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August 25, 2008

Hon. Thomas Cane, Chair  
Kevin J. Kennedy, Director  
Government Accountability Board  
17 W. Main Street, Suite 310  
P.O. Box 2793  
Madison, Wisconsin 53701-2973

Re: HAVA Checks and Provisional Ballots

Dear Judge Cane and Mr. Kennedy:

We write in response to an August 14th letter from Reince R. Priebus to Judge Cane. In his letter, Mr. Priebus requested that the GAB take steps at its August 27th meeting that he says are necessary for Wisconsin to comply with the Help America Vote Act of 2002 (“HAVA”). The actions Mr. Priebus urges, however, are not required by HAVA, and some of them would violate federal law. This letter is intended to correct various misunderstandings of federal law upon which Mr. Priebus’ recommendations are based. We urge the GAB to avoid any precipitous actions based on his recommendations, which would result in significant numbers of Wisconsin voters being denied their right to vote in November.

Like Mr. Priebus, we were glad to see the GAB’s August 6th announcement that the Statewide Voter Registration System’s (“SVRS”) data interfaces are now operational.<sup>1</sup> By allowing voter data in the SVRS to be matched with information in other government databases, these interfaces provide an important tool that will help to maintain the accuracy of Wisconsin’s voter rolls and the integrity of Wisconsin’s elections. And we are heartened that, according to the GAB’s announcement, Wisconsin’s use of the new matching capabilities will comply with federal law and sound policy.

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<sup>1</sup> See Government Accountability Board, State of Wisconsin, *Press Release: Voter Registration System Data Interfaces Now Working; Wisconsin Now Compliant with Federal Law*, Aug. 6, 2008, at <http://elections.state.wi.us/docview.asp?docid=14492&locid=47>.

We disagree with many of Mr. Priebus' assertions that the new matching capabilities of the SVRS are not being lawfully employed, as well as with several of his policy recommendations. Mr. Priebus' central argument is that where a registration applicant is not successfully matched against the motor vehicle or Social Security database, and the "un-matched" applicant does not follow-up and "correct[] the error," that applicant must not be permitted to cast a regular ballot, but may only cast a provisional ballot. In fact, such a practice is inconsistent with HAVA as well as with the registration policies of forty-six states and the District of Columbia.<sup>2</sup>

***Under HAVA, the state's failure to "match" a new registration against the motor vehicle or Social Security Administration database does not require that the voter be forced to cast a provisional ballot.***<sup>3</sup> Nothing in federal law requires voters to be relegated to provisional ballot status, much less purged from registration lists, because the state has been unable to match the information provided in their registration against other government databases. In fact, HAVA is quite specific in limiting the circumstances in which a voter must cast a provisional rather than a regular ballot, due to a state's failure to match the voter's registration against an existing government record.

A successful match is one of two means HAVA prescribes for verifying the identity of first-time voters who registered by mail. They can vote a regular ballot *either* by being matched *or* by providing documentary identification ("ID"), either when they register or when they vote.<sup>4</sup> HAVA thus protects the rights of these un-matched voters by letting them vote regular ballots if they show ID; only those un-matched new voters who registered by mail and do *not* present identification documents are to be given provisional ballots under HAVA's "Fail-Safe Voting" provision.<sup>5</sup>

There are good reasons why HAVA only requires provisional ballots due to a failed match in these circumstances. Requiring provisional ballots in other circumstances imposes administrative costs and increases the likelihood that eligible voters' votes will not be counted.<sup>6</sup> Indeed, during the 2008 presidential primary election, fewer than 1/3

<sup>2</sup> See generally Justin Levitt, Wendy R. Weiser and Ana Munoz, *Making the List: Database Matching and Verification Processes for Voter Registration* (2006), at <http://tinyurl.com/66t6r8>.

<sup>3</sup> See 42 U.S.C. § 15483(b)(2)(A).

<sup>4</sup> See *id.* §§ 15483(b)(2)(A), 15483(b)(3)(B); see also *Wash. Assoc. of Churches v. Reed*, 492 F. Supp. 2d 1264, 1269 (W.D. Wash. 2006) (Section 303(b) of HAVA "requires that a first-time voter who registered by mail must verify his or her identity before voting. To vote, the applicant may show some form of identification either at the time of registration or when he or she actually votes. However, such identification is *not required* if the information on the voter registration has been matched. In other words, 'matching' serves as a substitute for voter ID.") (citations omitted).

<sup>5</sup> See 42 U.S.C. § 15483(b)(2)(B).

<sup>6</sup> In the words of the United States Election Assistance Commission, "[t]he bottom line is that the casting of a proper, traditional ballot constitutes a vote, while the casting or submission of a provisional ballot does not." U.S. Election Assistance Commission, EAC Advisory 2005-006:

of the provisional ballots cast in Wisconsin were ultimately counted.<sup>7</sup> It is therefore wrong to suggest, as Mr. Priebus does, that the rights of un-matched voters “can be completely protected” by giving them provisional ballots.

Moreover, as we noted in our July 14, 2008 letter to Kevin Kennedy, there are many reasons why matches fail even when an applicant is entirely eligible, provides complete and accurate information on his or her application, and lives at his or her stated address. Among other reasons, these failed matches are caused by typos made when processing applications, data entry errors in the motor vehicle and Social Security databases, inconsistent uses of nicknames or married and maiden names, and problems with hyphenated or compound last names. Erroneous failed matches are especially prevalent with respect to the Social Security database: the Social Security Administration (“SSA”) itself reported that of 2.6 million voter registration records submitted to the SSA through February 2007, *nearly half* — fully 46.2% — resulted in a failed match.<sup>8</sup>

Failed matches are frequently caused by errors found in government databases, or by errors made when data entry clerks input hand-written information from applications into the voter registration database. These errors prevent matches even when applicants supply complete and accurate information on their applications. In many cases, even when such applicants are informed of a failed match there is nothing they can do to resolve the failed match, because they will not understand what type of database error caused the mis-match. The only recourse for such voters is to again provide election officials with their (accurate and complete) information, which may lead to a vicious cycle of failed matches when officials submit this same data to the same automated matching process — leading to the same result.

For all these reasons, it is simply false to assert that election officials’ failure to match an application with an error-filled database is “reliable information that a proposed elector is not qualified,” as Mr. Priebus contends. Without further evidence that an un-matched applicant is not eligible, no applicant should be relegated to provisional ballots

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Provisional Voting and Identification Requirements, Sept. 13, 2005, *available at* <http://tinyurl.com/575yqk>.

<sup>7</sup> The Pew Center on the States, Electionline.org, *2008 Primary in Review* 30 (July 2008), *at* <http://www.pewcenteronthestates.org/uploadedFiles/Primary%202008%20FINAL.pdf>.

<sup>8</sup> *See Florida State Conference of the NAACP v. Browning*, No. 07-402, Amended Complaint ¶ 67 (N.D. Fla. Sept. 21, 2007), *available at* <http://tinyurl.com/6rkdkw>. As the former Commissioner of the SSA testified in explaining the frequency of failed matches with the SSA database, “There are many reasons [for failed matches:] name change after a marriage or divorce, . . . incomplete, transposed or missing names or social security number in SSA records[,] . . . a discrepancy created by [the] use of multiple or compound names. It is extremely common for foreign-born and female workers to be the subject of a discrepancy. Workers from Latin American countries, for example, may use compound last names, a portion of which may be inadvertently reflected on SSA records as a middle name.” *American Federation of Labor v. Chertoff*, No. 07-4472, Declaration of Kenneth S. Apfel in Support of Temporary Restraining Order and Preliminary Injunction, ¶ 7 (N.D. Cal. Aug. 29, 2007).

— much less removed from the registration rolls. It is also wrong to suggest that, unless “un-matched” applicants are prevented from voting a regular ballot, it will be impossible for Wisconsin to stop fraudulent or fictitious voters from casting ballots. Rather than disenfranchising eligible voters, as Mr. Priebus’ approach would do, Wisconsin should do what HAVA requires: require proof of identity for first-time voters who registered by mail, if and only if the state has failed to match their registration information against an existing state identification record.

Three additional points in Mr. Priebus’s letter warrant a response.

*First*, Mr. Priebus argues that “all new registration activity” should be subject to the “federally mandated HAVA check.” The meaning of the phrase “all new registration activity” is not clear — it could refer to applications from new, first-time, mail-in applicants, or it could refer to all applications, including, for example, those submitted to record changes of address for long-registered voters. If the latter meaning is intended, the suggestion that voters should be penalized due to the state’s failed matches is wrong — both as a matter of federal law and sound policy. As explained above, HAVA only relegates one category of voters to provisional ballots as the result of a failed match: first-time voters who registered by mail, and who do not provide documentary ID at the time of registration or voting. Other voters are not required to cast a provisional ballot due to a failed match.

*Second*, Mr. Priebus contends that if a “Ping” letter sent to an un-matched voter is returned as non-deliverable, the registrant should be removed from the voter list. This, too, is wrong. There are numerous reasons why letters are not successfully delivered even when a legitimate voter uses a legitimate address. The same typos that prevent failed matches will occur when election officials input voters’ mailing addresses; some voters receive their mail at a different location than their residential voting address; a voter’s name may not be listed on the mailbox of a shared residence; the voter may be residing overseas; or the postal service may simply have made a mistake.<sup>9</sup> Thus, a failed mailing is not sufficient evidence to justify purging a voter. To do what Mr. Priebus requires would violate HAVA’s requirement that states maintain their lists so that “only voters who are not registered or who are not eligible to vote are removed from the computerized list.”<sup>10</sup> It would also violate the requirement that there be “[s]afeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.”<sup>11</sup>

*Third*, Mr. Priebus states that matching should be conducted with respect to voters who registered prior to the activation of the SVRS’s matching interface on August 6th. As a practical matter, given the extensive preparation that will be necessary to ensure smooth

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<sup>9</sup> For a list of common reasons why mail may not be delivered to an eligible voter’s address, see Justin Levitt and Andrew Allison, *A Guide to Voter Caging*, June 29, 2007, available at [http://www.brennancenter.org/content/resource/a\\_guide\\_to\\_voter\\_caging/](http://www.brennancenter.org/content/resource/a_guide_to_voter_caging/).

<sup>10</sup> 42 U.S.C. § 15483(a)(2)(B)(ii).

<sup>11</sup> 42 U.S.C. § 15483(a)(4).

elections this Fall, this may not be logistically feasible. But if it is possible to conduct HAVA matches on these voters without disrupting the other work of election administrators, doing so would be acceptable — provided, however, that the matches must be conducted in accordance with HAVA and sound policy. As explained, that means, at a minimum, that only first-time registrants who registered by mail should be subject to matching; that un-matched voters must not be removed from the registration rolls solely because of a failed follow-up letter; and, most importantly, that no voter should be relegated to casting a provisional ballot solely on the basis of a failed match.

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Recent reports of irregularities involving paid registration workers are a reminder that it is important to take appropriate steps to prevent election fraud. But it is crucial that the GAB does not respond to these reports by adopting policies that will inevitably disenfranchise legitimate voters while doing little to actually prevent fraudulent votes. Phony registration forms have been submitted in the past — registering “Dick Tracy” or “Mickey Mouse,” for example — but there is no evidence of a serious problem with people actually attempting to vote under the names of such fictional characters. Indeed, the fact that the recent spate of phony registrations has been uncovered and addressed demonstrates that existing safeguards are working.

We agree wholeheartedly with Mr. Priebus that it should be easy for Wisconsin’s voters to vote, and that appropriate measures should be taken to ensure that Wisconsin’s elections are free from fraud. Utilizing SVRS in a manner that is consistent with HAVA will accomplish this goal. Moreover, implementing a matching program consistent with HAVA will prevent unintended disenfranchisement, which will be the inevitable result of many of the misguided measures Mr. Priebus recommends.

Thank you for considering our comments. We would be happy to discuss with you and the GAB members any questions or concerns you may have.

Respectfully,



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cc: Reince R. Priebus  
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