



MEMORANDUM

TO: Paddy J. McGuire, Deputy Secretary of State, Oregon

FROM: Wendy R. Weiser and Justin Levitt
Brennan Center for Justice at NYU School of Law

DATE: June 15, 2005

RE: Verification of Voter Registration Information

You asked for the Brennan Center’s legal opinion concerning whether, consistent with the Help America Vote Act of 2002 (“HAVA”), a state may (a) process voter registration applications containing driver’s license or partial social security numbers that election officials are unable to match with existing government records, and (b) exempt from HAVA’s identification requirements a first-time voter who registers by mail and provides a non-driver’s state identification number that election officials successfully match with a state record. For the reasons stated below, the answer to both questions is yes.

A. Summary of HAVA’s Identification Number and Verification Provisions

HAVA requires each state to request that each applicant for voter registration provide: (1) the applicant’s driver’s license number, or, if the applicant does not have a current and valid driver’s license, (2) the last four digits of the applicant’s social security number.¹ If an applicant has neither a current and valid driver’s license nor a social security number, the state is required to “assign the applicant a number which will serve to identify the applicant for voter registration purposes.”² HAVA prohibits states from processing voter registration forms without these identifying numbers.³

In addition to requiring changes to voter registration applications, HAVA requires that each state implement a statewide voter registration database that is “coordinated with other

¹ 42 U.S.C. § 15483(a)(5)(A)(i)(I) and (II).

² *Id.* § 15483(a)(5)(A)(ii) (“special rule for applicants without driver’s license or social security number”).

³ *Id.* § 15483(a)(5)(A)(i). The subparagraph states, in full:

Except as provided in clause (ii) [concerning applicants without driver’s license or social security numbers], notwithstanding any other provision of law, an application for voter registration for an election for Federal office may not be accepted or processed by a State unless the application includes –

- (I) in the case of an applicant who has been issued a current and valid driver’s license, the applicant’s driver’s license number; or
- (II) in the case of any other applicant (other than an applicant to whom clause (ii) applies), the last 4 digits of the applicant’s social security number.

agency databases within the State.”⁴ The statute further requires chief state election officials to enter into agreements with state motor vehicle authorities to “match” information in databases to enable state election officials to “verify the accuracy of the information provided in applications for voter registration.”⁵ In addition, the DMV Commissioner must enter into an agreement with the federal Commissioner of Social Security “for the purpose of verifying applicable information.”⁶ The statute does not define the terms “match” and “verify,”⁷ and thus it is up to each state to determine how to use its databases to assist in the voting process.

HAVA gives states considerable discretion in determining how to implement its identifying number and verification provisions. Specifically, the statute provides that each state “shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law.”⁸ As Senator Dodd, the chief Senate sponsor of HAVA, explained, the statute’s drafters were careful to ensure flexibility so that states could maximize voters’ access to registration:

[N]othing in this section [303(a)(5)(A)] prohibits a State from accepting or processing an application with incomplete or inaccurate information. Section 303(a)(5)(A)(iii) specifically reserves to the States the determination as to whether the information supplied by the voter is sufficient to meet the disclosure requirements of this provision. So, for example, if a voter transposes his or her Social Security number, or provides less than a full driver’s license number, the State can nonetheless determine that such information is sufficient to meet the verification requirements, in accordance with State law.... Moreover, nothing in this section prohibits a State from registering an applicant once the verification process takes places, notwithstanding the fact that the applicant provided inaccurate or incomplete information at the time of registration ... or that the matching process did not verify the information.⁹

Each state has a responsibility to implement HAVA in a manner that preserves voters’ access to registration and ability to exercise their fundamental right to vote. In implementing the identifying number and verification provisions, Oregon should take care not to create new and unnecessary barriers to voter registration.

B. States May – Indeed, Must – Process Applications with Identification Numbers that Election Officials Are Unable to Match With Existing Records

In our legal opinion, it is fully consistent with HAVA for a state to process voter registration applications containing driver’s license or partial social security numbers that election officials are unable to match with existing government records. Indeed, we believe that

⁴ *Id.* § 15483(a)(1)(A)(iv).

⁵ *Id.* § 15483(a)(5)(B)(i).

⁶ *Id.* §§ 15483(a)(5)(B)(ii) and (C)(i).

⁷ In fact, the statute does not even require that “verification” be used for the purpose of confirming a voter’s identity. Verification could, and indeed should, also be used for the purpose of supplementing information or correcting errors on voter registration applications.

⁸ 42 U.S.C. § 15483(5)(A)(iii).

⁹ 148 Cong. Rec. S10488-02 (daily ed. Oct. 16, 2002)

the only reading of Section 303(a)(5) that makes sense of all of HAVA’s verification provisions is one in which states are required to process such applications.

1. Nothing in Section 305(a)(5) Makes a Voter’s Registration Status Turn on the State’s Ability to Match her Identifying Numbers

Although Section 305(a)(5) of HAVA prohibits states from processing voter registration applications that do not include an identifying number – either a driver’s license number, the last four digits of a social security number, or another unique state-issued identifying number¹⁰ – nothing in its language justifies a state’s refusal to register a voter if election officials cannot verify that identifying number. Section 305(a)(5) does not mention any verification process at all. Its language directing states not to process certain applications refers only to the numbers on the face of an application: “an application for voter registration for an election for Federal office may not be accepted or processed by a State unless *the application includes*” one of the listed identifying numbers.¹¹

While it is true that subsection 305(a)(5)(A)(i)(I) dictates the number that an applicant “who has been issued a *current and valid* a driver’s license” must provide,¹² this subsection does not create any new state obligations relating to verification. Although the phrase does use the adjectives “current” and “valid” to modify the applicant’s “driver’s license,” those adjectives refer to the document possessed by the *applicant*, not to the number listed on the voter registration *application*. No such adjectives are used to modify the “applicant’s driver’s license *number*” that must be provided on the application. In other words, the sole purpose of the phrase is to identify which applicants are required to list their driver’s license numbers; it creates no duty for the state other than the duty to request the appropriate numbers from driver’s license holders. An applicant who has an expired driver’s license or whose license has been revoked, for example, does not have a “current and valid driver’s license” and thus need not provide that number on his or her application.

That the driver’s license subsection should not be read to incorporate verification results is reinforced by the parallel subsection – (A)(i)(II) – addressing social security numbers. That subsection uses no adjectives like “current” and “valid” to modify the “last four digits of the applicant’s social security number” that must be provided by applicants without driver’s licenses but with social security numbers. Since both driver’s license numbers and social security numbers are subject to verification (pursuant to a separate provision), the disparity makes sense

¹⁰ 42 U.S.C. § 15483(5)(A)(i). Section 15483(a)(5)(A)(ii) provides an exemption in the event that an applicant indicates that he “has not been issued a current and valid driver’s license or a social security number.”

¹¹ *Id.* § 15483(a)(5)(A)(i) (emphasis added). The full sentence reads, in pertinent part: “[A]n application for voter registration ... may not be accepted or processed by a State unless the application includes ... (I) in the case of an applicant who has been issued a current and valid driver’s license, the applicant’s driver’s license number....” *Id.* § 15483(a)(5)(A)(I).

¹² That section also delineates which identifying numbers are appropriate for which applicants: “an applicant who has been issued a current and valid driver’s license” must submit his license number, *id.* § 15483(a)(5)(A)(i)(I); an applicant who has not been issued a current and valid driver’s license and who has been issued a social security number must submit the last four digits of that social security number, *id.* § 15483(a)(5)(A)(i)(II); and those who have no such license or social security number need not, obviously, submit either, *id.* § 15483(a)(5)(A)(ii).

only if the adjectives “current” and “valid” in subsection (A)(i)(I) are understood independently of the verification process.

HAVA expressly reserves to a state’s discretion the procedures to verify the information, including identifying numbers, on voter registration applications and the consequences of any verification failure or uncertain determination. HAVA clearly states, in a section entitled “Determination of Validity of Numbers Provided,” that “[t]he State shall determine whether the information provided by an individual [in his application] is sufficient to meet the requirements of this subparagraph, in accordance with State law.”¹³ In other words, states retain the ability to process voter registration applications regardless of verification results. This is consistent with the fact that nothing in HAVA – and certainly not its verification provisions – was intended to impose a new federal requirement for registration or voting. As Senator Dodd explained when presenting the conference report on HAVA,

with respect to the provisions of section 303(a)(5) which require verification of voter registration information, it is important to remember that nothing in this conference report establishes a federal definition, or standard, for when a voter is duly registered. That authority continues to reside solely with State and local elections officials pursuant to State law. Nor does this conference report require States to enact legislation changing voter eligibility requirements to conform to the Act.¹⁴

In short, nothing in the language of Section 303(a)(5) of HAVA makes the ability to register to vote turn on the state’s ability to match a registrant’s identifying number. To read a broader prohibition into HAVA is to invent text that does not exist. Congress could have drafted Section 303(a)(5)(A) to prohibit states from processing applications until information submitted by the applicant had been matched with information in other state or federal databases. It did not do so.¹⁵

2. Rejecting Voter Registration Applications Solely Because State Officials Are Unable to Match the Identifying Numbers Would Violate HAVA

Standard canons of construction direct that statutory provisions be read so as to render companion provisions meaningful.¹⁶ When section 303(a)(5)(A) is read in concert with adjacent sections of HAVA, it becomes apparent that states are in fact *required* to process registration applications containing numbers that the state is unable to match (assuming the registrants otherwise meet state law requirements).

In particular, the failure to process voter registration applications that do not produce a match would be inconsistent with HAVA Section 303(b). That section provides that a first-time voter who registers by mail must present, at or before the time of voting, identification

¹³ *Id.* § 15483(a)(5)(A)(iii).

¹⁴ 148 CONG. REC. S10488-02, *S10504 (daily ed. Oct. 16, 2002).

¹⁵ Nor is it clear that Congress could have done so consistent with the Constitution.

¹⁶ *See, e.g., Lake Cumberland Trust, Inc. v. EPA*, 954 F.2d 1218, 1222 (6th Cir. 1992) (“Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.”).

confirming their identity.¹⁷ If that voter is unable to meet those identification requirements, HAVA entitles the voter to cast a provisional ballot,¹⁸ which must be counted if the voter is “eligible under State law to vote.”¹⁹ However, the statute also provides an express exemption: if a state is able to validate a voter’s registration information through the matching process, that voter need provide no further identification when he or she votes.²⁰ In other words, HAVA contemplates that the matching process will be used to protect new voters by relieving them of HAVA’s identification burdens. This indeed was one of the two principal purposes of HAVA’s verification provisions, as discussed further below.

If HAVA caused states to reject voter registration applications that do not produce a successful match, its neighboring provision exempting new voters from identification requirements in the event of a match would be rendered meaningless. These identification requirements are triggered only when a state *cannot* match the voter’s registration information with an existing state record. It would be superfluous to exempt new voters from identification requirements in the event of a successful match if the lack of a match prevented these prospective voters from registering in the first place. In addition, a policy of refusing to register voters whose numbers do not produce a match would vitiate HAVA’s provisional ballot protections for first-time voters who register by mail and do not provide identification, since the refusal to register those voters would mean that the provisional ballots are void *ab initio*.

Perhaps more importantly, a state that rejects voter registration applications simply because officials are unable to verify the registration information in another state database would also run afoul of HAVA’s mandates that states ensure that “the name of every eligible voter *appears*” on the voter registration list²¹ and adopt “safeguards to ensure that eligible voters are not removed in error” from the list.²² Given the difficulties in reliably matching data in different databases, each of which records data in different ways and each of which is likely to contain errors, a rule rejecting voter registration applications whose information a state is unable to match is likely to lead to the mass disenfranchisement of eligible voters. Because this result is both foreseeable and preventable, states may be obligated under HAVA to adopt safeguards against such disenfranchisement. The only reliable safeguard is to *prohibit* election officials from rejecting voter registration applications solely because they are unable to produce a match.

The unfair disenfranchisement that would result from rejecting applications without a successful match is no mere conjecture. New York City’s recent experience suggests the potential scope of the disaster that would ensue. Last September, the city’s board of elections sent 15,000 registration records with driver’s license numbers to the state department of motor vehicles for verification. The department flagged 3,560 of those records as listing driver’s license numbers that did not match any numbers in the department’s database. Fortunately, the city board of elections undertook a massive audit of its database by reviewing the scanned original of each registration form that did not produce a match. It found that the driver’s license

¹⁷ *Id.* §§ 15483(b)(1)-(2).

¹⁸ *Id.* § 15483(b)(2)(B)(i); *id.* § 15482(a)(2)(B).

¹⁹ *Id.* § 15483(b)(4).

²⁰ *Id.* § 15483(b)(3)(B).

²¹ *Id.* § 15483(a)(2)(B)(ii) (emphasis added).

²² *Id.* § 15483(a)(4)(B).

numbers on 2,951 of those records – close to 20% of the total submitted – were incorrectly entered by election officials.²³ Had the city rejected those applications for failure to produce a match, close to 20% of new registrants who had supplied driver’s license numbers would have been disenfranchised as a result of typographical errors by election officials. This is precisely the type of harm that HAVA was intended to prevent.

List audit procedures, although advisable, would not entirely solve the problem. It is practically impossible for election officials to catch all errors by manually reviewing thousands of new registration records, often in very a short time period. More importantly, audits of the records in the statewide database will not catch errors in the matching databases. The Social Security Administration estimates that at least ten percent of the information obtained when attempting to match records with its database will be inaccurate, and there is a significantly greater chance of inaccuracy with so-called “foreign” or Latino names.²⁴ It would be unacceptable for the state to make a potential voter’s access to the franchise turn on these odds.

Our interpretation of Section 305(a)(5) is consistent with HAVA’s concern that eligible voters be granted access to the registration process. A prospective voter who has submitted a complete application and sworn to its accuracy can and should expect that the application will be processed by the state. Mistakes beyond the control of the applicant – such as difficulties in retrieving information outside of the state’s voter registration system, data entry errors by election officials, or technical malfunctions in the matching or verification algorithms, all of which may render election officials temporarily or permanently unable to verify the submitted information of an eligible voter – must not impede the processing of a complete application. At the very least, states have the latitude to process such applications if they wish.

The specific verification provisions at issue were intended to provide (a) an alternative to the more burdensome identification requirements otherwise imposed upon first-time voters who register by mail; and (b) a method to assure that every registrant would have a unique identifying number associated with her record in the statewide voter registration database. Those provisions were *not* intended to provide the exclusive method of verifying a registrant’s identity.

3. Rejecting Voter Registration Applications For Failure to Produce a Match Would Be Inconsistent With the Purposes of Section 305(a)(5)

A policy of rejecting voter registration applications solely because the state is unable to match them against existing state records would be completely inconsistent with the purposes of HAVA’s verification provisions. First, one of the two principle purposes of those verification provisions is to provide a way for states to ease the burden on those voters who register by mail for the first time who would otherwise be required to provide identification or documentation before voting. As Senator Bond explained,

²³ The City Board of Elections also found a small number of errors attributable to the Department of Motor Vehicles, as well as approximately 600 errors by voters that should not affect the Board’s ability to verify their eligibility (such as filling in a social security number on the line provided for the driver’s license number).

²⁴ Remarks of Pete Monaghan, Director of Information Exchange and Computer Matching of the Social Security Administration, at the February 2004 meeting of the National Association of Secretaries of State.

New voters who choose to register by mail must provide proof of identity at some point in the process, whether at initial registration, when they vote in person or by mail. Among the kinds of acceptable forms of identification: utility bill, government check, bank statement, or driver's license – no dog licenses, please. *In lieu of the individual providing proof of identity, States may also electronically verify an individual's identity against existing State databases.*²⁵

For these new registrants, Senator Bond continued, “the objective of Congress is fulfilled by voters who register by mail verifying the identity of the voter at some point before they cast their first vote.”²⁶ This could be accomplished through a match, but if matching is unsuccessful, a new voter is still entitled to cast a regular ballot after providing some form of identification.

The second purpose of the verification provisions is to ensure that every voter's registration record would have a unique number associated with it to facilitate clean, accurate record-keeping within the database. As explained by Senator Bond:

The conferees agree that a unique identification number attributed to each registered voter will be an extremely useful tool for State and local election officials in managing and maintaining clean and accurate voter lists. It is the agreement of the conferees that election officials must have such a tool. The conferees want the number to be truly unique and something election officials can use to determine on a periodic basis if a voter is still eligible to vote in that jurisdiction. The social security number and driver's license number are issued by government entities and are truly unique to the voter. They are the most unique numbers available, that is why the conferees require the voter to give the number.²⁷

This second purpose affects all new registrants, not simply those who register by mail. For those registrants who register in person, Congress did not see any need to impose a similar identification requirement. Rather, such registrants would be required to provide their driver's license or partial Social Security numbers so as to facilitate their registration and allow their registration record to be checked for duplication. Indeed, a significant portion of the comments made by legislators about the bill focused on the problem of duplicate registrations in different parts of the same state or in different states. In other words, for those voters who register in person, Congress' concern was duplication, not verification.

For this reason, those states that have adopted a policy of rejecting any registration application for which a successful match is not made are violating the intent of HAVA for both universes of new registrants. For by-mail registrants, Congress clearly envisioned verification through such matching as a way to avoid imposing the identification requirements on such voters at the polls. A failure to match, therefore, should mean only that the voter must provide identification before voting a regular ballot at the polls, not that she cannot be registered at all. For in-person registrants, the driver's license or Social Security numbers were intended simply to provide an easy and unique identifying number to use in the statewide registration database to

²⁵ 148 CONG. REC. S10488-02, *S10489 (daily ed. Oct. 16, 2002) (emphasis added).

²⁶ *Id.*

²⁷ *Id.* at S10490.

protect against duplicate registrations. The verification of such registrants' identities was not considered necessary, and thus would run afoul of the purpose of this portion of HAVA.

C. States May Permit First-Time Voters Who Register by Mail and Provide a Verified Non-Driver's State Identification Card to Vote without Further Identification

You have also asked whether a state may give a regular ballot to a first-time voter who registers by mail and who provides a non-driver's state identification number that the state successfully verifies against another state record, without requiring the voter to present further identification. The Brennan Center believes that such a policy is fully consistent with HAVA, under either of two HAVA provisions. First, the statutory term "driver's license number"²⁸ in Section 303(a)(5)(B) may easily be interpreted to include an identification number issued by the state licensing authority to non-drivers. Second, the statutory term "other government document that shows the name and address of the voter" in Section 303(b) may easily be interpreted to include a government-issued identification number that is linked to records, verified by a state official, containing the name and address of the voter.

As noted above, HAVA section 303(b) provides that most voters who register by mail and who have not previously voted in the jurisdiction must present, at or before the time of voting, identification confirming their identity.²⁹ However, the statute expressly exempts from this requirement a voter who has submitted with his registration a driver's license number or the last four digits of his social security number, when the number, the voter's name, and the voter's date of birth have been successfully matched against an existing State identification record by an election official.³⁰ In other words, if the matching process has been successful, a voter need not submit further identification when voting.

The history and purpose of HAVA's verification process demands a broad construction of the information eligible for matching. It is true that HAVA specifically designates a "driver's license number,"³¹ but this term naturally embraces identification numbers issued by state licensing agencies that serve as official identification for non-driving residents. An individual's authorization to drive an automobile does not reflect upon his eligibility to vote; a driver's license number is specified under HAVA only because it is a commonly available identification number verified by the government as belonging uniquely to a particular individual. The same is true of the identification number of a non-driver's identification card issued by the state.

For this reason, the precursors to HAVA routinely failed to distinguish between driver's licenses and personal identification cards issued by the same or similar government entities. For example, in praising the Michigan system that served as the model for HAVA's verification system, the National Commission on Federal Election Reform (commonly known as the "Ford-Carter Commission") noted that Michigan matched its voter registration information against the

²⁸ 42 U.S.C. §§ 15483(a)(5)(A)(i)(I), 15483(b)(3)(B)(i)(I).

²⁹ *Id.* §§ 15483(b)(1)-(2).

³⁰ *Id.* § 15483(b)(3)(B).

³¹ *Id.* §§ 15483(a)(5)(A)(i)(I), 15483(b)(3)(B)(i)(I).

Michigan Department of State’s “driver license / personal identification card” file.³² States implementing HAVA’s requirements have followed suit; on their voter registration forms, at least thirteen states expressly allow individuals to submit a state identification card number in lieu of a driver’s license number for verification purposes.³³ It is therefore entirely consistent with both the impetus for HAVA and common practice implementing HAVA to construe section 303(b)(3)(B)’s express exemption from incremental identification requirements to include successful matches of name, date of birth, and the identification number from a non-driving voter’s state identification card that an individual submitted with his application for voter registration.

Even if a verified state identification number from an official non-driver’s identification card rather than a driver’s license does not qualify a voter for section 303(b)(3)(B)’s express exemption from identification requirements, a non-driver’s identification number otherwise satisfies HAVA’s identification requirement for first-time voters who have registered by mail. HAVA requires that if such a voter has not included with his registration materials “a current and valid photo identification; or ... [a] government document that shows the name and address of the voter,”³⁴ he must “present [one of these forms of identifications] to the appropriate State or local election official” at or before the time of voting.³⁵ A non-driver’s identification number that the state is able to match against existing state records is such a “government document that shows the name and address of the voter” because the validation process for that official number supplied by the voter in registration materials suffices to confirm the information required. In the course of a successful validation process, election officials will have been sufficiently “present[ed]” with documentation (an entry in the database of the issuing motor vehicle agency) confirming the name and address of the prospective voter. Thus, if a non-driver’s identification card number has been verified in the registration process, a state need not require additional identification of a prospective voter in order to grant him a regular ballot.

* * *

Please feel free to contact us if you have any further questions or if you would like to discuss the analysis in this memorandum. Wendy Weiser can be reached at 212-998-6130 or wendy.weiser@nyu.edu, and Justin Levitt can be reached at 212-998-6730 or justin.levitt@nyu.edu.

³² National Commission on Federal Election Reform, To Assure Pride and Confidence in the Electoral Process 102 (Aug. 2001).

³³ These states include Alaska, Arizona, California, Florida, Illinois, Iowa, Maryland, Michigan, Minnesota, Texas, Utah, Washington, and Wisconsin. Colorado allows the voter to submit a unique identification number from the Department of Revenue.

³⁴ 42 U.S.C. § 15483(b)(3)(A).

³⁵ *Id.* at § 15483(b)(2)(A)(i).