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HAVA'S MATCHING/ID REQUIREMENT:  
A MEANINGLESS TALE TOLD BY... CONGRESS

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As of this writing, Senators John McCain and Barack Obama are locked in a virtual dead heat for the electoral votes from the state of Ohio.<sup>1</sup> This is not surprising, as the polls mirror the events of 2004, when President George W. Bush defeated Senator John Kerry by a narrow margin in Ohio.<sup>2</sup> This year, however, is different because the candidates—perhaps sensing the accuracy of the Ohio result might be questioned, as it was after 2004—have started to make the election's result an issue *before* the results are even known.<sup>3</sup> Thus, in an October 15, 2008 televised debate, Senator McCain claimed that Association of Community Organizations for Reform Now (“ACORN”), a left-leaning voter registration group, was “on the verge of maybe perpetrating one of the greatest frauds in voter history in this country, maybe destroying the fabric of democracy.”<sup>4</sup>

Ohio Republicans supported Senator McCain by suing Ohio's Democratic Secretary of State Jennifer Brunner, alleging she effectively disabled a quality-control function—the “matching” function—of the state's voter registration database and thereby allowed individuals to place fraudulent registrations in that database.<sup>5</sup> The plaintiffs claimed

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1. See Ohio Polls, <http://www.electoral-vote.com/evp2008/Pres/Graphs/ohio.html> (last visited Oct. 30, 2008).

2. See *id.*

3. See Michael D. Shear & Robert Barnes, *A Hard-Hitting Final Round: As McCain Presses Attack, Obama Stresses the Economy*, WASH. POST, Oct. 15, 2008, at A1.

4. *Id.*

5. Ohio Republican Party v. Brunner, No. 2:08-cv-00913, slip op. at 3–4 (S.D. Ohio Oct. 9, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/R52Order.pdf>. See generally Election Law @ Moritz, Litigation (Ohio Republican Party v. Brunner), <http://moritzlaw.osu.edu/electionlaw/litigation/ohiorepublicanpartyv.brunner.php> (last visited Oct. 30, 2008) (providing an overview of the case of *Ohio Republican Party v. Brunner* with links to the documents filed during the case's duration).

the federal Help America Vote Act of 2002 (“HAVA”)<sup>6</sup> required Secretary Brunner to keep the matching function activated and produce user-friendly reports of the function’s results with local election administrators.<sup>7</sup> The District Court for the Southern District of Ohio agreed with the Republican Party and granted a temporary restraining order,<sup>8</sup> as did an en banc panel of the Sixth Circuit on appeal.<sup>9</sup> Secretary Brunner appealed,<sup>10</sup> and the Supreme Court of the United States stayed the temporary restraining order in a per curiam opinion, finding the Ohio Republican Party likely lacked standing to dispute the database procedure.<sup>11</sup> The Republican Party did not give up immediately, and it re-filed the case as a mandamus action before the Ohio Supreme Court.<sup>12</sup> The Party, however, then asked the court to dismiss the matter without prejudice.<sup>13</sup> A similar suit is also pending before a Wisconsin state trial court.<sup>14</sup>

This Article explores the question of whether HAVA requires matching, as well as the subsidiary question of whether HAVA mandates matching in states requiring voters to present a form of identification at the time of voting. The first question is a close one. However, on the

6. Help America Vote Act of 2002, Pub. L. No. 107-252, § 303, 116 Stat. 1666, 1708–14 (2003).

7. *Ohio Republican Party v. Brunner*, No. 2:08-cv-00913, slip op. at 3–4 (S.D. Ohio Oct. 9, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/R52Order.pdf>.

8. *Id.* at 1.

9. *Ohio Republican Party v. Brunner*, No. 08-4322, slip op. at 17 (6th Cir. Oct. 14, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/orpvbrunnerenbanc.pdf>.

10. *Brunner v. Ohio Republican Party*, 77 U.S.L.W. 3238, 3238 (2008) (per curiam), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ORP-Order-10-17-08.pdf>.

11. *Id.*

12. *Petition for Writ of Mandamus, Ohio ex rel. Mahal v. Brunner*, No. 08-2027 (Ohio filed Oct. 17, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/632008.pdf>.

13. *Ohio ex rel. Mehal v. Brunner*, No. 2008-2027 (Ohio Oct. 21, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Mahal-Dismissal-10-21-08.pdf>.

14. See generally *Election Law @ Moritz, Litigation* (Van Hollen v. Government Accountability Board), <http://moritzlaw.osu.edu/electionlaw/litigation/vanhollenv.gab.php> (last visited Oct. 30, 2008) (providing an overview of the case of *Van Hollen v. Government Accountability Board* with links to documents filed during the case’s duration). On September 10, 2008, the Wisconsin Attorney General filed a mandamus action against the state’s chief election authority, the Government Accountability Board (“GAB”), to compel it to retroactively match all voter registrations dated after HAVA’s database provisions became effective in the state. *Petition for Writ of Mandamus, Van Hollen v. Gov’t Accountability Bd.*, No. 2008CV004085 (Dane County Cir. Ct. Sept. 10, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/VanHollen-Complaint.pdf>. This action would affect almost one million voters. Todd Richmond, *Judge Allows AG to Continue Voter Lawsuit*, HERALD TIMES REP. (Wis.), Sept. 25, 2008, at 7A. This matching had not been possible until August 6, 2008 when Wisconsin finally launched the matching function of its statewide online voter registration database. See *Petition for Writ of Mandamus, Van Hollen*, No. 2008CV004085. The GAB, like the Attorney General, believes the law requires it to match applicants, but it will probably deny any duty to match applications submitted prior to August. See Letter from Kevin J. Kennedy, Dir. & Gen. Counsel, Gov’t Accountability Bd., to J.B. Van Hollen, Attorney Gen., Wis. Dep’t of Justice (Aug. 28, 2008), available at <http://www.doj.state.wi.us/news/files/GAB%20Response.pdf>.

second question, at least some courts are likely to conclude that HAVA exempts a state from having a matching program if the state requires identification from every voter at the polls.<sup>15</sup> This Article makes a few modest recommendations to administrators trying to avoid the possibility of a lawsuit.

## II. THE REQUIREMENT

HAVA authorizes, but does not necessarily require, states to attempt to confirm, or “match,” the accuracy of personal information contained in voter registration applications.<sup>16</sup> States can match information by comparing it with information contained in databases maintained by state departments of motor vehicles or the federal Social Security Administration.<sup>17</sup> The matching process must attempt to confirm, at a minimum, the applicant’s driver’s license, state identification number, or social security number, as well as the applicant’s name and date of birth, within one of these databases.<sup>18</sup> When this matching process fails, HAVA commands states to require certain types of identifying documents from the voter prior to casting a regular ballot.<sup>19</sup> The statute permits the voter to present these documents at the time of in-person voting.<sup>20</sup> The voter may also satisfy the identification requirement by submitting a photocopy of the required identification with his or her mail-in voter registration form or absentee ballot.<sup>21</sup> Voters with information verified by the matching process do not have to conform to the identification requirement, unless independent state law mandates the presentation of identification.<sup>22</sup>

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15. See Wendy R. Weiser, Deputy Dir., Democracy Program, Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law, Testimony before the California State Senate Committee on Elections, Reapportionment and Constitutional Amendments (Apr. 6, 2006), available at [http://www.votetrustusa.org/index.php?option=com\\_content&task=view&id=1217&Itemid=26](http://www.votetrustusa.org/index.php?option=com_content&task=view&id=1217&Itemid=26).

16. 42 U.S.C. § 15483(a)(5)(A)(i)–(iii) (Supp. V 2007).

17. *Id.* Voters who have neither a driver’s license nor a social security number are exempt from this requirement. *Id.*

18. See *id.* § 15483(a). This matching program refers only to database verification occurring at the point of registration—a process described, though only partially, in HAVA. See *id.* Above and beyond these requirements, states may be free to develop their own matching processes that occur at a time other than the point of registration, such as matching processes that occur on a periodic basis to facilitate list maintenance.

19. *Id.* § 15483(b)(2)(A)(i)(I)–(II). Sufficient types of identification include: current valid photo identification, current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter. *Id.*

20. *Id.*

21. *Id.* § 15483(b)(2)(A)(ii)(I)–(II).

22. *Id.* § 15483(a)(5)(D).

These rules do not apply to all voters. Rather, they apply only to voters who register by mail and vote in a federal election for the first time.<sup>23</sup> Thus, officials are not required to attempt to confirm the information submitted by individuals who appear in person to register. They also are not required to attempt to confirm the information of voters who previously have voted in a federal election in the relevant state. Furthermore, applicants falling into either of these categories do not have to present identification at the time of registration or at the time of voting, unless mandated by an independent state law.<sup>24</sup>

### III. DO STATES NEED TO MATCH AT ALL?

HAVA's database provisions have been called a collection of "clumsy subsections and clauses," and rightly so.<sup>25</sup> The most relevant section in deciding whether matching is required, "Sharing Information in Databases,"<sup>26</sup> does not explicitly say that states must engage in matching programs. Instead, it merely says, officials "shall enter into an agreement [with departments of motor vehicles] to match [personal] information [contained in incoming voter registration applications] . . . to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration."<sup>27</sup> The statute also says that states "shall enter into an agreement with the Commissioner of Social Security . . .,"<sup>28</sup> but fails to provide any further details about what form this agreement should take. The vague language of these sections opens the door for two arguments that can be used as an attempt to avoid implementing any kind of matching program whatsoever.

The first, and most straightforward, argument is that HAVA does not require actual matching at all, but it only requires an agreement that would make matching possible. While on its face this interpretation might sound silly—why would Congress require states to enter into an agreement to make a process possible that Congress did not intend to mandate?—there is a non-frivolous argument to be made that this is indeed the correct interpretation. Congressional records show HAVA's

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23. *Id.* § 15483(b)(1)(A)–(B)(i).

24. *Id.* § 15483(b).

25. Fla. State Conference of NAACP v. Browning, 522 F.3d 1153, 1171 (11th Cir. 2008).

26. 42 U.S.C. § 15483(a)(5)(B)(i) (Supp. V 2007).

27. *Id.* (emphasis added).

28. *Id.* § 15483(a)(5)(B)(ii).

matching provisions were quite controversial.<sup>29</sup> Conservative interests wanted the matching provisions to guard against the possibility of voter fraud, while more progressive voices expressed fear that the matching could lead to confusion and disenfranchisement.<sup>30</sup> It would not be surprising, then, if the conservatives could not negotiate language mandating matching, but could only negotiate language requiring states to develop the infrastructure that would make matching possible. Thus, the battle over whether and how to use that infrastructure could be put off until a later time. HAVA's plain language bolsters this interpretation: "The specific choices on the methods of complying with the requirements of this subchapter shall be left to the discretion of the state."<sup>31</sup>

A more convoluted, but perhaps stronger, argument points out that HAVA only requires officials to enter into an agreement "to the extent required" to verify the accuracy of personal information.<sup>32</sup> Therefore, if states have found other ways to verify the accuracy of personal information and are implementing those methods, then they are absolved from having to make matching agreements at all. This argument seems to make sense because "to the extent required" language would be mere surplusage if HAVA actually intended all states to develop a matching program. To give the words meaning, one logical conclusion is that HAVA makes an agreement necessary in some circumstances, but not in others.<sup>33</sup> If this argument were true, it would absolve many states—if not all—from the matching requirement. For years, most states have been performing several types of checks to confirm the information contained in registration applications.<sup>34</sup> While these

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29. *See* 148 CONG. REC. 20,833 (2002) (statement of Sen. Bond).

30. *See id.*

31. 42 U.S.C. § 15485 (Supp. V 2007).

32. *Id.* § 15483(a)(5)(B)(i).

33. Another, perhaps stronger interpretation is that HAVA requires all states to enter into an agreement, but the agreement only requires a degree of matching necessary to verify the accuracy of the information submitted by the voter.

34. For instance, most, if not all, states send out postcards to newly registered voters using the names and addresses provided by voters on their registration forms. *See, e.g.*, 10 ILL. COMP. STAT. ANN. 5/4-15 (West 2003); MICH. COMP. LAWS ANN. § 168.499(3) (West 2008); MINN. STAT. ANN. § 201.121 (West 1992 & Supp. 2008); OHIO REV. CODE ANN. § 3503.19(c)(1) (LexisNexis 2005 & Supp. 2008); WIS. STAT. ANN. § 6.32(4) (West 2004 & Supp. 2007). The purpose of the postcards is to confirm the name and address of the voter. Many states also periodically send out this type of postcard to all or a portion of registered voters, regardless of whether they are newly registered. *See, e.g.*, 10 ILL. COMP. STAT. ANN. 5/4-17 (West 2003); MICH. COMP. LAWS ANN. § 168.509dd (West 2008); MINN. STAT. ANN. § 201.12 (West 1992 & Supp. 2008); WIS. STAT. ANN. § 6.50(1) (West 2004 & Supp. 2007). Many offices also use the United States Postal Service's change of address service to confirm names and addresses. *See, e.g.*, MINN. STAT. ANN. § 201.13 (West Supp. 2008); OHIO REV. CODE ANN. § 3501.05 (LexisNexis 2005 & Supp. 2008); WIS. STAT. ANN. § 6.50(8) (West 2004 & Supp. 2007).

procedures mostly confirm only voters' names and addresses and not voters' dates of birth or social security and driver's license numbers, there is nothing to say that confirmation of the name and address alone is insufficient to satisfy HAVA's vague mandate that officials "verify the accuracy of the information provided on applications for voter registration."<sup>35</sup> Therefore, those states wishing to avoid matching have another tenable argument regarding its lack of necessity.

Does this interpretation of the statute fit the interpretation given by courts? Most courts that have discussed HAVA matching seemed to imply, in passing, that matching is required, but that implication carries little weight because none of these courts seem to have recognized the potential issue.<sup>36</sup> The only court that has recognized the potential issue declared that HAVA in fact does not require matching, but each state can individually decide whether to match.<sup>37</sup> In *Florida State Conference of the NAACP v. Browning*,<sup>38</sup> the United States Court of Appeals for the Eleventh Circuit considered whether it was illegal for Florida to make successful matching a precondition to voter registration.<sup>39</sup> The court concluded it was not illegal and explained:

To be sure, HAVA [] does not require that states authenticate these numbers by matching them against existing databases. It is explicit that states are to make determinations of validity in accordance with state law. States are

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Further, many states use a physical door-to-door canvas to confirm names and addresses. *See, e.g.*, 10 ILL. COMP. STAT. ANN. 5/4-30, 5/5-11 (West 2003); MICH. COMP. LAWS. ANN. § 168.509dd (West 2008). Many states also require every voter to present identification at the polls, which serves as another way to compare the voter rolls with official state records. *See generally* Election Law @ Moritz, Election Law Maps (Voter ID Requirements), <http://moritzlaw.osu.edu/electionlaw/maps/maps.php?ID=69> (last visited October 30, 2008) (providing an overview of state identification requirements for voters).

35. *See* 42 U.S.C. § 15483(a)(5)(B)(i).

36. Most of the cases mentioning the issue were not considering it directly, but instead were considering whether states should be permitted to deny voter registration applications without matching personal information, which is a question beyond the scope of this Article. *See* Wash. Ass'n of Churches v. Reed, 492 F. Supp. 2d 1264, 1268 (W.D. Wash. 2006) (considering whether it was illegal for the state of Washington to make successful matching a precondition to registration and stating, "The statute requires all applicants to provide a unique identifying number—their driver's license number or the last four digits of their social security number—on the application"); *see also* Crawford v. Marion County Election Bd., 553 U.S. \_\_\_, 128 S. Ct. 1610, 1616–17 (2008) (considering Indiana's controversial voter identification statute, stating that "HAVA [] requires the States to verify voter information contained in a voter registration application" although matching was never at issue); Fla. State Conference of the NAACP v. Browning, 569 F. Supp. 2d 1237, 1249–54 (N.D. Fla. 2008) (considering, *inter alia*, the constitutionality of Florida's matching program and discussing the Supreme Court's decision in *Crawford*); Complaint at 1, Morales v. Handel, No. 08-CV-3172 (N.D. Ga. filed Oct. 9, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Morales-Complaint-10-9-08.pdf>.

37. *See* Fla. State Conference of the NAACP v. Browning, 522 F.3d 1153, 1172 (11th Cir. 2008).

38. 522 F.3d 1153 (11th Cir. 2008).

39. *Id.* at 1155.

therefore free to accept the numbers provided on [the] application form, which at least in Florida are completed with an oath or affirmation under penalty of perjury, as self-authenticating. This does not alter the materiality of the information itself.<sup>40</sup>

The dissent agreed: “HAVA does not require states to verify an applicant’s identifying number.”<sup>41</sup> This is certainly strong support for the idea that if a state does not want to implement a matching program, it is not required to do so.

However, things are not as simple as the Eleventh Circuit seems to think. The portion of HAVA on which the court relied, entitled “[d]etermination of validity of numbers provided,”<sup>42</sup> is not necessarily, or even probably, referring to the matching process discussed by the court.<sup>43</sup> Rather, the referenced language probably refers to a more straightforward HAVA requirement that all individuals applying for voter registration must submit their driver’s license numbers or partial social security numbers—or indicate that they have neither—in order for the application to be eligible for processing.<sup>44</sup> This requirement is totally independent from the matching provisions, and it appears in a different section of the Code.<sup>45</sup> Therefore, when HAVA says the “State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph in accordance with State law,”<sup>46</sup> what it really says is states get to determine whether the voter actually satisfied HAVA’s requirement that he or she submit identifying numbers such as the driver’s license number contained on a “current and valid driver’s license.”<sup>47</sup> Congress wisely did not want to micromanage states by attempting to define what makes a driver’s

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40. *Id.* at 1174 n.21.

41. *Id.* at 1182 n.17 (Barkett, J., dissenting).

42. 42 U.S.C. § 15483(a)(5)(A)(iii) (Supp. V 2007) (“The State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law.”)

43. *Browning*, 522 F.3d at 1174, 1174 n.21.

44. *See* 42 U.S.C. § 15483(a)(5)(A)(i).

45. *Compare id.* § 15483(b)(2) (listing HAVA’s requirements for voters who register by mail), *with id.* § 15483(a)(5)(A)(i) (listing a separate requirement that all voters, not just those who register by mail, must provide either their driver’s license or partial social security number unless they indicate they have neither).

46. *Id.* § 15483(a)(5)(A)(iii).

47. *Id.* § 15483(a)(5)(A)(i)(I). This argument is not ironclad—the truth of it, somewhat depressingly, depends on the meaning of “subparagraph”—but it is good enough to make the whole issue a virtual toss-up. It is also worth noting that, even if the Eleventh Circuit was correct that the referenced language applied to the matching process, it would not explicitly say that states are free to throw up their hands and decide not to match voters at all. Rather, it would say that states are free to determine their own definitions of what constitutes a match. That differs from the statement that states do not have to develop any matching program whatsoever.

license current and valid, something that would later become an issue in Ohio<sup>48</sup> and elsewhere.<sup>49</sup>

Seven months later, the Sixth Circuit Court of Appeals reached, arguably, an opposite conclusion.<sup>50</sup> The case came before the Sixth Circuit after Ohio Republicans sued in federal court on the grounds that Ohio's Democratic Secretary of State had effectively disabled the matching function of the state's voter registration database.<sup>51</sup> The Ohio Republican Party argued this violated HAVA and, for purposes of granting a temporary restraining order, the district court agreed.<sup>52</sup> On appeal, the Sixth Circuit sustained the district court's position although, just days later, the Supreme Court of the United States overturned the decision on independent grounds.<sup>53</sup> In sustaining the appeal, the Sixth Circuit acknowledged one interpretation of HAVA required states only to "enter into an agreement to match information in their databases," but it did not require states to implement the agreement.<sup>54</sup> However, the opinion called that interpretation "ruthlessly literal,"<sup>55</sup> and it is difficult to read the majority opinion without developing an impression that the court looked on the position that HAVA does not require database matching with skepticism. Nevertheless, there is little in the court's opinion supporting the position that HAVA requires database matching,<sup>56</sup> and the Supreme Court's laconic stay opinion did nothing to clarify the issue.<sup>57</sup>

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48. *Ne. Ohio Coal. For the Homeless v. Blackwell*, No. C2-06-896, Consent Order (S.D. Ohio Nov. 1, 2006), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/NEOCHConsentOrd.pdf>.

49. *Cf.* Plaintiff's Brief in Support of Motion for Summary Judgment, *Van Hollen v. Gov't Accountability Bd.*, No. 08-SV-4085 (Dane County Cir. Ct. Sept. 17, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/VanHollen-MotionforSJ-9-17-08.pdf> (arguing HAVA requires matching because the statute's language states, "The [statewide voter registration database] shall be coordinated with other agency databases within the State." (quoting 42 U.S.C. § 15483(a)(1)(A)(iv))). However, the language relied upon by the Wisconsin Attorney General does not appear to apply to HAVA's matching provisions at all; rather, it appears to apply to other HAVA provisions describing coordination with state felony and death records databases, which appear shortly after the referenced language.

50. The question is arguable only because the Sixth Circuit did not reach the merits of the case, but only decided the issue for the purposes of a temporary restraining order.

51. *Ohio Republican Party v. Brunner*, No. 2:08-cv-00913, slip op. at 3-4 (S.D. Ohio Oct. 9, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/R52Order.pdf>.

52. *Id.*

53. *Brunner v. Ohio Republican Party*, 77 U.S.L.W. 3238, 3238 (2008) (per curiam), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ORP-Order-10-17-08.pdf>.

54. *Ohio Republican Party v. Brunner*, No. 08-4322, slip op. at 17 (6th Cir. Oct. 14, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/orpvbrunnerenbanc.pdf>.

55. *Id.*

56. *See id.*

57. *Cf.* *Brunner v. Ohio Republican Party*, 77 U.S.L.W. 3238, 3238 (2008) (per curiam), available at



Was the Sixth Circuit's instinct to require matching correct? Perhaps, but, as in the Eleventh Circuit case, the court's reasoning leaves much to be desired.<sup>58</sup> It is hard to blame the court for reaching its decision, especially considering the tight timeline and the intuitive appeal of the argument that a federal statute would not describe a process' implementation unless the statute also requires the process' implementation. Nevertheless, the court's opinion suggests the court simply failed to recognize at least three facts that should have played a role in the analysis: (1) HAVA leaves the methods of implementation to the states, (2) the purpose of matching provisions was not necessarily to guard against fraud even though that was one purpose behind HAVA, and (3) most states already use some procedures that obviate any requirement to adhere to HAVA's matching procedures.<sup>59</sup> Specifically, many states, including Ohio, have a voter identification requirement that applies to every in-person voter and obviates the necessity of HAVA-type matching procedures.<sup>60</sup>

So, what do HAVA's matching provisions mean? The answer is, approximately, nothing. The language is so confusing that all that can be said for sure is states are either free to have matching programs or they are not free to have the programs. That is not much guidance.

#### IV. THE TRUE PURPOSE OF HAVA MATCHING?

Courts and commentators seem to assume the purpose of HAVA matching is to guard against voter fraud.<sup>61</sup> While protection against voter fraud is probably one purpose, another is almost certainly to provide a courtesy to first-time voters. HAVA requires that certain first-time voters present identification at the polls before voting—

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<http://moritzlaw.osu.edu/electionlaw/litigation/documents/ORP-Order-10-17-08.pdf>.

58. See *supra* notes 42–47 and accompanying text.

59. See *Ohio Republican Party v. Brunner*, No. 08-4322, slip op. at 17 (6th Cir. Oct. 14, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/orpvbrunnerenbanc.pdf>.

60. See *infra* notes 61–67 and accompanying text.

61. See *Crawford v. Marion County Election Bd.*, 553 U.S. \_\_\_, 128 S. Ct. 1610, 1616–17 (2008); *Fla. State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1169 (11th Cir. 2008); Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 960, 963, 989 (2005); Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1207, 1214 (2005); Samuel P. Langholtz, Note, *Fashioning a Constitutional Voter-Identification Requirement*, 93 IOWA L. REV. 731, 745 (2008); Jennifer M. Walrath, Note, *The Promise of a Better Way: Biometric Voter Identification and the Homeless*, 14 GEO. J. ON POVERTY L. & POL'Y 95, 100 (2007).

otherwise they have to cast a provisional ballot.<sup>62</sup> However, members of Congress were concerned that the identification requirement would disenfranchise some of these voters.<sup>63</sup> Therefore, Congress authorized states to create matching programs that function as an alternative form of identification, and voters who are successfully matched are exempt from the identification requirement.<sup>64</sup> This interpretation of congressional purpose is supported by the legislative history.<sup>65</sup> It also furthers HAVA's dual goals of enhancing security while maintaining accessibility: The identification requirement enhances security while the matching requirement mitigates the degree of disenfranchisement that might occur as a result of the identification requirement.<sup>66</sup> It is no coincidence that this mitigating action of the matching requirement is one of the few areas where HAVA is absolutely clear.<sup>67</sup>

V. DO STATES REQUIRING AN IDENTIFICATION OF EVERY VOTER—  
EITHER AT THE TIME OF REGISTRATION OR AT THE TIME OF VOTING—  
HAVE TO DEVELOP A MATCHING PROGRAM?

If the last argument is true—that the real reason behind HAVA's matching provisions is to provide a courtesy to the voter—then the

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62. See 42 U.S.C. § 15483(b)(2)(A)–(B) (Supp. V 2007).

63. See 148 CONG. REC. S10,496 (daily ed. Oct. 16, 2002) (statement of Sen. Durbin) (“[T]his legislation is not without its shortcomings. These include new limitations on the way first-time and newly registering voters are permitted to identify themselves . . . .”); 148 CONG. REC. S10497 (daily ed. Oct. 16, 2002) (statement of Sen. Kerry) (“The bill’s requirements that first-time voters who register by mail provide specified forms of identification at the polls may disenfranchise a large number of voters . . .”).

64. See 42 U.S.C. § 15483(a)(5)(B)(i). The statute reads:

The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.

*Id.* (emphasis added).

65. See 148 CONG. REC. S10489 (daily ed. Oct. 16, 2002) (statement of Sen. Bond) (“New voters who choose to register by mail must provide proof of identity at some point in the process . . . . In lieu of the individual providing proof of identity, States may also electronically verify an individual’s identity against existing State databases.”).

66. See 148 CONG. REC. S10488 (daily ed. Oct. 16, 2002) (statement of Sen. Bond) (“We need to change the system to make it easier to vote and tougher to cheat.”).

67. See 42 U.S.C. § 15483(b)(3) (“[HAVA’s voter identification requirements] shall not apply in the case of a person . . . with respect to whom a State or local election official matches the information submitted [on a voter registration application] with an existing State identification record bearing the same number, name and date of birth as provided in such registration . . . .”); Wash. Ass’n of Churches v. Reed, 492 F. Supp. 2d 1264, 1269 (W.D. Wash. 2006) (“[S]uch information is *not required* if the information on the voter registration application has been matched. In other words, ‘matching’ serves as a substitute for voter ID.” (citations omitted))

upshot is this: States requiring a form of identification from all voters at the polls are not required to have a matching program at all. Many states—including Colorado,<sup>68</sup> Florida,<sup>69</sup> Indiana,<sup>70</sup> Michigan,<sup>71</sup> Missouri,<sup>72</sup> Ohio,<sup>73</sup> Virginia,<sup>74</sup> and Washington<sup>75</sup>—require identification from every voter at the polls, regardless of whether the voter was matched previously. In this situation, it is not clear whether HAVA matching serves any purpose at all. It generally does not serve the purpose of courtesy because the voter is going to be treated the same regardless of whether a match exists. Furthermore, although matching in this situation might further the purpose of security, how it achieves that goal is unclear. After all, HAVA does not prescribe any consequence in the event of a failed match, except for the aforementioned identification requirement,<sup>76</sup> which would apply to all voters anyway. Therefore, generally speaking, matching in states that require identification of everyone seems to have no point.<sup>77</sup> Further, states requiring a form of identification from every voter but not wanting to match voters have no obligation to do so.<sup>78</sup>

## VI. ADVICE TO ELECTION ADMINISTRATORS

The best advice to election administrators who are considering changes in matching policy is, “Watch out.” Changes to matching policy can result in lawsuits from one or both of two camps. These two camps are at opposite ends of a continuum representing maximum

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68. See COLO. REV. STAT. §§ 1-1-104, 1-7-110 (2008).

69. See FLA. STAT. ANN. § 101.043 (West 2002).

70. See IND. CODE ANN. §§ 3-5-2-40.5, 3-11-8-25.1 (Supp. 2008).

71. See MICH. COMP. ANN. § 168.523 (West 2008).

72. See MO. ANN. STAT. § 115.427 (West 2003 & Supp. 2008). *But see* Weinschenk v. Missouri, 203 S.W.3d 201 (Mo. 2006).

73. See OHIO REV. CODE ANN. § 3505.18 (LexisNexis 2005 & Supp. 2008).

74. See VA. CODE ANN. § 24.2-643 (2006).

75. See WASH. REV. CODE ANN. § 29A.44.205 (West Supp. 2008).

76. 42 U.S.C. § 15483(b)(2)(A) (Supp. V 2007).

77. However, in at least one circumstance, matching with general identification requirements has a point: When a state like Florida goes beyond HAVA's minimum requirements by, for instance, making matching a precondition to registration, the matching program facilitates the state's extra security requirements, which are required by state law, not HAVA. See FLA. STAT. ANN. § 97.053 (West 2002 & Supp. 2008).

78. This sort of exemption from HAVA requirements occurs in other areas of HAVA law. For instance, Minnesota and New Hampshire are exempt from having to provide provisional ballots to voters because they provide election day registration instead. See MINN. STAT. ANN. § 201.061 (West 1992 & Supp. 2008); N.H. REV. STAT. ANN. § 654:7-a (LexisNexis 2007).

security at one end and maximum access at the other.<sup>79</sup> Because of the 2008 presidential election, both factions currently are alert and prepared to file suit against administrators deemed insufficiently loyal to the groups' desired policy goals.<sup>80</sup>

The security camp wants to use matching programs to purchase security even if it comes at the expense of access.<sup>81</sup> Therefore, it likely favors the type of matching system currently used in Florida, which could prevent fraud, but also limits access by rejecting voter registration applications that cannot be matched.<sup>82</sup> The security camp may only just be beginning to understand how matching works, but administrators will be under increasing scrutiny as this awareness grows. Therefore, in the future, these groups likely will identify states that are not matching<sup>83</sup> and, regardless of the arguments made above, file suit. States wanting to defend the perceived right to abstain from a matching program have some good arguments at their disposal, but those arguments may not win when the court attempts to make sense of HAVA's opacity.

The access camp wants to purchase access even if it comes at the expense of security and generally can be expected to oppose any sort of matching program making it more difficult for individuals to register to vote.<sup>84</sup> Nevertheless, this does not mean that administrators in states with no current matching program can rest assured they will not be sued by members of the access camp. Specifically, the access camp may argue that first-time voters have a right to a matching program exempting them from having to present identification, and the state is violating that right by not having such a program. This is a good argument, considering this is one of the few areas where HAVA's matching provisions are clear. Still, states like Ohio and Indiana, which require identification from everyone, rob the argument of its power.<sup>85</sup> In those states, matching programs would not exempt the voter from

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79. See Debra Milberg, Comment, *The National Identification Debate: "REAL ID" and Voter Identification*, 3 I/S: J.L. & POL'Y FOR INFO. SOC'Y 443, 444 (2008).

80. Cf. Election Law @ Moritz, Pre-election Litigation Risk Assessment (PELRA), <http://moritzlaw.osu.edu/electionlaw/maps/maps.php?ID=63> (last visited Oct. 30, 2008).

81. See Milberg, *supra* note 79, at 448, 466.

82. See *supra* note 77.

83. Current research indicates that New Hampshire and New Mexico, and probably other states, do not make any attempt to match incoming voter registration applications against motor vehicle or Social Security Administration databases at the point of registration. See Election Law @ Moritz, Election Law Maps (HAVA Matching Standards), <http://moritzlaw.osu.edu/electionlaw/maps/maps.php?ID=67> (last visited Oct. 30, 2008).

84. See Milberg, *supra* note 79, at 466.

85. See *supra* Part V.

identification requirements,<sup>86</sup> so the access group lacks an incentive to argue in favor of matching.

States currently without an identification program, but anticipating one passed into law, need to consider the implications this change has for their matching policy. Likewise, states in which the legislature has removed past voter identification requirements, or in which the courts have invalidated such requirements, need to reevaluate their programs. By analyzing how identification and matching fit together, states can avoid surprise lawsuits.

A final recommendation is to ensure that matching programs, and the interrelated identification requirements, are applied evenly across all jurisdictions in each state. Based on conversions with election administrators, it is believed the chief election authority of at least one state, Missouri, has not given local election officials uniform guidance on how to treat unmatched individuals.<sup>87</sup> This approach could trigger suits from both security groups believing that matching is not used to combat fraud and access groups believing that matching is not used to help voters avoid HAVA's identification requirements. Local administrators need to receive uniform instructions regarding each state's matching program before each election regarding each state's matching program. If they do not, they face the risk of lawsuits rooted in either of the two above-identified concerns or even a suit based on a *Bush v. Gore*<sup>88</sup>-type claim that voters in different jurisdictions are treated differently.

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86. *See supra* Part V.

87. *See* Election Law @ Moritz, Election Law Maps (Does Inability to Verify Prevent Registration?), <http://moritzlaw.osu.edu/electionlaw/maps/maps.php?ID=31> (last visited Oct. 30, 2008).

88. 531 U.S. 98 (2000).