



VIA FAX & U.S. MAIL

Ms. Constance Kaplan
Miami-Dade County Election Supervisor
c/o Jeff Ehrlich, Esq.
Miami-Dade County Attorney
Stephen P. Clark Center, Suite 2810
N.W. 1st Street
Miami, FL 33128-1993

September 28, 2004

Dear Ms. Kaplan:

The Brennan Center for Justice, a non-partisan organization that promotes effective and inclusive democracy, and the Miami-Dade Election Reform Coalition have been monitoring county-level implementation of the Help America Vote Act (“HAVA”) and the Florida Election Reform Act to ensure that these new laws are implemented in a manner that both safeguards the integrity of our election process and protects voters’ rights. In particular, we are concerned that the office of the Miami-Dade Supervisor of Elections has not provided accurate guidance or adequate training to election officials and poll workers about the identification and provisional balloting requirements. These failures increase significantly the possibility of disenfranchising voters in the upcoming election.

Specifically, we have heard reports that numerous eligible voters were turned away from the polls in Miami-Dade County during the August primary election because they did not have identification and were not told they could vote as long as they filled out affidavits. We have also learned that while the office of the Miami-Dade Supervisor of Elections has instructed its poll workers to provide provisional ballots to first-time voters who register by mail and do not provide identification, such ballots will not be counted. Unlike other Florida counties we have monitored, it appears Miami-Dade County officials do not plan to compare the signature on the provisional ballot envelope with the signature on the voter’s registration form and, if the signatures match, count the ballot.

Miami-Dade’s handling of the new identification and provisional ballot requirements is inconsistent with both Florida and federal law, as explained below. To prevent the unnecessary disenfranchisement of many eligible voters and to ensure compliance with the law, we write to request that the Miami-Dade County Board of Elections change its policy and procedures. First, we ask that you instruct election officials to ensure that in the upcoming election poll workers know they must provide

non-first-time voters who do not present identification with the opportunity of completing an affidavit or attestation, as stipulated by Sections 101.043 and 101.49 of the Florida statute.

Second, with respect to first-time voters, we ask you to instruct election officials that they not only a) must provide provisional ballots to first-time voters who have registered by mail and do not provide identification, but b) must count the votes cast on those ballots if the signatures on the provisional ballots match those on the voters' valid registration forms.

As you have recognized, both the Florida law and HAVA require election officials to permit first-time voters who register by mail but do not provide identification to vote by provisional ballot. Section 101.043 of Florida's statute specifies that if an "elector who fails to furnish the required identification is a first-time voter who registered by mail and has not provided the required identification to the supervisor of elections prior to election day, the elector shall be allowed to vote a provisional ballot." Fla. Stat. § 101.043. HAVA similarly includes a "fail-safe voting" provision enabling a covered first-time voter who does not meet identification requirements to "cast a provisional ballot." 42 U.S.C. § 15483(b)(2)(B).

Furthermore, Florida law clearly requires county canvassing boards to count the provisional ballot of a first-time voter who registered by mail and did not provide identification so long as (a) the voter was eligible to vote in the precinct in which she cast the ballot, and (b) the signature on the provisional ballot envelope matches that on the voter's registration form. With respect to a provisional ballot cast by a first-time voter who registers by mail and does not provide identification, Florida law mandates that "[t]he canvassing board shall determine the validity of the ballot pursuant to s. 101.048(2)." Fla. Stat. § 101.043. Section 101.048(2), in turn, provides:

(2)(a) The county canvassing board shall examine each provisional ballot envelope to determine if the person voting that ballot was entitled to vote at the precinct where the person cast a vote in the election and that the person had not already cast a ballot in the election.

(2)(b) If it is determined that the person was registered and entitled to vote at the precinct where the person cast a vote in the election, the canvassing board shall compare the signature on the provisional ballot envelope with the signature on the voter's registration and, if it matches, *shall count the ballot*.

Fla. Stat. 101.048 (emphasis added). In other words, Florida law *requires* the canvassing board to *count* a provisional ballot if it was cast in the proper precinct and if the signature on the ballot envelope can be matched with the signature on the voter's registration.¹ The statute does not authorize the canvassing board to refuse to count a provisional ballot if those two conditions are met.

¹ We understand that the precinct requirement is the subject of a pending lawsuit in Florida. This letter does not address the claims raised in that lawsuit.

Elections officers in all of the Florida counties we have reviewed, including Duval, Bradford, Gilchrist, and Clay Counties, have indicated that they plan to follow the procedure set forth in Florida law and count the provisional ballots cast by first-time voters who fail to present identification if the canvassers determine that the signatures on their registration forms and provisional ballots match. Several of these counties already successfully used this counting process in the August 31 primary election. To prevent the widespread disenfranchisement of eligible voters, and to ensure uniform standards for counting ballots, *see Bush v. Gore*, 531 U.S. 98, 110 (2000), we urge you immediately to adopt the standard used throughout the state – namely, of counting provisional ballots cast by registered voters in the proper precincts after conducting a signature match.

If Miami-Dade County fails to follow these requirements of Florida election law, it will also run afoul of HAVA. As noted above, HAVA explicitly includes a “fail-safe voting” provision to ensure that first-time voters who register by mail and cannot meet the identification requirements are not thereby disenfranchised. Thus, HAVA requires states to permit first-time voters who register by mail but cannot provide the specified identification to cast provisional ballots. 42 U.S.C. § 15483(b)(2)(B). HAVA then obligates states to transmit the provisional ballots to appropriate election officials for verification, *id.* § 15482(a)(3), and to “count[] as a vote in that election” the provisional ballot cast by any individual who is eligible under state law to vote, *id.* § 15482(a)(3). Since Florida does not – and could not, consistent with the Constitution – make voter identification an absolute prerequisite to voter eligibility, HAVA requires that election officials count those provisional ballots so long as the voters are otherwise eligible under state law to vote. A blanket refusal to count *all* provisional ballots cast by first-time voters who register by mail and do not provide identification would render meaningless these “fail-safe voting” mechanisms in HAVA.

* * *

As you know, the right to vote is a fundamental right protected by the First and Fourteenth Amendments to the U.S. Constitution. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). And, as the Supreme Court recently explained in *Bush v. Gore*, 531 U.S. at 104:

[T]he right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.

In the wake of the election scandals in the last presidential election, Florida took several steps to secure equitable and popular enfranchisement throughout her counties. If Miami-Dade County correctly provides provisional ballots to first-time voters who do not present identification (where these voters have met Fla. Stat. 101.408(2)), but then erroneously refuses, in violation of both federal and Florida law, to count their votes when the signatures match their registration forms, their ballots become sham ballots. If Miami-Dade County incorrectly turns away voters at the polls for failing to provide identification without providing the opportunity of filling out an affidavit or attestation, it

would be a serious affront to the voters' most fundamental rights and a clear contravention of Florida law.

Fortunately, correcting these problems, we believe, is as simple as clarifying your county canvassing procedures and taking steps to ensure that poll workers and canvassers are properly trained to implement Florida election law. Misapplied voter-identification rules should not prevent a voter from casting a ballot or a provisional ballot from being counted. Accordingly, we would like to know if you have provided or intend to provide clarification and additional training to election officials and poll workers to guarantee that no eligible voters are turned away from the polls because they do not present identification, as apparently occurred during the August primary. We would also like to know if you will consider changing your provisional ballot policy to comport with the law.

Since time is short, we would appreciate and welcome the opportunity to discuss the matters raised in this letter within the next week. Please feel free to contact Lida Rodriquez Taseff at 305-960-2242, Chris Pendry at 212-998-6289 or Wendy Weiser at 212-998-6130. Thank you for your attention.

Sincerely,

Wendy R. Weiser, Esq.

Lida Rodriquez Taseff, Esq.
Miami-Dade Election
Reform Coalition

Christine B. Pendry, Esq.
Brennan Center For Justice
at NYU School of Law

Cc: Miami-Dade County Board of County Commissioners
Barbara Carey Schuler, Chair
Betty Ferguson
Dennis Moss
Jimmy Morales

George Burgess, County Manager