



Memorandum

TO: ACORN and the Advancement Project

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RE: “Matching” Under HAVA’s Statewide Voter Registration Database Provisions

This memorandum explains why the Help America Vote Act of 2002 (“HAVA”),¹ permits Pennsylvania to register applicants who provide their driver’s license numbers or the last four digits of their Social Security numbers on their voter registration applications but whose information does not “match” information in state motor vehicle or Social Security Administration databases. The Brennan Center believes that a matching failure should not be a barrier to inclusion on Pennsylvania’s or any other state’s voter rolls.

I. Statutory Background

A. HAVA’s Identifying Number Requirements

One of HAVA’s new requirements is that identifying numbers must now be associated with each new voter registration record. But nothing in HAVA requires states to reject applications from eligible voters because of technical errors or omissions that do not affect their eligibility.²

Under HAVA, each state must ask each applicant for voter registration after January 1, 2003 to provide: (1) her driver’s license (or non-driver’s ID) number, or, if she does not have a current and valid driver’s license (or non-driver’s ID), (2) the last four digits of her social security number.³ If an applicant has neither number, the state is required to “assign the applicant a number which will serve to identify the applicant for voter registration purposes.”⁴ HAVA prohibits states from processing voter registration forms without any of these identifying

¹ 42 U.S.C. § 15481 *et seq.*

² *See* 42 U.S.C. § 1971(a)(2)(b).

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

⁴ *Id.* § 15483(a)(5)(A)(ii) (“special rule for applicants without driver’s license or social security number”).

numbers⁵ (though the statute does not say that the source of these numbers must be the voter herself).

HAVA expressly gives states 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*.”⁶ 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....⁷

B. HAVA’s Verification or “Matching” Requirements

In addition to requiring each state to associate a unique identifying number – a driver’s license or non-driver’s ID number, a partial Social Security number, or a state-generated number – with each new voter registration record, HAVA requires states to pass each application through a verification, or “matching,” process. For those applications containing driver’s license or partial Social Security numbers, the state must *attempt* to match those numbers, along with the applicants’ name and date of birth, with existing records in DMV or Social Security Administration databases.

Specifically, the statute requires that each state implement a statewide voter registration database that is “coordinated with other agency databases within the State.”⁸ 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.”⁹ In addition, the DMV Commissioner must enter into an agreement with the federal Commissioner of Social Security

⁵ *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.

⁶ 42 U.S.C. § 15483(5)(A)(iii) (emphasis added).

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

⁸ *Id.* § 15483(a)(1)(A)(iv).

⁹ *Id.* § 15483(a)(5)(B)(i).

“for the purpose of verifying applicable information.”¹⁰ The statute does not define the terms “match” and “verify,”¹¹ and thus it is up to each state to determine how to use its databases in the voting process. There are no further requirements in HAVA relating to verification.

The only other reference to “matching” in the statute appears in Section 303(b). That section provides that a first-time voter who registers by mail is exempt from HAVA’s identification requirements if the state successfully matches her identifying numbers.¹² (As discussed in part III of this memo, that makes clear that eligible applicants should be added to the registration list regardless of whether election officials successfully match their identifying numbers.)

II. Nothing in HAVA Prohibits Pennsylvania From Registering Applicants Whose Information Cannot Be “Matched”

The critical point is that HAVA visits *absolutely no consequences* on applicants whose information does not match (unless those applicants are first-time voters who register by mail). Again, HAVA leaves it to the discretion of each state to determine what to do if no match is found. As Senator Dodd explained,

[N]othing 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.¹³

In short, nothing in the language 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 successfully matched with information in other state or federal databases. It did not do so.¹⁴

The reason HAVA visits no consequences on applicants whose voter registration information cannot be matched with existing state records is that HAVA’s verification provisions were *not* intended to be an additional barrier to the franchise, to serve as a substitute for state eligibility determinations, or to be the sole means by which a state can verify the identity of a prospective voter.

Rather, as discussed in part IV below, there are two main purposes of HAVA’s verification provisions. The first purpose is to enable states to maintain better lists by ensuring that each record has a unique identifying number associated with it that will follow the applicant throughout her voting life. Once that number is verified, election officials can be confident that

¹⁰ *Id.* §§ 15483(a)(5)(B)(ii) and (C)(i).

¹¹ 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.

¹² See 42 U.S.C. § 15483(b)(3)(B).

¹³ *Id.*

¹⁴ Nor is it clear that Congress could have done so consistent with the Constitution. See U.S. Const. amend. X.

Jane Smith who registered in Belleville in 2001 is the same Jane Smith now registering in Pittsburgh in 2006. In other words, unique identifying numbers enable states easily to identify duplicate registration records with greater confidence and thus to eliminate duplicates and other deadwood from their lists. With respect to this interest, Congress was concerned with improving state database management, not with creating a barrier to voting.

The second purpose of HAVA's verification provisions is to provide a way of reducing the burdens of HAVA's identification provisions. This was the result of a compromise between those who wanted to subject all first-time voters who registered by mail to identification requirements and those who believed that identification requirements would exclude legitimate voters. Matching was settled upon as an additional method of confirming an applicant's identity sufficient to render documentary identification unnecessary.

HAVA recognizes that there are several ways in which a voter can establish and a state can verify her identity. Matching is one way of affirmatively verifying an applicant's identity; presenting one of the forms of identification listed in § 303(b) of the statute is another. If neither method is conclusive, HAVA leaves it to the state's discretion to determine whether additional means of verifying an applicant's identity – such as signature matches, affidavits, witnesses, or recognition by poll workers – are necessary. Although a number of states plan to engage in further verification of un-matched applicants, nothing in HAVA requires them to do so (unless the applicants are first-time voters who registered by mail).

III. The Refusal to Register Applicants Whose Information Does Not “Match” In Fact Violates HAVA

HAVA's provisions concerning first-time voters who register by mail confirm the fact that matching was not intended to be a barrier to registration. To the contrary, when the verification provisions in section 303(a)(5)(A) are 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).

Standard canons of construction direct that statutory provisions be read so as to render companion provisions meaningful.¹⁵ Unless the verification provisions are read so that non-matching applicants would be included on the voter rolls, adjacent sections of HAVA would be rendered meaningless.

Specifically, 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 confirming his or her identity.¹⁶ If that voter is unable to meet those identification requirements,

¹⁵ 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.”).

¹⁶ *Id.* §§ 15483(b)(1)-(2).

HAVA entitles the voter to cast a provisional ballot,¹⁷ which must be counted if the voter is “eligible under State law to vote.”¹⁸ 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.¹⁹ 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 meant that these prospective voters would not be registered in the first place. Put another way, a first-time voter whose information does *not* match has a right under HAVA to cast a regular ballot if she shows ID. That right would be completely obliterated if the voter is left off the rolls entirely because there was no match. 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*.

In addition, 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 list²⁰ and adopt “safeguards to ensure that eligible voters are not removed in error” from the list.²¹ 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.

IV. Rejecting Voter Registration Applications For Failure to Produce a Match Is 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. 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

¹⁷ *Id.* § 15483(b)(2)(B)(i); *id.* § 15482(a)(2)(B).

¹⁸ *Id.* § 15483(b)(4).

¹⁹ *Id.* § 15483(b)(3)(B).

²⁰ *Id.* § 15483(a)(2)(B)(ii) (emphasis added).

²¹ *Id.* § 15483(a)(4)(B)

for the first time who would otherwise be required to provide identification or documentation before voting. As Senator Bond explained,

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.*²²

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.”²³ 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.²⁴

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 or who were previously registered, 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

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

²³ *Id.*

²⁴ *Id.* at S10490.

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 protect against duplicate registrations. The verification of such registrants' identities, although permissible was not considered necessary. To the extent that the state nonetheless wishes to verify the identities of those voters, there is no reason to limit that verification to one method – database matching – and not to allow voters whose information does not match to confirm their identities by other means.

V. Pennsylvania's Current Practices Are Inconsistent With and More Restrictive Than the Practices in Other States

The Brennan Center's comprehensive survey of the database policies of forty-six states and the District of Columbia shows that Pennsylvania's current policies are at odds with those in the vast majority of states. See <http://www.brennancenter.org/programs/downloads/HAVA/svrd/SVRD%20matching%20report.pdf>. In fact, if Pennsylvania's current policies remain in effect, Pennsylvania may very well be one of the leaders in the country in disenfranchising eligible voters.

The Brennan Center survey found that the vast majority of states do not plan to reject voter registration applications merely because the state is unable to match the information in those applications with existing state records. See *id.* at 16-17. Instead, most states plan to respond to non-matching applications in one of three ways. First, some states plan to treat such applicants as registered, but if the applicants are first-time voters who registered by mail, to require them to present identification as required by HAVA § 303(b). Second, some states plan to treat such applicants as registered but to flag their records for further information and verification, such as by requiring the applicants to present identification, by subjecting them to a signature match, or by requiring them to sign an affidavit confirming their eligibility. Third, some states plan to treat such applicants as provisionally registered, but to allow them to vote a ballot that will be counted if they provide additional information that the state can verify, such as identification, signature matching, or affidavits. *In each case, an applicant whose information could not be matched will be afforded an opportunity to vote a ballot that will be counted without regard to the fact that the state was unable to find matching information in an existing state database.* Each of these states will add the non-matching voter registration applications to the statewide databases, though most will include a notation in the records associated with those applications indicating that the state sought but failed to find a match for the data on those applications.

Those state policies are based on the premise that a matching failure, standing alone, is an insufficient basis to refuse to allow a voter to register and vote. Pennsylvania's current practice places it in the small minority of states that currently plan to reject voter registration applications if matching is unsuccessful. Only Texas, Washington, Iowa, and South Dakota have indicated that they will reject such applications. As explained above, HAVA in no way requires that these applications be rejected.

Also, other states are planning to register voters who do not provide driver's license or social security numbers. Most states treat applications without such numbers the same as applications on which registrants indicate that they have not been issued such numbers; those states register such voters and assign them unique identifying numbers. *See id.* at 18. Thus, Pennsylvania's policy of rejecting such applications also places it in the minority position among the states.