UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FLORIDA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), as an organization and representative of its members; *et al*.;

Plaintiffs,

v. CASE NO. 4:07-cv-402-SPM-WCS

KURT S. BROWNING, in his official capacity as Secretary of State for the State of Florida,

Defendant.
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**SECRETARY OF STATE'S RESPONSE TO**
**PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Defendant Kurt S. Browning, in his official capacity as Secretary of State for the State of Florida (the "Secretary"), files this response to Plaintiffs' Motion for Preliminary Injunction (the "Motion") (doc. 4) and incorporates herein by reference his Motion to Dismiss (doc. 23) and his Reply to Plaintiffs' Response to the Secretary's Motion to Dismiss (doc. 60).

## INTRODUCTION

After collecting extensive information from election officials for nearly two years, conducting almost unfettered discovery in six of Florida's largest counties, and devoting more than 2,300 hours to this statutory challenge, *see* doc. 26, 70, Plaintiffs take shelter in a handful of anecdotes, a bold rhetorical front, and a narrative of facts replete with inaccuracies and gross overstatements. For good reason: the facts run counter to Plaintiffs' story. Indeed, as discussed more fully below, the number of applicants whose driver's license or Social Security numbers could not be matched, and who have not yet verified that number or otherwise become registered, is not, as Plaintiffs predicted, **15 to 30 percent**, *see* doc. 1 ¶ 7; or **25 percent**, *see id*. ¶ 65; or **46.2 percent**, *see id*. ¶ 67; or **19.6 percent**, *see id*. ¶ 69; or **20 percent**, *see id*. ¶ 70; or **25.5 percent**, *see id*. ¶ 71; or **16 to 30 percent**, *see id*. ¶ 72—but **0.39 percent** of the total number of applications submitted since the effective date of the challenged law—38 to 118 times *less* than Plaintiffs' exaggerated projections.

This dispositive and unquestioned fact represents more than a mere difference in degree. It totally dispels Plaintiffs' forecasts of pervasive error, ineptitude, and disenfranchisement and reflects the insignificance of any burden which the challenged law places on individual voter registration applicants. These minimal requirements are amply justified by the common-sense notions that underlie Section 97.053(6), Florida Statutes. Nothing in constitutional or federal law mandates the "trust but don't verify" system of voter registration which Plaintiffs advocate. On the contrary, the public has a compelling interest in the verification of voter registration applications to prevent voter registration fraud, to secure the integrity of its elections, and to promote confidence and participation in the democratic process. The challenged law does exactly this without imposing unjustified burdens on voter registration applicants. Because

Plaintiffs have not established a clear entitlement to the extraordinary relief they seek, this Court should deny their request for a preliminary injunction.

## I. THE DATA.

Between the effective date of the challenged law on January 1, 2006, and the last day of September, 2007, state and local election officials received 1,529,465 applications for voter registration. *See* Doc. 66, Exhibit H. Of these, 36,122—2.36 percent—could not initially be matched to data in state and federal databases and were returned to the Supervisors of Elections for further action. *See* Exh. A ¶ 7 (declaration of P. Taff). An additional 36,802 applications—2.41 percent of the total—were partially matched and were transmitted to the Department of State's Bureau of Voter Registration Services ("BVRS") for further review and investigation. *See id*. Of the 36,802 applications forwarded to BVRS for review, 30,985—84.19 percent—were promptly resolved by BVRS without requiring any additional information from the applicant.[1] *See id*. The remaining 5,067 applications—13.77 percent of those forwarded to BVRS—were not resolved by BVRS and were returned to the Supervisors as unmatched for further action. *See id*. Thus, a total of 41,189 applications—2.69 percent of the total number of applications—were returned to the Supervisors with or without BVRS review, while 97.31 percent of applications cleared the verification process without any further action requested of the applicant. Finally, of the 41,189 applications returned to the Supervisors, only 6,010—0.39 percent of all applications received—remain unregistered as a result of the absence of a match or subsequent verification. *See* Doc. 66, Exh. H. The vast majority of the applications returned to the Supervisors—35,179 of 41,189, or 85.41 percent—were successfully resolved at the local level.

These data totally refute Plaintiffs' conjectures of rampant error and ineptitude and their extravagant assertion that an "enormous" number of applicants have been "disenfranchised." Doc. 67 at 5. On the contrary, they constitute empirical proof that the challenged law operates precisely as it should. The data show that only a small percentage of voter registration applications—2.69 percent—are returned to the Supervisors for local action (either research and resolution by local staff or notice to and verification by the applicant), while the remainder—97.31 percent—clear the verification process established by the challenged law seamlessly. They also show that the notice and override process, which allows applicants to verify the authenticity of their numbers by providing a copy of an identifying document—by personal delivery, mail, facsimile, or e-mail—works. The overwhelming majority of the applications returned to the Supervisors—85.41 percent—have been resolved. The bottom-line result is that only 0.39 percent of applications submitted since the enactment of the challenged law remain unresolved, demonstrating that the verification process identifies questionable applications as it should without imposing any unconstitutional burden on otherwise eligible applicants. Meanwhile, lawful voters across Florida have the priceless assurance that voter registration—and the rights to which it admits the registrant—are securely reserved to legitimate, lawful voters.

## II. THE CHALLENGED LAW SERVES A VITAL FRAUD PREVENTION PURPOSE.

The challenged law is an essential preventative of election fraud. Indeed, it is the only reliable barrier to several corrosive electoral practices. While Plaintiffs suggest that the public interest in the prevention of voter registration fraud "is considerably less important than the interest in preventing fraudulent votes," *see* doc. 38 at 33, this position fails to appreciate the

[1] Of the 36,802 applications forwarded to BVRS for review, 750 were found to be updates rather than new applications or were cancelled. *See* Exh. A ¶ 7.

interrelatedness of registration and the exercise of the rights to which registration admits the registrant.[2] Under Florida law, any person able to register fraudulently can complete the fraud and cast a fraudulent vote with a near perfect assurance of impunity. With similar ease, fraudulent registrations can be used—and have been used—to ensure ballot placement for constitutional amendment initiatives. Once a fraudulent application is admitted, it becomes virtually *impossible* to prevent or detect the consequent unlawful act. For all practical purposes, the fox is in the henhouse.

Ample avenues of casting a fraudulent vote are available to fictitious registrants. The most inviting of these is absentee ballot fraud. Any fictitious registrant can, without stating a reason, request an absentee ballot either in person, in writing, or even telephonically, *see* § 101.62(1), Fla. Stat., and the fraudulent vote will be counted as long as the voter's signature on the certificate accompanying the returned absentee ballot appears to match the signature on the fraudulent registration application, *see* § 101.68(1), (2), Fla. Stat. In fact, Florida law no longer requires an absent elector's signature to be witnessed. *See* Ch. Law 2004-232, Laws of Fla. To cast a fraudulent vote, therefore, a fictitious registrant, in the total absence of scrutiny, need only replicate the fictitious signature on the voter registration application. In fact, no practical impediment prevents the organized execution of this scheme on a mass scale—for example, by the third-party voter registration organizations to which voter registration fraud has frequently been linked. *See* Report of the Commission on Federal Election Reform, September 2005, at 46 (*available at* http://www.american.edu/ia/cfer/report/full_report.pdf). Any person or group would be able to complete and submit any number of fictitious applications and subsequently

[2] Plaintiffs' contention that the Secretary asserts a "moving target" in alleging that the challenged law advances the state's interest in preventing both voter registration fraud and

cast as many fraudulent absentee ballots, and election officials would be powerless to detect—or, if detected, to reject—either the spurious applications or the fraudulent votes.

Florida is no stranger to absentee ballot fraud. In *In Re The Matter of the Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election for the City of Miami, Florida*, 707 So. 2d 1170 (Fla. 3d DCA 1998), the Court found that "substantial competent evidence existed to support the trial court's findings of massive fraud in . . . absentee ballots" in Miami's mayoral election. *Id*. at 1171. Among other evidence, an FBI agent testified that 113 absentee ballots were cast under false voter addresses. *Id*. at 1172. The trial court concluded that the absentee ballot fraud scheme "literally and figuratively, stole the ballot from the hands of every honest voter in the City of Miami" and ordered a new election. *Id*. On appeal, the Court accepted the trial court's factual findings, vacated its holding and instead ordered the invalidation of all absentee ballots cast in the election. *Id*. at 1173. The impossibility of distinguishing between legitimate and fraudulent absentee ballots thus negated thousands of lawful votes. *Accord Bolden v. Potter*, 452 So. 2d 564 (Fla. 1984) (invalidating all absentee ballots where vote fraud scheme was "conspicuously corrupt and pervasive").

Provisional balloting also facilitates the easy translation of voter registration fraud into fraudulent votes. Though Florida law generally requires voters who present themselves to vote at a polling place to present a photo identification, *see* § 101.043(1), Fla. Stat., a voter who does not may nevertheless cast a provisional ballot. *Id*. § 101.043(2), Fla. Stat. That provisional ballot—cast under color of a fictitious name and without any photo identification—will be counted as long as the fictitious person was registered and voted at the proper precinct and the signature on the provisional ballot certificate matches the signature that appears on the fraudulent

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fraudulent votes likewise demonstrates Plaintiffs' failure to recognize the indissoluble link that

voter registration application. § 101.048(2)(b)1., Fla. Stat. The invalidation of Section 97.053(6), Florida Statutes—the gatekeeper of Florida's electoral process—would clear a convenient path not only to absentee ballot fraud, but also to fraudulently cast provisional ballots, with no remaining security for detection under Florida law.

The Seventh Circuit recently noted the difficulty of detecting fraud in the electoral process and the consequent necessity of preventive measures:

> [T]he absence of prosecutions is explained by the endemic underenforcement of minor criminal laws (minor as they appear to the public and prosecutors, at all events) and by the extreme difficulty of apprehending a voter impersonator. He enters the polling place, gives a name that is not his own, votes, and leaves. If later it is discovered that the name he gave is that of a dead person, no one at the polling place will remember the face of the person who gave that name, and if someone did remember it, what would he do with that information? . . . One response, which has a parallel to littering, another crime the perpetrators of which are almost impossible to catch, would be to impose a very severe criminal penalty for voting fraud. Another, however, is to take preventive action . . . .

*Crawford v. Marion County Election Bd*., 472 F.3d 949, 953 (7th Cir. 2007), *cert. granted* 128 S. Ct. 33 (2007); *accord Burson v. Freeman*, 504 U.S. 191, 208 (1992) ("[E]lection fraud [is] successful precisely because [it is] difficult to detect."). For this reason, Congress recognized that the "right time" and the "right way" to "discourage fraud . . . is essentially at the front end when people come to sign up for the electoral process." 148 Cong. Rec. S10421 (statement of Sen. Wyden). The challenged law performs this function by blocking illegitimate registrations and ensuring that only legitimate voters receive admission to the civic prerogatives reserved to them by the laws.

In addition to securing Florida's elections from fraudulent votes, the challenged law secures the ballot and the Florida Constitution from constitutional amendments that rely on fraud in the initiative petition process. The Florida Constitution grants citizens the right to propose

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connects these illicit acts.

constitutional amendments by obtaining a prescribed number of signatures of registered voters. *See* Art. XI, § 3, Fla. Const. A signature is counted toward the required number if the name and signature on the petition match the name and signature of a registered voter. *See* § 99.097(1), (3), Fla. Stat. By registering fictitious names and affixing these names to initiative petitions, supporters of an initiative can easily cheat the proposal onto the ballot. The Florida Supreme Court has noted that "the ability of citizens to amend the state constitution through the initiative process without fraud is extremely important." *Floridians for a Level Playing Field v. Floridians Against Expanded Gambling*, --- So. 2d ----, 2007 WL 2790776 (Fla. Sep. 27, 2007). This danger, like the threat of absentee and provisional ballot fraud, is not imaginary. In *Floridians Against Expanded Gambling v. Floridians for a Level Playing Field*, 945 So. 2d 553, 561 (Fla. 1st DCA 2006), the sponsor of a petition initiative "admit[ted that] it presented petitions that contained forged and fictitious names to fraudulently create the illusion that it had complied with the mandatory constitutional prerequisites."[3] By preventing fraudulent registrations, the challenged law stands as an obstacle to the repetition of this very recent fraud.

As Congress recognized, the purity of the voter registration process is indispensable to the purity of the entire electoral system. Contrary to Plaintiffs' view, the evils incident to voter registration fraud are far-reaching and pervade and poison the whole sphere of citizen participation in a representative democracy. Once registered, a fictitious or otherwise ineligible person can find means to exercise the full panoply of rights which the laws reserve to eligible voters. Plaintiffs' "trust but don't verify" system of voter registration, while it exempts eligible voters from the verification process, suspends the integrity of the entire electoral process—and

[3] Noting that "fraud vitiates and annuls everything which it touches," *id*. (quoting *City of Naples v. Conboy*, 182 So. 2d 412, 417 (Fla.1965)), the Court held that subsequent voter approval of a petition initiative that obtained ballot placement by fraud does not cure the defect.

public confidence and participation in it—on the tenuous honesty of individuals. Neither the Constitution nor federal law requires a result so clearly hostile to experience, common sense, and the public interest.

## III. STATEMENT OF FACTS.

The facts demonstrate that the verification process established by Section 97.053(6), Florida Statutes, is an efficient and well administered safeguard that protects the right to vote of lawful voters. Plaintiffs' statement of those facts contains numerous errors, critical omissions, and unsupported characterizations. Below, the Secretary summarizes the voter registration process in the format set forth by Plaintiffs, correcting Plaintiffs' errors, omissions, and mischaracterizations.

### *A. Data Entry.*

Nearly fifty percent of voter registration applications are submitted and processed in conjunction with driver's license transactions at local offices of the Department of Highway Safety and Motor Vehicles ("DHSMV").[4] These entirely electronic applications are instantly deemed verified for purposes of Section 97.053(6), Florida Statutes, because, as a matter of process, they are accompanied by the issuance of a valid driver's license number and the creation of a record in DHSMV's database. *See*, *e.g.*, Exh. A ¶ 4; Exh. B ¶ 4 (declaration of B. Peacock). Because the valid driver's license number automatically becomes a part of the voter registration application, there is no possibility of human error, an absolute certainty of a match if one were sought, and consequently no need to validate its authenticity. *See id*. About half of voter registration applications processed in Florida are not, therefore, subject to the matching process

[4] For example, from 2002 to 2006, 3,475,719 of 7,386,131 new applications received—about 47 percent—were submitted directly to DHSMV. *See* http://election.dos.state.fl.us/voterreg/sources.asp.

because a match necessarily exists by reason of the application's joint origin with an entry into DHSMV's database.

The remaining applications are paper applications received in person or by mail by the Supervisors of Elections or the Division of Elections.[5] Data entry clerks enter the information on these applications into the statewide computerized database known as the Florida Voter Registration System ("FVRS"). The evidence establishes that election officials take particular care to ensure that data is properly entered. Proofreading data entries, though not required by Florida law, is commonplace among the Supervisors of Elections. *See*, *e.g.*, Bryant Depo. 19:21-20:3, 37:24-38:9; Johnson Depo. I, 32:15-21; Kelly Depo. 107:5-15; Snipes Depo. 41:25-42:20; Smith Depo., 23:2-17.[6] Data entry clerks electronically scan the original application and associate the resulting image with the appropriate entry in the FVRS database, ensuring a permanently retrievable record of the application and enabling further proofreading at later stages of the process, as described in Section III.B & D, *infra*. *See*, *e.g.*, Bryant Depo., 18:25-19:4; Cowles Depo. 10:7-21; Johnson Depo. I, 33:11-13; Kelly Depo. 43:3-12; Snipes Depo., 78:3-13. Clerks are trained in the performance of their duties, *see*, *e.g.*, Snipes Depo. 57:25-58:7, Bryant Depo. 31:3-9, Cowles Depo. 15:9-16; Johnson Depo. I, 37:9-15, Kelly Depo, 50:22-51:1, Smith Depo. 14:14-15, and each office takes necessary steps to ensure that it is properly staffed at all times, including the employment and training of temporary personnel in busier seasons, *see*, *e.g.*, Bryant Depo. 92:13-93:14, Cowles Depo. 14:12-15, Smith Depo. 9:1-21, Johnson Depo. I, 13:6-18, Snipes Depo. 60:18-21. Like the Supervisors, the Division of Elections hires additional personnel as necessary to complete its duties as expeditiously as

[5] Some of these applications are initially collected at other voter registration agencies and then delivered either to the Supervisors or the Division.

[6] All deposition excerpts cited herein are attached to Exhibit C (declaration of A. Bardos).

possible. *See* Taff Depo., 52:9-16, 53:3-17.

While human error can occur in this process—as it can in any human process—Plaintiffs' suggestion that the entry of data into FVRS "is fraught with typographical and other errors," *see* doc. 67 at 9, finds no evidentiary support. Indeed, Plaintiffs' attempt to characterize the magnitude of human error as "endemic," *see id*. at 7, or to insinuate that the absence of a match is "due in large part to ministerial mistakes," *see id*. at 15, is pure conjecture. The fact that Plaintiffs, after ransacking the records of six of Florida's most populous counties and devoting thousands of hours to this statutory challenge, have identified "dozens" of data entry errors establishes the exact reverse. If data entry errors were "endemic," the number of instances identified by Plaintiffs' searching review would not be in the *tens*. Plaintiffs make no further attempt to quantify the extent of the allegedly "endemic" human error, and anecdotal evidence of data entry errors in fewer than twenty cases—over a period of time embracing over 1.5 million applications—in no way supports Plaintiffs' grossly exaggerated claims.

***B. Matching.***

Once the information from a voter registration application is entered into FVRS, it is transmitted to DHSMV for verification. Plaintiffs' description of this process is factually incorrect. They suggest that DHSMV searches its database for an exact match, requiring every character of the first name, last name, date of birth, and identifying number to match. Doc. 67 at 14. If an exact match is not found, Plaintiffs say, the record is transmitted directly to the appropriate Supervisor of Elections, with only a "small set" of applications receiving further attention from the state. *Id*. at 14, 21. The actual process is far more careful and comprehensive than Plaintiffs indicate.

In the case of an applicant who provided a driver's license number, DHSMV first reviews

its database for exact matches. *See* Exh. B ¶ 6. If one is found, DHSMV reports a match to BVRS, the agency responsible for the implementation of Section 97.053(6), Florida Statutes. *Id*. If a match is not found on the first attempt, DHSMV conducts a second search using the same Soundex method by which it creates driver's license numbers. Soundex is a phonetic algorithm which uses components of an individual's name, date or birth, and gender to generate a driver's license number. *Id*.; Roberts Depo., 43:18-22. DHSMV uses the Soundex method to generate a hypothetical driver's license number for the voter registration applicant, eliminating the effect of certain spelling discrepancies. Exh. B ¶ 6; Roberts Depo., 91:17-22. This hypothetical driver's license number is then compared to existing driver's license numbers in DHSMV's database, known as the Driver and Vehicle Information Database ("DAVID"). *Id*.

Finally, even if DHSMV does not find a match, either by spelling or pronunciation, it frequently locates partial matches. *Id*. ¶ 7. In such cases, DHSMV classifies each partial match as a potential match and returns the record electronically to BVRS for further investigation. *Id*. Returned records are promptly investigated. Taff Depo., 41:2-9. BVRS staff, who have access to DAVID, are instructed to make every possible attempt using the database to verify the record before returning it to the Supervisors. *See* BVRS Procedures Manual, at 108 ("Before sending a verification to the county, it is imperative that you attempt, in EVERY possible way, to verify the voter registration information with information available on the DAVID system . . . ."); Exh. A ¶ 8. They search DAVID not only by the identifying number provided by the applicant, but also by name, searching the system by possible variants of the name provided on the application. *Id*. Twelve staff members spend up to two hours every morning reviewing and attempting to verify partial matches returned the previous evening. It is "the first assignment of the day." Taff Depo., 50:19-51:10.

As necessary, BVRS staff also review the scanned image of an original application to determine whether any discrepancy resulted from a data entry error. Exh. A ¶ 8; BVRS Procedures Manual, at 108. For example, if BVRS staff, in searching DAVID, identify a record that appears to match, except that the record displays a different driver's license or Social Security number from that which appears in FVRS, they are instructed to retrieve the image. *See* BVRS Procedures Manual, at 111. Thus, not only do personnel of the Supervisors of Elections typically proofread data entries, BVRS is equipped to view the application once again to review the accuracy of the information entered into BVRS.

Applications containing driver's license numbers, therefore, are returned to the Supervisors for further action only if (i) there is no exact match on an initial search; (ii) a phonetically generated hypothetical driver's license number fails to produce a match; and (iii) if a partial match is found, BVRS is unable to verify the information upon investigation of DAVID and a review of the original application. The entire verification process, from the time the information on the application is entered and released into FVRS by data entry clerks of the Supervisors of Elections, until the time a notice of unmatched applications is returned to the Supervisors, takes only twenty-four to forty-eight hours. *See* Bryant Depo. 35:14-36:4, Cowles Depo. 28:22-29:3; 35:14-36:4; Smith Depo., 25:11-13; Kelly Depo., 108:25-109:5; Snipes Depo., 31:3-7; Sola Depo., 33:25-34:7. Finally, for the information of the Supervisors, BVRS staff enter individualized comments into a comment field associated with each record they investigate and return. *See* Exh. A ¶ 9.

In the case of applications containing Social Security numbers, DHSMV first searches DAVID to determine whether the applicant can be identified, and, if so, whether the applicant's Social Security number has previously been verified. Exh. B ¶ 8. A number might previously

have been verified when the applicant obtained a driver's license. *See id*. Each application for a driver's license must contain the applicant's Social Security number, *see* § 322.08(2)(a), Fla. Stat., and DHSMV attempts to match numbers provided on driver's license applications to records in the database of the Social Security Administration (the "SSA"). If such an individual subsequently applies to become a registered voter and provides the last four digits of his Social Security number, DHSMV is able to locate the earlier match in its own database, obviating the need to send the applicant's voter registration information to the SSA. Exh. B ¶ 8.

If DAVID does not reflect an earlier verification of the applicant's Social Security number, the digits provided by the applicant are transmitted to the SSA. *See id*. ¶ 9. In practice, the SSA responds to each inquiry within forty-eight hours with one of seven codes. *Id*. The SSA codes indicate whether there was (i) no match; (ii) a single match with a living person; (iii) a single match with a deceased person; (iv) multiple matches[7] with living persons; (v) multiple matches with deceased persons; (vi) multiple matches with at least one living and one deceased person; or (vii) a data input error. *Id*. Records accompanied by a code indicating a single match with a living person or multiple matches, whether with living persons or with at least one living and one deceased person, are treated as matches and become registered. Exh. A ¶ 10. Records accompanied by a code indicating a single match with a deceased person, multiple matches with deceased persons, or a data input error are investigated by BVRS staff as described above. *Id*. Only records accompanied by a code indicating no match proceed directly to the Supervisors for further action.[8] *Id*.

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[7] Multiple matches are possible because "every 'last four' digit combination returns approximately 40,000 Social Security numbers." *See* doc. 1 at ¶ 45.

[8] While Plaintiffs allege that "the SSA database is full of errors," they cite no evidence whatsoever that failures to match records in the Social Security database are more properly attributable to errors in the Social Security database than to other possible causes.

### *C. Information Available to the Supervisors of Elections.*

Plaintiffs next allege that "the State provides the counties with virtually no information about the failed matches and even less guidance about what to do with them." Doc. 67 at 21. They press further: "In the vast majority of cases, the counties are not told anything about why the applications failed to match." *Id*. This is simply false. As noted above, BVRS adds individualized comments to each record that failed to match and could not be resolved by subsequent investigation. These comments communicate to local election officials the status of the record and information concerning the possible reasons for the failed verification. With respect to records returned directly to the Supervisors without investigation by BVRS, FVRS inserts a code indicating the result. *See* Smith Depo., 26:16-27:1; Sola Depo., 34:15-21; Kelly Depo., 107:21-108:14. The Supervisors are thus privy to any useful information the state can provide, allowing them in many instances to resolve the application without any action by the applicant. And, in addition to providing the Supervisors information with each record, BVRS established an e-mail account to assist Supervisors with any questions regarding the challenged law, including questions about specific applicants. A BVRS staff member reviews inquiries from the Supervisors and either provides answers or, if unable to do so, forwards the inquiry to the proper person.[9] *See* Taff Depo., 47:1-24. BVRS also provides assistance by telephone. *See*, *e.g.*, Sola Depo., 53:17-20.

To bolster the doomsday picture they are determined to paint, Plaintiffs again rely on an anecdote. Here, Plaintiffs cite a case from April, 2006, in which an applicant's Social Security

[9] Plaintiffs' suggestion that during the winter holidays the HVRS help line is inadequately staffed is also false. *See* doc. 67 at 22. The e-mail they cite in confirmation of this was sent in the winter of 2006, immediately *after* the 2006 general election, and does not warrant the ridiculous inference that in the winter of 2007, immediately *before* the presidential preference primary election, the help desk will be unmanned.

number was unmatched by the SSA, but whose number appeared correct. *See* doc. 67 at 22. Plaintiffs infer that county officials are helpless to assist applicants who provide correct information. Yet they overlook the fact that the "override" procedure—which allows county officials, upon receipt of evidence sufficient to verify the authenticity of the number provided, to register an applicant who was not matched—only became effective two months later in June, 2006. *See* Exh. C, Attachment 15. The incident they cite, therefore, in addition to being anecdotal, does not represent current practice. Now, the local official would not contact BVRS but would simply activate the applicant's registration. Plaintiffs' repeated reliance on obsolete anecdotes that precede the implementation of the challenged law's notice and override procedures is just plain wrong.

The implementation of the override procedure is indicative of the continued improvement of the overall system. The verification process is fewer than two years old, and its current form is not identical to its original form. Because they seek only prospective injunctive relief, Plaintiffs cannot fairly rely on perceived flaws in the old system.

***D. Notice Letters.***

On a daily basis, within about forty-eight hours after information from the voter registration application was first entered into FVRS, the Supervisors of Elections receive an electronic notification of the applications that could not be validated by DHSMV, the SSA, or BVRS. *See* Bryant Depo., 37:2-23; Kelly Depo., 39:24-40:3. Upon the return of such records, local staff researches them individually, including additional proofreading, in an attempt to resolve the issue and effect the registration without any action by the applicant. *See* Cowles Depo., 26:14-27:5; 28:10-21; Reed Depo., 13:23-14:7, 14:22-15:5; Sola Depo., 38:13-21. The Supervisors also mail notices to applicants whose applications cannot be resolved and, to the

extent possible, attempt to reach the applicants by phone. *See*, *e.g.*, Bryant Depo., 42:25-43:11; Kelly Depo., 125:13-25; Sola Depo., 45:18-46:6; Snipes Depo., 89:5-12; Smith Depo., 32:12-21. Local staff "take pride in clearing their pending list as quickly as possible," Bryant Depo., 68:17-21, and "go to great lengths to err on the side of the voter when it comes to placing a person in a position to vote," Johnson Depo. I, 38:15-18; *accord id*., 47:3-5 ("We have a process for notifying the voter and doing our dead level best to get that voter registered to vote appropriately."). And the data prove that these efforts have been successful: 35,179 of 41,189 applications returned to the Supervisors—85.41 percent—have been resolved at the local level.

Plaintiffs do not allege that the Supervisors and their staff lack attentiveness or diligence in the performance of this important duty. Rather, they assert that the notices are inaccurate and fail to afford clear instruction to the applicant. To reach this conclusion, Plaintiffs glean particular sentences, clauses, or even words from selected letters and raise semantic quibbles about the use of such words as "incomplete" and "incorrect."[10] Doc. 67 at 24. Each of the notices cited by Plaintiffs, however, gives fair notice to applicants that further information is necessary to effect their voter registrations. In Osceola County, for example, while Plaintiffs dwell on the use of the word "incomplete," the notice clearly instructs the applicant: "Please provide proof of your social security number and return to this office along with your completed application." Doc. 66, Exh. P. Similarly, in Palm Beach County, while Plaintiffs parse the dictionary definition of "incorrect," the notice states: "Please furnish us with a ***copy*** of your Florida driver's license or Florida ID Card. If you do not have either, please send a ***copy*** of your

[10] The term "incomplete" is a term of art that refers to the status of the application, not the completeness or incompleteness of particular information provided by the applicant. *See* § 97.073(1), Fla. Stat. (requiring Supervisors of Elections to notify applicants "that the application has been approved, is incomplete, has been denied, or is a duplicate of a current registration.").

Social Security Card." *Id*. (emphases in original). Plaintiffs simply evade these portions of the notice letters. Moreover, *each* notice invites applicants to call their local elections offices with any questions and provides applicants with a local telephone number.

Plaintiffs also suggest that notice letters are sometimes never sent. Doc. 67 at 27. Once again, however, they cite instances that predate the notice and override procedure. *Id*. at 27-28. When it became effective on January 1, 2006, Section 97.053(6), Florida Statutes, denied voter registration applications upon the failure of a match without expressly affording applicants an opportunity become registered voters by verifying the authenticity of their identifying numbers. *See* § 97.053(6), Fla. Stat. (2006). It required applicants who remained unmatched at the time of an election to cast a provisional ballot and afterwards to present evidence validating their identifying numbers. *Id*. The only applicable notice provision was the general one that Supervisors "notify each applicant of the disposition of the applicant's voter registration application." § 97.073(1), Fla. Stat. This "notice must inform the applicant that the application has been approved, is incomplete, has been denied, or is a duplicate of a current registration. . . . If the application is incomplete, the supervisor must request that the applicant supply the missing information using a voter registration application signed by the applicant." *Id*.

On June 16, 2006, the Division of Elections circulated an instruction to the Supervisors of Elections establishing the existing procedure that allows applicants, upon notice from the Supervisor, to present evidence of their identifying numbers prior to an election and thus to become registered and cast a regular ballot. *See* Exh. C, Att. 15. The general notice provision of Section 97.073(1), Florida Statutes, continued to apply. Then, in its 2007 regular session, the Florida Legislature amended the challenged law to codify the procedure established by the Division of Elections. The amended statute provides specifically that "the applicant shall be

notified that the application is incomplete and that the voter must provide evidence to the supervisor sufficient to verify the authenticity of the number provided on the application." § 97.053(6), Fla. Stat. Notably, this specific statutory notice requirement, which directly informs applicants how to complete the registration process, takes effect on January 1, 2008.

The instances cited by Plaintiffs in which no notice was afforded all occurred within the first three months after the implementation of FVRS and the effective date of the challenged law. They occurred before the override procedure was established and well before the Legislature amended the challenged law to include a specific notice provision.[11] Indeed, throughout their narrative, Plaintiffs misleadingly reach back to the first five months of 2006—before the notice and override procedures were established—for anecdotes that they cannot find under current law. Furthermore, effective January 1, 2008, the challenged law will specifically require Supervisors to instruct applicants that they must present evidence sufficient to verify the authenticity of the number they provided. This new notice requirement, which some Supervisors have already incorporated into their notice letters, affords an additional guarantee that notice letters received by applicants will clearly convey the appropriate information.

***E. Provisional Ballots.***

An applicant whose driver's license or Social Security number could not be matched and who has not supplied evidence sufficient to verify the authenticity of the number provided—0.39 percent of voter registration applications since the effective date of the challenged law—may nevertheless cast a provisional ballot. § 97.053(6), Fla. Stat. The absentee ballot will be counted if the applicant provides such evidence by 5 p.m. on the second day after the election. *Id*.

[11] In the only case cited by Plaintiffs that is more recent, Amrita Hansra applied on October 11, 2006, and became a registered voter on October 24, 2006. She did not receive a notice letter because she was registered.

Florida law ensures that "[e]ach person casting a provisional ballot shall be given written instructions regarding the person's right to provide the supervisor of elections with written evidence of his or her eligibility to vote." *Id*. § 101.048(5), Fla. Stat. Specifically, all written instructions given to a provisional voter must include the following statement: "You may provide written evidence supporting your eligibility to vote to the Supervisor of Elections at (provide address of the Supervisor) by no later than 5:00 p.m. of the [second] day following the election."[12] Rule 1S-2.037(1)(c), Fla. Admin. Code.

Plaintiffs represent the provisional ballot process as an insuperable obstacle to voting. In particular, Plaintiffs maintain that provisional voters "are required to make a special trip" to the Supervisor's office. Carrying their reliance on anecdote and illustration to an extreme, they even attach a map showing that the drive from Lithia, Florida, to the Supervisor's office is an 80-mile round trip. The allegation, however, that provisional voters are required to make a "special trip" is factually incorrect and was repeatedly contradicted by deposition testimony in this proceeding. Indeed, the Supervisors will accept that evidence in any visible form, however conveyed—whether by personal delivery, mail, facsimile, or e-mail transmission. *See*, *e.g.*, Bryant Depo., 27:19-28:4, 154:18-155:20, 157:20-22, 158:20-23; Cowles Depo. 121:23-122:13 Sola Depo., 123:14-124:4. The only limitation is that the Supervisors must be able to "see" the evidence, and, accordingly, it cannot be provided by telephone, *see* Bryant Depo., 136:21-137:1; Sola Depo., 37:15-38:1. Local staff, far from imposing arbitrary, rigid rules and heavy burdens, "does

[12] Plaintiffs contend that this instruction is misleading because it "creates the false impression that presenting evidence is optional." Doc. 67 at 34. It is not misleading for the simple reason that presenting evidence—like voting itself—*is* optional. The law does not obligate provisional voters to present evidence in support of their eligibility. *See* § 101.048(1), Fla. Stat. ("A person casting a provisional ballot shall have the right to present written evidence supporting his or her eligibility to vote to the supervisor of elections by not later than 5 p.m. on the second day following the election.").

anything possible to work through any situation." Bryant Depo., 27:19-28:4. Undeterred, Plaintiffs disregard known facts to embellish their narrative.

Plaintiffs complain that poll workers are not trained "to answer specific questions from voters about matching." Doc. 67 at 32. The tens of thousands of volunteers who offer their time on election day to serve as poll workers across the state perform an essential civic function, but they are not election experts and are not intimately familiar with Florida's Election Code. As discovery in this case made clear, voter registration is a fact-specific enterprise presenting unique and individualized scenarios. *See*, *e.g.*, Bryant Depo., 68:17-21; Cowles Depo., 16:1-7; Johnson Depo. I, 62:21-25; Reed Depo. 14:25-15:5. Rather than rely on poll workers "to answer specific questions from voters about matching," Florida law provides information to applicants by means of a notice letter and the written instructions accompanying the provisional ballot. *See* §§ 97.053(6), 101.048(5), Fla. Stat. Indeed, case law recognizes that written notice is preferable to oral instructions provided by volunteers at the polls. *Cobb v. Thurman*, 957 So. 2d 638, 644 (Fla. 1st DCA 2006) (approving written notices at the polls so that voters will not be "forced to question poll workers and rely on the potentially inconsistent, incomplete, or partial information provided by the poll workers").

Finally, contrary to Plaintiffs' hypochondriac view of Florida's election process, poll workers are not helpless to assist voters. Volunteers at the polls are generally instructed to call their local Supervisor of Elections office on election day to provide more complete information to voters whose names do not appear on the registration lists. *See*, *e.g.*, Bryant Depo., 75:1-4, Kelly Depo., 69:8-17; Reed Depo., 31:2-12; Sola Depo., 84:1-11; Snipes Depo., 63:4-10. Counties, moreover, are in the process of acquiring new technologies that enable poll workers at each precinct to perform functions which before could only be performed at a local elections

office. *See*, *e.g.*, Bryant Depo., 55:23-56:11 (explaining that, by means of the Electronic Voter Identification ("EViD") system, poll workers are able to verify the authenticity of an unmatched applicant's identifying number, and the override can be performed on election day without further action by the applicant); Snipes Depo., 63:4-12 (EViD system enables poll workers to access the county's voter registration database).

***F. The Canvassing Board.***

Under Florida law, the canvassing board in each county is responsible for determining, on a ballot-by-ballot basis, whether provisional ballots will be counted. After an election, the Supervisors of Elections collect all provisional ballots, *see* § 101.048(1), Fla. Stat., and submit them, together with any evidence or additional information they can provide, to the canvassing boards for their determination. *See* Bryant Depo., 134:20-25; Sola Depo., 106:10-16. In the case of a provisional voter who applied before book-closing but whose identifying number, at the time of the election, remained unverified, the ballot will be counted if (i) a match is found by the end of the canvassing period; or (ii) the applicant presents evidence sufficient to verify the authenticity of the number provided by 5 p.m. on the second day after the election. § 97.053(6), Fla. Stat. Florida law also establishes a presumption in favor of provisional voters, providing that a provisional ballot "shall be counted unless the canvassing board determines by a preponderance of the evidence that the person was not entitled to vote." § 101.048(2)(a), Fla. Stat. Accordingly, testimony in this proceeding shows that canvassing boards "work very hard to accept every provisional ballot that [they] can" and "make a common sense decision . . . giving the voter every benefit of the doubt." Bryant Depo., 61:6-12, 120:15-21.

The Florida Statutes, therefore, set forth the rules which Plaintiffs claim do not exist, and provide the canvassing boards, with the assistance of their counsel, the necessary direction to

make a meaningful determination with respect to each ballot. Plaintiffs' portrayal of the canvassing boards as operating in a mist of confusion and uncertainty is not supported by the evidence. The deposition testimony they quote—that it would be "virtually impossible" or "speculation" to predict on the basis of a hypothetical what the canvassing board would do, *see* doc. 67 at 35, 36—reflects the myriad circumstances that might affect a particularized decision concerning a unique voter and the deponents' reluctance either to speak for the canvassing board or to commit themselves, as members of canvassing boards, without the assistance of counsel, without deliberation with other board members, and without a review of the governing statutes, to a particular course of official conduct. *See*, *e.g.*, Johnson Depo. I, 112:8-21 (responding to a hypothetical scenario and the question "would my vote count?" by explaining that the canvassing board is "a three-person body that makes that determination based on the evidence presented. And it's very specific and very tight, compact, real, tangible, palpable."). The inference that the canvassing process is standardless, simply because particular canvassing board members were unwilling positively to affirm that the board would or would not count an imaginary ballot, is strained. None of the deponents testified that canvassing board determinations are random and unguided, and the applicable statutes reject that conclusion.

## IV. PLAINTIFFS HAVE FAILED TO ESTABLISH THEIR ENTITLEMENT TO A PRELIMINARY INJUNCTION.

The grant of a preliminary injunction is "the exception rather than the rule." *Siegel v. LePore*, 234 F.3d 1163, 1175 (11th Cir. 2000) (quoting *Texas v. Seatrain Int'l, S.A.*, 518 F.2d 175, 179 (5th Cir. 1975)). A district court may grant a preliminary injunction only if the moving party establishes that "(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if

issued, the injunction would not be adverse to the public interest." *Id*. A "preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the burden of persuasion as to each of the four prerequisites." *Id*. (quoting *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998)) (internal marks omitted). Because Plaintiffs have failed to make the necessary showing, their Motion must be denied.

### *A. Plaintiffs Have Failed Clearly to Demonstrate a Substantial Likelihood of Success on the Merits.*

In support of their claims, Plaintiffs advance two kinds of evidence: empirical data and anecdotes. Far from establishing the invalidity of Section 97.053(6), Florida Statutes, the data advanced by Plaintiffs show that the number of applicants who submitted voter registration applications since the effective date of the challenged law and who remain unregistered as a result of the absence of a match or subsequent verification is less than one-half of one percent of the total number of applications. The slight burden which the challenged law places on applicants, as reflected by the data, is abundantly justified by the virtually complete certainty the challenged law affords that voter registration—and the rights incident to registration—are securely reserved to legitimate, lawful voters. The several anecdotes advanced by Plaintiffs, besides predating the reforms establishing the notice and override procedures, do not establish actionable conduct and certainly provide no basis to strike down the challenged law. On these facts, and on the eve of a presidential preference primary election, this Court should decline Plaintiffs' invitation to strike down Florida's most reliable barrier against election misconduct.[13]

[13] Plaintiffs seek a preliminary injunction on four grounds. They assert that the challenged law is inconsistent with the Help America Vote Act of 2002 ("HAVA"), that it violates the materiality provision of the Voting Rights Act, that it unduly burdens the right to vote, and that it violates equal protection. *See* doc. 5. They do not assert the remaining claims raised in their Amended Complaint as bases for the issuance of a preliminary injunction, and accordingly the Secretary does not address them here.

### 1. Section 97.053(6), Florida Statutes, Is Not Inconsistent With HAVA.

Plaintiffs' HAVA claims raise purely legal questions that have been copiously briefed in this case, and this analysis is unaffected by the Plaintiffs' supplemental submissions or any of their factual assertions. The issue of federal preemption is a purely legal issue to be considered without regard to factual circumstances. *Moore v. Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1220 (11th Cir. 2001) (federal preemption claim "presents a legal issue of statutory interpretation"). HAVA authorizes states, according to their own laws, to determine whether the identifying number provided by a voter registration applicant is valid and sufficient to allow the application to be accepted and processed. It also establishes that the anti-fraud requirements applicable to mail-in registrants are expressly minimum requirements that do not bar states from enacting stricter anti-fraud provisions. Section 97.053(6), Florida Statutes, is perfectly consistent with the intent of Congress to furnish states with the means of combating voter registration fraud according to state laws that account for their own unique circumstances. The Plaintiffs have not clearly established a substantial likelihood of success on their assertion that HAVA preempts the challenged law.

### 2. Section 97.053(6), Florida Statutes, Does Not Violate the Materiality Provision of the Voting Rights Act.

Plaintiffs' claim under the materiality provision of the Voting Rights Act (the "VRA") amounts to this: while HAVA *prohibits states from accepting* voter registration applications that *omit* the driver's license or Social Security numbers, the provision of such numbers is nevertheless so immaterial that the VRA *requires states to accept* applications that contain *erroneous* driver's license or Social Security numbers. This position is not only illogical, it contravenes HAVA's specific authorization to the states to determine, according to their own

laws, whether the number provided on the application is valid and sufficient so that the application may be "accepted [and] processed"—an authorization that would be senseless if Congress intended only the total omission of the number from the application to justify its denial.

Section 1971 of the Voting Rights Act ("VRA") provides that the right to vote may not be denied "because of an *error or omission* on any record or paper . . . if such error or omission is not material in determining whether [the] individual is qualified under State law to vote." 42 U.S.C. § 1971(a)(2)(B) (emphasis added). Plaintiffs allege that an error in or omission of a driver's license or Social Security number from an application is "not material" and that the state is required to accept and process such applications. HAVA unequivocally refutes this position. It states in direct terms that an applicant's *omission* of a driver's license or Social Security number from a voter registration application bars the state from processing the application. *See* 42 U.S.C. § 15483(a)(5)(A)(i) ("[A]n application for voter registration . . . may not be accepted or processed by a State unless the application includes . . . the applicant's driver's license number [or] the last 4 digits of the applicant's social security number.").

Thus, Congress deemed the *omission* of an identifying number so material that, far from requiring states to accept applications that omit the number, it prohibited them from doing so. It likewise follows that an *error* in the number provided—which, for all practical purposes, is the same as an *omission*—is, at the very least, not so immaterial that, while federal law prohibits states from accepting applications that omit the number, it obligates them to accept those that contain erroneous numbers. HAVA confirms this inference. It expressly authorizes states to determine, according to their own laws, whether the number provided is valid and sufficient to meet the requirements for acceptance and processing. *See* 42 U.S.C. § 15483(a)(5)(A)(iii). If federal law required only applications with omitted numbers—not those with erroneous

numbers—to be denied, this authorization would be unnecessary and meaningless.

In *Diaz v. Cobb*, 435 F. Supp. 2d 1206 (S.D. Fla. 2006), the Court held that a state may deny a voter registration application if the applicant fails to check one or more boxes indicating that the applicant is a citizen, has not been convicted of a felony, and has not been adjudicated mentally incompetent, even if the applicant signed the oath on the application stating generally that he is qualified. The Court explained that HAVA required the checkboxes and that it directed election officials to notify an applicant of an omission and provide the applicant an opportunity to correct it "subject to State law." *Id*. at 1213; *see* 42 U.S.C. § 15483(b)(4). The Court concluded that "[t]his reflects a Congressional determination that the question is material to a determination of eligibility, and constitutes a specific Congressional direction to reject an application as incomplete for failure to check one of the boxes." *Id*. at 1213-14. To the extent HAVA conflicts with the VRA, the Court explained that HAVA, "as the later and also more specific provision, controls." *Id*. at 1213. Similarly, in the present case, HAVA requires the provision of a driver's license and Social Security number, and, unlike the case of an application with unchecked boxes, HAVA explicitly directs that an application without an identifying number "may not be accepted or processed." 42 U.S.C. § 15483(a)(5)(A)(i). Here, therefore, Congress has spoken with still greater clarity and force than in the case at issue in *Diaz*. The same result must follow.

Plaintiffs concede that an error or omission that affects a state's ability to "know" whether an applicant is qualified to vote might be material. Doc. 38 at 25. But this is precisely what the challenged law does: it enables the state to "know"—not on faith alone, but with verifiable certainty—that applicants are who they say they are. Without verification, election officials cannot "know" whether the information provided by an applicant is true, accurate, false,

or fictitious, and, consequently, they cannot "know" whether the applicant is qualified to vote. Federal law does not require states to determine eligibility on an honor system. In *Howlette v. City of Richmond, Virginia*, 485 F. Supp. 17, 22-23 (E.D. Va.), *aff'd* 580 F.2d 704 (4th Cir. 1978), for example, the Court held that the VRA's materiality provision does not prohibit a state from rejecting petition signatures unaccompanied by a notarization. The notarization, like the verification process at issue in the present case, provided the state a reliable confirmation that the information on the petition was genuine.

The Supreme Court has recognized that oaths and affirmations alone are insufficient to deter fraudulent voter registration applications. In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Court explained that the "system of voter registration" is designed to "prevent a fraudulent evasion of state voter standards,"[14] but it also recognized that "false swearing is no obstacle to one intent on fraud." *Id*. at 346. In striking down a one-year residency requirement confirmed only by an oath or affirmation, the Court explained that a "nonresident intent on committing election fraud will as quickly and effectively swear that he has been a resident for the requisite period of time as he would swear that he was simply a resident. Indeed, the durational residence requirement becomes an effective voting obstacle only to residents who tell the truth and have no fraudulent purposes." *Id*. at 346-47. Plaintiffs' position that, once an applicant asserts that he is eligible, the state is bound to accept the assertion at face value and register the applicant ignores

[14] For this reason, the Florida Constitution and Florida Statutes make registration itself a criterion of eligibility. *See* Art. VI, § 2, Fla. Const. ("Every citizen of the United States who is at least eighteen years of age and who is a permanent resident of the state, if registered as provided by law, shall be an elector of the county where registered."); § 97.041(1)(a), Fla. Stat. (providing that a person is qualified if the person (i) is at least 18 years of age; (ii) is a citizen of the United States; (iii) is a legal resident of the State of Florida; (iv) is a legal resident of the county in which that person seeks to be registered; and (v) registers pursuant to the Florida Election Code). Plaintiffs' assertion that Florida law provides only four qualifications to vote—omitting the requirement that an individual register pursuant to law—is mistaken.

the reality that applicants intent on fraud are willing to be dishonest. The public's right to fair and honest elections should not be exposed, defenseless, to the dishonesty of such applicants. The verification of information provided by an applicant is a critical step in the determination of the applicant's eligibility.[15]

Plaintiffs' contention that a state may not deny an application on the basis of any omission other than the bare essentials which, assuming the applicant's honesty, establish his eligibility, would also preclude the state from denying a voter registration application on the ground that the applicant failed to sign it. *See* § 97.053(5)(a)8., Fla. Stat. (requiring applicants to place their signatures on voter registration applications). An applicant's signature is not relevant to his age, citizenship, or residence. The signature, however, like the verification of an applicant's driver's license or Social Security number, is a critical anti-fraud requirement. Florida law relies almost exclusively on a comparison of signatures to verify the legitimacy of absentee ballots, *see* § 101.68(1), (2)(c)1. Fla. Stat., provisional ballots, *see id*. § 101.048(2)(b)1., and signatures on petition initiatives, *see id*. § 99.097(1), (3), Fla. Stat. Information that enables election officials to verify the correctness of an applicant's representations of eligibility is

[15] *Schwier v. Cox*, 439 F.3d 1285, 1286 (11th Cir. 2006), is not on point. In *Schwier*, the lower court determined that the federal Privacy Act of 1974 prohibited Georgia's practice of requiring an applicant's entire Social Security number. *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005); *see also Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1212 (S.D. Fla. 2006) ("In *Schwier v. Cox*, the court held that the failure to provide a social security number was not a material omission . . . since a question forbidden by statute (in that case the Privacy Act) cannot be material."). Also, there was no indication that Georgia actually made use of Social Security numbers, as Florida does, actively to verify voter registration applications. There is no allegation in this case that the challenged law violates the Privacy Act or that Florida collects identifying numbers simply for collection's sake. And, if *Schwier* does stand for the general proposition that the omission of a Social Security number from a voter registration application is not material (which it does not), HAVA directly contradicts it. *See* 42 U.S.C. § 15483(a)(5)(A)(i). *Schwier* should not be construed so as to place it at odds with HAVA.

material, and its requirement does not violate the VRA.[16]

The materiality provision of the VRA was never intended to eradicate legitimate anti-fraud measures. As the Eleventh Circuit explained, the materiality provision "was intended to address the practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters." *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003) (citing *Condon v. Reno,* 913 F. Supp. 946, 949-50 (D.S.C. 1995)). "For example, one such tactic was to disqualify an applicant who failed to list the exact number of months and days in his age." *Id*. (internal marks omitted). This policy is clearly not implicated here. The Florida Legislature adopted Section 97.053(6), Florida Statutes, not with the intent to create an excuse to disqualify potential voters, but in response to HAVA and in implementation of Congress's fraud prevention purpose.

Plaintiffs suggest that the challenged law "turns an error or omission . . . into an absolute bar to registration." *See* doc. 5 at 19. Besides ignoring the federal prohibition against processing applications that omit the identifying number, this suggestion mischaracterizes the legal effect of both HAVA and Section 97.053(6), Florida Statutes. No person who otherwise meets the qualifications to vote is barred from registration. An applicant who omitted the identifying number or provided an erroneous number, like an applicant who provided the correct number but who could not be matched, will receive a notice requesting evidence of the authenticity of the

[16] The National Voter Registration Act confirms this reasoning. *See* 42 U.S.C. § 1973gg-7(b)(1) (providing that mail-in applications "may require only such identifying information (including the signature of the applicant) . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process"). Thus, it expressly allows states, even on federally developed mail-in applications, to require "identifying information" such as signatures that

number. § 97.053(6), Fla. Stat. Once the applicant provides the correct information, a new application will instantly be accepted and processed, and the applicant, if otherwise qualified, will be registered to vote. And, while the registration of an applicant who initially omitted or provided an erroneous number will not be effective retroactive to the date of the first submitted application, nothing in federal law requires otherwise.

HAVA provides that a state "may not accept or process" an application that does not include the applicant's driver's license or Social Security number, 42 U.S.C. § 15483(a)(5)(A)(i), and it authorizes states to determine when the applicant has provided that number, 42 U.S.C. § 15483(a)(5)(A)(iii). Plaintiffs' position that federal law requires states to accept and process applications that omit the applicant's driver's license or Social Security number, or which contain an incorrect number, is directly contrary to federal law. Plaintiffs have not clearly proven a substantial likelihood of success on the merits of this claim.

### 3. Section 97.053(6), Florida Statutes, Does Not Unduly Burden the Right to Vote.

As a reasonable, nondiscriminatory restriction[17] that does not impose severe burdens,

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enable election officials to evaluate an applicant's eligibility. It does not require election officials to take the applicant's word.

[17] Plaintiffs suggest in passing that the challenged law has a "differential impact" on certain applicants and that it is consequently a discriminatory regulation. *See* doc. 38, at 32-33. This allegation not only exaggerates any "differential impact," it misunderstands the nature of the correct legal inquiry. No known case has held that a disproportionate impact, without more, renders an election regulation "discriminatory" for purposes of the constitutional right to vote. Rather, the "nondiscriminatory" requirement entails two inquiries: (i) whether the regulation is "politically neutral"; and (ii) whether the regulation applies across the board to all individuals within the scope of the policy. *Burdick*, which propounded the governing standard, explained it by noting that the Court had "repeatedly upheld reasonable, *politically* neutral regulations," 504 U.S. 428, 438 (emphasis added). It cited *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986), in which the Court upheld a statute that ensured reasonable ballot access to minor party candidates. *Compare Patriot Party of Alleghany County v. Alleghany County Dep't of Elections*, 95 F.2d 253 (3d Cir. 1996) (invalidating a state law which, on its face, prohibited minor political parties from nominating candidates nominated by major political parties, but not *vice versa*).

Section 97.053(6), Florida Statutes, is amply justified by the compelling interest of the state—and the public—in fair and honest elections. The challenged law ensures the accuracy of Florida's voter registration rolls and thus secures to lawful voters the exclusive rights to which registration gives admittance. Unquestionably, the interest served by the challenged law is more than important; it is compelling: "A state indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006) (quoting *Eu v. San Francisco County Democratic Central Comm*., 489 U.S. 214, 231 (1989)). And the facts prove that any burdens imposed are not severe. The data unmistakably establish that the challenged law has not resulted in the pervasive denial of voter registration applications predicted by Plaintiffs in their Amended Complaint.

***a. Section 97.053(6), Florida Statutes, Does Not Impose Severe Burdens.***

Any burden imposed by Section 97.053(6), Florida Statutes, is far from severe. It requires voter registration applicants who have a driver's license number to provide that number, and it requires all other applicants who have a Social Security number to provide the last four digits of that number. For about half of all applicants—those who apply at DHSMV offices in conjunction with a driver's license transaction—the impact of the challenged law ends here. For the remainder, election officials attempt to verify the number, as described in Section II, *supra*, by comparing it to information in official databases. Only 2.69 percent of the 1,529,465

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There is no allegation that the challenged law is *politically* discriminatory. Likewise, to be nondiscriminatory, an election regulation must apply to all. *See Gonzalez*, 485 F.3d 1041, 1049 (9th Cir. 2007) (concluding that a proof-of-citizenship requirement for registration is nondiscriminatory, despite potentially different burdens faced by different classes of applicants to prove their citizenship, because the law "applies to all Arizonans"); *accord Anderson v. Celebrezze*, 460 U.S. 780, 787 n.9 (1983) ("We have upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself."). Section 97.053(6), Florida Statutes, is politically neutral and applies to all Floridians. It is not

applications received since the effective date of the challenged law have been returned to the Supervisors of Elections for verification by the applicant, while the remaining 97.31 percent have cleared the verification process without any further action by the applicant. Some of the applications returned to the Supervisors are resolved locally without any action required of the applicant. The Supervisors send notice letters to the small fraction of applicants whose applications were returned. Applicants may provide that verification either in person, by mail, by facsimile, by e-mail transmission, or in any other visible form. These requirements are so far from being severe, that 35,179 of 41,189 applications returned to the Supervisors—85.41 percent—have been successfully resolved, and only 0.39 percent of the total number of applications (6,010 of 1,529,465) remain unregistered as a result of the absence of a match or subsequent verification. There is simply no evidence to support Plaintiffs' apocalyptic theory of mass disenfranchisement or pervasive and severe burden.

Not only do the aggregate data reflect the minimal impact of the challenged law, they reflect continuous improvements that have increased its efficiency. As of the 2006 general election, the number of applicants that remained unregistered as a result of the challenged law was 1.7 percent of the total number of applications (12,804 of 768,933), *see* doc. 66, Exh. H—a percentage that has been decreased to 0.39 percent (6,010 of 1,529,645). While Plaintiffs predict that the total number of applicants whose registrations will remain incomplete as a result of the challenged law will increase as the presidential preference primary election approaches, there is no reason to believe that the percentage, which more accurately reflects the magnitude of the individual burden, will increase. The efficiency of the verification process was enhanced, for example, by the creation of the override process in June, 2006, which allows applicants to

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discriminatory.

provide evidence verifying the authenticity of their identifying numbers. This process provides applicants a convenient means of effecting their registrations.

Precedents have sustained similar election regulations. In *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007), the Ninth Circuit affirmed the denial of a preliminary injunction to prohibit the enforcement of a state law requiring voter registration applicants to provide proof of citizenship as a prerequisite to registration.[18] Arguing that the law unduly burdened the right to vote, the plaintiffs submitted the declarations of four individuals stating that they lacked a driver's license, birth certificate, or any other document evidencing their citizenship. *Id*. at 1048. The Court also noted that the number of voter registrations in the state declined from the effective date of the law. *Id*. It nevertheless concluded that the plaintiffs had failed to show a substantial likelihood of success on the merits, explaining that "courts uphold as not severe restrictions that are generally applicable, even-handed, politically neutral, and which protect the reliability and integrity of the election process." *Id*. at 1049 (internal marks omitted); *accord Hussey v. City of Portland*, 64 F.3d 1260, 1265-66 (9th Cir. 1995) (explaining that statutes which "promote[] traditional goals" such as "accurate and complete voter registration" are "subject only to limited scrutiny"). The proof-of-citizenship requirement, the Court noted, "applies to all Arizonans," and, though obtaining documentation of citizenship might be a burden to some, "the vast majority of Arizona citizens in all likelihood already possess at least one of the documents sufficient for registration." *Id*. at 1049-50. Accordingly, the Court denied preliminary injunctive relief.

Like the statute at issue in *Gonzalez*, the challenged law does not unduly burden the right

[18] Applications unaccompanied by proof of citizenship were "rejected, often with instructions on how the registration should be resubmitted." *Gonzalez v. State of Arizona*, No. CV 06-1268-PHX, 2006 WL 3627297, at *1 (D. Ariz. Sep. 11, 2006).

to vote. In *Gonzalez*, the law required applicants in the first instance to provide either a driver's license number or the copy of an identifying document. It required an applicant who did not possess either first to obtain one. The present law is even less burdensome. It only requires applicants to provide a driver's license or Social Security number if they already have one, and requires a copy of an identifying document only in the rare cases in which the state is unable to verify the number provided. The requirements of Section 97.053(6), Florida Statutes, apply to all Floridians, and, as a result, are generally applicable, even-handed, and politically neutral. And it does not require any applicant to obtain a document they do not already possess.[19]

Recent decisions upholding state law requirements that voters present photo identification at the polls also support the conclusion that any burden imposed by the challenged law is not severe. In *Crawford v. Marion County Election Board*, the Court noted that a photo identification requirement "will deter some people from voting," but it declined to characterize as "severe" the requirement that voters bring identification to the polls and, if they do not already have it, to obtain it:

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[19] Plaintiffs suggest that this defeats the fraud prevention purpose of the challenged law, since an applicant seeking to register fraudulently may omit the identifying number and become registered. This assertion overlooks several critical facts. First, an election regulation is not invalid simply because it is not all-encompassing. In *Crawford v. Marion County Election Board*, 472 F.3d 949 (7th Cir. 2007), the Court upheld a photo identification requirement applicable to voters who appear at a polling place despite its inapplicability to absentee voters. The plaintiffs alleged that the photo identification requirement did not serve a fraud prevention purpose because voters determined to commit fraud might do so by casting an absentee ballot. The Court explained that: "Perhaps the . . . law can be improved—what can't be?—but the details for regulating elections must be left to the states, pursuant to Article I, section 4, of the Constitution." *Id*. at 954. Second, it is consistent with the judgment of Congress, which specifically required states to register individuals who represent that they do not have a driver's license or Social Security number. *See* 42 U.S.C. § 15483(a)(5)(A)(ii). Finally, the number of applications that do not contain either number is so small—1,446 of 1,529,465 the total number of applications, or 0.09 percent—that, as a practical matter, any appreciable attempt to commit voter registration fraud by omitting an identifying number will be apparent from any perceptible

> To deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes. The Constitution does not require that result, for it is beyond question that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election-and campaign-related disorder.

472 F.3d at 951, 954 (quoting *Clingman v. Beaver*, 544 U.S. 581, 593 (2005)). The Supreme Court has noted that "States . . . have considerable leeway to protect the integrity and reliability of . . . election processes generally," *Buckley v. American Constitutional Law*, 525 U.S. 182, 191 (1999), and has recognized that every election regulation, "whether it governs the registration and qualification of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote," *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). The challenged law falls well within these parameters.

Plaintiffs have presented no evidence to suggest that the 6,010 applicants who remain unregistered as a result of the absence of a match or subsequent verification remain unregistered because of any significant burdens imposed by the challenged law. In upholding a photo identification requirement, the *Crawford* Court explained that even the slightest and most ordinary burdens are sufficient to deter some voters. *See* 472 F.3d at 951 ("[E]ven very slight costs in time or bother or out-of-pocket expense deter many people from voting, or at least from voting in elections they're not much interested in. . . . [A] few who have a photo ID but forget to bring it to the polling place will say what the hell and not vote, rather than go home and get the ID and return to the polling place."). Other applications might in fact have been fraudulent or submitted by an ineligible voter, consistent with the policy of the challenged law. In *Gonzalez*, for example, the Court, in upholding Arizona's proof-of-citizenship requirement for registration,

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increase in the number of such applications, and appropriate steps may be taken to investigate such activity.

noted that, since 1996, as many as 232 noncitizens attempted to register to vote, and that the state of Arizona had prosecuted ten of them. 485 F.3d at 1048. There is simply no reason to believe that the tiny fraction of applicants who remain unregistered as a result of the challenged law—0.39 percent of the total number of applications—are eligible voters who actually wish to register but are disabled from doing so by the challenged law in a constitutionally significant way.

The minimal burden imposed by Section 97.053(6), Florida Statutes, is attested by the fact that Plaintiffs, after more than a year of preparation and months of discovery, have been unable to identify a single individual who is a member of a Plaintiff organization and who has been prevented from voting by the challenged law or substantially burdened in the attempt to register or vote. *See* doc. 52 at 2 ("The answer is that Plaintiff does not yet have such information, but hopes to have such information through discovery."); Neal Depo., 22:5-13; LaFortune Depo., 25:14-20, 26:16-27:6. Beverlye Neal, the executive director of the Florida State Conference of the NAACP, testified that she was unaware of any complaints by members of her organization that the challenged law hindered their ability to register to vote, and she indicated that any complaints about the statute were only "a discussion of what could happen." Neal Depo., 25:20-26:14. Similarly, Jean Robert LaFortune, the chairman of the Haitian-American Grassroots Coalition (the "HAGC"), testified that he knew of one applicant who received a notice letter, but this applicant "resolve[d] the issue" and become registered. LaFortune Depo., 21:24-22:4, 25:1-10. This applicant was not a member of the HAGC, *id*., 22:7-9, and no member of the HAGC has even complained to the chairman of the HAGC about the challenged law, *id*., 23:19-23.

As in *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006), where the Court upheld a photo identification requirement:

> [I]t is a testament to the law's minimal burden and narrow crafting that Plaintiffs have been unable to uncover anyone who can attest to the fact that he/she will be prevented from voting . . . . Lacking any such individuals who claim they will be prevented from voting, we are hard pressed to rule that [the law] imposes a severe burden on the right to vote.

*Id*. at 823. Here, more than 97 percent of applications clear the verification process without any further action by the applicant, and the proportion of all applications that remain unresolved as a result of the absence of a match or subsequent verification is a mere 0.39 percent. In light of this, and considering Plaintiffs' inability to identify a single organizational member who has been harmed by the statute or will be prevented from voting at the presidential preference primary election or beyond, any burden imposed by the challenged law is insubstantial and well within the bounds of the Constitution.

***b. Section 97.053(6), Florida Statutes, Serves an Important Regulatory Interest.***

As discussed in the Secretary's Motion to Dismiss (doc. 23), his Reply to Plaintiffs' Response to the Secretary's Motion to Dismiss (doc. 60), and Section III, *supra*, the verification process established by Section 97.053(6), Florida Statutes, effectively secures Florida's voter registration rolls from unlawful registrations and thus serves the all-important function of securing Florida's electoral processes from irregularity and fraud. While Plaintiffs attempt to minimize this interest, *see* doc. 38 at 33, the Supreme Court recently recognized its critical importance. *See Purcell*, 125 S. Ct. at 7 ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised."). The Constitution itself recognizes this interest, expressly authorizing states to regulate the "times, places and manner of holding elections." *See* Art. I, § 4, U.S. Const. The Supreme Court long

ago explained that:

> [T]hese comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

*Smiley v. Holm*, 285 U.S. 355, 366 (1932). In Florida, where the verification of registrations is the insurmountable obstacle to absentee ballot fraud, provisional ballot fraud, and fraud in the collection of petition initiatives, *see* Section II, *supra*, the challenged law stands between Florida's electoral process and disorder, irregularity, distrust, and cynicism. It enhances public confidence in the electoral process, which is critical to successful elections. *See* Exh. D ¶ 10 (declaration of K. Hill). Because its fraud prevention purpose[20] more than justifies the minimal impact of the challenged law on voter registration applicants, Section 97.053(6), Florida Statutes, does not unduly burden the right to vote.

**4. <u>Section 97.053(6), Florida Statutes, Does Not Violate Equal Protection</u>.**

[20] Plaintiffs contend that the "simply cry of 'fraud'" is insufficient to justify Section 97.053(6), Florida Statutes. *See* doc. 38 at 34. Besides the fact that election fraud in Florida is substantiated by case law both in Florida, *see*, *e.g.*, *Bolden v. Potter*, 452 So. 2d 564 (Fla. 1984); *Floridians Against Expanded Gambling v. Floridians for a Level Playing Field*, 945 So. 2d 553, 561 (Fla. 1st DCA 2006); *In Re The Matter of the Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election for the City of Miami, Florida*, 707 So. 2d 1170 (Fla. 3d DCA 1998), and elsewhere, *see Crawford v. Marion County Election Bd.*, 472 F.3d 949, 953 (7th Cir. 2007) (citing Florida and Illinois as "notorious examples" of states afflicted by election fraud), and that it is even recognized by Congress, *see* 148 Cong. Rec. S10488 (statement of Sen. Bond) (noting the registration of Cocoa Fernandez—a dog—in Florida), it is well established that, in the election context, there is no need for an "elaborate, empirical verification of the weightiness of the State's asserted justifications." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997); *accord Munro*, 479 U.S. at 195-96 ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.").

### *a. Legal Standard.*

Plaintiffs also allege that the challenged law violates equal protection, suggesting that strict scrutiny applies. It does not. "When analyzing whether a state election law violates the Equal Protection Clause of the Fourteenth Amendment, the Eleventh Circuit applies the same balancing test established in *Burdick v. Takushi*." *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1378-79 (S.D. Fla. 2004) (citing *Fulani v. Krivanek*, 973 F.3d 1539, 1543 (11th Cir. 1992)). Accordingly, in upholding a state law photo identification requirement, the Court in *Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333, 1376-77 (N.D. Ga. 2007), determined that the same *Burdick* test applicable to the right to vote governs the equal protection analysis. *Accord Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 831 (S.D. Ind. 2006) (upholding a photo identification requirement against an equal protection challenge on the ground that it was supported by a "reasonable explanation"). In fact, *Wexler v. Anderson*, 452 F.3d 1226 (11th Cir. 2006), which Plaintiffs cite, applied the very test which Plaintiffs claim does not apply, indicating that, where the burden imposed is not severe, strict scrutiny does not apply. *Id*. at 1232-33. The applicable standard, therefore, is whether "important regulatory interests" justify the particular burdens imposed. *Anderson*, 460 U.S. at 788.

### *b. Applicants Who Provide Incorrect Information Are Not Similarly Situated With Applicants Who Provide Correct Information.*

Regardless of the applicable standard, however, Plaintiffs' suggestion that the challenged law improperly discriminates between applicants who placed correct identifying numbers on their applications and those who did not does not implicate equal protection. By considering the registration of applicants who initially provided a correct number to date from the initial submission of the application, while treating the application of an applicant who provided

incorrect information as complete only as of the time correct information was provided, the challenged law, Plaintiffs say, improperly treats similarly situated applicants differently. *See* doc. 5 at 23; doc. 38 at 36. An applicant who provided correct information and one that did not are not similarly situated. An applicant who provided correct information provided the legally required information to enable election officials to verify his identity, and the absence of a match should not preclude the applicant, upon provision of verifying evidence, from being registered as of the date of the application. An applicant who provided incorrect information did not provide the information necessary for verification, and the application was not complete until he did.

This analysis shows that the challenged law's treatment of these applicants is in fact consistent. Both are registered as of the day on which they provide the information needed to verify the application. An applicant who provided correct information on the initial application provided all legally required information on the initial day of submission, while an applicant who provided incorrect information and who subsequently provides evidence of the applicant's actual number provided the needed information on a later day. Thus, the challenged law treats the two applicants identically, dating the registration in each case from the day that the needed information was provided. And the statute affords notice to both applicants—an applicant who provided incorrect information and who consequently could not be matched, as well as an applicant who provided correct information but who nevertheless could not be matched. When the proper information is provided, the applicant is registered, effective, in both cases, on the day the application is completed by the provision of correct information.

#### *c. Equal Protection Does Not Bar the Use of the SSA Database.*

Finally, Plaintiffs suggest that Florida should be barred from using the SSA database on the ground that the different rates at which the DHSMV and SSA databases locate matches

subject similarly situated applicants to unconstitutional discrimination. Assuming *arguendo* that the match rates of the two databases are not identical, it does not follow that the challenged law is unconstitutional. Applicants who provided driver's license numbers and those who provided Social Security numbers both receive notices and can correct any failed match by verifying the authenticity of their numbers—a minimal burden which thousands of Floridians have undertaken to effect their registrations. This burden is strongly supported by the function of the matching and verification process to preclude unlawful applications. Equal protection "does not require that the state choose ineffectual means" to accomplish a legitimate purpose. *See Rosario v. Rockefeller*, 410 U.S. 752, 762 n.10 (1973). In fact, since no two databases yield exactly identical match rates, Plaintiffs' reasoning would prevent the state from using more than one database, and would allow applicants without driver's license numbers to bypass the verification process altogether. By exempting applicants without driver's license numbers from the verification process, despite the availability of verification by means of the SSA database, Plaintiffs' logic would threaten equal protection.[21]

### *B. Plaintiffs Have Failed Clearly to Demonstrate Irreparable Harm.*

Despite the wide-ranging devastation which Plaintiffs assert to have resulted from the challenged law, they have failed to identify a single member of their membership organizations who has been prevented from voting by the challenged law or substantially burdened in the attempt to register or vote. Plaintiffs' inability to locate a single injured member is the more startling because Plaintiffs have had ample opportunity to review the list of applicants provided to Plaintiffs by the Secretary identifying applicants whose applications were returned to the

[21] In their Amended Complaint, Plaintiffs also alleged that the challenged law has a disparate impact on certain racial groups. Because Plaintiffs do not raise this argument in

Supervisors of Elections for further action. In fact, Plaintiffs have even failed to identify one member who, based on personal experience, has complained about the challenged law. The total absence of a single individual who has been injured by the challenged law speaks volumes. It discredits the hyperbolic assertions of broad disenfranchisement and underscores the reasonable and well-adjusted nature of any burden imposed by Section 97.053(6), Florida Statutes.

In addition, the challenged law requires the Supervisors to notify any applicant whose identifying number could not be matched, and permits such applicants to provide evidence verifying the authenticity of that number. This evidence can be communicated in person, by mail, by facsimile, or by e-mail, *see* Bryant Depo., 27:19-28:4, 154:18-155:20, 157:20-22, 158:20-23; Cowles Depo. 121:23-122:13; Sola Depo., 123:14-124:4, and does not, contrary to Plaintiffs' hopes, require applicants to drive long distances to effect their registrations. Applicants are completely capable of consummating their registrations without the aid of a preliminary injunction. Indeed, only 6,010 of the 41,189 *questionable* applications—14.59 percent—remain unresolved. These data logically establish the reasonableness of the challenged law and its administration by the Supervisors.

Plaintiffs' delay in bringing this action also militates against a finding of irreparable harm. A "long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985); *accord Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (When an "application for preliminary injunction is based upon an urgent need for the protection of [a plaintiff's] rights, a long delay in seeking relief indicates that speedy action is not required."); *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) ("[Delay] may . . .

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support of their request for a preliminary injunction, *see* doc. 5 at 23-24, the Secretary does not

indicate an absence of the kind of irreparable harm required to support a preliminary injunction."); *Badillo v. Playboy Entertainment Group, Inc.*, No. 8:04-CV-591-T-30TBM, 2004 WL 1013372 (M.D. Fla. Apr. 16, 2004) ("In determining whether harm is irreparable, courts consider, as one factor, the delay of the movant in seeking relief."). Accordingly, in *Gonzalez v. Arizona*, CV 06-1268-PHX, 2006 WL 3627297 (D. Ariz. Sep. 11, 2006), in denying a motion for a preliminary injunction prohibiting a proof-of-citizenship requirement for registration, the Court noted that the plaintiffs "filed suit approximately eighteen months after [the law] became effective and only four months before the primary election and six months before the general election." *Id*. at *3.

The present case involved similar delay. It was filed nearly 27 months after the Governor signed Section 97.053(6), Florida Statutes, into law, more than 20 months after it took effect, and little more than four months before the presidential preference primary election. Plaintiffs testified that they became aware of the challenged law between August and November or December of 2006. *See* Neal Depo., 9:13-20; LaFortune Depo., 40:10-13. During and since this period, Plaintiffs' counsel demonstrated their full awareness of and opposition to the challenged law, maintaining a correspondence with the Secretary from September, 2006, to March, 2007, providing testimony to the Florida Legislature in January, 2007, and submitting numerous public records requests to state and local officials. *See* doc. 11 at 3-5. Plaintiffs nevertheless neglected to bring this action until mere months remained before the book-closing deadline for the presidential preference primary election. Their delay "raise[s] serious questions regarding Plaintiffs' need and desire for immediate injunctive relief." *Gonzalez v. Arizona*, CV 06-1268-PHX, 2006 WL 3627297, at *3 (D. Ariz. Sep. 11, 2006).

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address it here.

### *C. An Injunction, By Dismantling an Essential Safeguard Against Voter Registration Fraud, Would Be Adverse to the Public Interest.*

Plaintiffs acknowledge that "the Secretary, and all Florida citizens, have a vested interest in a fair, orderly, and legitimate election." Doc. 5 at 24-25. An injunction prohibiting the enforcement of Section 97.053(6), Florida Statutes, imperils each of these vested interests.

#### 1. **The Impending Presidential Preference Primary Election Militates Against the Issuance of an Injunction.**

It is well established that "court orders affecting elections can themselves result in voter confusion and cause the very chilling effect that plaintiffs claim they seek to avoid." *Northeast Ohio Coalition for Homeless and Service Employees Int't Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006)). In *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006), the Supreme Court vacated an order of the Ninth Circuit preliminarily enjoining the enforcement of a state law requiring voters to present photo identification when presenting themselves to vote. Holding that the Ninth Circuit failed to defer to the factual findings of the lower court, the Court noted that, in issuing the injunction "just weeks before an election, [the Ninth Circuit] was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases . . . ." *Id*. at 7. It explained that "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls," and concluded that, "[g]iven the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules." *Id*. at 7-8.

The Supreme Court has long urged judicial caution on the eve of an election. In *Roman v. Simcock*, 377 U.S. 695, 709-10 (1964), the Court noted that a district court which declined to invalidate an unconstitutional reapportionment plan immediately before a general election "acted

in a wise and temperate manner" because of "the imminence of that election and the disruptive effect which its decision might have had." *Accord Reynolds v. Sims*, 377 U.S. 533, (1964) ("[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case . . . ."); *United States v. Metropolitan Dade County, Florida*, 815 F. Supp. 1475, 1478-79 (S.D. Fla. 1993) (explaining that a court "may take into account equitable considerations" where "an impending election is imminent and the election machinery is already in progress"). The Ninth Circuit recently explained that "election cases are different from ordinary injunction cases . . . . Interference with impending elections is extraordinary." *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914, 919 (2003) (en banc) (affirming denial of preliminary injunction prohibiting use of punch-card ballots at ensuing election). Consistent with precedent, the imminence of the election in this case, and the potential consequences of compliance with Plaintiffs' request, weigh heavily against the grant of a preliminary injunction.

**2. <u>An Injunction Would Jeopardize the Integrity of Florida's Electoral Process</u>.**

Finally, the issuance of an injunction prohibiting the verification of an applicant's identity is directly contrary to the public interest in fair and honest elections. As discussed in the Secretary's Motion to Dismiss (doc. 23), his Reply to Plaintiffs' Response to the Secretary's Motion to Dismiss (doc. 60), and in Section II, *supra*, the danger of election fraud of every kind is real. Indeed, it is coeval with elections themselves. Section 97.053(6), Florida Statutes, implements an anti-fraud mechanism established by Congress in light of known election irregularities. It seals Florida's voter registration rolls against unlawful applications and secures to lawful voters the exclusive enjoyment of their political privileges. The invalidation of the

challenged law would deprive Florida of the surest means of combating election fraud and reinstate the substandard and discredited system of voter registration that leaves an unguarded door open to dishonest practices. The interest of all lawful voters is deeply concerned in the maintenance of a verification system that closes the door on the centuries-old problem of election fraud and justifies public confidence in the democratic process.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by Notice of Electronic Filing this 21st day of November, 2007, to the following:


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