Case No. 08-4322
IN THE UNITED STATES COURT OF APPEAL
FOR THE SIXTH CIRCUIT

Ohio Republican Party, et al.,	:	
	:	
Plaintiffs-Appellees,	:	On Appeal from
	:	the United States District Court
	:	for the Southern District of Ohio:
v.	:	District Court Case No. 2:08CV913
	:	
Jennifer Brunner,	:	
Ohio Secretary of State,	:	
	:	
Defendant-Appellant.	:	
	:	

BRIEF OF *AMICI CURIAE* OHIO AFL-CIO AND DISTRICT 1199 SEIU IN SUPPORT OF APPELLANT'S EMERGENCY MOTION TO STAY OR VACATE TEMPORARY RESTRAINING ORDER

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CORPORATE DISCLOSURE STATEMENT

Amici Ohio AFL-CIO and District 1199 are not corporate parties, and have no parent companies, subsidiaries, or affiliates that have issued shares to the public. There are no parent corporations or publicly held corporations that own 10% or more of the stock of these organizations and there is no third party publicly owned corporation that has a financial interest in the outcome of this appeal.

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INTRODUCTION

Amici curiae submit this brief in support of the Secretary of State and to urge reversal of the District Court's October 9, 2008 entry of a temporary restraining order. *Amici* are in agreement with the arguments set forth by the Secretary of State and *Amici* Project Vote et al. in the District Court regarding the proper interpretation of the Help America Vote Act ("HAVA"). Dkt. Nos. 41, 43, 45.

Amici write separately here to emphasize four points: First, United States Supreme Court and Sixth Circuit precedent make it absolutely clear that Plaintiffs may not enforce this provision of HAVA through Section 1983. That is because the statutory provision at issue does not unambiguously confer any *rights*; it simply imposes obligations upon state officials. The District Court completely ignored the applicable precedent, skipping over the question whether the statute unambiguously confers an individual right to focus upon an inquiry regarding alternative enforcement mechanisms that would be relevant only if the statute conveyed rights in the first place.

Second, the language of 42 U.S.C. §15483(a)(5)(B)(i) and related provisions of HAVA show that the State is not required to compare voter registration applications to data contained in the Ohio Bureau of Motor Vehicles'

database or to take any action when that data fails to match.

Third, the construction of the statute adopted by the District Court and urged by Plaintiffs would lead to conflicts with the National Voter Registration Act ("NVRA") and serious constitutional problems.

And fourth, equitable considerations including the doctrine of *laches* preclude issuance of the temporary restraining order when Plaintiffs waited until just before the election to request equitable relief even though the practices at issue have been in existence for months if not years.

This is an interest of great concern to *Amici* and to the public at large, as the District Court is without authority to order the relief set forth in the temporary restraining order, which threatens to disrupt the Secretary of State's preelection planning and thereby disenfranchise significant numbers of Ohio citizens.

STATEMENT OF INTEREST OF AMICI CURIAE

Amicus curiae the Ohio American Federation of Labor-Congress of Industrial Organizations ("Ohio AFL-CIO") represents 1,600 local unions across Ohio from 48 different international unions. The local unions that comprise the Ohio AFL-CIO represent approximately 650,000 working men and women, and some 300,000 union retirees. The Ohio AFL-CIO works to bring economic and social justice to the workplace and to the lives of working Ohioan men and

women. To this end, the Ohio AFL-CIO engages in voter registration, education and other election-related activities.

Amicus curiae District 1199, the Health Care and Social Service Union, SEIU ("District 1199") is a local union affiliated with the Service Employees International Union. District 1199 represents approximately 28,000 health care and social service workers in Ohio, Kentucky, and West Virginia. District 1199's Constitution expressly provides that one of the organization's purposes is "to maintain, preserve and extend the democratic process and institutions of our country." District 1199 engages in voter registration, education and other election-related activities within the State of Ohio on behalf of its members.

Amici represent members who have registered to vote in Ohio in the upcoming general election, including many who did so after January 1, 2008, and *Amici* have an interest in ensuring that their members are permitted to exercise the right to vote. *Amici* have already filed a separate *amicus* brief in this case, in the Southern District of Ohio, in opposition to a previous request for a temporary restraining order. Dkt. Nos. 8, 10.

ARGUMENT

This Court should vacate the District Court's temporary restraining order because Plaintiffs have no right of action under Section 1983; because the order

requires Ohio to conduct an electronic review of voter registrations that is not required by HAVA; because the court's construction of the statute would lead to conflicts with the NVRA and raise serious constitutional problems; and because the doctrine of *laches* precludes equitable relief when Plaintiffs have waited so long to request it. The Court's order would turn a law designed to help Americans vote into a mandate that could prevent thousands of qualified voters from voting, and it should be reversed.

I. Plaintiffs have no enforceable rights under HAVA.

Supreme Court and Sixth Circuit precedent makes it absolutely clear that the provision of HAVA at issue here (42 U.S.C. §15483(a)(5)(B)(i)) may not be enforced by a private plaintiff via Section 1983. This alone precludes Plaintiffs from obtaining any relief. Yet the District Court inexplicably ignores this binding precedent.

"[I]t is only violations of *rights*, not *laws*, which give rise to §1983 actions." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (citing *Blessing v. Freestone*, 520 U.S. 329, 340 (1997)) (emphasis in original); *see also id.* ("'benefits' or 'interests'" may not be enforced under Section 1983). When, as here, a federal statute does not explicitly grant a private right of action, a plaintiff may use Section 1983 to enforce only "an unambiguously conferred right." *Gonzaga*

Univ., 536 U.S. at 283. Thus, a statute must contain "explicit rights-creating language that focuses on 'rights,' not broader or vaguer 'benefits' or 'interests,'" or it is not enforceable by private plaintiffs through Section 1983. *Johnson v. City of Detroit*, 446 F.3d 614, 621 (6th Cir. 2006).

A right meets this standard only if the statutory text is "'phrased in terms of the persons benefited.'" *Gonzaga Univ.*, 536 U.S. at 284 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 692 n.13 (1979)). The key question is "whether or not Congress intended to confer individual rights upon a class of beneficiaries." *Id.* at 285. "Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (internal quotation marks omitted). Statutes that "have an aggregate focus" in that they "speak only in terms of institutional policy and practice" do not confer a right enforceable via Section 1983. *Gonzaga Univ.*, 536 U.S. at 288 (internal quotation marks omitted).

The District Court, inexplicably, completely ignores this authority and neglects even to ask whether the statutory text unambiguously conveys an individual right. It skips over this issue entirely and starts with the question whether the existence of an alternative enforcement mechanism shows that Congress meant to preclude a remedy for the right at issue – *an inquiry that is*

relevant only if a plaintiff has shown that the statute at issue creates an unambiguous right. The Supreme Court has made this clear:

> Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983. But the initial inquiry – determining whether a statute confers any right at all – is no different from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statute confers rights on a particular class of persons.

Gonzaga Univ., 536 U.S. at 284-85 (internal quotation marks and brackets omitted); *see also id.* at 285 n.4 (explaining that, once plaintiff has shown statute confers right, defendant may rebut presumption that right granted by statute is enforceable through §1983 by showing existence of alternative enforcement scheme). Thus, when the statute does not create an unambiguous right, there is no need to ask whether the existence of an alternative enforcement mechanism shows that Congress meant to preclude a remedy. *See Johnson*, 446 F.3d at 624-25 (after deciding that statute does not create enforceable right, ending inquiry without examining whether alternative enforcement mechanisms show Congress meant to preclude relief); *Westside Mothers v. Olszewski*, 454 F.3d 532, 542-43 (6th Cir. 2006) (same); *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004) (examining whether alternative enforcement mechanisms show Congress meant to preclude individual enforcement of right only after deciding

that language of statute unambiguously conferred rights).

The District Court erroneously concludes, and plaintiffs misleadingly suggest, that in *Sandusky* the Sixth Circuit held HAVA *in general* to be enforceable through Section 1983. *See* Temporary Restraining Order at 7; Renewed Motion for Temporary Restraining Order Following Interlocutory Appeal at 3-4. But in *Sandusky* the Sixth Circuit was far more specific than the District Court or Plaintiffs acknowledge:

> Appellees contend that HAVA creates a federal right enforceable against state officials under 42 U.S.C. §1983. *With respect to the right to cast a provisional ballot under the circumstances described in HAVA §302(a)*, we agree.

387 F.3d at 572 (emphasis added). That determination was based on the specific wording of the HAVA provisional ballot provision. This Court noted that "[t]he rights-creating language" of the provisional ballot provision – that "an '*individual shall be permitted* to cast a provisional ballot'" – "is unambiguous" and tracks language in the Civil Rights Act and other similar laws that grant individually enforceable rights. *Id.* (emphasis in original); *see also id.* at 573 ("HAVA also refers explicitly to the '*right of an individual to cast a provisional ballot.*'") (emphasis in original).

By contrast, here, the provision at issue contain no rights-creating language;

rather, at most, it imposes mandates upon state officials. *See* 42 U.S.C. §15483(a)(5)(B)(i) ("The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement . . . ."). This Court has held that Section 1983 may not be used to enforce similarly worded statutory provisions, even in cases in which the intended beneficiaries of the statute at issue are far easier to identify than those in the instant case. *See Johnson*, 446 F.3d at 622-25 (statutes providing that public officials "shall develop and carry out a demonstration, . . . shall conduct appropriate research," and "shall establish procedures to eliminate as far as practicable the hazards of lead based paint poisoning" may not be enforced under Section 1983); *Westside Mothers*, 454 F.3d at 541-43 (same conclusion with respect to Medicaid provision requiring payments under state plan to be sufficient to attract enough providers, because provision focuses on state officials' obligations rather than individual entitlement). Language that imposes mandates upon state officials "has an aggregate focus, . . . speaks in terms of institutional policy and procedure, and fails to confer the sort of individual entitlement that is enforceable under §1983." *Johnson*, 446 F.3d at 624.

For these reasons, Plaintiffs may not use Section 1983 to enforce the

provisions of HAVA at issue.[1]

II. HAVA does not require electronic matching or any particular use of electronic matching systems.

Even if HAVA could be read to give Plaintiffs an enforceable right, the substantive provision at issue here does not require what the District Court ordered. The District Court held that "HAVA . . . requires matching for the purpose of verifying the identity of the voter before counting that person's vote," and mandates that the Secretary of State either verify the voter's information or give the county boards of election records of all mismatches so that they can do so. Temporary Restraining Order at 11, 15-16. But HAVA grants broad discretion to the Secretary of State regarding the establishment and use of an electronic matching program. In no way can HAVA be construed to mandate that the Ohio Secretary of State match all voter registration applications submitted on or after a specified date and provide all county boards of elections with access to this information within eight days. Nor can it be construed to require what Plaintiffs

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[1] Other courts have interpreted similar language in HAVA to preclude use of Section 1983. *See, e.g., Paralyzed Veterans of Am. v. McPherson*, No. C 06-4670, 2006 WL 3462780, at **8-10 (N.D. Cal. Nov. 28, 2006) (provision that "the voting system shall be accessible for individuals with disabilities" was not enforceable through Section 1983 because it "is framed in terms of requirements for voting systems, which are chosen by state and county officials"); *Taylor v. Onorato*, 428 F.Supp.2d 384, 387 (W.D. Pa. 2006) (same).

originally requested: that the state take some action when a voter registration does not match a record in the motor vehicle database.

A. The language of the statutory provision at issue grants the Secretary of State discretion to determine what she needs in order to verify the accuracy of voter registration information.

"HAVA represents Congress's attempt to strike a balance between promoting voter access to ballots on the one hand and preventing voter impersonation fraud on the other." *Florida State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1168 (11th Cir. 2008). To implement its multiple and competing objectives, HAVA provided that state election and motor vehicle officials "shall enter in into an agreement to match" voter registration and motor vehicle record "*to the extent required* to enable each such official to verify the accuracy of the information provided on applications for voter registration." 42 U.S.C. §15483(a)(5)(B)(i) (emphasis added). This qualification affords state officials the authority to determine whether a matching system is needed in order to verify voter registration applications; if so, which information must be matched; and, if so, whether and how the information obtained through the matching process shall be used.[2]

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[2] For further elaboration of this theory, *see* Nathan Cemenska, *HAVA's Matching/ID Requirement: A Meaningless Tale Told by . . . Congress*, RICHMOND J.L. & PUB. INT. (publication forthcoming).

In other words, because "to the extent required" modifies the mandate that an agreement to match be reached, the Ohio Secretary of State would have the discretion to decide that no electronic matching system is needed in order to verify voter registration information. By contrast, the provision of HAVA that follows the one at issue here requires that state motor vehicle authorities "shall enter into an agreement with the Commissioner of Social Security," without any qualification regarding state officials' view of its necessity. 42 U.S.C. §15483(a)(5)(B)(ii).

Ohio law already provides for several measures to verify the accuracy of information provided on voter registration applications. For example, newly registered voters are sent a communication by nonforwardable mail and, if the mail is returned, local election officials must investigate and take certain steps to verify the accuracy of the voter registration information. Ohio Rev. Code §3503.19(C); *see also id.*, §3501.05(Q)(1) (providing for removal of ineligible voters from rolls); *id.*, §3505.18(A) (requiring voters to present photo identification or other documents to verify name and current address or to cast provisional ballot). The Secretary of State has the discretion, under HAVA, to decide that its existing verification procedures are adequate to verify voter eligibility, without performing the matching process.

Moreover, HAVA declines to specify the required content of a matching agreement. Plaintiffs take the position that, "[a]t a minimum, the matching must include a comparison between the registrant's name, social security number or driver license number, the address, and the date of birth and the information maintained by the BMV." Proposed Order (Dkt. No. 36-6) ¶1. But HAVA imposes no such requirements. Rather, HAVA provides that any agreement must match information "to the extent required to enable" verification of voter registration applications.[3] In other words, state officials can determine that some portion, or all, of the information in their voter registration and motor vehicle databases needs be compared under their agreement. HAVA leaves that determination to their discretion.

Even assuming that some agreement to match information is required, the statute expressly leaves to states the choice *whether* and *how* to use any information obtained from a matching process. The District Court has ordered the Secretary of State to provide county boards of election access to the information generated from the matching and, specifically, establish "an effective way" for the

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[3] By contrast, section 405(r)(8) of Title 42, which §15483(a)(5)(B)(ii) references, expressly delineates the information that must be matched (§405(r)(8)(D)) and affirmatively requires that the Social Security Commissioner "*shall* develop methods to verify the accuracy of the information provided by the [state] agency." §405(r)(8)(C) (emphasis added).

boards "to access and review mismatches" no later than October 17, 2008. Temporary Restraining Order at 16. And it suggests that either the state or the county boards of election must use this information to "verif[y]" the identity of the voter before counting that person's vote. Temporary Restraining Order 11.

But the statute does not require state officials to grant access to county boards in an "effective" manner, or to use the information to verify voter registration information. It expressly leaves to the discretion of the Secretary of State and Bureau of Motor Vehicles official whether and how the information generated from the matching process shall be used, in light of what those officials deem necessary to verify the accuracy of voter information. *See* 42 U.S.C. §15483(a)(5)(B)(i) (agreement should provide for matching "to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration"). Thus, the temporary restraining order's imposition of detailed mandates upon the Secretary of State is not only wholly without basis in the statutory language, but also contrary to the explicit discretion the statute vests in each State to make its own determinations about the matched information.

Nor does *Washington Ass'n of Churches v. Reed*, 492 F.Supp.2d 1264 (W.D. Wash. 2006), on which the District Court relied, Temporary Restraining

Order at 9, establish a contrary principle. *Washington Association of Churches* contrasted the use of matching in order to determine eligibility to cast a vote with the use of matching to determine eligibility to register. But the decision does not hold that a state *must* find that voter registration records match motor vehicle records prior to allowing a person to vote or counting a vote; it simply recognizes that HAVA *permits* such a match to serve as a form of voter identification. 492 F.Supp.2d at 1269 (explaining that, under §15483(b)(3)(B), match with motor vehicle records can substitute for other forms of identification required at time of voting for certain voters who registered by mail). Indeed, *Washington Association* undermines the District Court's conclusion that HAVA requires a matching process to verify voter eligibility: "It is clear from the language of the statute and by looking at legislative history that HAVA's matching requirement was intended as an administrative safeguard for 'storing and managing the official list of registered voters,' and not as a restriction on voter eligibility." 492 F.Supp.2d at 1268 (quoting 42 U.S.C. §15483(a)(1)(A)(i)).

Matching is no more a prerequisite for voting or counting a vote than it is for registration. HAVA describes identification requirements for certain voters who registered by mail. 42 U.S.C. §15483(b). But the matching of data records is not a requirement for these voters, and "nothing at all in the statute . . . discusses

the requirements and procedures for establishing eligibility and identity of in-person registrants." *Florida State Conf. of NAACP*, 522 F.3d at 1172.

B. Other HAVA provisions support this interpretation.

HAVA expressly states that "[t]he specific choices on the methods of complying with the requirements of this subchapter shall be left to the discretion of the State." 42 U.S.C. §15485.

This rule is consistent with the general statutory approach taken in HAVA, which provides for broad state discretion and flexibility. For example, rather than authorizing an agency to issue binding rules and regulations, HAVA provides that the Election Assistance Commission may issue voluntary guidance. 42 U.S.C. §15501; *id.*, §15329 ("[T]he [EAC] shall not have authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government, except to the extent permitted under section 1973gg-7(a) of [title 42, the National Voter Registration Act of 1993]."); Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 Election L.J. 424, 428 (2004) ("The EAC was designed to have as little regulatory power as possible."). Other provisions use general terms that permit states to decide the proper measures to meet HAVA's goals. *See, e.g.,* 42 U.S.C. §15483(a)(4)(A)-(B) (requiring states to adopt "system of file maintenance that

makes a *reasonable* effort to remove [ineligible] registrants" and unspecified "*[s]afeguards* to ensure that eligible voters are not removed in error from the official list") (emphasis added); *id.*, §15483(a)(3) (requiring states "shall provide *adequate* technological security measures to prevent the unauthorized access to the computerized list") (emphasis added).

In fact, other portions of the subsection in which the provision at issue appears reinforce states' flexibility under HAVA. Subsection 15483(a)(5), which concerns "Verification of voter registration information," prohibits states from processing voter registration applications unless they include an applicant's driver's license number or portions of his or her social security number or, if the applicant has no such numbers, provides that the applicant will be assigned a unique identifying number. *Id.*, §15483(a)(5)(i)-(ii). But critically, the subsection expressly grants states discretion to "determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law." *Id.*, §15483(a)(5)(A)(iii); *see also Florida State Conf. of NAACP*, 522 F.3d at 1156 ("HAVA . . . directs each state to determine according to its own laws whether the information provided by the registrant is sufficient to meet the federal requirements") (punctuation omitted); *id.* at 1174 n.21 ("To be sure, HAVA also does not require that states authenticate these

numbers [provided on registration forms] by matching them against existing databases. It is explicit that states are to make determinations of validity in accordance with state law. States are therefore free to accept the numbers provided on application form."). Congress could have, but did not, *require* states to use motor vehicle matching programs to "determine whether the information provided . . . is sufficient to meet" the relevant requirements. 42 U.S.C. §15483(a)(5)(A)(iii). It also could have specified the standards for determining whether the information was sufficient, rather than permitting each state to make that determination under state law. But it did neither.

As *Washington Association* recognized, to the extent that HAVA provides any direction regarding how matched data should be used, it suggests a purpose exactly opposite to Plaintiffs' proposal that the information be used to purge ineligible voters from the voter rolls. 492 F.Supp.2d at 1269. HAVA directs that "matched" data *facilitate* voting by serving as a substitute for identification requirements for new voters. 42 U.S.C. §15483(b)(3)(B)(ii). Even this provision, moreover, allows but does not require the state action at issue.

The flexibility of the matching provision is also reflected in the diverse state approaches to implementation. Among seventeen states polled by Ohio State University researchers, some had no program, some required exact matching of all

information in voter registration applications and motor vehicle databases, and others required only substantial matching or some combination thereof. *See* Election Law @ Moritz, HAVA Matching Standards, http://moritzlaw.osu.edu/electionlaw/maps/maps.php?ID=67 (last visited Oct. 7, 2008);[4] *see also* Justin Levitt, Wendy R. Weiser & Ana Muñoz, Making the List: Database Matching and Verification Processes for Voter Registration (Brennan Center 2006), http://tinyurl.com/66t6r8 (summarizing state law in 2006). The flexibility has permitted states to experiment and abandon problematic approaches. Thus, for example, "[m]ost states that adopted matching schemes have done away with them. For example, after implementing matching schemes, several states . . . abandoned those registration schemes after thousands of eligible voters were being denied the right to vote." *Florida State Conf. of NAACP*, 522 F.3d at 1176 n.1 (Barkett, J., concurring in part, dissenting in part).

[4] This research report does not describe the details of states' use of matching programs, e.g., when during the registration process the data is matched, the consequences of a non-match, and whether any adjustments are made for registrations made shortly before an election.

III. The District Court's and Plaintiffs' construction of HAVA should be rejected for the additional reason that it would lead to conflict with the NVRA and serious constitutional problems.

A. The NVRA does not permit the relief granted by the District Court or requested by Plaintiffs.

The stated purpose of the District Court order is to mandate new procedures to prevent voters deemed ineligible from voting. Temporary Restraining Order at 8-9, 10, 11; *see also id.* at 12 (discussing harm that would ensue "if unqualified individuals are permitted to cast votes"), 14 (same). And Plaintiffs argued below that a temporary restraining order was needed to ensure "that persons who are not qualified voters should not vote" and "to ensure that [certain absentee ballots] are not counted." Renewed Motion, at 7, 8 (emphasis in first quote omitted). But the NVRA prohibits states from implementing "any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters" within 90 days of an election, for reasons other than death, criminal conviction, mental incapacity, or the voter's request. 42 U.S.C. §1973gg-6(c)(2)(A). Yet that is precisely what the District Court has ordered and what Plaintiffs ask this Court to countenance.

Congress specifically intended that HAVA be construed in a manner that is consistent with the NVRA. *See* 42 U.S.C. §15545(a) ("Except as specifically

provided in section 15483(b) of this title . . . nothing in this Act may be construed to authorize or require conduct prohibited under any of the following laws, or to supersede, restrict, or limit the application of such laws: . . . (4) The National Voter Registration Act of 1993 (42 U.S.C. 1973gg *et seq.*)."); *Bay County Democratic Party v. Land*, 347 F.Supp.2d 404, 428 (E.D. Mich. 2004) ("Congress directed that HAVA be construed in harmony with the National Voter Registration Act."). Therefore, Section 15483(a)(5)(B)(i) may not be read to authorize the relief Plaintiffs request.

B. The temporary restraining order and Plaintiffs' requested relief would raise serious constitutional issues.

Even if HAVA could somehow be read to require Ohio to adopt a motor vehicle database matching program and implement that program as the District Court has ordered, this Court should vacate the District Court's temporary restraining order because it would raise significant constitutional questions. *See Jones v. United States*, 529 U.S. 848, 8578 (2000) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.") (internal quotation marks omitted).

Equal protection requires that the "State may not, by . . . arbitrary and

disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (*per curiam*). Yet the temporary restraining order provides that some individuals whose have *already* successfully registered to vote will be subject to matching requirements above and beyond those applied to other voters. The line between those two groups of voters is the apparently arbitrarily selected date of January 1, 2008. The order also imposes a disproportionate burden upon legal voters who have no entry in motor vehicle databases (and whose registrations will necessarily produce a "no-match") or whose address or other information differs from that in motor vehicle databases.

To the extent the District Court's temporary restraining order results in these voters having to cast provisional ballots (as Plaintiffs originally requested and as the District Court's order permits) and/or being removed from voter rolls, the distinction will reduce the chance that these voters' ballots will be counted.[5]

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[5] Provisional ballots require additional action by both the voter *and* the state or they are not counted. *See generally* Ohio Rev. Code §3505.182 (describing how provisional ballots are treated). As a result, they are less likely to be counted than a regular ballot. *See* Advancement Project, *Provisional Voting: Fail-Safe Voting or Trapdoor to Disfranchisement?* 11 (Sep. 2008), http://www.advancementproject.org/pdfs/Provisional-Ballot-Report-Final-9-16-08.pdf (accessed Oct. 9, 2008) (approximately 18% of provisional ballots cast were rejected); *see also* U.S. Election Assistance Commission, *The 2006 Election Administration and Voting Survey* 44 (Dec. 2007), http://www.eac.gov/clearinghouse/docs/eds-2006/edsr-final-high-res-for-printing.pdf/attachment_download/file(accessed Oct. 9, 2008).

Thus, certain citizens' votes will be less likely to count than others' – simply because they registered this calendar year and have no reason to appear in the state motor vehicles database or the information in that database differs from their current information. A statistical probability that some votes are less likely to count than others is enough to raise equal protection concerns.

In addition to the equal protection problem posed by this disparate treatment, the temporary restraining order raises serious questions under *Bush v. Gore*'s prohibition of "varying standards to determine what was a legal vote." 531 U.S. at 107. The District Court holds that HAVA requires that the matching process be used to verify voter eligibility, but that county boards may determine how they should investigate or handle mismatched information. Temporary Restraining Order at 16. But the order provides no specific guidance as to the measures that the counties must take or as to what it required in order to resolve a discrepancy. Nor does the order authorize or require the Secretary of State to issue uniform procedures, even though HAVA grants the discretion to determine the appropriate uses of this information to the Secretary. The order thus invites counties to implement its mandate in a variety of reasonable – but *varying* – ways.

For example, a county official might find that a voter registered as "John H. Smith" at one address has the same social security number as a driver listed in the

motor vehicle database as "John Smith" at a different address. The order does not direct how counties should handle this information or verify the voter's eligibility. Should John H. Smith be telephoned? Sent a postcard? Alerted that he should bring to the polls the material required to fill out a provisional ballot, under Ohio Rev. Code §3505.182? Should the county check other records to see if John H. Smith moved? Or some combination of the above? And what should a poll worker do? Request an affidavit from John H. Smith that the address in the motor vehicles database was his former address? Allow a more informal explanation?

Because the Court's interpretation of HAVA provides no clear answers to these questions, it will raise significant equal protection questions. Certainly, the election is approaching. But "[a] desire for speed is not a general excuse for ignoring equal protection guarantees." *Bush*, 531 U.S. at 108.

The justification for the distinctions and standards at issue is entirely arbitrary; the mere fact that a legal voter who registered after a certain date does not appear at all in one state agency's database, or that the record in that database differs from the information contained in the current voter registration application, is no reason to subject that person's vote to greater scrutiny than the vote of a person who happened to have registered before January 1, who registered a vehicle or obtained a driver's license, and/or whose current address is the same as

that reflected in the motor vehicles database – especially when the person's registration was *previously* determined to be valid under existing law. *Cf.* 42 U.S.C. §1971(a)(2)(B) (prohibiting denial of the right to vote due to technical errors that are not material to qualification to vote).

The constitutional problem here is particularly severe because it is post-hoc; unlike the voters in *Crawford v. Marion County Election Board*, 128 S.Ct. 1610 (2008), in which the Supreme Court upheld a statute requiring voters to provide photo identification, the voters in this case who are already registered will have *no* opportunity to obtain a driver's license, otherwise enter themselves into the motor vehicles database, or change the information in that database prior to the time that the ordered matching occurs. *Cf. Crawford*, 128 S.Ct. at 1621 n.19 (2008) (plurality opinion) (suggesting that burden imposed by voter photo identification requirement would not be justified as to voters who could not obtain such identification before the next election). The chance that certain votes will be subject to additional scrutiny will not be the result of the voters' action or inaction, but rather the result of a system imposed after the voters registered, of which the voters had no prior notice, and which – due to the restricted timeline – will allow the voters little meaningful opportunity to resolve any problems prior to election day.

IV. Equitable considerations preclude issuance of the temporary restraining order.

The District Court's order imposes a daunting mandate upon the Secretary of State just 26 days before the election. It not only exceeds the requirements of HAVA, but also writes from scratch a new state policy. It does so without having afforded an adequate opportunity for the presentation of evidence regarding the likely burden that this would impose upon the Secretary of State, whether the relief ordered could disrupt preelection preparations, and whether it could threaten the efficient running of the election which is critical for enabling Ohio citizens to exercise their right to vote. "Court orders affecting elections, especially conflicting orders, can . . . result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006). Yet the District Court denied the Secretary of State's request for the opportunity to present witnesses and evidence before its ruling. Dkt. No. 47.

Such judicial activism is particularly inappropriate when Plaintiffs have been dilatory in pursuing vindication of their rights, and are responsible for the short time period before the election. "A party asserting laches must show: (1) lack of diligence by the party against whom the defense is asserted, and (2)

prejudice to the party asserting it." *Chirco v. Crosswinds Communities, Inc.*, 474 F.3d 227, 231 (6th Cir. 2007) (internal quotation marks omitted). Plaintiffs have not exercised diligence, having waited until October 5, 2008, just 30 days prior to the election, to seek equitable relief. Dkt. No. 36. At no time did a representative of Plaintiff Republican Party inquire about the State's methods for sharing data under HAVA, even though HAVA was passed in 2002, the Secretary of State signed a memorandum of understanding with the state Bureau of Motor Vehicles regarding information sharing in 2004, and the manual on which Plaintiffs base their claims was released in January 2008. Farrell Affidavit (Dkt. Nos. 44-9, 44-10) ¶¶8, 10, Ex. A; Maragos Affidavit (Dkt. No. 44-1) ¶5; *cf. Blankenship v. Blackwell*, 429 F.3d 254, 258 (6th Cir. 2005) (plaintiffs who filed election-related complaint on October 6, 33 days after complained-of action and months after they should have been aware of relevant law and candidate had announced candidacy, "could and should have acted more expeditiously in asserting" their claim).

Moreover, although the District Court gave the parties no opportunity to present evidence on this issue, there is strong reason to believe prejudice will result from Plaintiffs' delay. The Secretary of State will be forced not only to reprogram the voter registration database on a rushed time schedule but also to create a new policy for verifying voter information, and potentially to retrain

hundreds or thousands of county elections officials and poll workers on such new policies. Response (Dkt. No. 43) at 20-21. Error is inevitable in such rushed procedures. *Cf. Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980) (election-related claim that plaintiff waited 25 days to bring barred by *laches* because, "[a]s time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made, and the candidate's claim to be a serious candidate who has received a serious injury becomes less credible by his having slept on his rights").

CONCLUSION

For the reasons discussed, the District Court's entry of a temporary restraining order was in error and must be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Fed.R.App.P. 32(a)(7)(b). The foregoing brief contains 5,673 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was WordPerfect for Windows XP.

/s/ Michael J. Hunter
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed electronically on October 10, 2008. Notice of the filing will be sent by the Court's electronic filing system to all parties indicated on the electronic filing receipt.

By: /s/ Michael J. Hunter
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