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. 4:07CV-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 MOTION TO DISMISS

Defendant Kurt S. Browning, in his official capacity as Secretary of State for the State of Florida (the "Secretary"), pursuant to Federal Rule of Civil Procedure 12(b)(6), respectfully moves this Court to dismiss Plaintiffs' Complaint. In support of this Motion, the Secretary submits the attached Memorandum of Law.

WHEREFORE, the Secretary respectfully seeks the entry of an Order granting this Motion and dismissing Plaintiffs' Complaint.

MEMORANDUM OF LAW

In this case, Plaintiffs seek to undermine a specific, common-sense anti-fraud measure embodied in federal and state law. At the heart of this case is a simple question: may Florida verify the identities of voter registration applicants before registering them to vote? Florida verifies their identities by matching an applicant's driver's license number or the last four digits of the applicant's Social Security number to data in official state and federal databases. If the applicant's identifying information is not verified, an applicant is notified and may establish that the number provided is correct. The challenged provision exists for the benefit of all legally registered voters, and, by ensuring the integrity of the voter registration process, it promotes fair elections and confidence in the electoral process. Plaintiffs allege that this basic requirement is inconsistent with federal law and the United States Constitution. Their Complaint should be dismissed for the reasons set forth below.

The Help America Vote Act of 2002

Congress enacted the Help America Vote Act of 2002 ("HAVA") in response to election deficiencies and voter fraud during the 2000 elections. Its adoption served a dual purpose: to "make it easier to vote and tougher to cheat." 148 Cong. Rec. S10488 (statement of Sen. Bond).[1]

[1] Indeed, the Congressional Record is replete with affirmations of this dual purpose. *See, e.g.*, *id.* at S2523 (statement of Sen. Feinstein) ("[T]he new standards . . . are meant to 'make it easer to vote, and harder to vote fraudulently.' What a laudable goal."); *id.* at S2521 (statement of Sen. Cantwell) ("[W]e all agree that any election reform . . . should be about two things: deterring voter fraud and promoting voter participation."); *id.* at S2517 (statement of Sen. Wyden) ("From the beginning of this debate, I have said that this legislation should be about deterring voter fraud and promoting voter participation."); *id.* at S2516 (statement of Sen. McConnell) ("My thanks to Senator Bond who gave us our rallying cry behind this bill, 'making it easier to vote, and harder to cheat.'"); *id.* at H7842 (statement of Rep. Ehlers) ("We must not only guarantee that each vote counts, we must also ensure these votes are not diluted by fraudulent votes."). Unquestionably, one of the main pillars of HAVA was the prevention of voter fraud.

Nor was Congress, in combating voter fraud, contending with imaginary evils. Rather, it was responding to concrete and verifiable examples of wrongdoing, including duplicate registrations. For example, more than 720,000 people were registered in more than one state. *Id.* at S10492. Of this number, 60,000 were registered in Florida and another state. *Id.* at S10490. Senator Bond found that it was "not unusual to find people who were registered four times." *Id.* at S10491. In fact, 3,000 people were known to have double-voted in the 2000 election, when the presidential race was essentially decided by 537 votes. *Id.* at 10488. [2] In view of this evidence, Congress properly concluded that "[d]uplicate registrations provide the opportunity for unscrupulous people to commit fraud and undermine honest elections by, in effect, invalidating legally cast ballots." *Id.* at S10492.[3]

Congress also recognized that voter registration fraud "can occur in many ways." *Id.* at S10492. Apart from duplicate registrations, "submitting registration forms in the name of deceased or fictitious people is one of the most common. But some folks even fill out registration cards in the name of their pet." *Id.* Senator Dodd explained that "anecdotal evidence of dogs and deceased persons registering, and perhaps even voting, and registration lists with

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[2] Congress also took notice of a well publicized investigation of voter registration fraud in South Dakota, where applicants were "on an 'honor system'" and were not required to identify themselves when submitting a voter registration application. *See id.* at S10488, S10494. The South Dakota Attorney General, speaking of fraudulent activity under investigation by the FBI, lamented that "[i]t's pretty easy to register under a false name, have the registration confirmation sent back to your home, then send in by mail an absentee ballot request, get it and vote under the false name, send it back and get it counted." *Id.* at S10419.

[3] Congress understood the dangers of fraudulent registrations. Senator Bond explained that HAVA "recognizes that illegal votes dilute the value of legally cast votes—a kind of disenfranchisement no less serious than not being able to cast a ballot." *Id.* at S10488; *accord id.* at S2517 (statement of Sen. Bond) ("Unfortunately, the votes of those who have the right to vote have been diluted and have been canceled because fraud has been prevalent . . . ."). He concluded that, "[b]ased on the extensive documentation we have seen, there can be no doubt that voter fraud is a serious problem in Federal elections." *Id.* at S10492.

duplicate names in several different jurisdictions illustrate the frailties of current registration procedures." *Id.* at S10503. And "even an insignificant potential for fraud can undermine the confidence of voters, election officials, political parties, etc., in the results of a close election." *Id.* at S2535 (statement of Sen. Dodd).

The remedies devised by Congress—the "anti-fraud provisions" of HAVA—include the matching provision at issue in this litigation. Title III of HAVA governs states' election technology and administration requirements for federal elections, providing, among other items, minimum standards for voter registration. *See* 42 U.S.C. §§ 15481 through 15485. Its central voter registration mandate is the establishment by each state of "a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter . . . ." *Id.* § 15483(a)(1)(A). The statewide database was designed as "the single greatest deterrent to election fraud, whether by unscrupulous poll workers or officials, voters, or outside individuals and organizations." *Id.* at S10509 (statement of Sen. Dodd).[4]

In addition, HAVA requires each voter registration applicant who has a "current and valid driver's license" to provide the driver's license number on the application, and it requires all other applicants (except those who do not have a Social Security number) to provide the last four digits of their Social Security numbers. 42 U.S.C. § 15483(a)(5)(A). An application "may

[4] Senators agreed that the primary purpose of the database is fraud prevention. *See, e.g.*, *id.* at S2526 (statement of Sen. McCain) ("[T]he bill establishes an interactive, computerized, statewide voter registration system that will prevent future incidents of election fraud."); *id.* at S2523 (statement of Sen. Lieberman) ("The bill also requires the States to develop statewide computerized and interactive voter registration lists both to make it easer to vote and to deter fraud.").

not be accepted or processed" unless it includes this information. *Id.* HAVA then requires each state to "match" driver's license numbers provided by applicants to information in "the database of the motor vehicle authority" to enable it to "verify the accuracy of the information provided on applications for voter registration." *Id.* § 15483(a)(5)(B)(i). It further requires the Commissioner of Social Security to "enter into an agreement with [the official responsible for a State driver's license agency] for the purpose of verifying" the last four digits of an applicant's Social Security number. *Id.* § 15483(a)(5)(C).

Critically, HAVA declines to determine when the identifying information provided by an applicant is adequate or to prescribe the consequences of a failed match. Rather, it expressly provides that "[t]he State shall determine whether the information provided by an individual is sufficient to meet the requirements of [Section 15483(a)(5)(A)], in accordance with State law." Accordingly, "nothing in [HAVA] establishes a Federal definition, or standard, for when a voter is duly registered. That authority continues to reside solely with the State and local election officials pursuant to state law." 148 Cong. Rec. S10504 (statement of Sen. Dodd). Not only does HAVA authorize states to determine whether an applicant's identifying information has been sufficiently verified, it expressly establishes only "minimum requirements" and leaves states free to establish additional requirements that are "more strict" but not "inconsistent with" HAVA's requirements. *Id.* § 15484. As Senator Bond noted, "[e]ach of the steps taken in this bill to address fraud shall be considered to be a minimum standard." *Id.* at S10490.

In adopting the matching requirement, Congress was determined to "make sure we do our best to see to it that people who register to vote are who they say they are, so we don't have people registering fictitious people and casting ballots for them." *Id.* at S10501 (statement of Sen. Dodd). Similarly, Senator Wyden indicated that Congress would "[discourage fraud] at the

right time and in the right way, which is essentially at the front end when people come to sign up for the electoral process. But then, after we can ascertain they are who they say they are, they are not going to face innumerable hassles and barriers when they actually show up to vote." *Id.* at S10421 (emphasis added). The intent of Congress, therefore, was clearly to establish a mechanism to allow states to verify the identity of voter registration applicants *before* those applicants ever register to cast a ballot in a federal election.

Congress believed, moreover, that the verification of an applicant's identity was an appropriate means of deterring fraudulent registrations. As Senator Bond explained, the "[p]rovision and verification of an existing social security number is required before a person can qualify for Federal temporary assistance. . . . Surely clean elections, accurate results and faith in the election process is as important of an objective as preventing welfare fraud." *Id.* at S10490. He continued: "The use of driver's license numbers and full or partial social security numbers will help election officials to verify the identity and eligibility of individuals and reduce fraudulent voter registrations from being added to our voter rolls." *Id.* at S10492. Senator McConnell explained that "the only thing that [the matching] provision impedes is voter fraud." *Id.* at S10419. And Congress noted that "[s]tates that require additional identifying information from registrants have substantially fewer duplicate and fraudulent registrations on their voter rolls." *Id.* at S10492-93 (statement of Sen. Bond).

Congress thus expressly crafted HAVA's matching provision in a direct response to concerns about voter registration fraud. Responding to "many reported cases and incidents of registration and vote fraud revealed in [congressional] testimony," Congress "made a statement that vote fraud exists in this country." *Id.* at S10489 (statement of Sen. Bond). Senator McConnell echoed this view:

> This bill makes significant changes in the voter registration process for Federal elections. These changes are designed to clean up our Nation's voter registration lists and reduce fraudulent registrations and voting. Congress has a compelling interest in protecting the integrity of the Federal election process. This legislation will further that interest by helping to ensure accurate voter rolls, which is the first step in ensuring fair elections.

Id. at S10492. Recognition of the threat presented by voter registration fraud was therefore a leading congressional policy in drafting and adopting HAVA. Indeed, the consistent refrain in Congress unquestionably establishes that the dominant purpose both of the statewide database in general and the matching requirement in particular was the prevention of voter registration fraud.

The Challenged Legislation

Before the adoption of Section 97.053(6), Florida Statutes, Florida law provided no means of verifying the identities of voter registration applicants. In a report released on January 5, 1998, the Florida Department of Law Enforcement ("FDLE") noted that Florida's "[m]inimal identification . . . requirements provide ample opportunity for voter registration fraud." *See* Exhibit A at 1. In fact, according to that report, Florida law "eliminated virtually any ability by Supervisors of Elections to independently verify whether the information provided on a registration form is in fact[] accurate," resulting in "'no questions asked' voter registration." *Id.* at 1, 6-7. It explained that "Florida has implemented a standard that is in essence little more than 'trust me at my word alone' in registering to vote." *Id.* at 7. The report concluded that unless Florida establishes "a way to truly verify a registrant's eligibility . . . , state and local officials can do little to stop the potential registration (and subsequent voting) fraud." *Id.* at 8.

Florida adopted Section 97.053(6), Florida Statutes, in 2005 to address these concerns by implementing HAVA's matching provision.[5] It provides that a "voter registration application

[5] The Florida Legislature recently amended Section 97.053(6), Florida Statutes, effective January 1, 2008. *See* Ch. 2007-30, § 13, Laws of Fla. Because Plaintiffs challenge the statute as

may be accepted as valid only after the [Department of State] has verified the authenticity or nonexistence of the driver's license number, the Florida identification card number, or the last four digits of the social security number provided by the applicant."[6] Florida has accordingly determined that "the information provided by an individual is sufficient to meet the requirements of" HAVA, *see* 42 U.S.C. § 15483(a)(5)(A)(iii), and may therefore "be accepted [and] processed," *see id.* § 15483(a)(5)(A), if the identifying information provided by the applicant is in fact verified. This is precisely what HAVA permits.

In addition, the challenged law creates a safeguard in favor of the right to vote that goes above and beyond the requirements of HAVA. Even if an application was received—but the identifying information could not be verified—prior to the book-closing deadline,[7] the challenged law affords the applicant an opportunity to establish the authenticity of that information. Specifically, if the identifying information does not match that in the official database, the supervisor of elections must notify the applicant, and the applicant may, at any time before 5 p.m. on the second day after the ensuing election, present evidence that the identifying information is authentic. § 97.053(6), Fla. Stat.[8] Thus, Florida law not only establishes a notice procedure, but it allows applicants ample time, even past election day, to establish the authenticity of the information they provided, despite the fact that the registration books are otherwise closed.

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amended, *see* doc. 1 at ¶ 24, 27, the analysis in this Motion also relates to the amended statute.

[6] As it relates to the challenged law, any reference to an applicant's driver's license number in this Motion alternatively includes a reference to an identification card number.

[7] The book-closing deadline is the last day to register in order to be eligible to vote at a given election. *See* § 97.055, Fla. Stat. In Florida, registration books close on the 29th day prior to each election. *Id.*

[8] If an applicant presented the evidence prior to the election, the applicant may vote a regular ballot. Otherwise, the applicant may vote a provisional ballot, and the vote will be counted if the evidence is presented before the ultimate deadline. *See* § 97.053(6), Fla. Stat.

ARGUMENT

I. HAVA DOES NOT PREEMPT SECTION 97.053(6), FLORIDA STATUTES.

In Counts I, II, and III, Plaintiffs allege that Section 97.053(6), Florida Statutes, is inconsistent with and preempted by HAVA.[9] They contend that HAVA "was passed . . . in large part to ensure that eligible voters would not be left off the voting rolls," and that, consistent with this purpose, HAVA's matching requirement was designed to "facilitate the orderly maintenance" of the statewide voter registration database. *See* doc. 4 at 13, 14. The matching requirement, Plaintiffs argue, was designed solely "to ensure confidence that the [unique identifiers] are accurately assigned."[10] *Id.* at 15. Plaintiffs conclude that, by making identity verification a precondition of registration, the challenged law "hinder[s] Congress's objectives."

Plaintiffs' contention totally ignores the dominant congressional policy that underlies HAVA's matching requirement: the prevention of voter registration fraud. Worse still, it overlooks express language in HAVA and volumes of legislative history that affirm the authority of states to establish the requirements of voter registration, to determine the acceptability of identifying information submitted by applicants, and to prescribe the consequences of a failed

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[9] While Plaintiffs allege that Section 97.053(6), Florida Statutes, "violates" HAVA, nothing in HAVA expressly prohibits matching as a precondition of registration. Indeed, Plaintiffs suggest only that "no provision of HAVA permits a voter to be disenfranchised if the 'match' should fail . . . ." Doc. 4 at 13. Thus, Plaintiffs' sole contention appears to be that HAVA preempts Section 97.053(6), Florida Statutes.

[10] Plaintiffs' suggestion that the matching requirement was designed merely to facilitate the assignment of a unique identifier to each voter ignores not only the Congressional Record, but also practicality. Because any computer system is capable of randomly assigning unique identifiers to entries in a database, the use of driver's license numbers and Social Security information is far from the "easiest" method of assigning a unique identifier. *See* doc. 4 at 14. And, because the last four digits of an applicant's Social Security number are not at all unique, compliance with HAVA requires states—as Florida does—to assign each applicant a number distinct from the applicant's driver's license or Social Security number. In practice, therefore, the verification of driver's license and Social Security numbers is completely disconnected from the assignment of HAVA's unique identifier.

match. This ample record squarely refutes Plaintiffs' suggestion that HAVA preempts Section 97.053(6), Florida Statutes, and affirmatively establishes that HAVA authorizes states to make the verification of identifying information a precondition of registration.

A. Legal Standard.

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Accordingly, when courts "consider issues that arise under the Supremacy Clause (i.e., preemption issues), [they] start with the assumption that the historic police powers of the states are not superseded by federal law unless preemption is the clear and manifest purpose of Congress." *Cliff v. Payco Gen'l Am. Credits, Inc.*, 363 F.3d 1113, 1122 (11th Cir. 2004). "The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of a state statute." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982). Rather, preemption occurs only if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Thus, "[t]he purpose of Congress is the ultimate touchstone." *Cliff*, 363 F.3d at 1122 (quoting *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

B. HAVA Authorizes States to Make Matching a Precondition to Registration.

Having established the matching process, Congress left each state free, according to local policy considerations, to determine the acceptability of identifying information submitted by voter registration applicants and to prescribe the process following of a failed match. The express terms of HAVA and its legislative history are clear and consistent: Section 15483(a)(5) authorizes states to make identity verification a precondition of registration. Far from

preempting state voter registration requirements, Section 15483(a)(5) defers to the traditional authority of states to determine voter registration eligibility and empowers states to determine the consequences of a failure to verify an applicant's identifying information. The legislative history establishes with unmistakable clarity that the requirements of HAVA are minimum standards that each state may supplement with additional and more stringent anti-fraud measures.

HAVA stops short of determining the acceptability of information provided by an applicant or of prescribing the consequences of a failed match. Instead, HAVA expressly entrusts these policy determinations to the states: "[t]he State shall determine whether the information provided by an individual is sufficient to meet the requirements of [Section 15483(a)(5)(A)], in accordance with State law." 42 U.S.C. § 15483(a)(5)(A)(iii). By its plain terms, HAVA permits each state, according to its own laws, to determine when an applicant has supplied a valid driver's license number or Social Security information, and, consequently, when the application "may be accepted or processed." *See id.* § 15483(a)(5)(A). While states may choose to accept any identifying information—even incorrect information—as "sufficient to meet the requirements of" HAVA, states are equally free to insist that the information provided on the application be correct, as determined by HAVA's matching process.

Senator Dodd, HAVA's chief Senate sponsor and the principal Senate author of HAVA's conference report, emphasized the discretion of states to determine the consequences of a failed match. He explained that "nothing in [HAVA] establishes a Federal definition, or standard, for when a voter is duly registered. That authority continues to reside solely with the State and local election officials pursuant to state law." 148 Cong. Rec. S10504. In response to concerns that states would deny voter registration applications in the absence of a match, Senator Dodd explained that HAVA does not require—but does permit—this result:

> [N]othing in this section prohibits a State from accepting or processing an application with incomplete or inaccurate information. Section [15483(a)(5)(A)(iii)] specifically reserves to the States the determination as to whether the information supplied by the voter is sufficient to meet the disclosure requirements of this provision. . . . Consequently, a state may establish what information is sufficient for verification, preserving the sole authority of the State to determine eligibility requirements for voters . . . .
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> Moreover, nothing in this section prohibits a State from registering an applicant once the verification takes place, notwithstanding that the applicant provided inaccurate or incomplete information at the time of registration . . . or that the matching process did not verify the information. The provision requires only that a verification process be established but it does not define when an applicant is a duly registered voter. Again, this conference report does not establish Federal registration eligibility requirements . . . . Section [15483(a)(5)(A)(iii)] makes it clear that State law is the ultimate determinant of whether the information supplied under this section is sufficient for determining if an applicant is duly registered under State law.

Id. at S10505 (emphases added). Senator Dodd agreed with the principal House author of the conference report that HAVA "provides for basic requirements that States shall meet, but leaves to the discretion of the States how they meet those requirements in order to tailor solutions to their own unique problems."[11] *Id.* at S10504. Indeed, deference to the discretion of states, acting in light of their own unique circumstances, was HAVA's "hallmark." *Id.* at S10506 (statement of Sen. Dodd). HAVA thus "requires that States and localities meet basic requirements in . . . the verification of identification for new registrants." *Id.* In the "implementation of these requirements," however, "the sole determination is left to the States as to . . . whether an individual registrant is determined under State law to be duly registered and

[11] This view was shared by other Senators who repeatedly reiterated the position that HAVA establishes only minimum standards. Senator Bond explained that "[e]ach of the steps taken in this bill to address fraud shall be considered to be a minimum standard." *Id.* at S10490. Senator Kerry stated his view that "this bill will enable more people to exercise their fundamental right to vote by setting uniform, minimum standards for Federal elections." *Id.* at S10497. Senator McConnell noted that "[t]his new registration requirement is a minimum standard," *id.* at S10492, and he explained that "[t]his legislation will make American election systems more accurate, more accessible, and more honest while respecting the primacy of States and localities in the administration of elections," *id.* at S2516. Indeed, considering the anti-fraud

entered into the centralized registration list." *Id.*[12]

Subsequent interpretations of HAVA by federal executive agencies concur. On September 8, 2003, the Civil Rights Division of the U.S. Department of Justice explained that HAVA "leaves the ultimate decision whether to register [an] applicant, including the decision of whether the information provided by the [applicant] has been sufficiently verified, up to the State or local election official charged with that responsibility under state law." *See* Exhibit B. "Congress obviously intended that where the verification process is working correctly and the results of that verification process indicate that the registrant is eligible, the application will be accepted." *Id.* Where, however, "the results indicate the registrant is not eligible, has provided inaccurate or fraudulent information, or information that cannot be verified, then the application must be denied." *Id.* (emphasis added). Thus, while Congress respected the authority of states to determine the eligibility of applicants, it expected that unverified applications would be denied.

The interpretation of HAVA by the newly created U.S. Election Assistance Commission ("EAC") is also in accord. In its Voluntary Guidelines,[13] the EAC clearly anticipated the denial of unverified applications. While it recommended that states should afford applicants an

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purpose of HAVA, it is absurd to construe HAVA as a ban upon state-law anti-fraud measures.

[12] Remarkably, in *Washington Association of Churches v. Reed*, 492 F. Supp. 2d 1264 (W.D. Wash. 2006), which preliminarily enjoined Washington's matching requirement and on which Plaintiffs heavily rely, the Court overlooked HAVA's legislative history and made no mention of HAVA's anti-fraud purpose. In fact, the Washington Secretary of State did not present to the Court the legislative history outlined here. In addition, the statute challenged in *Reed* contained no procedure—as Florida law does—for the authentication of unverifiable information, and the consent order entered in *Reed* does little more than establish such a process while upholding the matching requirement. *See* Exhibit D at ¶ 1 ("This Order does not require [the Washington Secretary of State] to tabulate ballots or count votes cast by . . . voters absent the completion of matching process or the receipt of alternative identification by no later than the day before certification of election results by the county canvassing board."). The result of *Reed* therefore was essentially the same process which Florida law already embodies.

[13] HAVA required the EAC to "adopt voluntary guidance" to "assist States in meeting [certain] requirements of" HAVA, including the matching provision. *See* 42 U.S.C. § 15501(a).

opportunity—as Florida law does—to authenticate their identifying information, it noted that "[t]his does not mean that States should accept or add unverified registration applications to the statewide list. Rather, it means only that election officials should make certain efforts before an application is determined to be unverifiable and finally rejected." *See* Exhibit C at 13. Thus, the EAC has construed HAVA to permit the rejection of unverified applications and merely counseled states to "make certain efforts" to validate the information provided before denying an application. *Id.* The express language of HAVA, the overwhelming weight of opinion in Congress, and subsequent official interpretations of HAVA each recognize the authority of states to make identity verification a precondition of registration.[14]

C. Section 97.053(6), Florida Statutes, Is Not Inconsistent With HAVA's Mail-In Registration Requirements.

Plaintiffs next suggest that the use of identity verification as a precondition to registration is inconsistent with the first-time mail registration provisions of Section 15483(b). Specifically, Plaintiffs suggest that matching as a precondition to registration conflicts with HAVA provisions that appear to allow unmatched mail-in applicants, when they first present themselves to vote, either to vote a regular ballot after producing photo identification or to cast a provisional ballot in the absence of photo identification. This, Plaintiffs say, is proof that Congress did not intend matching to be a precondition to registration.

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[14] Section 244(b) of HAVA also indicates Congress's understanding that states were authorized to make identity verification a precondition of registration. In Section 244(b), Congress directed the EAC to "study and report to Congress on the feasibility and advisability of using Social Security identification numbers . . . to establish voter registration or other election law eligibility or identification requirements . . . ." This provision demonstrates that Congress clearly contemplated the use of Social Security information to establish voter registration eligibility. In light of the EAC's reporting responsibility, Senator Dodd concluded that "[i]f the results of these studies indicate . . . that these new anti-fraud provisions are disenfranchising voters, . . . Congress will be in a position to modify or repeal these provisions." 148 Cong. Rec. S10504. The EAC has not yet completed the report required by Section 244(b).

The supposed conflict asserted by Plaintiffs is easily resolved by reference to HAVA's legislative history. Until April 10, 2002, the bill which became HAVA did not contain any matching provisions. That day, Senator Dodd, on behalf of Senator Wyden, introduced an amendment, now codified as Section 15483(b)(3)(B), to exempt any mail-in applicant who submits a driver's license number or the last four digits of the applicant's Social Security number, and whose number matched official records, from the requirement that such applicants show photo identification when first presenting themselves to vote. *See* 148 Cong. Rec. S2500. The Senate adopted the Wyden amendment on the same day and passed the Senate version of the bill on the following day. *See* http://thomas.loc.gov.

With the adoption of the Wyden amendment—before the matching provisions of Section 15483(a)(5) even existed—the provision by an applicant of identifying information was optional and merely afforded a mail-in applicant an opportunity to avoid the photo identification requirement. Senator Wyden explained that, instead of producing photo identification, mail-in applicants "may put their driver's license number of the last four digits of their social security card on their registration card." 148 Cong. Rec. S2522. "If that number . . . matches another State record . . . the voter won't be required to provide any further identification. This means they won't have to stop by a copy center before they register or before they vote." *Id.*

The matching provision contained in Section 15483(a), which applies to all voters, did not appear until six months later, when, on October 8, 2002, House and Senate conferees filed the conference report. *See id.* at H7259. The conference report also included the Wyden amendment without modification. The House passed HAVA two days later, and the Senate did the same on October 16, 2002. *See* http://thomas.loc.gov. As Senator Dodd explained, the late addition of Section 15483(a)'s matching requirement "obviated and essentially rendered moot"

the photo identification requirement of Section 15483(b):

> The Wyden amendment included in the Senate-passed bill, and retained without modification in the conference report, provides a means by which first-time mail registrant voters can avoid the [photo identification] requirements of section [15483(b)] altogether. At the choice of the individual, under section [15483(b)(3)], a first-time mail registrant can opt to submit their drivers license number, or at least the last 4 digits of their Social Security number, on the mail-in voter registration form in order for the State to match the information against a State database . . . . If such information matches, the additional identification requirements of section [15483(b)(2)] do not apply to that individual.
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> Under the new requirements added in conference as section [15483(a)(5)], . . . all new applicants must provide at the time of registration, a valid drivers license number, or if the individual does not have such, the last 4 digits of their Social Security number . . . . States must then attempt to match such information, thereby satisfying the provisions of section [15483(b)(3)] which renders the first-time mail applicant provisions of section [15483(b)(1)] inapplicable. By operation of section [15483(a)(5)] added in conference, in conjunction with the existing language of the Senate-passed bill (as added by Senator Wyden) in section [15483(b)(3)], the first-time voter identification requirement is obviated and essentially rendered moot.

See 148 Cong. Rec. S10504 (emphases added). Thus, Congress itself recognized that HAVA's matching requirement, added to the bill at the end of the legislative process, rendered Section 15483(b)'s photo identification provision meaningless. It made clear, however, that this was the intended result—not an argument against matching as a precondition of registration.[15]

Even if the legislative history were less conclusive than it is, however, Plaintiffs contention would still be mistaken. It overlooks the fact that HAVA permits—but does not require—states to make matching a precondition of registration. As discussed above, HAVA expressly authorizes states to determine the sufficiency of the identifying information provided by an applicant. Thus, while some states might make a match a precondition to registration, others might choose to forego this precaution. HAVA's mail-in provisions are not, therefore,

[15] Indeed, Senator Dodd's explanation assumes that all states would make matching a precondition of registration, because only then would the photo identification and provisional ballot provisions be "obviated and essentially rendered moot."

superfluous, because Congress might have expected that some states would not require matching as a precondition to voting. In these states, Section 15483(b) applies in full force and requires the state to permit mail-in registrants to vote either by regular ballot (if the applicant produces photo identification) or by provisional ballot. And, even in states that require matching as a precondition of registration, Section 15483(b) is not a dead letter. First-time mail applicants who have neither a driver's license nor a Social Security number—and to whom, consequently, matching is inapplicable—benefit from Section 15483(b) in every state.

The argument, therefore, that matching as a precondition of registration is inconsistent with the provisions of Section 15483(b), which permit first-time mail applicants to vote by regular ballot (if they produce photo identification) or provisional ballot, is unfounded. It ignores the legislative history, which fully explains the seemingly discordant provisions and confirms the position that Congress intended to enable states to make matching a precondition of registration, even if it "obviated and essentially rendered moot" the provisions of Section 15483(b). It also overlooks the option which HAVA expressly affords states to determine the sufficiency of identifying information submitted on voter registration applications, and thus fails to recognize that Section 15483(b) will continue to operate in those states that do not require a match as a precondition of registration. Because the use of matching as a precondition of registration is consistent with HAVA's terms and intent, this Court should dismiss the allegation that HAVA preempts Section 97.053(6), Florida Statutes.

II. SECTION 97.053(6), FLORIDA STATUTES, DOES NOT VIOLATE THE MATERIALITY PROVISION OF THE VOTING RIGHTS ACT.

A. HAVA's Specific Matching Provision Takes Precedence Over the General Materiality Provision of the Voting Rights Act.

Plaintiffs' Voting Rights Act ("VRA") claim fails to state a claim upon which relief can

be granted because Congress specifically determined that a matching requirement is an appropriate and material means of combating voter registration fraud. Plaintiffs nevertheless allege that a failed match is immaterial under the VRA and that the VRA requires states to register all applicants—real or fictitious—whether or not their identities can be established. As shown above, however, HAVA expressly permits states to verify the identities of voter registration applicants and to determine the adequacy of the identifying information provided by an applicant. The verification of an applicant's identity is thus undeniably material because Congress has made it so.

It is a basic "canon of statutory construction that the more specific takes precedence over the more general." *Medberry v. Crosby*, 351 F.3d 1049, 1060 (11th Cir. 2003). Alternatively stated, "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one . . . ." *In re Cox*, 338 F.3d 1238, 1243 (11th Cir. 2003). Here, Congress has carefully crafted specific "anti-fraud provisions" authorizing states to deny the voter registration applications of unverified applicants. It would be anomalous for the broad statutory provisions of the VRA, addressing "immaterial" voting requirements, to supersede a more specific and more recent federal enactment intended to combat voter registration fraud.

B. The Verification of a Voter Registration Applicant's Identity is a Material Requirement.

In Florida, "[e]very 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." Art. VI, § 2, Fla. Const. For these eligibility requirements to have any meaning, it is imperative that election officials be able to determine "that people who register to vote are who they say they are . . . ." 148 Cong. Rec. S10501 (statement of Sen. Dodd). Moreover, the phrase "if registered as provided by law" recognizes the authority of

Congress and the Florida Legislature to establish a registration process which might require applicants to verify their identities. Nevertheless, Plaintiffs allege that an applicant's failure to provide verifiable identifying information is immaterial, and that the VRA mandates an "honor system" of voter registration. Plaintiffs' interpretation is implausible, since it would destroy the common-sense method established by Congress to combat voter registration fraud.

Anti-fraud measures such as that challenged here are not inconsistent with the VRA's materiality provision. For example, 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), the Court rejected a challenge brought under the materiality provision and upheld a notarization requirement for petition signatures as an anti-fraud measure. *See also Hoyle v. Priest,* 265 F.3d 699, 704-05 (8th Cir. 2001) ("Requiring that petition signers be qualified electors simply protects the state and its citizens against both fraud and caprice, valid concerns considering the time and expense needed to undertake the initiative process. We conclude that the challenged practice is material, and thus outside the scope of [the materiality provision].").

In *Schwier v. Cox*, 412 F. Supp. 2d 1266 (N.D. Ga. 2005), voter registration applicants challenged a Georgia law that required applicants who had Social Security numbers to provide those numbers on their applications. *Id.* at 1268. They contended that, because the federal Privacy Act prohibited any state from denying "any right, benefit, or privilege . . . because of [an] individual's refusal to disclose his social security account number," the omission of an applicant's Social Security number was immaterial under the VRA. *Id.* at 1276. The Court "agree[d] with [the Georgia Secretary of State] that requiring disclosure of a registrant's SSN could help to prevent voter fraud," but it concluded that "disclosing one's SSN cannot be material . . . if Georgia is not permitted to require this disclosure." *Id.* (emphasis added).

Here, by contrast, Congress expressly directed states to require disclosure of identifying information. In fact, HAVA specifically provides that the disclosure of the last four digits of a Social Security number on a voter registration application does not violate the Privacy Act. *See* 42 U.S.C. § 15483(c) ("The last 4 digits of a social security number . . . shall not be considered to be a social security number for purposes of . . . the Privacy Act . . . ."). Congress required the disclosure of Social Security numbers for anti-fraud purposes and required states to verify them. *Accord Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1212-13 (S.D. Fla. 2006) (holding that a requirement that an applicant affirm citizenship and mental competence are not immaterial because, unlike *Schwier*, the disclosure of such information is not prohibited, and its disclosure is relevant to determining eligibility).

In addition, Plaintiffs' facial attack on Section 97.053(6), Florida Statutes, is based on the insufficient allegation that, "for some voters," the omission of identifying information would be immaterial. Every anti-fraud measure will impose requirements on valid and legal, as well as fraudulent and illegal voter registration applications. In *Diaz*, for example, the Court upheld a requirement that applicants affirm their citizenship and mental competence. 435 F. Supp. 2d at 1212-13. It did so despite the fact that applicants who are both citizens and mentally competent might inadvertently fail to check the necessary boxes on their voter registration applications. The Court concluded that these affirmations were relevant to the eligibility of an applicant. Likewise, in the present case, identity is unquestionably relevant to an applicant's eligibility. An applicant's failure to provide a valid identifying number cannot, therefore, be an immaterial omission—even if the particular applicant was otherwise eligible to register.

III. SECTION 97.053(6), FLORIDA STATUTES, DOES NOT VIOLATE SECTION 2 OF THE VOTING RIGHTS ACT.

Courts have long recognized that a disproportionate impact on racial minorities does not,

without more, establish a violation of Section 2 of the VRA. Plaintiffs, nevertheless, allege that the verification requirement disproportionately affects racial and ethnic minorities who, Plaintiffs allege, are more likely than other applicants to have foreign-language surnames, compound names, unique names, and westernized names. Plaintiffs' allegation, unaccompanied by any suggestion of interacting racial or ethnic biases, is insufficient to state a claim under Section 2.

Section 2 prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right . . . to vote on account of race or color . . . ." 42 U.S.C. § 1973(a). A "court must assess the impact of the contested structure or practice on minority electoral opportunities on the basis of objective factors." *Burton v. City of Belle Glade*, 178 F.3d 1175, 1198 (11th Cir. 1999) (marks omitted).[16] "Despite its broad language, Section 2 does not prohibit all voting restrictions that may have a racially disproportionate effect." *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1228 (11th Cir. 2005). On the contrary, "the existence of some form of racial discrimination . . . remains the cornerstone of section 2 claims . . . ." *Nipper v. Smith*, 39 F.3d 1494, 1515 (11th Cir. 1994).

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[16] These factors—the so-called "Senate factors"—include (i) the extent of any history of official discrimination . . . that touched the right of the members of the minority group to . . . participate in the political process; (ii) the extent to which voting in the elections of the state . . . is racially polarized; (iii) the extent to which the state . . . has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination . . . ; (iv) if there is a candidate slating process, whether the members of the minority group have been denied access to that process; (v) the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; (vi) whether political campaigns have been characterized by racial appeals; (vii) the extent to which members of the minority group have been elected to public office; (viii) whether there is a significant lack of reponsiveness on the part of elected officials to the particularized needs of the members of the minority group; and (iv) whether the policy underlying the [state's] use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous. *Burton*, 178 F.3d at 1196 n.20. Plaintiffs have made no allegation of these factors, and, in light of the strength of the policy underlying the verification requirement, the factors weigh against Plaintiffs' claim.

"[T]o be actionable, a deprivation of the minority group's right to equal participation in the political process must be on account of a classification, decision, or practice that depends on race or color, *not on account of some other racially neutral cause*." *Johnson*, 405 F.3d at 1229 n.30 (quoting *Nipper*, 39 F.3d at 1515) (emphasis in original). To prevail, the "plaintiffs would have to demonstrate that specific and relevant racial biases in society interact with [the challenged practice], resulting in a denial of the franchise '*on account of race or color.*'" *Johnson*, 405 F.3d at 1230 n.31 (citing *Thornburg v. Gingles*, 478 U.S. 30, 47 (1987)) (emphasis in original); *accord Ortiz v. City of Philadelphia*, 824 F. Supp. 514 (E.D. Pa. 1993) (Section 2 is not violated where the challenged law does not "interact[] with social and historical conditions to deny minority voters equal access to the political process . . . .").

Circuit courts have consistently "rejected [Section] 2 challenges based purely on a showing of some relevant statistical disparity between minorities and whites." *See Smith v. Salt River Project Ag. Imp. & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997). In *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986), the Court rejected a Section 2 challenge to Tennessee's felon-disenfranchisement law that relied chiefly on disparities in conviction rates among minorities and whites. In *Irby v. Virginia State Bd. of Elections,* 889 F.2d 1352 (4th Cir. 1989), the Court rejected a Section 2 challenge to Virginia's system of appointing school board members—despite a "significant disparity" between the proportions of minorities in the population and on the school board—because the under-representation of minorities resulted from the fact that minorities were "not seeking school board seats in numbers consistent with their percentage of the population." Similarly, in *Salas v. Southwest Texas Junior College Dist.,* 964 F.2d 1542 (5th Cir. 1992), the Court rejected a Section 2 challenge to at-large elections that was premised exclusively on the lower voter turnout of minority electors.

More recently, in *Ortiz v. City of Philadelphia Office of the City Comm'rs,* 28 F.3d 306 (3d Cir. 1994), the Court upheld a voter-purge statute against a Section 2 allegation that a greater proportion of minority voters was inactive, and the names of minorities were thus more likely to be purged from the list. And, in *Smith*, the Court upheld water district elections in which electors were required to own real property and could cast one vote for each acre they owned. 109 F.3d at 589. Though minorities owned a lesser percentage of real property than whites, *see id.* at 589-90, the Court explained that "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the [Section] 2 'results' inquiry," *id.* at 595 (emphasis in original). Rather, the intent of Congress was to "prohibit election practices that accommodate or amplify the effect that private discrimination has on the voting process." *Id.* at 595 n.7 (quoting *Solomon v. Liberty County, Florida,* 899 F.2d 1012 (11th Cir. 1990) (Tjoflat, J., concurring)).[17]

In the present case, Plaintiffs do not allege that underlying racial biases cooperate with Section 97.053(6), Florida Statutes, to occasion a disproportionate impact. They make no allegation either of discriminatory intent or the objective factors a court must consider when analyzing a Section 2 challenge. *See* note 16, *supra.* Rather, Plaintiffs merely hypothesize a statistical disparity between whites and minorities in the verification of applicants' identities, resulting from the specific names of individual minority applicants. The allegation of a numerical disparity arising from conditions totally unrelated to past or present racial discrimination or bias is insufficient under well settled precedent to state a claim under Section 2.

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[17] While the Ninth Circuit abruptly departed from this line of cases in *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), when it reversed the entry of summary judgment against a challenge to Washington's felon-disenfranchisement law, the Eleventh Circuit has maintained the opposite position. In *Johnson*, the Court held that disparities resulting from a felon-disenfranchisement law "do not demonstrate a racial bias" and that, despite the disproportionate impact, the law did not deny "the right to vote on account of . . . race." 405 F.3d at 1230 at n.31.

Further, the anti-fraud policy of the challenged law, together with the absence of any allegation of the objective factors that control the Section 2 analysis, negate the hypothesis that the challenged law denies the right to vote "on account of race or color." 42 U.S.C. § 1973(a).

IV. SECTION 97.053(6), FLORIDA STATUTES, DOES NOT VIOLATE THE NATIONAL VOTER REGISTRATION ACT.

Plaintiffs' claim under the National Voter Registration Act ("NVRA") rests on a fundamental misreading of its provisions. Plaintiffs allege that, because the NVRA requires a state to ensure an eligible applicant's right to vote if a valid application is submitted no later than 30 days before a federal election, *see* 42 U.S.C. § 1973gg-6(a)(1)(A)-(D), it prohibits a state from verifying the authenticity of an applicant's identifying information. The design of this provision, however, is to establish that book closing may not occur earlier than 30 days prior to a federal election. It does not purport to define whether an applicant is eligible or whether a registration application is valid under state law.

Section 1973gg-6(a)(1) requires each state to "ensure that any eligible applicant is registered to vote in an election . . . if the valid voter registration form of the applicant" is submitted, postmarked, accepted, or received (depending on the form of application) "not later than the lesser of 30 days, or the period provided by State law, before the date of the election." It does not define which applicants are "eligible" or which applications are "valid." These determinations remain with the states, and nothing in the NVRA precludes states from making these determinations according to state law. Rather, the NVRA simply establishes a book-closing deadline by "provid[ing] that the registration cutoff may be no more than 30 days before election or such lesser period as State may provide." H.R. Conf. Rep. No. 103-66, at 20 (1993).

In *Association of Community Organizations for Reform Now v. Miller*, 912 F. Supp. 976 (W.D. Mich. 1995), the plaintiffs challenged a Michigan law which provided that an applicant is

not registered until receipt of a voter identification card. They contended that Section 1973gg-6(a)(1) required the state to register an applicant as long as the application was completed no later than the book-closing deadline. *Id.* at 986. The Court rejected this position, explaining that "[t]his section deals with time deadlines in the registration process. It requires a state to ensure that an eligible applicant is registered to vote in an election so long as the applicant's valid voter registration form is submitted to or received by the appropriate official or agency, or is postmarked, by the registration deadline for an election." *Id.* Significantly, the Court explained that the NVRA "still left [to the states] the task of determining that an applicant is eligible, and that the registration form as submitted complies with state law." *Id.* at 987; *accord Charles H. Wesley Educ. Found. Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005) ("The [NVRA] simply requires that valid registration forms delivered . . . in time be processed.").

Though the NVRA limits the discretion of states in establishing a book-closing deadline, it does not preclude states from considering an applicant "eligible" or a voter registration application "valid" only on the condition that the applicant's identifying information has been verified (whether by a database match or by evidence provided by the applicant). In fact, HAVA expressly authorizes states to do exactly that. Plaintiffs' NVRA claim must be dismissed.

V. SECTION 97.053(6), FLORIDA STATUTES, DOES NOT UNDULY BURDEN THE RIGHT TO VOTE.

A. Legal Standard.

"Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections . . . ." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). "[A]s a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974). Indeed, the right of states to regulate the

manner of conducting elections derives from the U.S. Constitution. *See* U.S. Const. art. I, § 4. As a result, "[e]lection laws will invariably impose some burden upon individual voters." *Burdick*, 504 U.S. at 434. Each provision, "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).

"Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 434. A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments . . . against the precise interests put forward by the State as justifications for the burden imposed by its rule . . . ." *Id.* (marks omitted). Under this test, the "State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788. Only when such restrictions are "severe" must the regulation be "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

"A strict standard would be especially inappropriate in a case . . . in which the right to vote is on both sides of the ledger." *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007). This occurs where the challenged law seeks to protect legitimate votes against dilution or invalidation by fraudulent votes. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006)

(quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). As the Supreme Court recognized:

> 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.

Purcell, 127 S. Ct. at 7. Thus, a "State indisputably has a compelling interest in preserving the integrity of its election process." *Id.* at 7 (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989)).[18]

B. Florida's Verification Process is Justified by the State's Compelling Interest in the Prevention of Voter Fraud.

The verification of an applicant's identity under the process established by Congress is a reasonable, nondiscriminatory regulation amply justified by the state's important—indeed, compelling—regulatory interest in preventing voter registration fraud. Driver's license and Social Security numbers, because "they are issued by government entities and are truly unique to the voter," *see* 148 Cong. Rec. S10490 (statement of Sen. Bond), afford not only the most logical but perhaps the only practicable means of verifying the identities of voter registration applicants. By matching the number provided to information in official databases, election officials are quickly able to ensure that applicants are who they claim they are. The recognition by the Supreme Court and Congress of the dangers of voter fraud and the compelling importance of fair and honest elections counsels strongly against the unconstitutionality of this most basic and logical method of verifying applicants' identities. Indeed, nothing in the Constitution compels a

[18] Circuit courts have long been in accord. *See, e.g., Lerman v. Board of Elections*, 232 F.3d 135, 149 (2d Cir. 2000) ("[T]he first interest asserted by the defendants—ensuring the integrity and preventing fraud in the electoral process—is unquestionably compelling."); *Krislov v. Rednour*, 226 F.3d 851, 859 (7th Cir. 2000) ("Because elections must be regulated to remain free from fraud and coercion, some latitude is given to regulations designed to serve these purposes.").

no-questions-asked "honor system" of voter registration.

Section 97.053(6), Florida Statutes, does not impose "severe" burdens on voter registration applicants. Instead, it simply asks applicants who have a driver's license number to place that number on their applications, and asks all other applicants who have Social Security numbers to indicate the last four digits of that number. Florida protects each applicant's identifying information from public disclosure, *see* § 97.0585(1)(c), Fla. Stat., and it does not ask any applicant to obtain a driver's license or Social Security number which they do not have. The challenged law even allows applicants whose identifying information was not timely verifiable to validate their registrations after the book-closing deadline. The supervisors of elections are required to notify such applicants of the insufficiency of their applications, and applicants are afforded more than 30 days after registration books close—up to 5 p.m. two days after the election—to provide evidence of the correctness of the identifying information they provided.

Similar anti-fraud measures have been held not to impose "severe" burdens. In *Crawford*, the Court declined to apply exacting scrutiny to a state law requiring voters to present "a government-issued photo ID" when presenting themselves to vote. 472 F.3d at 950, 952. It did so despite the fact that the law would require some voters to procure a photo ID before voting, noting that a strict standard would be inappropriate where the challenged legislation, by combating voter fraud, secures the fundamental right to vote of legitimate voters. *Id.* at 951-52; *accord Common Cause/Georgia v. Billups*, --- F. Supp. 2d ----, 2007 U.S. Dist. LEXIS 68950, at *129 (N.D. Ga. Sep. 6, 2007) (holding that a photo ID requirement like that in *Crawford* did not "severely burden[] the right to vote").[19] And, significantly, the Fourth Circuit has concluded that

[19] Plaintiffs misunderstand the nature of this inquiry. They suggest that because the consequence of a failed match is a denial of the ballot to the applicant, the challenged law imposes the "severest of burdens." Doc. 4 at 21. The relevant question, however, examines the

though the *public* disclosure of a Social Security number on a voter registration application compelled a "profound invasion of privacy," "no substantial burden would exist" if the disclosure were required only for the "internal use" of election officials. *Greidinger v. Davis*, 988 F.2d 1344, 1354 & n.10 (4th Cir. 1993).

Even if Section 97.053(6), Florida Statutes, imposes severe burdens on an applicant's right to vote (which it does not), the regulation would still be constitutional because it is narrowly drawn to advance a state interest of compelling importance. It is indisputable that the prevention of voter registration fraud is compellingly important. *See, e.g., Purcell*, 127 S. Ct. at 7 ("A State indisputably has a compelling interest in preserving the integrity of its election process.") (emphasis added). As explained *supra*, the dominant purpose both of HAVA and the challenged law is the prevention of voter registration fraud. The challenged law, moreover, is narrowly drawn to serve this interest. It requires applicants who have a driver's license or Social Security number to provide it, thus enabling the verification of applicant's identities. It imposes no burden on applicants who have neither.[20]

Where for any reason an applicant's identity cannot be verified in time for any election, the law requires the applicant to be notified and affords the applicant not only the entire period between the book-closing deadline and the election, but also two days after the election to establish the authenticity of the information provided. This process, while it eliminates the

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magnitude of the burden imposed by state law in order to secure the right to vote—*i.e.*, providing identifying information or evidence that such information was accurate—not the consequence of an applicant's failure to comply with that requirement. Plaintiffs' interpretation would subject every voter registration requirement to strict scrutiny simply because non-compliance would result in the ineligibility of the voter.

[20] The fact that HAVA and the challenged law do not burden such applicants, and thus do not completely eradicate all voter registration fraud, does not render them constitutionally infirm. *See Vance v. Bradley*, 440 U.S. 93, 108 (1979) ("Even if the classification . . . is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is

discredited "honor system" of registration, places only a minimal, initial burden on all applicants, and affords unmatched applicants all possible time (consistent with the necessary administration of elections) to establish that the number provided is theirs. It is therefore narrowly tailored to advance the compelling interest of the state—and of legitimate voters—to prevent voter fraud.[21]

VI. SECTION 97.053(6), FLORIDA STATUTES, DOES NOT VIOLATE EQUAL PROTECTION.

A. Legal Standard.

"The right to vote is fundamental, forming the bedrock of our democracy. . . . Nevertheless, states are entitled to burden that right to ensure that elections are fair, honest and efficient." *Wexler v. Anderson*, 452 F.3d 1226, 1232 (11th Cir. 2006). While equal protection prohibits a state from imposing restrictions that result in the "arbitrary and disparate treatment of members of the electorate," *Bush v. Gore*, 531 U.S. 98, 105 (2000), it does not preclude "reasonable, nondiscriminatory restrictions" justified by the state's "important regulatory interests." *Wexler*, 452 F.3d at 1232-33. Because "[a]ny [election] restriction is going to exclude, either *de jure* or *de facto*, some people from voting, the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves." *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004).[22]

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nevertheless the rule that . . . perfection is by no means required.") (marks omitted).

[21] Notably, nothing in HAVA even requires state law to create a procedure by which applicants can authenticate unverifiable information. A finding, therefore, that Section 97.053(6), Florida Statutes, imposes unconstitutional burdens on the right to vote would more than call into question the constitutionality of HAVA itself.

[22] "[S]trict scrutiny of an election law is not warranted merely because it may prevent some otherwise eligible voters from exercising that right." *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 822 (S.D. Ind. 2006) (rejecting the "oft-criticized, but nonetheless frequently invoked, erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny"). Plaintiffs accordingly do not appear to contend that strict scrutiny applies to their equal protection claims. *See* doc. 4 at 23.

B. Section 97.053(6), Florida Statutes, Does Not Arbitrarily Discriminate Between Applicants Whose Identities Are Verified and Those Whose Identities are Not Verified.

Plaintiffs first allege that the challenged law violates equal protection because it "arbitrarily and unreasonably" differentiates applicants whose identifying information has not been verified from those whose information has been verified. The statute, however, does not bar unmatched applicants from voting. It recognizes that error, in a system as large as Florida's statewide database (which includes about 12 million voters), is inseparable from any system of verification and affords unmatched applicants ample time to establish the authenticity of the information they provided. In fact, the law requires the supervisor of elections to notify the applicant, and the applicant may establish the authenticity of the information at any time between book closing 29 days before the election and 5 p.m. on the second day after the election. Given the state's compelling interest in the detection and prevention of fraudulent voter registrations by the verification of applicants' identities, the notice and opportunity given to applicants to supply authenticating evidence completely remove the risk of arbitrary and disparate treatment.

The U.S. Supreme Court has recognized that, to promote a legitimate state interest, a state may require applicants to take affirmative steps to effectuate their registrations. In *Rosario v. Rockefeller*, 410 U.S. 752 (1973), the U.S. Supreme Court upheld a state law requiring primary election voters to register before the last preceding general election. The Court, in rejecting an equal protection challenge that characterized the period as too long, concluded that any disenfranchisement resulted from the applicants' "own failure to take timely steps to effect their enrollment." *Id.* at 758; *accord Crawford*, 472 F.3d at 951 (upholding photo identification requirement despite the fact that "some people who have not bothered to obtain a photo ID will not bother to do so just to be allowed to vote"). Similarly, in *Carrington v. Rash*, 380 U.S. 89

(1965), the Court invalidated a state law prohibiting members of the Armed Forces from registering to vote. The Court, recognizing the state's interest in precluding the registration of "transient" residents, found fault with the statute because it did not provide soldiers an opportunity "to controvert the presumption of non-residence." *Id.* at 96. Accordingly, because Section 97.053(6), Florida Statutes, provides all applicants both notice and an opportunity "to controvert" any failed match, it does not violate equal protection.

Plaintiffs also suggest that the challenged law violates equal protection because, with respect to applicants whose identifying information could not be verified by the book-closing deadline, it permits those who submitted correct identifying information to authenticate that information, but does not permit those who submitted incorrect identifying information to establish their identities. *See* doc. 1 at ¶ 36. Equal protection, however, requires only that the challenged law "treat similarly situated people alike." *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1313 (11th Cir. 2006). The applicants hypothesized by Plaintiffs are not similarly situated. One submitted an application with erroneous information, while the other did not.

C. Section 97.053(6), Florida Statutes, Does Not Arbitrarily Discriminate Between Applicants Who Provide Their Driver's License Numbers and Those Who Provide Their Social Security Numbers.

Plaintiffs suggest that because the different might databases yield different rates of successful matches, equal protection prohibits the state from using these databases. Plaintiffs' interpretation, however, would entirely subvert the available means of verifying applicants' identities by precluding the use of one or both databases, opening the door to unverifiable voter registration applications and consequent fraud and abuse. "[I]n requiring that the state use to a proper end the means designed to impinge minimally on fundamental rights, the Constitution does not require that the state choose ineffectual means." *Rosario*, 410 U.S. at 762 n.10. In

enacting HAVA, Congress clearly regarded the use of both driver's license and Social Security databases for matching purposes as a proper and effective means of combating voter registration fraud. Moreover, because the challenged law provides all applicants notice and ample opportunity to correct any failed match, an initial failed match does not preclude any applicant from authenticating the information and being registered as an active voter. Equal protection does not require Florida to decline the use of available and effective means toward the prevention of voter registration fraud.

D. Section 97.053(6), Florida Statutes, Does Not Arbitrarily Discriminate Between Applicants Based On Their Residences.

Plaintiffs next contend that the challenged statute's silence regarding the substance of the notices to be provided to applicants, the nature of the evidence required of applicants whose identities are not verified, and the information poll workers should provide to an unmatched applicant who must vote a provisional ballot, violates equal protection. Equal protection does not, however, mandate exact uniformity in election procedures. In *Bush*, on which Plaintiffs rely, the Supreme Court held that, "where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards," "the rudimentary requirements of equal treatment and fundamental fairness" were not satisfied. 531 U.S. at 109. It noted, however, that "[t]he question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id.*

Indeed, consistent with the principle that "federal court intrusion into state electoral processes is disfavored without a compelling justification," *Hall v. Holder*, 117 F.3d 1222, 1231 (11th Cir. 1997), local discretion and flexibility in the administration of elections has consistently been affirmed. *See, e.g., Wexler*, 452 F.3d at 1233 ("[L]ocal variety [in voting systems] can be justified by concerns about cost, the potential value of innovation, and so on.");

cf. Hendon v. N.C. State Bd. of Elections, 710 F.2d 177, 181 (4th Cir. 1983) ("A state may employ diverse methods of voting, and the methods by which a voter casts his vote may vary throughout the state."); *Pettengill v. Putnam County R-1 Sch. Dist.* 472 F.2d 121, 122 (8th Cir. 1973) ("The appellants' [vote dilution] complaint asks the federal court to oversee the administrative details of a local election. We find no constitutional basis for doing so . . . ."); *Powell v. Power*, 436 F.2d 84, 86 (2d Cir. 1970) ("Were we to embrace plaintiffs' theory, this court would henceforth be thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law."). The implementation by local officials of the requirements established by the challenged law is thus consistent with the "rudimentary requirements of equal treatment and fundamental fairness."

E. Section 97.053(6), Florida Statutes, Does Not Arbitrarily Discriminate Against Racial, Ethnic, and Language Minorities.

Finally, Plaintiffs suggest that the challenged law violates the equal protection rights of racial, ethnic, and language minorities because, Plaintiffs conjecture, administrative errors are more likely to occur in the verification of their names. "Of course, the Equal Protection Clause prohibits a state from using a facially neutral law to *intentionally* discriminate on the basis of race." *Johnson*, 405 F.3d at 1218 (quoting *Washington v. Davis*, 426 U.S. 229, 239-40 (1976)) (emphasis in original); *accord Clark v. Putnam County*, 293 F.3d 1261, 1266 (11th Cir. 2002) ("Electoral schemes which cancel out or dilute the voting strength of racial groups are unconstitutional when they are adopted with a discriminatory purpose."). Specifically, a facially neutral state law:

> Will not be held unconstitutional solely because it results in a racially disproportionate impact . . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. Once racial discrimination is shown to have been a "substantial" or "motivating" factor behind the enactment of the law, the burden shifts to the law's defenders to demonstrate that

the law would have been enacted without this factor.

Johnson, 405 F.3d at 1223 (quoting *Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985)). Here, Plaintiffs do not allege that the enactment of the challenged statute, which unquestionably is neutral on its face with respect to minorities, was motivated by racial animus. In addition, minorities have the same ample opportunity as all other applicants whose identifying information could not be verified to authenticate the information provided. Under these circumstances, Plaintiffs' claim that Section 97.053(6), Florida Statutes, invidiously discriminates against minority applicants must fail.

VII. SECTION 97.053(6), FLORIDA STATUTES, DOES NOT VIOLATE DUE PROCESS.

As noted, the challenged law requires the supervisors of elections, in case of a failed match, to notify the applicant that the application was insufficient. The applicant may, at any time after the book-closing deadline (29 days before the election) and before 5 p.m. two days after the election, contact the supervisor's office and establish the correctness of the identifying information provided on the application. The challenged law thus provides applicants every opportunity consistent with practical realities to establish the correctness of the identifying information submitted on their applications. Plaintiffs nevertheless speculate that the statute will violate the "fundamental fairness" that due process ensures, *see Wexler*, 452 F.3d at 1233, because the notice provided "will not" be "sufficient," "meaningful," "adequate," or "timely."[23]

[23] The period afforded applicants to authenticate their identifying information cannot realistically be longer than it is. As noted in Section IV, *supra*, registration books cannot close earlier than they do. 42 U.S.C. § 1973gg-6(a)(1). And, because Florida law requires votes cast by provisional ballot to be included in the first set of unofficial returns due on the third day after a primary election or the fourth day after a general election, *see* § 102.141(5), Fla. Stat., as amended by Ch. 2007-30, § 33, Laws of Fla., the deadline two days after the election is necessarily the same to which all voters casting provisional ballots are subject, *see* § 101.148(1), Fla. Stat. Florida law also mandates the prompt processing of voter registration applications, requiring all applications to be entered into the statewide database within thirteen days after receipt and to be forwarded to the supervisor of elections "immediately" thereafter. *See id.* at

See doc. 1 at ¶ 79, 80, 189. Plaintiffs' vague and purely conjectural allegations of unconstitutional implementation are insufficient to state a claim for which relief can be granted.

Moreover, a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745. The fact that the challenged law "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.* Because the law includes a notice provision and affords applicants an opportunity to correct verification errors, and because Plaintiffs' claims of inadequate notice are, on their face, totally hypothetical, Count IX fails to state a claim upon which relief can be granted and must be dismissed.

Conclusion

Florida has an undeniable interest in limiting voting to those who are legally entitled to vote. Section 97.053(6), Florida Statutes, and the verification of the identities of voter registration applicants further that important interest. In availing itself of the anti-fraud mechanism established by Congress, the Florida Legislature did not burden the right to vote. Though it eliminated the discredited no-questions-asked "honor system" of voter registration, the Legislature established precautions in favor of eligible applicants to minimize the burden on the right to vote. Because the challenged law is not inconsistent with HAVA and does not violate the VRA, the NVRA, or the United States Constitution, Plaintiffs' Complaint must be dismissed.

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§ 97.053(7), Fla. Stat. The thirteen day limit was reduced from fifteen by the Legislature in 2007 and becomes effective January 1, 2008. *See* Ch. 2007-30, §§ 13, 57, Laws of Fla.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by Notice of Electronic Filing this 9th day of October, 2007, to the following:

Glenn T. Burhans, Jr.
Greenberg Traurig, P.A.
101 East College Avenue
Tallahassee, Florida 32301
Phone: 850-222-6891
Fax: 850-681-0207

Robert A. Atkins
D. Mark Cave
J. Adams Skaggs
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1286 Avenue of the Americas
New York, New York 10019-6064
Phone: 212-373-3000
Fax: 212-492-0289

Justin Levitt
Myrna Pérez
Wendy R. Weiser
Brennan Center for Justice at NYU School of Law
161 Avenue of the Americas, 12th Floor
New York, New York 10013
Phone: 212-998-6730
Fax: 212-995-4550

Elizabeth S. Westfall
Jennifer Maranzano
Advancement Project
1730 M Street, NW, Suite 910
Washington, D.C. 20036
Phone: 202-728-9557
Fax: 202-728-9558

Brian W. Mellor
Project Vote
196 Adams Street
Dorchester, Massachusetts 02124
Phone: 617-282-3666
Fax: 617-436-4878

/s/ *Andy V. Bardos*
PETER ANTONACCI
Florida Bar No.: 280690
ANDY V. BARDOS
Florida Bar No.: 822671
ALLEN WINSOR
Florida Bar No.: 016295
GRAYROBINSON, P.A.
Post Office Box 11189
Tallahassee, Florida 32302-3189
Phone: 850-577-9090
Fax: 850-577-3311
E-mail:
pva@gray-robinson.com
abardos@gray-robinson.com
awinsor@gray-robinson.com

Attorneys for Defendants

Florida Voter Fraud Issues

An FDLE Report And Observations

January 5, 1998

Overview:

With the passage of the 1993 National Motor Voter Law followed by Florida's own implementation legislation (Chapter 94-224, Laws of Florida) to comply with the National Motor Voter Law, the process by which one may register to vote or update one's registration has been greatly simplified. Unfortunately, the simplifications implemented also make it easier for possible fraud since once one is registered, the Motor Voter Laws also made absentee ballots available for any reason. The nation and this state must now reconcile the clash between the philosophy of the Motor Voter laws in promoting virtually "no questions asked" voter registration and voting, with the significant potential for fraud and corruption such a system has promoted.

The Department of Law Enforcement is not charged with principal responsibility to monitor Florida election issues, and does not hold itself out to be the expert agency on election law issues. The Department has, in the past several years, been called upon several times to conduct criminal investigations of specific allegations of election fraud or other misconduct, and has noted basic "trends" in election fraud both within Florida and across the nation.

The following is offered by FDLE to prompt debate and consideration of the issue whether, based on the nation's and Florida's experience since 1993, more protections to help prevent fraud are needed in our election laws. Recognizing that Florida's options may be somewhat restricted by the national law's requirement, and concerns about avoiding a "dual registration system" in which certain standards apply for state elections while others apply for federal elections, FDLE suggests that more registration and absentee ballot integrity protections are required if Florida voter fraud is to be reduced.

The Basic Types Of Fraud Encountered:

FDLE's experience in recent years, including cases predating the 1993 and 1994 "Motor Voter" changes, suggests the areas that are "ripe" for potential fraud fall primarily into these categories:

- **Voter Registration Fraud:** – Minimal identification and citizenship proof requirements provide ample opportunity for voter registration fraud. This includes specialized "changes of address" done solely to allow a vote in a particular election, when in fact, no actual change of address has occurred.

- **Absentee Ballot Fraud:** – The desire to facilitate the opportunity for each person to vote has resulted in increased opportunity to use absentee ballots improperly. (Once one has registered fraudulently, he or she can obtain an absentee ballot for every election

thereafter if he or she wishes. The lack of "in-person, at-the-polls" accountability makes absentee ballots the "tool of choice" for those inclined to commit voter fraud.)

- **Illegally or Improperly "Assisting" Others To Vote Their Absentee Ballot:** – Those inclined to do so can capitalize on others' access to an absentee ballot by voting their ballot for them, often with the actual voter not knowing what has occurred. This offers tremendous opportunity for vote fraud, particularly to those who have access to the ill or infirm or those who do not have the ability to resist the influence of another as they are urged to vote in a "required" manner. It also encourages those inclined to commit voter fraud to seek to utilize absentee ballots provided to those whose interest in voting is marginal or non-existent.

- **Vote-Buying:** - Securing votes by payment or other "rewards" or the "selling of one's vote"– is an age-old problem that still exists.

This report does not address campaign financing concerns. The Florida Legislature through CS/HB 461, 281 and 75 (Chapter 97-13, Laws of Florida), implemented several campaign finance reforms. These reforms were a step in the right direction, and while more campaign finance reform may be desirable, the focus of this report is on voter fraud concerns. 1

We are not alone in experiencing voter fraud problems. The State of California has been dealing with similar issues, as has the State of Georgia, among other states. Some of the potential responses under consideration in those states will be identified for consideration of whether they should be implemented in Florida.

A Realization—Voter Fraud Has Greater Impact On Local Elections But It Affects The Integrity Of Our Democracy In All Elections.

The impact of fraud on elections is more often and most significantly felt in local elections. It is in municipal or county elections that the difference of a relatively small number of ballots can change the election results. It is in such elections that anyone prone to committing fraud can anticipate that the fraudulent activity may pay off with his or her candidate of choice being elected by reason of the activity. However, many national elections or statewide elections have been settled by a relatively small vote margin. If the options for fraud are not adequately preempted by criminal sanctions, greater voter registration integrity efforts, or other steps, the public's confidence in the integrity of our free election system could be lost. Few issues strike so closely to the heart of our democracy as does the issue of maintaining fair and legitimate elections.

In a 1975 case involving an election whose outcome hinged on the validity of absentee ballots, the Florida Supreme Court discussed the basic issues of preserving the sanctity of the ballot and the integrity of our elections process. The Court's discussion remains as timely as ever. In Boardman v. Esteva, 323 So.2d 259 (1975) the Court included at page 269 of its opinion a review of the essentials necessary to maintain a valid election:

> **In summary, we hold that the primary consideration in an election contest is whether the will of the people has been effected. In determining the effect of irregularities on the validity of the absentee ballots cast, the following factors shall**

be considered:

> **(a) the presence or absence of fraud, gross negligence, or intentional wrong doing;**
>
> **(b) whether there has been substantial compliance with the essential requirements of the absentee voting law; and**
>
> **(c) whether the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the election.**
>
> **The underlying concern of the election officials in making the initial determination as to the validity of the absentee ballots is whether they were cast by qualified registered voters, who were entitled to vote absentee and did so in a proper manner.** (Emphasis added.)

Indeed, the essential responsibility in Florida elections is to assure that ballots are cast by qualified registered voters, who were entitled to vote, and who have done so in a proper manner. With the continued movement toward more relaxed voting standards and methods, it is important that Florida also realistically addresses the potential for fraud in a manner that assures this responsibility is met.

FDLE's Historical Perspective—A Brief Review of Cases of Interest

MIAMI, November, 1997, Mayoral Elections. This case is still active and details of the investigation cannot be revealed. However, the basic allegations of election misconduct are known and can be generally discussed. The primary allegation is that absentee ballots were being made available for sale and that absentee ballots were being purchased by person(s) supporting one or more candidates in the election. By reason of the investigation into the specific allegations that surfaced, FDLE determined there appeared to be widespread absentee ballot voter fraud in the City elections.

The types of absentee ballot voter fraud alleged to have occurred include:

- **Someone voting on behalf of someone else.**
- **The purchasing or selling of absentee ballots or another's vote.**
- **Non-City of Miami residents voting.**
- **Changing of ballots.**
- **False statements or information being provided with regard to address information or changes of addresses on voter registrations.**
- **Possible use of certain addresses within the City limits as the "new address" for persons not residing within the City; done with the apparent sole purpose of permitting voting in the municipal election.**
- **Voting by absentee ballots under the name of deceased persons.**
- **Voting in the election by non-U.S. citizens.**

The allegations currently under investigation could constitute criminal violations, including, but not necessarily limited to, these violations of Chapter 104:

- **False swearing; submission of false voter registration information (a 3rd Degree felony; F.S. 104.11);**

- **Changing an elector's ballot (a 3rd Degree felony, F.S. 104.021);**
- **Fraud in connection with casting of a vote (a 3rd Degree felony, F.S. 104.041);**
- **Corruptly influencing voting (a 1st Degree felony, F.S. 104.061);**
- **Voting a fraudulent ballot (a 3rd Degree felony, F.S. 104.16);**
- **Perjury-related violations (1st Degree misdemeanor, F.S. 837.012)**

While not engaged in the criminal investigation, the Dade County Grand Jury is reviewing the matter with an intent to recommend improvements in the local elections process. A challenge seeking to overturn the recent election is pending in court in Miami. After the fact that the Miami election was under investigation became known, similar allegations regarding other elections held in Dade County have been received by FDLE and are under review. Two arrests have been made in the subject investigation, with further arrests anticipated.

HIALEAH 1993 November Mayoral Elections: Allegations were made regarding the use of absentee ballots which were cast during the 1993 runoff election, and with regard to particular campaign workers who witnessed the ballots. The basic misconduct alleged was that campaign workers were witnessing ballots that were not completed in their presence, and that campaign workers were completing ballots or causing ballots to be completed without the actual voter's knowledge or assent for the vote as cast. The matter was reviewed by the Dade State Attorney's Office, which obtained a transfer to the Palm Beach State Attorney's Office pursuant to an Executive Order of the Governor on the basis of a conflict by reason of a personal relationship between one of the subjects of the allegation and the State Attorney. The matter was also reviewed by the U.S. Attorney's Office.

No criminal charges were filed, but the election was invalidated by a civil court. A final report issued on September 30, 1996, by the Palm Beach State Attorney's Office included in its summary this finding:

> **The decision not to file charges should not be considered as an endorsement of the conduct of this election. However, it is not within the jurisdiction of this office to condemn the actions of campaign workers who may have engaged in unethical conduct. We leave for others to determine whether this is conduct that we want to condone in our society. Until such time as the legislature addresses the inadequacies of the present legislative authority, the State is not authorized to address this matter in criminal court....**

DAYTONA BEACH 1993 Commission Election: FDLE's investigation established grounds to believe that campaign supporters obtained a number of absentee ballots and solicited votes prior to election day. The investigation led FDLE to believe that the candidate himself distributed the ballots, influenced the marking of ballots and obtained signatures of persons as witnesses who did not actually witness the elector's casting and signing of his or her absentee ballot. Some ballots were witnessed only by one witness. A Volusia County Grand Jury heard the case and issued a Presentment, while not indicting any persons involved. The Grand Jury expressed concerns that conduct such as the witness irregularities, the number of absentee ballots outstanding, the direct handling of such ballots by a candidate and his campaign workers, were not more specifically prohibited by Florida law.

HARDEE COUNTY 1992 Sheriff's Election: FDLE's investigation established grounds to believe that three campaign supporters obtained a quantity of absentee ballots on behalf of their candidate and subsequently solicited votes prior to the election. A number of these

ballots were found to contain irregularities involving the witnessing. In some cases, the actual vote (via a punch out ballot) was completed by the campaign supporter. A Hardee County Grand Jury reviewed the case that no criminal intent was involved. A new election was ordered, however.

DIXIE COUNTY 1992 Sheriff's Election: FDLE's investigated allegations that a campaign supporter obtained a number of absentee ballots and then took them to sick and elderly throughout the county and "assisted" them in voting. During the process they were encouraged to vote for a specific candidate. The worker then allegedly took the ballots and later had them falsely witnessed. No compensation for the "votes" was made. No one was arrested in this matter.

BAKER COUNTY 1990 School Board Election: One arrest and conviction resulted from this investigation which demonstrated that a campaign supporter recruited and transported voters to the County Courthouse where they obtained an absentee ballot to be marked in accordance with the worker's directions. In return, each such voter was paid $10 by the campaign supporter.

DIXIE COUNTY 1988 Supervisor of Elections Election: One arrest and conviction in federal court resulted from this investigation. The investigation established that the Supervisor of Elections, herself a candidate, gave groups of absentee ballots to selected supporters. These were taken to poor and infirm voters where, in exchange for $10 to $20, the voters' votes were secured. The absentee ballots were witnessed by campaign workers and then returned to the candidate, the Supervisor of Elections.

LAFAYETTE COUNTY 1984 County Commission Election: Five arrests and convictions in federal court resulted from this vote-buying investigation. The supporter of a candidate secured a large number of absentee ballots and took them to the poorer sections of the county. For a payment of $25 to $35 and a bottle of whiskey, supplied by the candidate, a voter's vote was "bought." The voter completed the absentee ballot, and the candidate's worker would have the ballots falsely witnessed later prior to return to the Supervisor of Elections.

Observations and Concerns Derived From FDLE's Investigations

- **The absentee ballot is the "tool of choice" for those who are engaging in election fraud.**

The absentee ballot's very nature makes it the mechanism to use when trying to capitalize on a voter's infirmities or desire to make some quick money. Both federal and Florida law make absentee ballots available to anyone who seeks them, with no requirement of "justification" for not appearing in person at the polls. Given this easy access to absentee ballots, the "tool of choice" will remain popular among those who corrupt the elections process.

- **The absentee ballot's integrity is only as good as the weakest link in the voter registration process, and the voter registration process is extremely open to fraud and abuse.**

Once registered to vote, any person may request and utilize an absentee ballot without ever having to appear in person to vote. If the voter registration process does not require significant proof of citizenship, address, and identity, then those inclined to commit fraud will capitalize on the process by successfully registering those who have no right to vote, and then "facilitate" their (illegal) vote by absentee ballot.

- **Voter registration and absentee ballot fraud can be expected to increase unless steps are taken to stop it.**

Voter registration fraud is occurring throughout the nation. The National Center For Policy Analysis' "Policy Digest" for December 1996-February 1997 related that multi-state voting, fake registrations, and repeat voting by an individual in the same election are becoming problems. It reports that in Chicago, 150,000 voters registered more than once, with 90,000 registering three or more times. Thousands of mentally handicapped voters were assisted in registering in Illinois. In reality, it appears that Florida's ability to maintain the integrity of its voter registration rolls may be no better than Illinois'. If this is the case, then perhaps Florida should review how truly effective its current efforts at maintaining voter registration integrity are, and consider options such as specialized audits of registration rolls or other efforts to avoid problems like those encountered in Chicago. While the national Motor Voter Law may restrict the state's ability to "cull" its voter registration rolls to the extent the rolls once were reviewed and updated, focused efforts to assure integrity may still be done.

- **The elderly are often exploited by others to commit absentee ballot fraud.**

It appears that the elderly voter or elderly witness to another's absentee ballot are often targeted for use in fraud schemes, perhaps because some of these voters may be easily manipulated or influenced by those in whom they have previously placed their trust. Such persons might be a condominium association representative, a community "leader," or even just a stranger who approaches an elderly person with an absentee ballot in hand.

- **Those fighting fraud should utilize the sense of community identity and pride to make citizens more aware of how they can help prevent voter fraud.**

Many Floridians may not be aware of how their timely report of suspected wrongdoing could facilitate the discovery of voter fraud before it occurs or as it is occurring. Such timely reporting could stop problems before they grow to the point that an entire election's integrity is questioned. A greater emphasis on promoting a "zero tolerance" to voter fraud in all of Florida is needed, with an appeal to each voter's sense of community and civic pride as a means of motivating citizen interest in assisting in the state's anti-fraud efforts. An explanation of why a zero tolerance is so important could help citizens understand their responsibilities in fighting fraud.

- **Under current law, there is little effective review of what is claimed on one's registration form.**

Relatively easy change-of-address procedures, implemented by the motor voter laws, makes it easy to "move" into an election zone for the express purpose of voting in a particular local election, with little or no scrutiny of whether the "move" is truly legitimate or not. Indeed, the recent changes in the registration requirements have eliminated virtually any ability by Supervisors of Elections to independently verify whether the information

provided on a registration form is in fact, accurate.

- **Additional steps to prevent absentee ballot fraud are needed.**

In 1996, Florida made numerous revisions to Chapter 101, attempting to address absentee ballot fraud and related issues. A limit of no more than two absentee ballots per election may be secured by a third party other than a member of one's immediate family. F.S. 101.62(4)(b). However, under F.S. 101.62(1), a person may request, with no verification, in person, by phone or by mail a personal absentee ballot. Under F.S. 101.64, the requirement that an absentee ballot be witnessed by a notary or two separate witnesses has been eliminated. Now, only one witness need to sign an absentee ballot. With no more scrutiny or justification for such a ballot than is provided by current law, easy access to absentee ballots remains a reality in Florida. Any person may pick up the phone and request an absentee ballot, no questions asked. Unfortunately, any person inclined to use that ballot fraudulently, may now do so with less fear of becoming known than in the past when tighter standards were applied.

- **Florida's present registration and absentee ballot procedures lack safeguards that could help prevent fraud.**

To a great extent, Florida's absentee voting and voter registration is based on a "trust me" level of scrutiny. While the goal of incorporating more voters into the process is laudatory, perhaps we have begun to see that the "Motor Voter" approach is in need of returning some "common sense" safeguards to the registration and absentee ballot process. Those inclined to defraud the process are capitalizing on the philosophy of "easy registration and easy voting" under our current laws. It makes good sense that safeguards be implemented that recognize the potential for fraudulent exploitation of the elections process. If a ballot is only as good as the weakest link in the registration process, then should not Florida seek to better regulate, monitor, audit and investigate its voter registration process?

- **Florida requires little verification of registration information.**

Florida currently does not require a voter registrant to provide a Social Security number or Florida Driver's License number. In fact, in 1997, Florida dropped the requirement that a registrant provide gender, race or ethnicity information when registering. When registering, Florida requires merely an "indication" that the registrant is a U.S. Citizen, is not a convicted felon, or is not adjudicated mentally incapacitated. While submitting a false voter registration application is a third degree felony (as of 1/1/98), the current trend to require little if any verifying information at the time one registers makes effective auditing, review, or investigative follow-up virtually useless to pursue. (Florida law *allows* the applicant to volunteer the information, but does not *require* that it be provided as a requisite for registration.) *In reality, Florida has implemented a standard that is in essence little more than "trust me at my word alone" in registering to vote.*

- **Non-Citizens registering to vote and voting is a national problem, and has been alleged to have occurred in Florida.**

The FBI and the U.S. Attorneys office in Dallas are examining whether non-U.S. citizens are on Dallas County's roll of registered voters, according to an Associated Press article by Michelle Mittelstadt, dated 9/19/97. The article reports that the investigation has been

slowed because INS officials in Washington are refusing to cooperate with investigators. U.S. Attorney Michael Uhl sought INS assistance by comparing the computerized tape containing the names of those who voted in the Dallas County November, 1996 and May, 1997 elections against INS' computerized records to determine if voting by foreigners occurred. Assuming that cooperation between the INS and the U.S. Attorney's office can be restored, the results of Dallas' inquiry are worth watching.

Non-U.S. citizens have registered, and have been found to have voted in other states. *Florida could be experiencing the same problem. (Non-citizen voting is one of the several allegations currently under investigation in regard to the Miami mayoral election.)* The federal Illegal Immigration Reform and Immigrant Responsibility Act (Title 18 U.S. Code, Section 611) makes it a federal crime for noncitizens to vote in federal elections, with maximum penalties of deportation or imprisonment. Likewise, Florida requires its registered voters to be United States citizens (F.S. 97.041) and criminalizes making a false voter registration (F.S. 104.011—a 3rd degree felony as of 1/1/98) but unless Florida (and other states) have a way to truly verify a registrant's eligibility with something more than the basic "trust me at what I've said" level of accountability, state and local officials can do little to stop the potential registration (and subsequent voting) fraud. In addressing this concern, Florida should consider requiring documented proof of one's citizenship when registering to vote.

- **Florida should consider capitalizing on its coming "centralized statewide voter file," by implementing significant additional safeguards.**

Florida has moved toward implementing a centralized statewide voter file. It is to be established and run by the Division of Elections as implemented under Chapter 97-13, Laws of Florida, which became effective 1/1/98. If, and when, all of Florida's voter registration records could be centrally housed in this file, then any polling place or registration processing site could maintain on-line access the central file to determine whether a person has already voted in a particular election or whether the person is registered to vote in more than one jurisdiction. If sufficient identifying information were available in the voter file, the file could be "run" against other state and federal databases to determine whether deceased persons, convicted felons, or others appear to have been inappropriately maintained on the state's voter registration rolls. If sufficient identifying information were available in the voter file, routine audits of registration rolls could be performed to help identify areas of potential fraud concern.

However, since Florida's registration requirements do not include essential verifying information such as a Social Security Number, Florida Driver's License number, proof of becoming a naturalized U.S. citizen, or even race, gender, or ethnicity, the ability of any reviewer to truly determine one's identity in the voter file will be severely hampered, if not completely defeated. Consequently, if the voter file is to reach its full potential for fighting fraud, a requirement of significant registration verification information must be returned to Florida's voter registration procedures.

- **At-the-poll identity verification standards should be reviewed to determine if enhancement is warranted.**

Actual false impersonation at the polls continues to occur regularly, although use of absentee ballots appears to be the preferred method of committing fraud. While false

impersonation is a felony, being able to prove the conduct is difficult. A poll worker's ability to recognize the person who showed up and voted under another's name is severely compromised by the sheer number of faces that poll worker will encounter on election day. Making a crucial identification of a perpetrator is a task that would tax virtually any person's memory or ability to recall. Poll workers are not experts at handwriting analyses, and most will confess that if a signature on a poll registry resembles the signature on a voter registration card or other signed identification, the presumption is that the person is in fact who he or she purports to be. There is no method of conducting even a cursory follow-up check on persons suspected by a poll worker.

Some system of identity verification should be warranted. When we seek to utilize a credit card, we may be asked a crucial piece of information normally known only to a few people, such as our mother's maiden name. Yet no such "identity check" verification option is included in our elections process. Poll workers have no "confidential" verification information upon which to rely when they suspect someone is not who he or she claims to be. Some sort of readily usable "verification" of identity information would greatly reduce the chances of one successfully voting under a false identity. Perhaps some sort of enhanced identity verification information could be incorporated in Florida's voter registration process.

Other states' voter fraud responses and experiences.

California has encountered similar problems. Their frustration with the present system appears to have reached a degree of crisis greater than Florida has expected to date. Among California's proposed or implemented responses are:

- **"Zero tolerance to voter fraud."** Bill Jones, Secretary of State in California has established a goal of "100 percent participation by all eligible California voters with a tough zero tolerance policy for fraud." 2
- **"Voter Fraud Hotline" and "Handbook."** As part of California's anti-voter fraud efforts, a statewide Voter Fraud Hotline (1-800-345-VOTE) has been established to allow any person to report any witnessed suspected election fraud or campaign abuses. The Secretary of State's Office in California has printed a small, pocket sized, "Voter Fraud Prevention Handbook" that briefly describes the requirements under law for registering to vote, voting at a poll, voting by absentee ballot, and "campaign do's and don'ts." 3 Included in the book's responses regarding "Absentee Ballots" is this advice: "...your vote is secret and you should not let anyone handle your ballot in any way...Pay close attention to deadlines, and under no circumstances permit any campaign workers to handle your ballot or fill in your choices. Be sure to refuse any offer from them to return your ballot for you. If they offer to do so, they are breaking the law. (EC Section 18371, 18403, 18577)." Florida is in need of similar and repeated advice to its citizens.
- **"Voter Eligibility Verification Act."** In April, 1997, California saw introduced the "Voter Eligibility Verification Act." It seeks to provide local election officials the authority to make inquiries with the Social Security Administration and the Immigration and Naturalization Service to verify the citizenship of people who have submitted a voter registration application.
- **Aggressive Anti-Fraud Efforts By The California Secretary of State:** In 1996, the California Secretary of State's Office uncovered evidence of voter fraud and dropped 727 noncitizens from the voter rolls. A few months later it discovered voting irregularities and ordered a complete review of Orange County, California's 1.3 million residents registered to vote in the state's general election.

- **Federal elections subject to alleged fraud, too.** For example, in November, 1996, California Republican Representative Bob Dornan was deposed by Democrat Loretta Sanchez in an election determined by only a 984 vote margin. Dornan has alleged the crucial "upset" total resulted from "noncitizen voting."

- **Georgia's response to voter fraud:** In a press release dated January 7, 1997, Georgia Secretary of State Lewis Massey announced his proposal of several anti-election fraud measures, including a provision which will require citizens to present identification before receiving a ballot at their polling place. Other changes proposed included making all election code violations a felony, increasing the maximum fine and imprisonment that could be imposed for such violations, including a printed warning to all absentee ballot instructions and return envelopes describing the penalties for vote buying or selling, and implementation of the U.S. Postal Service's National Change of Address or alternative database systems to insure the accuracy and timeliness of the state's voters list.

- **Louisiana experiences:** Louisiana State Representative Louis "Woody" Jenkins has charged that 2,600 "phantom voters" and 10,000 more questionable ballots were cast in his U.S. Senate race, which he lost by 5,788 votes.

- **Illinois' experience:** As noted earlier in this report, Chicago has to deal with the reality that persons were registering to vote more than once, a substantial number of which had registered to vote three times in different precincts. Auditing efforts taken to assure the integrity of the voter rolls are being done.

SUMMARY: A balance between promoting the vote and maintaining the integrity of the elections process must be carefully secured. While Florida's move toward "Internet voting" and "voting by mail" represents a laudatory effort to expand the opportunity to vote, it also expands the opportunity to commit voter fraud. Absent the inclusion in voter registration records of significant personal identifier information that is not currently required of Florida voters, the opportunities to defraud the election process will abound through any voting method, be it absentee ballot, electronic voting, or by-mail voting. Indeed, with each step taken that does not include a process that requires sufficient identification verification, the opportunity for fraud increases.

The above-noted observations and concerns are based upon FDLE's experience in investigations and upon national trends. Below, developed in part upon FDLE's experience and drawn from a variety of sources, are several suggestions of ways in which Florida's elections process may be better protected against fraud. It is possible that some of the suggestions may already be in place in one form or another in some areas of the state. The suggestions are intended to promote debate and consideration of what steps are needed in our state and local elections processes to better insure the integrity of our elections.

Anti-Fraud Steps Florida May Wish To Consider Implementing:

- Promote a **"zero tolerance" approach to voter fraud** by making significant efforts to elevate community awareness and opportunity to report fraud.

- Enhancing the state's ability to ferret out potential fraud before it occurs **by implementing significant and meaningful proof requirements in voter registrations.** No longer simply accept one's "representation" that the form is correct. Instead, require proof of citizenship, and current residency. Is production of a Social Security card or a phone bill or power bill receipt showing one's residence too onerous a burden to place on one who seeks to vote? Surely not.

- Consider a "reverse absentee ballot process" that sends a **poll worker to the absentee voter** with the ballot. Instead of sending the ballot to "points unknown" and having it returned for after-the-fact verification that is less than acceptable, why not fund absentee ballot vote collection agents who will deliver a ballot upon request to any registered voter. The collection agent could then wait while the ballot is completed and could serve as a state-bonded witness that the ballot has been filled out correctly by the person to whom the ballot was provided. The process might cost more in personnel time and expense, but after-the-fact ballot verification could be eliminated, thereby offsetting some of the costs, and the much greater value of substantially curtailing absentee ballot fraud could be obtained.

- As an alternative to the "reverse absentee ballot" idea, in the minimum, **return to an enhanced absentee ballot witnessing requirement.** An absentee ballot verification, including verification of the identity of the person voting, should be required, with the sealing of the ballot being witnessed by two or more witnesses or a notary, as was once the standard in Florida.

- All absentee ballots should have **prominently printed warnings** regarding the violations of law that could occur in their use, and the penalties attached.

- A **voter fraud hotline** like California's should be considered. The toll free number could be printed on all absentee ballots.

- **Make vote-buying and absentee ballot fraud too expensive for those inclined to do it by offering a reward of a substantial sum of money to any person providing information to law enforcement that results in the conviction of a person for voter fraud.** Make the state's payoff for information resulting in a conviction much greater than the profit from accepting a vote buying payoff or participating in absentee ballot fraud.

- Return to a requirement of **personal appearance before a government official to register** to vote and **require the registrant to produce sufficient verification** information.

- **Require drivers license and/or social security numbers on voter registration cards** and as part of the information contained on one's absentee ballot.

- Require **foreign-born citizens to provide their naturalization number** on their voter registration card.

- Require **documented proof of residency** in the form of a power bill, phone bill, or other regular mailing to the claimed address, in order to help prevent the "move" made for the sole purpose of voting in a local election.

- With implementation of sufficient specific voter registration verification information, **implement the state's centralized voter file to its greatest extent**, including running voter registration records against all available government databases that could identify fraud attempts.

- With sufficient verification information in the data base, **place all poll voting places "on line"** to the data base for instant verification of registration status and to prevent multiple

voting at different locations by the same person.

- **Commit to a statewide review of registration records to determine if non-citizens or others have wrongly registered to vote.** Consider offering a brief "grace period" in which any person who has illegally registered may, without fear of punishment, appear and voluntarily remove his or her name from the voter records. (Allow the person's name to be retained in the databases so that if he or she attempts to register at a subsequent date, the effort will receive special scrutiny to verify his or her eligibility to vote.)

- **Require proof of residency and identity** when appearing at a poll to vote AND when requesting an absentee ballot. **Issue the absentee ballot in the name of the verified requestor only, and prevent the requestor from voting any other way unless the ballot is returned unvoted.** Require, as necessary, additional information to verify identity, such as the person's mother's maiden name, etc.

- **Aggressively use existing databases and processes to identify those who claim they are not "residents" or citizens in order to be excused from jury duty or other obligations, then claim they are a resident or citizen for purposes of registering to vote.** Citizenship and its responsibilities should not be something one claims or denies when convenient.

- Consider **tough alternatives to criminal sanctions** for those who are found to have engaged in voter fraud. FDLE's experience demonstrates that often "criminal intent" is often difficult to establish, even though questionable vote conduct occurs. Give the Attorney General or another entity the authority to seek civil sanctions and civil fines when criminal sanctions will not be sought.

- **Expand candidate disqualification sanctions**. Florida does not provide a blanket disqualification from holding office for those convicted of voter or election misconduct. For example, while a convicted felon may not vote, Florida law disqualifies a person from holding office upon felony conviction of F.S. 104.071 (remuneration by candidate for services, support, etc.) and F.S. 104.271 (making false or malicious charges against, or about an opposing candidate.) Not every election related conviction will disqualify one from office-holding. The list of offenses that, once committed, disqualifies a person from holding office should be expanded to cover any voter fraud activity.

- **Enhance registration and absentee ballot process audit efforts.** Recognize that such efforts require a level of highly-specialized expertise to ferret out voter fraud around the state before it occurs and rises to a criminal level. Local jurisdictions may not have the resources to support such an effort, so consideration should be given to providing the effort at the state level.

- **Publish and distribute to each registered voter a "Voter Fraud Prevention Handbook"** similar to that used in California, including a voter fraud hotline toll free number to report suspected abuses, and, if implemented, to provide information that could be used to fund one's reward when a fraud perpetrator is convicted.

- **Consider requiring notification of the death of an individual to the Supervisor of Elections as a requisite prior to the settling of one's estate in court either by reason of a will or without.** Proof of notification would be necessary in order to close

out the estate's matter in court. Require the Supervisors of election to report any received notices of death to the central database within a short period of time, and to remove the person from all active voting rolls.

This list is not exhaustive, but is offered as the "starting point" for potential legislative consideration and review. None of the suggestions should be deemed "FDLE proposals." They are offered as the basis to promote discussion rather than as finalized proposals.

Florida Department of Law Enforcement

January 5, 1998

Footnotes:

1. Chapter 97-13 did address two areas of voter fraud. Section 31 of the law raised the penalty under F.S. 104.011 (False swearing; submission of false voter registration information) from a First Degree Misdemeanor to a Third Degree Felony. Section 32 created a First Degree Misdemeanor offense at F.S. 104.012(4), "Altering Voter Registration Application Without Person's Knowledge and Consent." Back to Text

2. "Voter Fraud Prevention Handbook" page 1. By the Office of California Secretary of State Bill Jones. Back to Text

3. A copy of the book may be accessed at www.ss.ca.gov or by writing California's Secretary of State at 1500 11th Street, Sacramento CA 95814. Back to Text

U.S. Department of Justice

Civil Rights Division

Washington, D.C. 20530

September 8, 2003

Judith A. Armold, Esq.
Assistant Attorney General
Counsel for Election Laws
Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202-2021

Dear Ms. Armold:

This is in response to your July 10, 2003 letter to me regarding one of the Frequently Asked Questions ("FAQ") on the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. 15301 *et seq.*, as it appears on the Voting Section's website. Specifically, your question concerns whether HAVA requires States to verify certain information such as driver's license numbers provided by persons applying to register to vote, and asks for the rationale for the Division's conclusion set forth in the FAQ that States must do so. In your letter, you indicate that you do not believe that HAVA requires "that states verify those numbers or necessarily refuse to register an applicant if the number provided cannot be verified."

The Attorney General has assigned to the Civil Rights Division the Department of Justice's enforcement responsibilities under Section 401 for the uniform and nondiscriminatory election technology and administration requirements of Sections 301, 302, and 303 of Title III of HAVA. 42 U.S.C. §15511. Although the Department states its formal positions with respect to statutes it enforces only through case-by-case litigation, the Department does on occasion offer its general views on the manner in which it intends to enforce a particular statute or set of laws. Therefore, while we cannot issue a formal advisory opinion, we will attempt to answer the questions you have posed to the extent we can based on the Department's responsibilities to enforce Title III of HAVA and other pertinent federal laws. The opinions expressed in this letter are not binding and would not prevent the Department from taking a different position in any future litigation under HAVA or other federal voting rights statutes.

As our FAQ describes, there are two relevant federal law obligations. First, under the National Voter Registration Act ("NVRA"), Section 8(a)(1) requires that covered States "ensure that any eligible applicant is registered to vote in an election" if the "valid voter registration form of the applicant" is submitted, accepted, received or postmarked, as the case may be, within 30 days before the federal election in question (or lesser period if allowed by state law). Second,

Section 303(a)(5) of HAVA requires non-exempt States to begin verifying certain information from all registrants as of January 1, 2004, or with a good cause extension from the Election Assistance Commission, as of January 1, 2006, and Section 303(b) requires States to begin verifying certain information from mail-in registrants as of January 1, 2004.

Section 303(a) contains the requirements for a computerized statewide voter registration list. Section 303(a)(5), entitled "Verification of voter registration information," deals with one of these requirements. Section 303(a)(5)(A) provides that a voter registration application for federal elections "may not be accepted or processed by a State" unless the application includes the applicant's driver license number (if the applicant has such number) or the last four digits of the applicant's social security number (if the applicant does not have a driver license number). If the applicant has neither such number, then the State must assign a unique identifying number. Section 303(a)(5)(A)(iii), entitled "Determination of validity of numbers provided," provides that States "shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law."

Section 303(a)(5)(B), entitled "Requirements for State officials," contains additional detail regarding these verification requirements. Section 303(a)(5)(B)(i) provides that state election officials and state motor vehicle officials "shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to *verify the accuracy* of the information provided on applications for voter registration" (emphasis added). Section 303(a)(5)(B)(ii), provides that state motor vehicle officials and the federal Commissioner of Social Security shall "enter into an agreement ... for the purpose of verifying applicable information" provided by voter registration applicants. That section further provides that the Commissioner "shall develop methods to verify the accuracy of information" provided by States "with respect to applications for voter registration, for whom the last 4 digits of a social security number are provided" and that the information to be verified includes whether the name, date of birth, and social security number provided "match the information contained in the Commissioner's records" and whether the individual is shown by the Commissioner's records to be deceased.

Section 303(b) of HAVA, entitled "Requirements for voters who register by mail," provides that certain categories of persons who register to vote by mail for federal elections for the first time after January 1, 2003, and do not qualify for one of the exemptions in Section 303(b)(3), must submit one of the forms of identification required by Section 303(b)(2)(A) the first time that they vote in a federal election after January 1, 2004. One exemption is Section 303(b)(3)(A), which applies to an individual who registers to vote by mail under Section 6 of the NVRA and includes in the application a copy of one of the required identification documents. Another exemption is Section 303(b)(3)(B), which applies to an individual who registers to vote by mail under Section 6 of the NVRA and provides either a driver's license number or at least the last four digits of the applicant's social security number and "with respect to whom a State or local election official *matches the information* submitted ... with an existing State identification

record bearing the same number, name and date of birth as provided in such registration" (emphasis added). If an individual does not qualify for one of the exemptions and does not present the required identification, Section 303(b)(2)(B) provides that he or she may only cast a provisional ballot.

It is clear in §303 that Congress intended, absent some exemption, that voter registration applicants for federal elections must provide certain specific information and States must take certain specific steps to verify this information. Indeed, Congress went to some length in HAVA to describe the steps to be taken by States in verifying registration information for the statewide registration list and for mail-in registrants. The obvious purpose of such verification provisions is to ensure that only eligible individuals are registered to vote, and that those individuals only have one registration at any given time on the statewide list. Under the relevant provisions of the NVRA and HAVA, a State can neither refuse to consider timely and complete registration applications, nor can the State refuse to undertake the verification process for those applications.

It is true that HAVA, like the NVRA, leaves the ultimate decision of whether to register the applicant, including the decision of whether the information provided by the voter has been sufficiently verified, up to the State or local election official charged with that responsibility under State law. However, it is clear under Section 303 that a State must set up a verification system that enables it to determine whether the information provided by a registrant is accurate by comparing it to its own state motor vehicle driver's license records or federal social security records. Congress obviously intended that where the verification process is working correctly and the results of that verification process indicate that the registrant is eligible, the application will be accepted. Where the results indicate the registrant is not eligible, has provided inaccurate or fraudulent information, or information that cannot be verified, then the application must be denied. If verification cannot be completed between the close of registration and the election date, then the prudent course would be to allow such voters to cast a provisional ballot and to count the ballot only if the registration information is later verified as required under the statute. Contrary to your assertion, a State that does not takes the steps required by the statute to verify this information prior to making a registration effective would appear to be in clear violation of HAVA.

I trust this response answers your inquiry. If you have any further questions regarding this matter, please contact us again.

Sincerely,

Hans A. von Spakovsky
Counsel to the Assistant Attorney General

UNITED STATES ELECTION ASSISTANCE COMMISSION

Voluntary Guidance on Implementation of Statewide Voter Registration Lists

AGENCY: United States Election Assistance Commission.

ACTION: NOTICE; publication of final Voluntary Guidance on the Implementation of Statewide Voter Registration Lists.

SUMMARY: The U.S. Election Assistance Commission (EAC) is publishing its final voluntary guidance on Section 303 (a) of the Help America Vote Act of 2002 (HAVA). HAVA was enacted to set standards for the administration of Federal elections. Included in these standards is a requirement that each State develop and maintain a single, statewide list of registered voters. The voluntary guidance published here by the EAC will assist the States in understanding, interpreting and implementing HAVA's standards regarding statewide voter registration lists.

FOR FURTHER INFORMATION CONTACT: Gavin S. Gilmour, Associate General Counsel, Washington, D.C., (202)566-3100, Fax: (202)566-1392.

SUPPLEMENTARY INFORMATION:

Background. HAVA mandates that the EAC draft and publish voluntary guidance to assist States in implementing the HAVA requirements for computerized statewide voter registration lists. (42 U.S.C. §15501(b)). To meet its obligation, the EAC gathered information and sought input from experts and stakeholders. Specifically, the EAC held public meetings, receiving testimony from State election officials whose States had implemented statewide voter registration lists. Additionally, the EAC, assisted by the National Academies, convened a two-day working group of State and local election officials. The working group received technical assistance from technology experts invited by the Academies and representatives of the country's motor vehicle administrators.

Following this research and information gathering, the EAC drafted its *Proposed Voluntary Guidance on Implementation of Statewide Voter Registration Lists.* This proposed voluntary guidance was published with a request for public comment on April 18, 2005. (70 FR 20114). The pubic comment period was open until 5:00 p.m. e.d.t. on May 25, 2005. All comments received were considered in the drafting of this final guidance.

Discussion of Comments. The EAC received 310 comments from the public. The overwhelming majority of these comments came from public interest groups or their members (221 comments in all). The EAC received 14 comments from State and local officials. Finally, 75 of the comments the EAC received were either not relevant to the subject matter, broad in nature or otherwise provided no specific recommendation.

The comments received from public interest groups were generally consistent in content, focusing primarily on what they perceived were missing from the guidelines. These groups focused on the need to provide additional information and guidance to States. They recommended that the guidance be expanded to provide States direction on (1) list verification and maintenance processes and protocols, (2) implementation of policies to protect registrants against removal from registration lists in error, (3) coordination with voter registration agencies, (4) security procedures to both prevent unauthorized access and protect database information and (5) database features such as public access portals and election management. The comments from State and local officials were more diverse. Most of the comments focused upon the types of databases that meet HAVA requirements. While the comments differed and often conflicted in their conclusions, as a whole they made it clear that further guidance on database structure and operation was desired. A number of comments from State and local officials also expressed concern over definitions within the guidance, fearing that they were absent, overly broad or

might otherwise conflict with definitions under State law. Finally, a few State and local officials shared the concerns articulated by the public interest groups regarding security (specifically, limiting database access).

The EAC reviewed and considered each of the comments presented. In doing so, it also gathered additional information and performed research regarding the suggestions. The EAC's commitment to public participation is evident in the final version of the voluntary guidelines. The guidelines have been enhanced in a number of areas in response to conscientious public comment. The document has been reorganized to improve readability. Definitions for "statewide voter registration list" and "chief State election official" have been added. Similarly, the definition of "local election official" has been clarified. Additional guidance was added regarding (1) the creation of stricter standards by States; (2) election officials' responsibility to track voter history; (3) security requirements (including provisions on technological security; access protocols; transactional record keeping and system backup, recovery and restoration); (4) records retention and (5) public access portals. Similarly, many existing guidelines were enhanced in response to public comment. Previous guidance on coordinating statewide voter registration lists with other State, local and Federal databases was expanded. Further guidance was added on (1) voter registration coordination, (2) registration verification coordination; and (3) registration list maintenance. Finally, guidance on the types of databases that meet HAVA requirements has been amended to provide clearer direction to States.

VOLUNTARY GUIDANCE ON THE IMPLEMENTATION OF STATEWIDE VOTER REGISTRATION LISTS

I. INTRODUCTION:

The Help America Vote Act of 2002 (HAVA) requires the Chief Election Official in each State to implement a "single, uniform, official, centralized, interactive computerized statewide voter registration list." That list is to be "defined, maintained, and administered at the State level" and must contain the "name and registration information of every legally registered voter in the State."

Congress mandated that the United States Election Assistance Commission (EAC) issue voluntary guidance to assist the States in implementing the provisions of HAVA relating to statewide voter registration list requirements. While it is the responsibility of the EAC to interpret and issue guidance on HAVA, civil enforcement of the statute is expressly assigned to the United States Department of Justice (DOJ).

The following interpretative guidance clarifies the meaning of certain portions of Section 303(a) of HAVA (42 U.S.C. 15483(a)). Specifically, this guidance serves to assist States in their efforts to develop and implement a single, uniform, official, centralized, interactive computerized statewide voter registration list. Moreover, the guidance also serves to encourage State and local election officials to work together to define and assume their appropriate responsibilities for meeting this HAVA requirement, and engage other relevant stakeholders in this process.

II. SCOPE AND DEFINITIONS

A. Is this guidance regarding statewide voter registration lists or Section 303(a) of HAVA mandatory?

No. The guidance issued here by the EAC is voluntary. This means that States can choose to adopt this guidance to assist in the implementation of HAVA's requirements for a statewide voter registration list or create their own policies. However, to the extent the policies below reiterate HAVA mandates, such requirements are not voluntary but are statutorily required.

B. What is a computerized statewide voter registration list?

A computerized statewide voter registration list is a single, uniform, centralized, interactive computerized voter registration list that is technically and functionally able to perform tasks described in Sections 303(a)(1)(A)(i) through 303(a)(1)(A)(viii) of HAVA. In essence, it is the one official list of lawfully registered voters within a State for all elections for Federal office and the only lawful source of Federal registration information for poll books or precinct registers on Election Day. The list must be centrally managed at the State level in a uniform and non-discriminatory manner. The list must be computerized and technically capable of providing immediate electronic access to appropriate State and local election officials; assigning unique identifiers; affording local officials expedited entry of voter registration information; allowing voter registration information to be verified with other State, local and Federal agencies; providing a means for list maintenance; tracking appropriate voting history; and ensuring appropriate system security.

C. Who would benefit from this guidance?

This guidance is targeted to assist the States and local governments in fulfilling their requirements under Section 303(a) of HAVA. This guidance may help election officials understand HAVA's establishment of a single, uniform statewide voter registration list and the responsibilities that HAVA places on all election officials to assure that the names and information contained in the statewide voter registration list are accurate, secure and complete.

D. To whom is Section 303(a) of HAVA applicable?

The provisions of Section 303(a) apply to all States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, and the United States Virgin Islands except those that on or after the date of enactment of HAVA had no requirement for registration of voters with respect to elections for Federal office. Currently, only North Dakota has no voter registration requirement.

E. Does this guidance in any way alter, interpret, or affect the requirements of the National Voter Registration Act of 1993?

No. Nothing in this guidance should be construed to alter, interpret or effect, in any way whatsoever, the requirements of the National Voter Registration Act of 1993 (NVRA), including requirements and timeframes with respect to the administration of voter registration and/or the process States must follow in removing names of registrants from the voting rolls.

F. Who is a local election official?

For the purposes of this guidance, a local election official is a public employee who has, as a primary duty, the responsibility for collecting and processing voter registration information for Federal elections or otherwise maintaining voter registration information pursuant to State mandates and the requirements of HAVA.

G. Who is the chief State election official?

The chief State election official is the highest ranking State official who has, as a primary duty, the responsibility to ensure the lawful administration of voter registration in Federal elections. Ultimately, it is the State's responsibility to determine the identity of this official. Each State should have previously identified their chief State election official as required by the NVRA (42 U.S.C. §1973gg-8).

H. Who is responsible for implementing the provisions of Section 303(a) of HAVA?

The State, through the State's Chief Election Official, is responsible for ensuring that the State has a single, uniform, official, centralized, interactive computerized Statewide voter registration list. This official is also responsible for defining, maintaining and administering this list. However, local election officials also have certain responsibilities outlined in Section 303(a) of HAVA, particularly with regard to entering voter registration information into the statewide voter registration list on an expedited basis. Local election officials may also be required to perform list maintenance activities pursuant to State mandates.

I. Will the EAC provide additional guidance on Computerized Statewide Voter Registration Lists?

Yes. The EAC and a working group of State and local election officials will continue to explore technical issues related to the maintenance and upgrade of these database systems, with assistance from the National Academies. The EAC also plans to work with public interest groups to help ensure these guidelines serve all Americans. Additional guidance and/or best practices regarding statewide voter registration lists will be developed.

III. GUIDANCE ON STATEWIDE VOTER REGISTRATION LISTS

A. May a State create policies for Statewide Voter Registration Lists that go beyond HAVA's requirements?

Yes. Under Sections 304 and 305 of HAVA, the details of implementing Statewide Voter Registration Lists have been left to the States. HAVA requirements are minimum requirements. States are free to establish policies that provide stricter standards as long as such standards are not inconsistent with HAVA or other Federal Laws. States must ensure that their additional policies are indeed stricter than HAVA and do not create impermissible standards that fall below the statute's minimum requirements. In this way, a stricter standard, in terms of a provision that protects voter access, would be a standard that further enhances or expands such access. Similarly, a stricter standard, in terms of a provision that protects the integrity and security of the voting process, would be a standard that furthers that goal.

B. What types of databases meet the requirements of HAVA to generate a single, uniform voter registration list?

HAVA requires a State to define, maintain and administer one official and uniform statewide voter registration list. This computerized list must be accessible by local election officials for purposes of conducting voter registration and voting in an election for Federal office. *Generally, in order to meet HAVA's computerized list requirement, the State must define and have immediate, real-time access to all the data that serves as the State's official voter registration list. Moreover, the State must be able to control access to this data and perform HAVA mandated action on the information (such as coordinating with other databases for the purpose of performing voter registration verification and list maintenance). Finally, local election officials must have immediate access to this official list.* While HAVA requires that

both State and local election officials have immediate access to the voter registration list, ultimately the State must direct the degree of access and control any one official or class of officials have over the list's data.

A State database hosted on a single, central platform (e.g., mainframe and/or client servers) and connected to terminals housed at the local level (often referred to as a "top down" system) is most closely akin to the requirements of HAVA. However, other database systems may also meet the single, uniform list requirement as long as they function consistent with the general rule stated, above.

For example, a State database that gathers or uploads its information from local voter registration databases to form the statewide voter registration list (often referred to as a "bottom up" system) may serve to meet the single, uniform list requirement. This is true as long as the State database, the data and the data flow are defined, maintained, and administered by the State. Thus, the State database must house the only official list of registered voters; establish interactive and compatible software and user protocols that allow each local jurisdiction to seamlessly transfer data to and from the State; require local databases to routinely upload or electronically send registration information to the State; and ensure that the data that forms the official voter registration list is regularly downloaded or otherwise sent electronically to local officials so that they may have immediate access to the entire official list. It is important to understand that in a "bottom up" system the official statewide voter registration list is that list hosted on the State's database and downloaded to local jurisdictions. The list remains static until the State electronically provides the next, updated version. Registration information held solely in a local database is not a part of the official registration list until it is electronically sent to the State and added to the official list. States must require local information to be uploaded and the

official statewide voter registration list to be downloaded on a regular basis. In this way, both State and local election officials will have immediate, real time access to the statewide voter registration list.

C. How frequently must the statewide voter registration list be synchronized with any local databases to assure that the statewide voter registration list is the single source for the names and registration information of all legally registered voters in the State?

If a statewide voter registration list is not hosted on a single, centralized platform, States must ensure that all information contained on local, satellite databases is uploaded (synchronized) into the statewide voter registration database routinely, such that the State database can be viewed as the sole, official list of registered voters. Similarly, States must assure that the data comprising the official list (maintained by the State database) is downloaded or sent electronically to local systems on a regular basis so that local officials may have immediate access to the official list. At a minimum, the statewide voter registration list should be synchronized with local voter registration databases at least once every 24 hours to assure that the statewide voter registration list contains the names and registration information for all legally registered voters in the State. In the same way, the State must electronically send or download the appropriate information in its database to local election officials at least every 24 hours, so that they have immediate electronic access to the official voter registration list.

D. How should the statewide voter registration list be coordinated with other agencies?

In order to ensure the completeness and accuracy of statewide voter registration lists, HAVA requires timely coordination between various Federal, State and local agencies. Generally, there are three forms of coordination required under HAVA: coordination with voter registration agencies, coordination to verify voter registration information (e.g. motor vehicle

authorities and Social Security Administration), and coordination necessary to perform list maintenance (e.g. death and felony records).

1. Voter registration agencies. HAVA makes accurate and complete voter registration lists a priority. States must coordinate the statewide voter registration list with other State agency databases that collect, correct or update voter registration information. These agencies must include State motor vehicle agencies and voter registration agencies as defined by NVRA (i.e. State public assistance and disability agencies). Proper coordination with these databases is essential for ensuring that statewide voter registration lists are complete. As such, the chief State election official shall:

a. Establish policies and provide adequate support to local election officials to ensure that registration applications or other registration information is entered into the State voter registration list on an expedited basis. (See HAVA Section 303(a)(1)(A)(vii)). This responsibility includes the obligation to create requirements that ensure election officials will receive registration information from voter registration agencies promptly; and

b. Establish policies that ensure information will be coordinated accurately, securely and efficiently. The EAC recommends that voter registration information be transmitted electronically. Further, to the greatest extent allowed by State law and available technologies, this electronic transfer between statewide voter registration lists, State motor vehicle agencies and voter registration agencies should be accomplished through direct, secure, interactive and integrated connections.

2. Verification of voter registration. Generally, Section 303(a) of HAVA requires that registration applications include either a valid driver's license number or, if none, the last four

digits of a social security number.[1] States are prohibited from accepting or processing registration applications that do not have this information (with the exception of individuals who do not possess either identifier). Moreover, HAVA requires States to match information received on voter registration forms against driver's license and social security databases for the purpose of verifying the accuracy of the information received from all new voter registrants. Under Section 303(b), such validation provides an exemption to the voter identification requirement for first-time registrants by mail if the information matches. States must take steps to ensure that this matching or verification process is accomplished promptly and performed in a uniform and non-discriminatory manner. Ultimately, States are required to determine if the information provided in a registration application meets the above verification requirements pursuant to State law. States must take great care in formulating these policies, taking into consideration the different ways databases may record information and the possibility of errors within a database. Consistent with this task, States should:

a. Create matching or verification protocols to ensure that properly filed registration applications from eligible voters are not rejected due to a database error or inflexible database coordination or matching rules. States must have a documented plan that specifies how election officials will identify and deal with a variety of outcomes that may result from the matching process (such as a mismatch, partial match, multiple match or failed match). States should avoid proffering protocols that automatically reject all registration applications that do not result in a perfect match with a verification database, as such procedures may be impractical, unrealistic and result in the rejection of a large number of eligible voters.

[1] Some States may require use of a registration applicant's full Social Security Number pursuant to 42 U.S.C. §15483(a)(5)(D).

b. Use additional databases (beyond driver's license and social security databases) to assist in the verification process, when such use would be effective and efficient. When the outcome of the verification process is unclear or suspect, use of other databases may help identify data errors and allow for appropriate corrections to be made to a database.

c. Make every effort to ensure that a voter registration application is not rejected as unverifiable until the State has given the individual an opportunity to correct the information at issue and attempted to validate the accuracy of the government information contained in its databases. This does not mean that States should accept or add unverified registration applications to the statewide list. Rather, it means only that election officials should make certain efforts before an application is determined to be unverifiable and finally rejected. The EAC recommends that in the event a State determines that the information provided in a registration application does not match the information contained in a verification database, States contact the individual in order to: (1) inform him or her of the disparity, (2) provide a meaningful opportunity for the applicant to respond or provide the correct information and (3) explain the consequences of failing to reply. In the event the voter registration applicant informs election officials that the information provided in the application was correct, steps should be taken to ensure that the information contained in the verification databases was accurate.

d. Ensure that the coordination of information in the verification process is accurate and efficient. Verification of voter registration information shall be accomplished through electronic transmission. Further, to the greatest extent allowed by State law and available technologies, this electronic transfer between statewide voter

registration lists and coordinating, verification databases should be accomplished through direct, secure, interactive and integrated connections.

e. When the verification process indicates the possible commission of an election crime (such as the submission of false registration information), such matters should be timely forwarded to local, State and Federal law enforcement authorities for investigation.

3. List maintenance. HAVA requires that election officials perform computerized list maintenance in order to remove duplicate names and the names of ineligible voters. HAVA specifically requires coordination with State death and felony record databases to meet this requirement. States should also coordinate with relevant federal databases, such as the U.S. Postal Service National Change of Address and Social Security Death Index databases, as well as criminal conviction records from U.S. Attorneys and the U.S. District Courts. It is essential that States regularly coordinate with these databases to ensure their statewide voter registration lists are current and accurate. In meeting this goal, chief State election officials shall:

a. Ensure State procedures for removing names from the statewide voter registration list are consistent with the provisions of the NVRA (42 U.S.C. § 1973gg-6). The NVRA contains certain requirements regarding the removal of names from official voter rolls. It requires States to conduct a program that removes individuals from voting registration lists who have died or changed residence (42 U.S.C. §1973gg-6 (a)(4)). These requirements include the notification of individuals (in certain circumstances such as a change of residence) prior to their removal from the list (42 U.S.C. §1973gg-6 (d) & (e)). It also requires the removal of individuals who have moved outside of a given registration jurisdiction, have been sent proper notice, have failed to respond to such

notice and have not voted in two consecutive general elections for Federal office (42 U.S.C. §1973gg-6 (d)(1)(B)). The statute additionally requires election officials to complete any systematic programs to remove ineligible voters not later than 90 days before a Federal election (42 U.S.C. §1973gg-6 (c)(2)).

b. Create "provisions" that include "[s]afeguards to ensure that eligible voters are not removed in error from the official list of eligible voters." (HAVA Section 303(a)(4)). HAVA requires States to create procedures that recognize the fallibility of databases and ensure that only ineligible voters are removed from a statewide voter registration list. States shall create procedures and requirements to ensure that:

(i.) The removal process and list maintenance program is transparent, non-discriminatory and uniform. To this end, the EAC recommends that States perform list maintenance regularly and over the list as a whole. In any event, States should avoid the appearance of impropriety associated with performing maintenance on limited geographical jurisdictions unless a specific need has been identified in a particular jurisdiction.

(ii.) All databases used to determine an individual's voting eligibility (e.g. agency records on felony and death) or otherwise maintain the statewide voter registration list are accurate, up-to-date and secure. Moreover, States may rely conclusively on such databases only to the extent they provide all the information necessary to determine voter eligibility. To the extent coordination with a given database is not dispositive of a voter's eligibility, States must consult additional sources or databases before taking action. For example, if a State maintains

felony records and records on the restoration of voting rights in different databases, both must be consulted during the maintenance process.

(iii.) Adequate safeguards are created to ensure that properly registered and otherwise eligible voters are not removed from the statewide voter registration list in error. As such, the EAC recommends that when information on a coordinating database matches only in part with data contained on a statewide voter registration list or there are otherwise indications that some data may be unclear, incomplete or untrustworthy; election officials should coordinate with other State databases. This should be done in order to verify data and ensure the information contained on the statewide voter registration list and the coordinating database are accurate and refer to the same individual. States should make efforts to correct databases when necessary.

The EAC further recommends that States contact individuals prior to removing their names from the statewide voter registration list. This will allow the public to serve as a further check in the maintenance process. In the event a State has identified a name on the voter list that it believes is either a duplicate name or an ineligible voter, election officials should contact the individual. Such contact should inform the individual (1) that the official intends to remove them from the registration list, (2) the basis for their removal (i.e. ineligibility factor or duplicate name), (3) how and to whom they may respond if they believe the basis for the removal is unfounded and (4) the timeframe they have to respond. While contacting the registrant often provides him or her added protection against being mistakenly removed from the registration list, in some circumstances it may be

unnecessary. Where contacting the registrant is not required by the NVRA, election officials may consider foregoing the step if it is clear that no further information is required to correctly determine a registrant's voting eligibility. In such cases, election officials are obligated to assess the accuracy and completeness of any information that will serve as the basis for removal of a name from the voter registration list. Officials must be confident that no additional safeguards are needed to protect the registrant. For example, if election officials identify duplicate voter registration entries and all information contained in the entries is complete and identical, the State may reasonably determine that contacting the registrant is unnecessary.

c. Establish policies that ensure information will be coordinated accurately and efficiently. The EAC recommends that the coordination necessary to perform list maintenance be accomplished through electronic transmission. Further, to the greatest extent allowed by State law and available technologies, this electronic transfer between statewide voter registration lists and coordinating, maintenance databases should be accomplished through direct, secure, interactive and integrated connections.

E. Must States track a registrant's voting and registration history?

Yes. While a registrant's voting and registration history are not specifically mandated to be a part of the statewide voter registration list, the tracking of this information is required in order to meet NVRA and HAVA requirements regarding the removal of names from voter rolls and voter identification requirements. This voter-specific information must be accessible and available to the appropriate election officials so these provisions may be timely met. The most efficient and effective means to track voter and registration history information is through a

State's statewide voter registration list. As such, the EAC recommends that databases housing statewide voter registration lists should be capable of tracking the following information in order to comply with NVRA and HAVA:

1. Registration by mail. States must track whether an individual registered to vote by mail, as registering in this way triggers Federal identification requirements. 42 U.S.C. §15483(b)(1).

2. Voting history. States must also track an individual's voting history. This is necessary to:

a. Meet NVRA requirements regarding the removal of names from voter rolls. Under the NVRA, if a registrant has moved from a registration jurisdiction, failed to respond to required NVRA notice, and failed to vote in two consecutive Federal general elections, the person's name may be removed from the list of eligible voters. (42 USC 1973gg-6).

b. Meet HAVA identification requirements. Under HAVA, individuals who register by mail and have not previously voted in an election for Federal office are subject to Federal identification requirements. (42 U.S.C. §15483(b)(1)(B))

3. Identification and verification information for first time voters who register by mail. States must track whether first-time voters who registered by mail provided appropriate identification (i.e. a copy of a valid photo identification or current utility bill) or verification information (i.e. verified driver's license number or last four digits of a social security number[2]) in their registration applications under 42 U.S.C.§15483(b)(3)(A) & (B), sufficient to exempt him or her from HAVA's voter identification requirements (42 U.S.C. §15483(b)(2)). If such

[2] Some States may require use of a registration applicant's full Social Security Number pursuant to 42 U.S.C. §15483(a)(5)(D).

registrants failed to provide this identification or verification information during the registration process, they will be required to present it in person, at the polls. This should also be tracked by election officials.

4. Individuals entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). (42 U.S.C. §1973ff-1 *et seq)*. States must identify registrants who are entitled to cast an absentee ballot under UOCAVA as they are exempt from HAVA's 42 U.S.C. §15483(b)(2) identification requirements. Furthermore, UOCAVA, as amended by HAVA, requires States to report to the EAC the individual and combined numbers of absentee ballots transmitted to uniformed services voters and overseas citizens, as well as the individual and combined number of such ballots returned and cast by such voters. (42 U.S.C. 1973ff-1(c))

5. Individuals entitled to vote otherwise than in person under the Voter Accessibility for the Elderly and Handicapped Act (42 U.S.C. 1973ee-1(b)(2)(B)(ii)) or any other Federal law. States must identify registrants who are entitled to cast an absentee ballot under such statutes as they are exempt from HAVA's 42 U.S.C. §15483(b)(2) identification requirements.

F. What obligations do election officials have concerning the security of the statewide voter registration list?

HAVA makes election officials responsible for ensuring that statewide voter registration lists are accurate, complete and technologically secure.

1. Technological Security. HAVA requires election officials to provide adequate, technological database security for statewide voter registration lists that prevent unauthorized access. Such computerized security must be designed to prevent unauthorized users from altering the list or accessing private or otherwise protected information contained on the list.

Access may be controlled through a variety of tools including network or system-level utilities and database applications (such as passwords and "masked" data elements). Special care must be taken to ensure that voter registration databases are protected when linked to outside systems for the purposes of coordination.

2. Access Protocols. Election officials must also create clear policies and protocols to make statewide voter registration lists secure. These protocols must identify appropriate classes of authorized users and clearly delineate the members of each class, when they have access, what data they have access to and what level of access each class holds. It is essential to security that the authority to remove a name from the voter registration list be properly limited and documented. Access protocols should also provide physical security requirements to further limit unauthorized access to a system.

3. Transactional Recordkeeping. The EAC recommends that systems housing statewide voter registration lists have the capability to track and record transactions which add or remove names or otherwise alter information contained in the voter registration list. This includes documenting the identity of the individuals who initiate such transactions. This capacity will allow the system to be audited, providing a means to hold authorized users accountable for their actions. Such accountability can serve as an important security measure by deterring unlawful or inappropriate use of the statewide voter registration list.

4. Backup, Recovery and Restoration Capabilities. Due to the important nature of the information stored on the statewide voter registration list, State election officials must ensure that the systems storing the list have adequate backup, recovery and restoration capabilities. These capabilities must be routinely tested. Officials must be confident that the system is properly backed up and that the data may be timely and accurately recovered and restored when needed.

Further, the EAC recommends that statewide voter registration list backups occur regularly on an automated basis and that the backup system be housed in a physical location separate from the primary database. Moreover, backup systems should be protected by technological security to the same degree as primary systems.

G. Do record retention requirements apply to statewide voter registration databases?

Yes. States must adhere to all State and Federal law (e.g. 42 U.S.C. § 1974 and 42 U.S.C. § 1973gg-6(i)) applicable to voter registration document retention. Such requirements must be applied to all records contained in or produced by statewide voter registration databases.

H. Should the public be granted access to their information on the computerized statewide voter registration list?

While not required by HAVA, the EAC encourages States to set-up accessible, secure means by which members of the public may verify their registration status and records. This type of public access could provide many benefits, it would serve to (1) enhance openness and voter confidence in the registration system, (2) encourage self-identification of database errors and duplications and (3) decrease instances of multiple registrations as a result of an individual's inability to recall registration status.

Further, States could use public access portals to provide other information to voters, such as the location of their proper polling place, important election dates and contact information for registration queries and updates. However, any public access portal must be protected with strong security measures to prevent unauthorized access.

The Honorable Ricardo Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON ASSOCIATION OF CHURCHES, et al., Plaintiffs, v. SAM REED, in his official capacity as Secretary of State for the State of Washington, Defendant.	NO. CV06-0726RSM STIPULATED FINAL ORDER AND JUDGMENT

WHEREAS, Plaintiffs Washington Association of Churches, et al. brought this action on May 24, 2006, alleging that Washington State's "matching" statute, RCW 29A.08.107, violates the Help America Vote Act of 2002, the Voting Rights Act, and the U.S. Constitution; and

WHEREAS, Plaintiffs moved for an order preliminarily enjoining enforcement of RCW 29A.08.107, and the parties each submitted certain evidence supported by declarations; and

WHEREAS, the Court held oral argument on July 28, 2006; and

WHEREAS, on August 1, 2006, the Court issued an Order Granting Motion for Preliminary Injunction; and

WHEREAS, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, the evidence received by the Court at the hearing on Plaintiffs' motion for a preliminary injunction, as subsequently supplemented by later court order, would be admissible upon a trial on the merits and would become part of the record on such a trial; and

WHERAS, following discussion and consideration, the parties mutually stipulate to the entry of this Order;

NOW THEREFORE,

Pursuant to the stipulation of the parties, the Court hereby finds and ORDERS as follows:

1. Defendant, his employees, agents, representatives and successors in office are permanently enjoined from enforcing RCW 29A.08.107 in such a way that any application for voter registration is denied solely on the basis of a failure to match a voter's driver's license number, state identification card number, or last four digits of a social security number with information on record with the state Department of Licensing or federal Social Security Administration, including by enforcement of RCW 29A.08.107(2) and (3). This Order does not require Defendant to tabulate ballots or count votes cast by such voters absent the completion of a matching process or the receipt of alternative identification by no later than the day before certification of election results by the county canvassing board.

In accordance with the foregoing:

a. If the Defendant matches an applicant's driver's license number, state identification card number, or last four digits of his or her social security number with the records of the state Department of Licensing or federal Social Security Administration, with or without seeking additional information or clarification

from the voter, the voter shall be registered to vote, effective as of the date of the submission or receipt of the original application, unless there exists a separate basis for concluding that the voter is ineligible to vote independent of the matching process;

b. If Defendant is unable to match an applicant's driver's license number, state identification card number, or last four digits of his or her social security number, but the applicant presents or submits to an election official an alternative form of identification acceptable under RCW 29A.44.205, the voter shall be registered to vote, effective as of the date of the submission or receipt of the original application, unless there exists a separate basis for concluding that the voter is ineligible to vote independent of the matching process;

c. If an applicant does not become registered to vote under either paragraph (1)(a) or (1)(b) above, unless there exists a separate basis for concluding that the applicant is ineligible to vote independent of the matching process, then the applicant shall be provisionally registered to vote. All voters provisionally registered pursuant to this paragraph shall be promptly notified in writing of this provisional status, of the need to provide additional documents or information, and of the relevant deadlines. They shall be included in the official rolls of registered voters maintained by the state and in all electronic or paper copies used for election administration purposes, but their provisional status may be flagged to indicate that identification is still required before their votes may be counted. All voters provisionally registered pursuant to this paragraph shall be permitted to cast a ballot in any primary or election;

d. No ballot cast pursuant to paragraph (1)(c) above shall be tabulated or regarded as containing valid votes for any office or measure until the Defendant receives information or the voter presents or submits documentation sufficient to register

the voter as described in paragraph (1)(a) or (1)(b) above. The Defendant is not required to tabulate votes cast pursuant to paragraph (1)(c) above, or treat them as properly cast votes for any office or measure unless the Defendant receives information or the voter presents or submits documentation sufficient to register the voter as described in paragraph (1)(a) or (1)(b). Upon receipt of such information or documentation by an election official, the ballot shall be tabulated and the voter shall be registered as a fully active registered voter, effective as of the date of the submission or receipt of the original application.

e. Nothing in this Order shall be construed to require the Defendant to maintain a voter in provisional status on the state's voter registration list after two federal general elections have been conducted since the date of the original application.

2. This Order constitutes a final order and judgment pursuant to Rule 54 resolving the merits of this action. The parties stipulate to the entry of this Order in full and final resolution of all claims and issues presented in this action, except claims for costs and attorney fees. The parties mutually agree that they will not appeal this Stipulated Final Order and Judgment to any court. This Court retains jurisdiction of this action to enforce the terms of this Order, and to adjudicate claims for costs and attorney fees.

IT IS SO ORDERED.

DATED this 16th day of March, 2007.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

SUBMITTED jointly this _____day of March, 2007, by:

HILLIS CLARK MARTIN & PETERSON, P.S.

Louis D. Peterson, WSBA #5776
1221 Second Avenue, Suite 500
Seattle, WA 98101-2925
206-623-1745; 206-623-7789 (fax)
lpd@hcmp.com

Attorneys for Plaintiffs Washington Association of Churches, et al.

OF COUNSEL:

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

Robert A. Atkins*
Evan Norris*
J. Adam Skaggs*
Patricia E. Ronan*
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000
* Admitted *pro hac vice*

BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW

Wendy R. Weiser*
Justin Levitt*
161 Avenue of the Americas
12th Floor
New York, New York 10013
(212) 998-6730
* Admitted *pro hac vice*

ROBERT M. MCKENNA
ATTORNEY GENERAL

James K. Pharris, WSBA # 5313
Jeffrey T. Even, WSBA # 20367
Deputy Solicitors General

Greg Overstreet, WSBA #26682
Special Assistant Attorney General

1125 Washington St. SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-3027
jamesp@atg.wa.gov

Counsel for Defendant