched because of their use of unique names, or derivative spellings of common names. Thus, for example, in Florida, under the matching program in effect in 2006 and 2007, Latinos constituted 15 percent of the total registration applications but 39 percent of those blocked due to a computer mismatch, and African American voters made up 13 percent of the applicants but were 26 percent of those not matched. White voters, on the other hand, constituted 66 percent of the applicant pool but only 17 percent of the mismatched applicants.[9]

C. The Courts Below Erred in Interpretting HAVA's Matching Requirement as a Voter Eligibility Requirement.

Contrary to the assertions of the Sixth Circuit or district court's orders, HAVA's database "coordination" provision does not require that Ohio (or any other state) use database matching to determine whether persons who register to vote are eligible to vote in elections. Instead, HAVA only requires Ohio (and other states) to

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[8] Aaron Deslatte and Mary Shanklin, *ID-match law stalls 5,000 voter applications*, Orlando Sentinel, Oct. 1, 2008, *available at* http://www.orlandosentinel.com/news/local/state/orl-novote0108oct01,0,6794080.story.

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

utilize database matching for the limited purpose of ensuring that accurate identifying numbers are assigned to registered voters.

The HAVA section that addresses the obligation of each state to create and maintain a statewide registration database, 42 U.S.C. § 15483, does not include any language stating that computer matching should be used to test the validity of a voter registration application. The only provision cited by the courts below specifies that registration records should be compared with driver's license records "to the extent required to enable [state officials] to verify the accuracy of information provided on applications for voter registration." 42 U.S.C § 15483(a)(5)(B)(i). However, as demonstrated below, this language simply means that state officials should conduct computer matching in order to ensure that the correct driver's license numbers are entered into the registration database (so that they may be used, in turn, to weed out duplicate registrations). This language does not mean that computer matching should be used to verify the identity or qualifications to vote of Ohio residents who submit registration applications.

The lower courts' flawed reading of HAVA is demonstrated by the language of HAVA itself. Congress explicitly linked computer matching and voter eligibility with regard to one narrow group of voters, while not doing so with regard to voters in general. The affected group consists of those persons who register by mail and have not voted previously in an election for federal office in the voter's state. HAVA provides that these voters generally must provide certain documentary proof of identity at the time of registering or voting, but are excused from this requirement

if election officials are able to match their voter registration data with a driver's license record or a record that contains at least the last four digits of the registrant's social security number. 42 U.S.C. § 15483(b). Thus, Congress clearly understood that database matching potentially could be linked with voter eligibility, understood how to write specific language that links the two, and chose not to require such a link except with regard to a narrow group of voters.[10] Of critical importance, Congress mandated acceptable alternatives to matching numbers between databases. This alone establishes that matches should not be the touchstone for voter eligibility.

Moreover, the district court and Sixth Circuit's reading of HAVA have been specifically rejected by the two courts that previously have addressed the HAVA database matching provisions. In *Florida State Conference of the NAACP*, 522 F.3d at 1172, the Eleventh Circuit flatly stated that "[t]here is nothing at all in [HAVA] that discusses the requirements and procedures for establishing eligibility and identity of in-person registrants" (as opposed to mail-in registrants who are first-time voters). Similarly, in *Washington Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1268 (W.D. Wash. 2006), the district court stated that "[i]t is clear from the language of [HAVA] and by looking at legislative history that HAVA's matching requirement was intended as an administrative safeguard for 'storing and managing the official list of registered voters,' and not as a restriction on voter

[10] It also should be noted that HAVA does not require any matching at all for registration applicants that lack a driver's license number or a Social Security number, 42 U.S.C. § 15483(a)(5)(A)(ii), and does not require matching in states that specify that voters must provide their full (and more reliably unique) Social Security number. 42 U.S.C. § 15483(a)(5)(D).

eligibility." The district court below sought to enlist the *Washington Ass'n of Churches* decision to its side, quoting that district court as saying that "'HAVA requires matching for the purpose of verifying the identity of the voter before casting or counting that person's vote.'" 6th Cir. En Banc Op. at 9. While this is an accurate quotation from the opinion, what the district court below failed to acknowledge is that the Washington district court was referring only to the narrow class of voters who registered by mail and are first-time voters, and did so to buttress its conclusion that HAVA does not require that states conduct database matching to verify voter eligibility for voter registrants in general.[11] The Sixth Circuit similarly misapplies *Washington,* stating that the case offers "no support for a contrary interpretation" to that of the district court. 6th Cir. En Banc Op. at p. 8.

The absence of any "database-matching, voter eligibility" requirement in HAVA (except with regard to the aforementioned narrow group of voters) means that the Secretary of State's actions do not raise any specter that persons ineligible to vote have been included in the state's voter registration database. Any assertion to the contrary is simply unsupported.

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[11] Both cases dealt with challenges to state statutes (in Florida and Washington, respectively) that specified that in order to successfully register to vote in the state, state officials had to first match the applicant's voter registration record with a state driver's license record or a Social Security Administration record. Plaintiffs argued that this linkage was prohibited by HAVA on the ground that HAVA does not include any such requirement and preempts state law on this subject. The Eleventh Circuit held that HAVA is not preemptive and that Florida was permitted – but, significantly, was not required – to create this linkage, *Florida State Conference of the NAACP*, 522 F.3d at 1167-1172, while the District Court for the Western District of Washington found HAVA to be preemptive. *Washington Ass'n of Churches*, 492 F. Supp. 2d at 1269-70. Since the interpretation of HAVA by the courts below is faulty regardless of whether HAVA is deemed to be permissive or preemptive, this Court need not resolve the preemption question and we do not address that question here.

Finally, the invalidity of the district court's holding, and the affirming opinion of the Sixth Circuit, is illustrated by the fact that the states have followed a variety of approaches with regard to whether, or to what extent, the occurrence of a database mismatch affects the validity of an individual's voter registration. Only a handful of states require a match as a prerequisite to registration. Some accept registrations from mismatched voters but require that they provide additional information, some specify that a mismatch is relevant only with respect to whether first-time voters who registered by mail must produce identification, and some do not provide for any consequence with respect to voter registration when a mismatch occurs. Levitt, Weiser & Munoz, *Making the List: Database Matching and Verification Processes for Voter Registration* (2006), 16-17, *available at* http://tinyurl.com/66t6r8.[12] The holding below that Ohio must use data matching to test eligibility is erroneous.

III. THE REMOVAL OF OHIO VOTER REGISTRANTS FROM THE ROLLS BASED ON COMPUTER MATCHING VIOLATES HAVA AND THE NVRA

As noted above, HAVA restricts the authority of states to remove registrants from the voter rolls in order to ensure that eligible voters are not wrongly deleted. As applied to Ohio, HAVA specifically provides that voter removal must be

[12] Since this report was issued, a number of states have further amended their practice with regard to the use of database matching. Cal. Code Regs., tit. 2, §§ 20108.38(c), 20108.65(e), 20108.71; Md. Regs. Code tit. 33, §§ 33.05.04.04(A)(3), (B)(3)-(4), 33.05.04.05(C)(5); N.C. Gen. Stat. § 163-166.12(b2); Alert Re: Driver's License and Social Security Data Comparison Processes Required by the Help America Vote Act (HAVA), *available at* http://tinyurl.com/36o2lt (Pennsylvania); Election Advisory No. 2006-19, *at* http://tinyurl.com/2stlcp (Texas); Washington Ass'n of Churches, No. CV06-0726 (W.D. Wash. 2006) (stipulated final order and judgment), *available at* http://www.brennancenter.org/page/-/d/download_file_48236.pdf.

conducted "in accordance with the provisions of the National Voter Registration Act of 1993." 42 U.S.C. § 15483(a)(2)(A)(i).

The essence of the temporary restraining order is that Ohio should invalidate the voter registrations of certain Ohio residents for purposes of conducting the November 4 election, *i.e.*, those registrations which do not yield a computer match where the state is unable to affirmatively conclude that the mismatch was the result of computer database snafu. Depending on how the counties utilize the flawed data, certain registrants could be purged improperly and prohibited from voting in the November 4 election.

There is nothing in the National Voter Registration Act that permits the removal of registered voters from the registration list based on computer matching. 42 U.S.C. § 1973gg-6. Indeed, precisely to guard against disfranchisement through hasty removals of voters from registration lists, the NVRA requires that "any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters" must be completed at least 90 days prior to a federal election. 42 U.S.C. § 1973gg-6(c)(2)(A). *See Association of Community Organizations for Reform Now v. Ridge*, 1995 WL 136913, at *9 (Pennsylvania law permitting removal of voters' names up to 15 days before election violated NVRA). Accordingly, the relief ordered by the district court would place the state of Ohio in violation of HAVA and the NVRA.

When Congress adopted the NVRA, it recognized that it was imposing new requirements for removing names from registration lists on states that had not been

doing so. Congress saw that function as important, but it also did not want that function to interfere with the work of election officials preparing to conduct federal elections. Accordingly, it mandated that systematic checking of registration lists be completed 90 days prior to any federal election (except for the categories of criminal conviction, mental incapacity, death or request of the registrant). 42 U.S.C. §§ 1973gg—6(a) and (c). When Congress adopted HAVA, it expressly retained the NVRA protections against arbitrary removal of names from registration lists. 42 U.S.C. § 15545.

IV. THE TEMPORARY RESTRAINING ORDER COULD RESULT IN A SIGNIFICANT PERCENTAGE OF ELIGIBLE VOTERS BEING FORCED TO VOTE A PROVISIONAL BALLOT AND THUS INCREASE THE ATTENDANT CONSEQUENCES OF PROVISIONAL BALLOTING ISSUES

There are a number of practical consequences to the temporary restraining order. The Secretary points out in her motion the administrative difficulties and database incompatibilities. However, administrative inconvenience aside, there are also serious consequences for the voter and the public at large. The confusion created over how to handle mismatches will inevitably lead to an increased proportion of voters who are forced to cast a provisional ballot instead of a regular ballot. Such a ballooning of the percentage of overall Ohio voters relegated to the provisional rolls will increase the chances that those voters ballots will not be counted, make it highly unlikely that Ohio will have even unofficial election results in a timely manner, and increase the likelihood of once again catapulting election results into contested litigation.

The *en banc* Sixth Circuit was sharply divided on the consequences of reinstating the district court's order. Judge Sutton, writing for the majority, reached the conclusion that "[n]othing about this case or the relief plaintiffs seek will allow them to prevent a single voter from casting a ballot in the November election. At most, the relief could prompt an inquiry into the bona fides of an individual's registration, and *at most it could require an individual to cast a provisional ballot*. At that point, the validity of the voter's registration will be determined and, with it, the validity of his or her vote." 6th Cir. En Banc Op. at 9 (emphasis added). There is no basis in the record to support the court's holding that all voters will be able to resolve the lack of a data match in time to have their provisional ballots counts. What the court's holding means is that failure to resolve any matching problem will determine that the voter's ballot shall not count.

Provisional balloting was designed to be a fallback method of voting, a safety net. There is no question it is valuable. But it was not meant to bear the weight of a significant portion of overall voters. It was meant to be a solution, for example, for voters who have recently moved, Ohio Rev. Code § 3505.16, or who did not bring proof of identification, Ohio Rev. Code. § 3505.18.[13] As articulated *supra*, the statewide database was supposed to ease the incidence of voters being wrongly left off the rolls, and thus minimize the need for provisional voting, not to increase it due to software glitches.

[13] A full list of circumstances in which an Ohio voter is eligible to cast an absentee ballot may be found at Ohio Revised Code § 3505.181(A).

The temporary restraining order affects over 600,000 Ohioans who registered and filed to vote since January 1, 2008, and 200,000 of whom for whatever reason encountered database mismatches. *See* "Fight Over Voter Registration Checks Hits U.S. Supreme Court; Rhetoric Intensifies", Gongwer, Volume #77, Report #201, Thurs., Oct. 16, 2008. The majority of the circuit court did not address the consequences of so significantly increasing the number of provisional voters

An increase in the percentage of voters forced to cast a provisional ballot would have a detrimental impact on voters and the public at large for four main reasons.

One, the state and county election system is not equipped to handle such a potentially high volume of provisional voters. Recent elections in Ohio have shown that the system has difficulty handling even the relatively small number of provisional voters in the course of a normal, non-presidential election. *E.g.,* Official election results from Ohio Secretary of State, http://www.sos.state.oh.us/SOS/elections/electResultsMain.aspx (last visited Oct. 16, 2008); *see also* From Registration to Recounts: The Election Ecosystem of Five Midwestern States, Steven F. Hueffner, Daniel P. Tokaji & Edward B. Foley (2007) (located online at http://moritzlaw.osu.edu/electionlaw/joyce/index.php).

Two, it increases the potential that the votes of eligible voters will not be counted. Under Ohio law, some provisional ballots will be counted automatically when the local board of elections has verified that the voter is eligible to vote in that election. Ohio Rev. Code § 3505.181(B)(4). However, other provisional ballots

cannot only be counted if the voter appears at the board of elections within ten days after Election Day to provide additional information necessary to determine the voter's eligibility to vote. Ohio Rev. Code § 3505.181(B)(8). The lower courts gave absolutely no guidance – much less protection – for voters who cannot resolve public officials' inability to match two databases. So it may fall upon the poll worker, who may have received little if any training, to instruct the voter whether or not they need to follow up. And it requires the voter to decipher what, if anything, needs to be done and when. Such an unregulated result will not be easily or consistently navigated.

Three, it makes it far less likely that Ohio would be able to promptly report a relatively complete unofficial canvass of election results. In recent years, states have been under increasing pressure to produce election results quickly, if not almost immediately. That will be impossible if there is a significantly greater percentage of provisional ballots. As explained above, boards of election are required to investigate the eligibility of each provisional voter and, where required, hold a hearing or gather additional evidence of eligibility or identity. *See* Ohio Rev. Code § 3505.181(B). This will no doubt slow the compilation of results. If any given race ends of being close, the results could be delayed for some time while provisional ballots are investigated and processed.

Four, it increases the likelihood that the election results themselves would be contested in court. If a race is close, and the number of provisional votes could be determinative of the result, that could lead to the counting or non-counting of those

ballots being used as a basis for challenging the final count. Again, this possibility for protracted litigation could delay official final results for some time. And it would be completely contrary to Congress's purpose when it enacted HAVA to prevent a repeat of the problems that plagued the 2000 Presidential election.

CONCLUSION

For the foregoing reasons, *amici* respectfully request this Court grant the Secretary of State's application for an emergency stay.

Respectfully submitted,

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Meredith Bell-Platts (OH 72917)
Counsel of Record
Neil Thomas Bradley
ACLU VOTING RIGHTS PROJECT
230 Peachtree Street, NW
Suite 1440
Atlanta, GA 30303
(404) 523-2721 (phone)
(404) 653-0331 (fax)
mbell@aclu.org
nbradley@aclu.org

Carrie L. Davis (OH 77041)
Jeffrey M. Gamso (OH 43869)
ACLU of Ohio
4506 Chester Ave
Cleveland, OH 44103
(216) 472-2220 (phone)
(216) 472-2210 (fax)
cdavis@acluohio.org
jmgamso@acluohio.org

Daniel P. Tokaji
The Ohio State University
Moritz College of Law (Institutional affiliation provided for purposes of identification only)
55 W. 12th Ave.
Columbus, OH 43210
(614) 292-6566 (phone)
(614) 688-8422 (fax)
dtokaji@gmail.com

Paul Moke (0014099)
Professor of Social and Political Science
1252 Pyle Center
Wilmington College (Institutional affiliation provided for purposes of identification only)
Wilmington, Ohio 45177
937-382-6661 ext 415 (phone)
937-382-7077 (fax)
paul_moke@wilmington.edu

Richard Saphire (0017813)
Professor of Law
University of Dayton School of Law (Institutional affiliation provided for purposes of identification only)
300 College Park
Dayton, Ohio 45469-2772
937-229-2820 (phone)
937-229-2469 (fax)
saphire@udayton.edu

Jon Greenbaum
Bob Kengle
Mark. A. Posner
Lawyers Committee for Civil Rights Under Law
1401 New York Avenue, NW
Suite 400
Washington, DC 20005
(202) 662-8600 (phone)
(202) 783-0857 (fax)
jgreenbaum@lawyerscomm.org

Teresa James (0031671)
PROJECT VOTE
23556 Marion Road
North Olmsted, Ohio 44070
(440) 503-5422
tjames@projectvote.org

Brenda Wright
Legal Director, Democracy Program
Demos: A Network for Ideas and Action
358 Chestnut Hill Avenue
Suite 303
Brighton, MA 02135
(617) 232-5885 ext. 13 (phone)
(617) 232-7251 (fax)
bwright@demos.org

Jennifer R. Scullion
Matthew Morris
John Snyder
PROSKAUER ROSE LLP
1585 Broadway
New York, NY 10036
(212) 969-3600 (phone)
(212) 969-2900 (fax)
jscullion@proskauer.com
mmorris@proskauer.com
jsnyder@proskauer.com

Ellis Jacobs
Advocates for Basic Legal Equality
On Behalf of the Miami Valley Voter Protection
Coalition
333 West First Street Suite 500
Dayton, Ohio 45402
(937) 535-4419
ejacobs@ablelaw.org