UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

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

Civil No. 4:07cv402 SPM/WCS

vs.

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

Defendant.

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE SECRETARY OF STATE'S MOTION TO DISMISS

TABLE OF CONTENTS

Table of Authorities ii

Preliminary Statement 1

The Amended Complaint 4

Argument 6

I. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED THAT SUBSECTION 6 VIOLATES AND IS PREEMPTED BY HAVA 7

A. Plaintiffs Have Stated a Claim that Subsection 6 Obstructs the Goals of the Registration List Provisions in Section 303(a) of HAVA 9

B. Plaintiffs Have Stated a Claim that Subsection 6 Directly Conflicts with Section 303(b) of HAVA 13

II. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED THAT SUBSECTION 6 VIOLATES THE VOTING RIGHTS ACT 17

A. Plaintiffs Have Stated a Claim Under the Materiality Provision of the VRA 17

B. Plaintiffs Have Stated a Claim Under Section 2 of the VRA 20

III. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED THAT SUBSECTION 6 VIOLATES THE NVRA 21

IV. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED THAT SUBSECTION 6 VIOLATES THE 1ST AND 14TH AMENDMENTS OF THE CONSTITUTION 22

A. Plaintiffs Have Stated a Claim that Subsection 6 Unduly Burdens the Right to Vote 22

1. The Constitutional Balance is a Question of Fact 23

2. Defendant Misconstrues the Character and Magnitude of the Burden 24

3. These Burdens are Neither Reasonable nor Nondiscriminatory, and Cannot be Justified by the "Precise Interests" Asserted 25

B. Plaintiffs Have Stated a Claim that Subsection 6 Violates the Equal Protection Clause 28

C. Plaintiffs Have Stated a Claim that Subsection 6 Violates the Due Protection Clause 31

Conclusion 32

TABLE OF AUTHORITIES

CASES

AFL v. *Chertoff*
2007 WL 2972952 (N.D. Cal. 2007) 6

Bell v. Marinko
235 F. Supp. 2d 772 (N.D. Ohio 2002).....32

Bradley v. Indiana State Election Bd.
797 F. Supp. 694 (S.D. Ind. 1992).....20

Burdick v. Takushi
504 U.S. 428 (1992)..... *passim*

Burton v. City of Belle Glade
178 F.3d 1175 (11th Cir. 1999) 21

Bush v. Gore
531 U.S. 98 (2000).....28, 31

CBS Inc. v. *Primetime 24 Joint Venture*
245 F.3d 1217 (11th Cir. 2001) 15

Condon v. Reno
913 F. Supp. 946 (D.S.C. 1995).....18

Connecticut Nat'l Bank v. *Germain*
503 U.S. 249 (1992).....15

Crosby v. *Nat'l Foreign Trade Council*
530 U.S. 363 (2000).....12

Diaz v. Cobb
435 F. Supp. 2d 1206 (S.D. Fla. 2006) 19

Duke v. Cleland
5 F.3d 1399 (11th Cir. 1993) 24

Duke v. Smith
13 F.3d 388 (11th Cir. 1994) 31

Dunn v. Blumstein
405 U.S. 330 (1972).....28

Friedman v. Snipes
345 F. Supp. 2d 1356 (S.D. Fla. 2004) 18

Fulani v. Krivanek
973 F.2d 1539 (11th Cir. 1992) 28

Gibbons v. *Ogden*
22 U.S. (9 Wheat) 1 (1824).....12

Harry v. *Marchant*
291 F.3d 767 (11th Cir. 2002) 15

Johnson v. Governor of Fla.
405 F.3d 1214 (11th Cir. 2005) 21

League of Women Voters of Albuquerque/Bernalillo County v. Santillanes
2007 WL 782167 (D.N.M. 2007) 25

Libertarian Party of Ohio v. Blackwell
462 F.3d 579 (6th Cir. 2006) 25, 27

Magluta v. *Samples*
375 F.3d 1269 (11th Cir. 2004) 6

Mathews v. Eldridge
424 U.S. 319 (1976).....32

McNeil v. Springfield Park Dist.
851 F.2d 937 (7th Cir. 1988) 21

Menasche v. *United States*
348 U.S. 528 (1955).....14

New Alliance Party v. Hand
933 F.2d 1568 (11th Cir. 1991).....23

O'Brien v. Skinner
414 U.S. 524 (1974).....29

Pharmaceutical Research & Mfrs. of Am. v. *Meadows*
304 F.3d 1197 (11th Cir. 2002) 12, 14

Purcell v. *Gonzalez*
127 S. Ct. 5 (2006).....23

Regan v. *Wald*
468 U.S. 222 (1984).....15

Rosario v. Rockefeller
410 U.S. 752 (1973).....29

Scheur v. *Rhodes*
416 U.S. 232 (1974).....6

U.S. Taxpayers Party of Florida v. Smith
871 F. Supp. 426 (N.D. Fla. 1993).....23

United States v. *Ballinger*
395 F.3d 1218 (11th Cir. 2005) 14

Washington Ass'n of Churches v. Reed
492 F. Supp. 2d 1264 (W.D. Wash. 2006)..... *passim*

Wexler v. Anderson
452 F.3d 1226 (11th Cir. 2006) 28

Wisconsin Pub. Intervenor v. *Mortier*
501 U.S. 597 (1991).....12

UNITED STATES CODE

42 U.S.C. § 1971(a)(2)(B) 17

42 U.S.C. § 1973.....20, 21

42 U.S.C. § 1973gg-6(a)(1) 21

42 U.S.C. § 1973gg-7(b)(1) 22

42 U.S.C. § 15329.....15

42 U.S.C. § 15483(a) ..... *passim*

42 U.S.C. § 15483(b)(2)(A).....13

42 U.S.C. § 15483(b)(2)(B) 13

42 U.S.C. § 15483(b)(3) 13

CONGRESSIONAL RECORD

148 Cong. Rec. S709-03, 2002 WL 220374 (Cong. Rec.) 8

148 Cong. Rec. S1171-03, 2002 WL 272861 (Cong. Rec.) 8

148 Cong. Rec. H3677-04, 2002 WL 1337884 (Cong. Rec.).....8

148 Cong. Rec. S10488-2, 2002 WL 31317844 (Cong.Rec.) 9, 11, 12, 14

FLORIDA CONSTITUTION

Fla. Const. Art. VI, § 2.....17

FLORIDA STATUTES

Fla. Stat. § 97.053(6).....31

Fla. Stat. § 101.043 27

MISCELLANEOUS

Fl. Staff An., H.B. 1589 (Apr. 15, 2005) 26

State of Florida HAVA Plan (June 2004).....16

State of Florida HAVA Plan (October 2006) 16

PRELIMINARY STATEMENT

Defendant's motion to dismiss concedes the very grounds on which it should be denied: (1) as a matter of law, the State is not required to make the "matching" or verification of a number a precondition to registration; and (2) as a matter of fact, the matching and verification process is an unreliable and error-riddled enterprise that will block eligible Florida citizens from voting in 2008.

Those two uncontested allegations are precisely why plaintiffs seek to enjoin 97.053(6) of the Florida Statutes ("Subsection 6"), which creates a new barrier to registration and voting. They are also the reasons why the court in *Washington Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264 (W.D. Wash. 2006), not only sustained the sufficiency of the complaint against Washington's similar matching law, but enjoined that statute. The facts alleged in the Amended Complaint are more than sufficient to state a claim under the Help America Vote Act ("HAVA"), Voting Rights Act ("VRA"), National Voter Registration Act ("NVRA") and U.S. Constitution.

In truth, defendant's motion is not a 12(b)(6) motion at all, but a preview of his preliminary injunction opposition. Defendant does not cite the applicable standard for dismissal on the pleadings. Nor does he argue that plaintiffs have failed to allege sufficient facts to show that Florida citizens will be prevented from voting as a result of trivial errors and bureaucratic glitches having nothing to do with their eligibility to vote. That is reason enough to deny the motion.

Defendant's attempt to argue the merits on this motion is not only premature, but wrong. Defendant repeatedly asserts that Subsection 6 exists to verify the identities of registrants. Even if that were true, the Court would still have to evaluate whether the

particular means by which it did so were compatible with federal law and the Constitution. But Subsection 6 does not require that registrants' identities be verified. Instead, it forbids citizens from being registered until the State is able to verify a number on a form.

That rule perverts the intent, and directly conflicts with the text of HAVA. Defendant concedes as much by arguing that the provision of HAVA he cannot reconcile with Subsection 6 -- Section 303(b) of HAVA -- be declared "moot" and "meaningless." Def.'s Mot. to Dismiss (the "MTD") at 15. But it is a bedrock rule of statutory construction that neither courts nor litigants may nullify statutory text.

Forced to admit that HAVA does not mandate Florida's matching law, defendant all but ignores the statutory text of HAVA. Defendant stitches together pieces of Senate speeches as purported proof that Congress "authorized" Florida to make matching a precondition to registration. Resorting to legislative sausage-making cannot contradict the plain meaning of HAVA. Nor can it create a Congressional authorization that does not exist.

As the actual provisions of HAVA establish, Congress acted to enhance voter participation and deter voter fraud by obligating the States to create dependable voter registration lists, which include a "unique identifier" for every voter. Thus, the State asks applicants for a driver's license or Social Security number. Applicants who do not have one are assigned an identifying number and registered, with no more questions asked. For those applicants who do provide a number, HAVA directs the States to attempt to match and verify the number so that voters are not enrolled under the wrong identifier.

That is why Section 303(a) of HAVA -- the section with the matching exercise -- is entitled "Computerized Statewide Voter Registration List Requirements." The provisions of 303(a) are aimed at developing a useful registration list. There is no requirement that unmatched applications be rejected -- though it would have been easy for Congress to have included one. On the contrary, 303(b) of HAVA -- the section defendant now says is "meaningless" -- provides that applicants whose information is unverified are still entitled to vote: either (1) by regular ballot, if they present an acceptable form of ID; or (2) in what Congress named "Fail-Safe Voting," by a provisional ballot that will be counted if their eligibility to vote is confirmed. Congress thus intended that applicants with unverified numbers *will* be registered and *will* have the right to vote -- and Congress made that explicit in the statute.

Therefore, on the facts alleged and accepted as true, Subsection 6 violates and is preempted by HAVA. Moreover, rejecting "un-matched" applications violates the VRA, the NVRA and the U.S. Constitution due to the undeniable error rate and the racial disparity involved in those errors. The VRA and NVRA provide that voters who submit meaningfully complete and timely forms must be registered despite immaterial errors or omissions, and that voters will not be disenfranchised disproportionately on the basis of race. The Constitution prohibits insufficiently justified burdens on the right to vote that are either undue or unequal.

The disenfranchisement of thousands of eligible voters alleged in the Amended Complaint is more than sufficient to demonstrate that federal law prohibits enforcement of Subsection 6. This motion to dismiss should be denied.

THE AMENDED COMPLAINT

The Amended Complaint alleges that if Subsection 6 is not enjoined, thousands of eligible Floridians who have timely submitted complete voter registration applications will be prevented from voting in 2008 because of the flaws inherent in database matching and number verification. Am. Compl. ¶¶ 1-3. Plaintiffs, on their own behalf and on behalf of their members, thus claim that Subsection 6 violates HAVA (Counts I-III), the VRA (Counts IV-V), the NVRA (Count VI), and the First and Fourteenth Amendments of the U.S. Constitution (Counts VII-IX).

Subsection 6 bars eligible voters from registering and voting unless the Secretary of State has matched the driver's license or Social Security number on their registration application with other government databases, or the voters have otherwise verified their numbers. Am. Compl. ¶¶ 26, 28-34. The Secretary then sends the number, plus the applicant's name and date of birth, to be compared with motor vehicle or Social Security records. Am. Compl. ¶¶ 28, 44. The systems often fail to find a "match" because, for example, there has been a typo, or a name has been changed, or a compound name is listed in different ways. Am. Compl. ¶ 34.

The Court must assume the truth of these allegations for purposes of this motion, and defendant never denies them. Defendant neither contests the facts alleged, nor argues that plaintiffs have failed to allege sufficient facts. There is no dispute here that trivial mistakes, immaterial typos and meaningless database discrepancies yield high error rates and render the process unreliable. Indeed, the Social Security Administration

recently reported that of 2.6 million voter registration records it attempted to process, 46.2% resulted in a failed match. Am. Compl. ¶ 67.

It is likewise uncontested that many failed matches will be "false negatives." That is when two records appear not to relate to the same person but, in fact, do: *e.g.*, a registration form for Dick Nixon and a driver's license for Richard Nixon. These false negatives have nothing to do with the identity or eligibility of applicants. Data entry operators make mistakes when they input information, like simple typos and erroneously splitting a compound last name into a middle and last name. False negatives also occur where the original data is inputted correctly -- *e.g.*, the use of a married name in one database and a maiden name in the other. Am. Compl. ¶¶ 59-62.

Under Subsection 6, such un-matched applicants will not be allowed to register or vote unless they somehow learn that they have been rejected, somehow identify the glitch in the matching process, and somehow verify *the number* on their registration form. Am. Compl. ¶¶ 29-32, 79-82. An un-matched applicant may cast a provisional ballot, but it will not be counted unless, within two days after the election, she travels to the supervisor of elections office and presents evidence "sufficient to verify the authenticity" of the number on the registration application. If an applicant gave her Social Security digits that the State then failed to match, she must show her Social Security card; other proof of the applicant's identity -- including the same photo identification Florida requires to prove identity at the polls -- will not satisfy Subsection 6. Am. Compl. ¶ 31. If the number on an application was inadvertently mis-written or mis-typed, no proof of the voter's identity will be sufficient to verify the errant number, and the provisional ballot will not be counted. Am. Compl. ¶ 36.

Therefore, it is a given that Florida citizens who are perfectly eligible to vote and comply fully with their registration requirements will not be allowed to cast a vote that counts in 2008.

It is also a given that two federal courts have already recognized "matching" to be dangerously unreliable. In *Washington Ass'n of Churches*, the court struck down Washington's "no match/no vote" voter registration law because of the mistakes made in trying to match registration applications with other government records. 492 F. Supp. 2d at 1270. Just two weeks ago, in *AFL* v. *Chertoff*, 2007 WL 2972952 (N.D. Cal. 2007), the court enjoined the government from trying to identify illegal workers based on failed matches with the Social Security database. It found that "SSA records . . . include numerous errors" that will prevent successful matches, such as "typographical errors made in spelling an employee's name or listing the SSN; [or the] failure of the employee to report a name change." 2007 WL 2972952, at *4 and *1 n.1.

In the face of these undisputed facts and precedents, defendant claims that the Amended Complaint should be dismissed because federal law not only permits using this infirm process as a bar to registration, but that HAVA authorizes the States to do so. As demonstrated below, neither of those arguments is grounds to dismiss the Amended Complaint and both of those arguments are wrong.

ARGUMENT

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), the Court must accept the well-pleaded facts as true, resolve all inferences in the plaintiffs' favor, and view the pleadings in the light most favorable to the non-moving party. *See, e.g.*, *Magluta* v. *Samples*, 375 F.3d 1269, 1273

(11th Cir. 2004) (citations omitted). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheur* v. *Rhodes*, 416 U.S. 232 (1974). Plaintiffs here have alleged more than enough facts about the high error rates in matching, the high obstacles to voting erected by Florida's number verification process, and the high likelihood of disenfranchisement and discrimination to sustain all of their claims.

I. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED THAT SUBSECTION 6 VIOLATES AND IS PREEMPTED BY HAVA

Plaintiffs allege that Subsection 6 violates and is preempted by HAVA by making database matching and number verification a precondition to registration and voting. Am. Compl. ¶¶ 110-114. On the facts, defendant does not attempt to dispute plaintiffs' extensive factual allegations demonstrating that Subsection 6 will disenfranchise thousands of eligible Florida citizens in 2008. On the law, defendant concedes that HAVA does not mandate this precondition. He argues, however, that HAVA "authorizes" it. MTD at 9.

To make that argument, defendant relies on snippets of Senate speeches and largely ignores the text of the law. There is no provision in HAVA that authorizes States to block an eligible citizen's registration when a number is unverified. But there is a provision -- Section 303(b) -- that forbids it. Confronted by the direct and preemptive conflict between Subsection 6 and Section 303(b), defendant pleads with the Court to declare that HAVA provision a meaningless nullity. As shown below, the Court cannot do that.

Defendant also insists that Subsection 6 is permissible because it supposedly reflects the judgment of the Florida Legislature to go beyond HAVA and use matching as a tool to "verify the identity" of new voters as a precondition to registration. But there is no showing of that purported legislative intent. Quite the opposite: the legislative record states that the bill enacting Subsection 6 was designed to implement the statewide voter registration database required under the Help America Vote Act of 2002. Fl. Staff An., H.B. 1589 (Apr. 15, 2003). To be sure, the Florida legislature did pass a voter identification law -- requiring all voters to show photo ID at the polls -- but that is a different statute, Fla. Stat. §101.043, not Subsection 6. Regardless of its purported purpose, Subsection 6 cannot be reconciled with HAVA and is thus preempted.

The parties are in accord about this much: Congress enacted HAVA in response to the problems exposed during the 2000 presidential election, and the resulting lack of confidence that Americans had in the electoral system.[1] We also agree that in adopting HAVA, Congress wanted to promote participation and deter fraud.[2] We do not deny, as defendant suggests, that election fraud was of concern. The issue, however, is *how* Congress sought to achieve its goals, through the actual terms of the statute. As such,

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[1] *See, e.g.*, 148 Cong. Rec. S709-03, 2002 WL 220374 (Cong.Rec.) at S710 (statement of Sen. Dodd) ("there is no greater challenge facing this body than restoring Americans' faith in our electoral process").

[2] *See* 148 Cong. Rec. S1171-03, 2002 WL 272861 (Cong.Rec) at S1186 (statement of Sen. Wyden) ("I think at the end of the day we have to figure out ways to make it easier to vote, easier to participate in the political process, as we deter fraud."); *id.* at H3679 (statement of Rep. Hoyer) ("we must address [fraud] in the context of what the purpose of this bill is, to facilitate the exercising of the democratic franchise; to facilitate people being recognized as eligible voters.").

none of the Senate speeches cited by defendant can convert the matching provision of HAVA into a roadblock to registration.

A. Plaintiffs Have Stated A Claim That Subsection 6 Obstructs the Goals of the Registration List Provisions in Section 303(a) of HAVA

The relevant centerpiece of Congressional effort in this respect was Section 303(a) of HAVA, the "Computerized Statewide Voter List Requirements." *See* 42 U.S.C. § 15483(a). Historically registration lists were the province of local jurisdictions -- often poorly maintained and haphazardly updated, mistakenly leaving eligible voters off the rolls and inviting fraud by keeping duplicates and departed voters on the rolls. The "single, uniform, official, centralized, interactive computerized statewide voter registration list" required by Section 303(a), 42 U.S.C. § 15483(a)(1)(A), would force more accurate maintenance of the rolls, adding new registrants transparently and removing them when they became ineligible.[3]

These latter obligations -- removing ineligible voters, *id.* § 15483(a)(4)(A), and duplicates, *id.* § 15483(a)(2)(B)(iii) -- represent the means that Congress chose to use the new systems to fight fraud. If registrants were cleaned off the list as they became ineligible, the potential for fraud would decrease commensurately. The existence of reliable and computerized registration lists would itself be a deterrent to fraud. This is what much of the legislative history quoted by defendant addresses.

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[3] *See* 148 Cong. Rec. S10488-02, 2002 WL 31317844 (Cong.Rec.) at S10491-2 (statement of Sen. Bond) ("The requirement for a state-wide registration system will enhance the integrity of our election process, making it easier for citizens to vote and have their ballots counted, while clearing ineligible and false registrations from the voter rolls.").

With 14% of Americans moving (and potentially re-registering) each year, Congress needed a means to protect the systems from bloat. The solution: assign each voter a unique identifying number, *id.* § 15483(a)(1)(A)(iii). These numbers would ensure that each voter is listed only once on the registration rolls -- and that if the voter moves, her registration record "moves" with her. Moreover, if voters' records were tied to unique identifiers that the voter already used for other purposes -- e.g. driver's license and Social Security -- States could collect those identifiers with every new registration form, and reliably determine whether the form belonged to a new registrant or an "old" mover.

Thus, Section 303(a)(5) of HAVA requires registrants to provide their driver's license numbers or the last four digits of their Social Security numbers. *Id.* §§ 15483(a)(5)(A)(i)(I) & (II). It then requires the States to attempt to match that information against records maintained by the motor vehicle authorities or the Social Security Administration. *Id.* §§ 15483(a)(5)(B)(i) & (ii). When an applicant's number is successfully matched with existing government records, it ensures that one voter's registration record is not, for example, accidentally associated with another voter's driver's license number.

Nowhere does HAVA provide that a failure to match or verify this recordkeeping number may block registration. HAVA expressly provides that if an applicant with a driver's license or Social Security number fails to include that information on the registration form, the application "may not be accepted or processed," *id.* § 15483(a)(5)(A), but it contains no such parallel provision for completed applications that the State is unable to match. Likewise, applicants who have no driver's license or Social

Security number are simply assigned a unique identifying number, and need not be "matched" prior to registering. *See id.* § 15483(a)(1)(A)(ii). If residents who have no driver's license or Social Security number can be registered without having to be matched, it makes no sense to argue that those who do have a number cannot be registered or permitted to vote until they are matched.

As one federal court has already recognized, "HAVA's matching requirement was intended as an administrative safeguard for 'storing and managing the official list of registered voters,' and not as a restriction on voter eligibility." *Washington Ass'n of Churches*, 492 F. Supp. 2d at 1268. As the court stated, "it is the assignment of some kind of unique identifying number to the voter that is the requirement of § 15483(a)(1)(A)(i), not the 'match.'" *Id*. at 1268-69.

Defendant thus concedes, as he must, that HAVA does not require matchin or verification as a precondition to registration. He claims instead that HAVA "authorizes states to make identity verification a precondition of registration." MTD at 9. The HAVA provision he cites, however, does no such thing. It reads: "The State shall determine whether the information provided by an individual is sufficient *to meet the requirements of this subparagraph*, in accordance with State law." 42 U.S.C. § 15483(a)(5)(A)(iii) (emphasis added). That provision authorizes the States only to make "the determination as to whether the information supplied by the voter is sufficient to meet *the disclosure requirements*" of Section 303(a)(5)(A). 148 Cong. Rec. S10488-02, 2002 WL 31317844 (Cong.Rec.) at S10505 (statement of Sen. Dodd) (emphasis added). As discussed above, that refers to the requirement in 303(a)(5)(**A**) that voter registration applicants must provide a driver's license number or Social Security digits on the form.

It does not refer to the matching and verification process, which appears in a different section, 303(a)(5)(**B**).

Because Subsection 6 makes the matching or verification of a record-keeping number a new precondition to registration and voting, it obstructs Congress' goals in enacting HAVA's statewide registration list provision. "[S]tate laws that 'interfere with, or are contrary to the laws of congress, made in pursuance of the constitution' are invalid." *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 604 (1991) (quoting *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat) 1 (1824)). Even in an area of traditional state regulation, Congress may preempt state law by occupying a legislative field through pervasive federal regulation or through what is called "conflict preemption." *Crosby* v. *Nat'I Foreign Trade Council*, 530 U.S. 363, 372 (2000). "Implied conflict preemption occurs when (a) compliance with both federal and state regulations is a physical impossibility, or (b) when a state law is an obstacle to execution and accomplishment of the objectives and purpose of a Congressional enactment." *Pharmaceutical Research & Mfrs. of Am.* v. *Meadows*, 304 F.3d 1197, 1206 (11th Cir. 2002).

As established above, HAVA's statewide list requirements were designed to identify each individual uniquely so that voters could be moved as they changed addresses and removed as they became ineligible, and in so doing, to ensure that eligible citizens are not prevented from voting because of bureaucratic errors affecting the rolls. Not only was Section 303(a) of HAVA not intended to impose new barriers created by new administrative errors, it was intended to prevent such errors. "[I]t is simply not an accurate reading of this section to conclude that a lack of a match or a "no-match" will result in the invalidation of a voter's registration application." 148 Cong. Rec. S10488-2,

2002 WL 31317844 (Cong.Rec.) at S10504 (statement of Sen. Dodd). By doing just that, Subsection 6 conflicts with and obstructs the goals of Section 303(a) of HAVA.

B. Plaintiffs Have Stated A Claim That Subsection 6 Directly Conflicts with Section 303(b) of HAVA

Section 303(b) of HAVA further proves that a failure to match or verify the number on a registration form *cannot* preclude voter registration. It requires that, in order to vote a regular ballot, first-time voters who register by mail must have their identity validated at some point before voting, *either* by providing documentary identification, 42 U.S.C. § 15483(b)(2)(A), *or* by the State's ability to complete a successful match, *id*. § 15483(b)(3).

This means, as plaintiffs allege in Count I, that HAVA expressly permits first-time voters who register by mail, but are not successfully matched by the State, to vote a regular ballot if they present documentary proof of identity. Am. Compl. ¶ 111; *see* 42 U.S.C. § 15483(b)(2)(A). And as plaintiffs allege in Count II, Section 303(b) guarantees that first-time voters who register by mail, but are not matched and fail to bring proper identification, still have a right to vote by provisional ballot, which will be counted if they are eligible to vote under State law. Am. Compl. ¶ 122; 42 U.S.C. § 15483(b)(2)(B). Congress entitled that HAVA provision "Fail-Safe Voting." *Id*.

Subsection 6 is at war with Section 303(b). Both the identification and fail-safe voting provisions of Section 303(b) demonstrate that Congress did not intend for un-matched applicants to be excluded from the registration rolls or the polls. *See Washington Ass'n of Churches*, 492 F. Supp. 2d at 269. Subsection 6 prevents Florida from complying with Section 303(b). An eligible but un-matched Florida voter who

presents photo ID at the polls -- as Florida law requires anyway -- will not be permitted to vote a regular ballot. If such an eligible voter is given a provisional ballot, it will not be counted unless within two days, she verifies the number on her application, no matter what other evidence of her identity or eligibility she can provide. Thus, Subsection 6 frustrates the fail-safe voting requirement of HAVA. Am. Compl. ¶¶ 107, 125. *See Pharmaceutical Research*, 304 F.3d at 1206.

Defendant does not deny that Subsection 6 conflicts with Section 303(b). Instead, based on one speech by one Senator, he argues that the Court should ignore the plain text of 303(b), as enacted, as "meaningless." MTD at 15.[4] That would violate the "cardinal principle of statutory construction . . . [that courts must] give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section." *Menasche* v. *United States*, 348 U.S. 528, 538-39 (1955) (quotation marks and citations omitted); *see also United States* v. *Ballinger*, 395 F.3d 1218, 1236 (11th Cir. 2005) (*en banc*) (it is "a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (quotation marks and citation omitted). "[C]ourts must presume

[4] Even if the Court were free to disregard the plain text of the statute based on one comment on the Senate floor, Senator Dodd's explanation of Section 303(b) did not eviscerate that provision. MTD at 15. It is not clear that he meant that HAVA's matching provision rendered moot the identification requirements of 303(b) for everyone, as defendant proposes, or simply that the identification requirement would be moot for any first-time mail-in registrant who was successfully matched.

Further, defendant's excerpt cuts Senator Dodd off in mid-sentence. In the full record, he finishes the quote: ", thereby avoiding the potential disenfranchisement of minority voters." 148 Cong. Rec. S10488-02, 2002 WL 31317844 (Cong.Rec.) at S10504 (emphasis added). The matching mechanism is used to *avoid* disenfranchisement.

that a legislature says in its statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992); *see also Harry* v. *Marchant*, 291 F.3d 767, 770 (11th Cir. 2002) (*en banc*).

Courts cannot rely on legislative statements to materially alter unambiguous texts because it "open[s] the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President." *Regan* v. *Wald*, 468 U.S. 222, 237 (1984). Courts must rely instead on the "text of a statute, which is the result of innumerable compromises between competing interests reflecting many competing purposes and goals." *CBS Inc.* v. *Primetime 24 Joint Venture*, 245 F.3d 1217, 1228 (11th Cir. 2001).

Nor can defendant rely on other documents outside the pleading to nullify the statutory text. He cites a letter to a Maryland election official from a former counsel to an Assistant U.S. Attorney General. *See* MTD at 12 & Ex. B. On its face, the letter is of little, if any, weight: "the opinions expressed in this letter are not binding and would not prevent [DOJ] from taking a different position in any future litigation under HAVA." *Id.* at 1. Moreover, the letter takes the extreme position that even defendant has disclaimed -- that under HAVA, if there is no match, "the application *must* be denied." *Id.* at 3. Since that is indisputably false, the letter can hardly be relied on as proof that Section 303(b) is void.

Likewise, the Voluntary Guidelines of the U.S. Election Assistance Commission ("EAC") cited by defendant are not binding or even persuasive on this point. *See* MTD, at 12 and Ex. C. The EAC is not authorized to interpret HAVA or issue rules on its implementation. *See* 42 U.S.C. § 15329. Regardless, the EAC guidance actually

confirms that the identification provision of Section 303(b) is not moot: "[u]nder Section 303(b), [matching or number verification] provides *an exemption* to the voter identification requirement for first-time registrants by mail." MTD, Ex. C at 12. Like Florida's own "HAVA Plan," the EAC guidance demonstrates that matching is an alternative -- and, thus, not a precondition -- under Section 303(b) of HAVA.

Finally, the Florida Secretary of State has previously, and repeatedly, admitted the same thing. In submitting the State Plan required to obtain disbursements under HAVA, 42 U.S.C. §§ 15403 *et seq.*, the Secretary reported in 2004 and again in 2006: "HAVA requires persons who register by mail and have not voted in an election for federal office to provide identification prior to voting. If the State is able to match the voter's driver's license number or Social Security number against an existing State record bearing the same number, name and date of birth, further identification by the voter is not required." State of Florida HAVA Plan 38 (updated October 2006); *see also* State of Florida HAVA Plan 31 (updated June 2004) (same). The Secretary did not claim that the identification provision was moot. On the contrary, the Florida HAVA Plan states that matching is an "exception" for mail-in registrants who vote without ID. *Id.* It was for that very reason -- *i.e.*, that matching "serves as a substitute for voter ID" -- that the court in *Washington Ass'n of Churches* found that making matching a precondition for registration cannot be reconciled with Section 303(b) and is therefore preempted by HAVA. 492 F.Supp. 2d at 1270. Subsection 6 is likewise at odds with HAVA and preempted.

II. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED THAT SUBSECTION 6 VIOLATES THE VOTING RIGHTS ACT

A. Plaintiffs Have Stated a Claim Under the Materiality Provision of the VRA

The Amended Complaint alleges in great detail that eligible Florida residents will not be permitted to vote in 2008 because of typos, misspellings, data entry mistakes and trivial differences in the "matching" process that have nothing to do with their eligibility to vote under Florida law. Am. Compl. ¶¶ 49-63, 73-76. A minor error in a government record that prevents a match with another government record is not material in determining whether a voter is over the age of 18, a United States citizen and resident of Florida, and has not been convicted of a felony or adjudicated mentally incompetent without restoration of her voting rights. Fla. Const. Art. VI, § 2. *See* Am. Compl. ¶¶ 75, 144.

Therefore, plaintiffs have more than sufficiently alleged facts to show that, by making trivial errors a barrier to registration and voting, Subsection 6 violates the "materiality provision" of the Voting Rights Act: that is, individuals will be denied the right to vote "because of an error or omission on any record or paper" which is "not material in determining whether such individual is qualified under State law to vote." *See* Am. Compl. ¶¶ 73-76, 141-46. In full, Section 1971 of the VRA provides that:

> No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application [or] registration . . . if such error or omission is not material in determining whether such individual is qualified under State law to vote . . . .

42 U.S.C. § 1971(a)(2)(B).

This materiality provision "was designed to eliminate practices that could encumber an individual's ability to *register* to vote." *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1370-71 (S.D. Fla. 2004) (citation omitted) (emphasis in original). Congress adopted the materiality provision specifically "to deal with the problem of registering as a deterrent to voting." *Condon v. Reno*, 913 F. Supp. 946, 949-50 (D.S.C. 1995).

Defendant does not dispute the facts alleged about the high error rates and "false negatives" in the matching and verification process. *See* Am. Compl. ¶¶ 64-72. Nor does defendant try to argue that the tiny mistakes and meaningless differences between databases that result in "failed matches" -- *e.g.*, misplaced hyphens, compound last names, reversed digits -- are material to determining a voter's eligibility under Florida law. Indeed, on this motion, the fact that such errors are *not* material must be accepted as true. The motion should therefore be denied.

Defendant nevertheless previews the arguments for his merits brief. He argues that the VRA does not bar Subsection 6 because verifying an applicant's"identity" is material. MTD at 17. That is a non-sequitur. The issue under the VRA is not whether a registrant's identity is material to her eligibility to vote, but whether an *error* or *omission* on a record or a paper is material. An applicant who fails to provide her address or date of birth on her registration form may have made a material error or omission since the State may not know whether the applicant is a Florida resident or over 18. But no one, including defendant, maintains that a "failed match" due to a typo or data entry error -- such as, separating a compound last name (Ros-Lehtinen) into a middle and last name (Ros Lehtinen) -- is "material in determining whether such individual is qualified under State law to vote."

Defendant's assertion that verification of an applicant's identity is "undeniably material because Congress has made it so" is contradicted by his own admission that HAVA does *not* require matching or verification as a precondition to registration or voting. MTD at 10. As demonstrated above, the number and other information registrants are required to provide is for purposes of creating and maintaining the computerized registration list. An error in the number simply means that the State will assign a different unique identifier. *See* § I.A., *supra.*

Plaintiffs do not allege that the requirement that applicants disclose their driver's license number or Social Security digits violates the VRA. Indeed, this is the only proposition arguably supported by the cases cited by defendant: that the complete failure to provide information specifically required by statute may be material. MTD at 17-19. For example, in *Diaz v. Cobb*, 435 F.Supp. 2d 1206 (S.D. Fla. 2006), the court held that Florida did not violate the VRA by requiring applicants to check a box on the registration form affirming their U.S. citizenship because HAVA requires such an affirmation to confirm eligibility. It therefore followed that the "error or omission" of failing to check the citizenship check-box was material. *Id*. at 1213-14.

That, however, is not the issue here. The issue is not what happens if an applicant fails to provide the required information. The issue is whether an applicant who *does* provide the required information can be denied the right to vote based on the myriad meaningless errors that can occur in matching that information which have nothing to do with the applicant's eligibility to vote. HAVA does not require nor permit that. The materiality provision of the VRA forbids it. As the court in *Washington Ass'n of Churches* held, Washington's matching law was "in direct conflict with the 'materiality'

provision of section 1971 of the Voting Rights Act" because it prevented voters from registering based on minor errors immaterial to determining whether an applicant was qualified to vote under Washington law. 492 F. Supp. 2d at 1270-71. The same is true in Florida.

B. Plaintiffs Have Stated a Claim Under Section 2 of the VRA

Section 2 of the VRA prohibits any "standard, practice, or procedure . . . which results in a denial or abridgment of the right of any citizen . . . to vote on account of race or color." 42 U.S.C. § 1973(a). The Amended Complaint alleges that Florida's practice of refusing to register applicants whose identifying number cannot be verified will deny the right of citizens to vote on account of race or color, because it will have a disproportionate impact based on naming conventions that are inseparable from race. Am. Compl. ¶¶ 39, 62-63, 156-58.

Defendant misunderstands the nature of this claim, perhaps because it may present a case of first impression. This is not a claim of mere disproportionate impact. Rather, the fact is that verification errors are more likely for certain minorities, not merely because of some independent causal factor, but *because* of their race's naming conventions. Subsection 6 therefore disproportionately denies the vote to Florida citizens "on account of" race. That is more than enough to state a claim under Section 2 of the VRA. *See, e.g., Bradley v. Indiana State Election Bd.*, 797 F. Supp. 694, 698 (S.D. Ind. 1992) (denying 12(b)(6) motion to dismiss because "cases under § 2 require a 'searching practical evaluation' of the 'past and present reality' surrounding voting practices, as considered in light of the totality of facts and circumstances" and requiring a fully

developed factual record) (quoting *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 940 (7th Cir. 1988)).[5]

III. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED THAT SUBSECTION 6 VIOLATES THE NVRA

Defendant argues that the "matching" requirement of Subsection 6 does not violate Section 8(a)(1) of the NVRA, 42 U.S.C. § 1973gg-6(a)(1)(A) ("Section 8(a)(1)"), because Section 8(a)(1) relates solely to voter registration deadlines and leaves to states the determination of voter eligibility and the validity of a voter registration application. Thus, he contends, Florida may deem applications that cannot be "matched" invalid without running afoul of the NVRA. MTD at 23.

Defendant's cramped interpretation of Section 8(a)(1) misconstrues plaintiffs' NVRA claim. Section 8(a)(1) requires states to "ensure that any eligible applicant is registered to vote in an election . . . if the valid voter registration form of the applicant" is submitted, mailed or otherwise received "not later than the lesser of 30 days, or the period provided by State law, before the date of the election." In addition, the NVRA

[5] Even if the court were to find that the naming conventions were not directly tied to race, and that the resulting differential impact of the law was therefore not "on account of" race, defendant overreaches by claiming that the claim must be dismissed absent an allegation of racial bias or discriminatory intent. Establishing discriminatory intent is not necessary for a Section 2 claim. *See Johnson v. Governor of Fla.*, 405 F.3d 1214, 1227 (11th Cir. 2005) ("Congress amended Section 2 of the Voting Rights Act so that a plaintiff could establish a violation without proving discriminatory intent."); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1196 (11th Cir. 1999) ("Congress amended section 2 to clarify that a plaintiff may establish a violation by a showing of discriminatory results alone."). One of Congress' purposes in amending Section 2 more than 25 years ago was, at a minimum, to permit an inference of such discrimination from the "totality of the circumstances." 42 U.S.C. § 1973(b). Such circumstances are alleged here -- *e.g.*, racially disproportionate impact in a state with a history of voting-related discrimination -- and it is for the finder of fact to determine the plausibility of such an inference.

prohibits states from requiring applicants to provide information on their voter registration application that is not "necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1).

Plaintiffs have alleged facts sufficient to state a claim under Section 8(a)(1) of the NVRA. In particular, plaintiffs have alleged that some of their members and other eligible Floridians will timely submit a complete voter registration application, Am. Compl. ¶¶ 12, 21, and that defendant will unlawfully fail to ensure that these applications are processed for the sole reason that defendant is unable to verify the number on the application, whether or not the voter can provide ample proof of identity and eligibility. Am. Compl. ¶¶ 3-4, 34, 45-49, 54, 58, 61-63. As explained in Section I.B., *supra*, HAVA does not permit States to refuse to process a voter registration application because the applicant's information cannot be matched. For the same reasons, defendant's suggestion that "unmatched" applications are not valid under Section 1973gg-6(a)(1) of the NVRA and thus need not be processed is incorrect, and defendant's motion to dismiss plaintiffs' NVRA claim should be denied.

IV. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED THAT SUBSECTION 6 VIOLATES THE 1st AND 14th AMENDMENTS OF THE CONSTITUTION

A. Plaintiffs Have Stated A Claim That Subsection 6 Unduly Burdens The Right To Vote

As defendant acknowledges, the First and Fourteenth Amendments of the Constitution require that courts closely scrutinize challenged election regulations, weighing "the character and magnitude of the asserted injury . . . against the precise interests put forward by the State as justifications for the burden imposed by its rule." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Even when voters are only modestly

burdened by State action, the State's "precise interests" must be able to justify the regulation, which must in turn be both "reasonable" and "nondiscriminatory," *id.*; *see also U.S. Taxpayers Party of Florida v. Smith*, 871 F. Supp. 426, 435 (N.D. Fla. 1993) (citing *New Alliance Party v. Hand*, 933 F.2d 1568 (11th Cir. 1991), as holding that "although the burden imposed on minor parties was not insurmountable, the interests put forth by the state were inadequate to justify the restriction imposed."). When the burden is more severe, the regulation in question must be able to survive strict scrutiny. *Burdick*, 504 U.S. at 434.

The nature, legitimacy and sufficiency of the State's asserted interests -- not to mention the burden on voters -- are all questions of fact that are improper for a motion to dismiss. Even on the merits, defendant misconstrues both the character and the magnitude of the injury pled. Moreover, no matter how severe these injuries are deemed to be, the various "precise interests" that defendant asserts to justify Subsection 6 cannot justify the burdens that the law actually imposes.

1. The Constitutional Balance is a Question of Fact

The existence and importance of a particular state interest, and the determination of whether that interest adequately justifies a burden on First Amendment interests, are questions of fact that are not properly decided on a motion to dismiss. *Duke v. Cleland*, 5 F.3d 1399, 1405-06 & 1405 n.6 (11th Cir. 1993). The very case on which defendant relies in asserting the State's interest in "preserving the integrity of its election process," states that "the possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs' challenges." *Purcell* v. *Gonzalez*, 127 S. Ct. 5, 7 (2006); *compare* MTD at 25-26. Here, plaintiffs

have alleged that the ballots of more than 20,000 voters have been imperiled by the state's verification requirement, with many more voters at risk in 2008. Am. Compl. ¶¶ 6-7. Defendant's mere assertion of a state interest in the verification requirement -- no matter how compelling -- cannot defeat the Complaint on a motion to dismiss. *See Duke* v. *Cleland*, 5 F.3d at 1405 n.6 ("[t]he existence of a state interest . . . is a matter of proof.").

2. Defendant Misconstrues the Character and Magnitude of the Burden

Defendant attempts to characterize Subsection 6 as nothing more than a ministerial requirement that "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." MTD at 27. Subsection 6 is not so benign. Rather, Subsection 6 blocks the citizen's registration until the particular number on the form is verified. Unlike the other requirements cited by defendant (*see* MTD at 27-28), the verification process is riddled with errors and mistakes *by and of the State* or other governmental agencies.

As alleged in the Amended Complaint, if the State fails in its attempt to match or verify a given number, the applicant must: (1) decipher a misleading or inadequate notice sent by the county; (2) diagnose and attempt to cure a problem of uncertain origin; (3) vote a provisional ballot; (4) decipher a second misleading or inadequate notice; (5) take a second day the same week to travel to the county supervisor's office; and (6) proffer the original card with the number. Am. Compl. ¶¶ 34-36, 79-81. Even if the

applicant manages to overcome all these obstacles, there is still no assurance that her vote will be counted. Am. Compl. ¶¶ 36.

Thus, in practice, the operation of Subsection 6 begins with errors in government-controlled databases and ends, one way or the other, at the discretion of a county's elected officials. The burdens created in this process are significant. *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 592 (6th Cir. 2006) ("[T]he fact that an election procedure can be met does not mean the burden imposed is not severe."); *League of Women Voters of Albuquerque/Bernalillo County v. Santillanes*, 2007 WL 782167, at *25 (D.N.M. 2007) ("The *Burdick* balancing test also contemplates that an election law may impose an undue burden on a person's fundamental right to vote by means of bureaucratic hurdles which impose substantial obstacles on the exercise of that right."). Moreover, if the eligible citizen or county data operator happened to transpose two digits in the number written on her form, the burden will be insurmountable -- i.e., her vote will not count..

3. These Burdens Are Neither Reasonable Nor Nondiscriminatory, and Cannot Be Justified By the "Precise Interests" Asserted

Whether this injury is "severe" or less than "severe," the creation of these hurdles is unreasonable and discriminatory. Fla. Stat. § 101.043. It is not reasonable to provide a misleading or inadequate notice as to the nature of a registration problem; it is not reasonable to expect a citizen to trace the source of an uncertain problem to an administrative record she neither created nor can access; it is not reasonable to deny a citizen the right to vote when she timely completed a registration form and is able to proffer irrefutable evidence of her identity and eligibility. These barriers also

discriminate without justification among different classes of similarly situated voters. Am. Compl. ¶¶ 39, 178. As pled, Subsection 6 has a differential impact on certain racial and ethnic minorities, on voters who have Social Security numbers but not driver's licenses, and on voters who live in different counties. Am. Compl. ¶¶ 39, 178-82.

Moreover, the barriers created by Subsection 6 cannot be justified by the "precise interests" asserted by the State. In identifying the interests in question, defendant presents a moving target. At various times, the interest asserted is the interest in preventing voter registration fraud, the interest in preventing fraudulent votes, and the overly general interest in "fair and honest elections." None of them justifies Subsection 6.[6]

The first "precise interest" asserted for Subsection 6 is the need to prevent voter registration fraud: more precisely, the need to ensure that applicants on the rolls are who they say they are. MTD at 26-27. It must first be noted that this interest is considerably less important than the interest in preventing fraudulent votes; by itself, a false name on the registration rolls causes harm to the State or its citizens only through the minor incremental cost of producing and mailing an unnecessary set of election materials. Even if this interest were compelling, however, it would not justify Subsection 6. Defendant claims an interest in the detection and prevention of fraudulent voter registrations by the

[6] Although the State asserts these interests in its briefing papers, not one of these interests appears in the legislative record for Subsection 6, either for the provision as originally passed in 2005 or for the provision as amended in 2007. The bill which enacted Subsection 6 -- H.B. 1589 -- was "designed to implement the statewide voter registration database required under the federal Help America Vote Act of 2002." Fl. Staff An., H.B. 1589 (Apr. 15, 2005). The Staff Analysis said not a word about using verification of the administrative number on a form as a means to prevent fraud.

verification of applicants' identities, but Subsection 6 does not require that a registrant verify her identity. Indeed, it precludes a citizen from registering, no matter how much proof of identity she is able to supply, as long as the State has not been able to verify a particular number on the registration form.

Likewise, the heavy burdens of Subsection 6 are not justified even by the more compelling interest in preventing votes by people who are not who they say they are. *Every* Florida voter at the polls must already show a current and valid photo identification, which confirms the voter's identity. § 101.043, Fla. Stat. Moreover, as explained above, Subsection 6 does not require that a registrant verify her identity.

Subsection 6 also is not justified by the general interest in "fair and honest elections." An election is not "fair and honest" -- nor is it an election with "integrity" -- if eligible citizens are excluded by bureaucratic errors and burdensome administrative requirements. The senseless barriers erected by Subsection 6 cause citizens to lose faith in the election process. *Cf. Libertarian Party of Ohio*, 462 F.3d at 593-94 (refusing to accept without scrutiny an asserted interest in "preserving the integrity and fairness of the electoral process.").

Finally, even if the "precise interests" asserted by the State plausibly supported Subsection 6 in the abstract, they would nevertheless fail to justify the burdens pled. The simple cry of "fraud" cannot be sufficient to impose unnecessary and undue barriers on eligible citizens' right to register and vote. Given the severity of the burdens alleged, Subsection 6 is not sufficiently tailored to the few weighty interests asserted to overcome constitutional objection. *Burdick*, 504 U.S. at 434.

B. Plaintiffs Have Stated A Claim That Subsection 6 Violates The Equal Protection Clause

Defendant again misstates the appropriate legal standard for this inquiry. Under the First and Fourteenth Amendments, an election regulation that burdens all citizens *equally* -- and which, as a result, may allow some citizens to vote while barring others who cannot surmount the burden -- is evaluated using the tests articulated in *Burdick* and briefed above. However, when the regulation exacts a *different* burden on the exercise of a fundamental right by one class of citizens than it exacts on another class of similarly situated citizens, strict scrutiny indeed applies.[7]

Even absent strict scrutiny, however, Subsection 6 arbitrarily and therefore unjustifiably treats similarly situated voters differently. Defendant claims an interest in

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[7] Put differently, for equal protection purposes, when the different classes of citizens are *created* by the law -- for example, where citizens are either registered or unregistered based on the appearance of errors beyond their control -- the *Burdick* analysis controls. For this reason, the Eleventh Circuit applies the *Burdick* analysis in ballot access cases, in which the challenged law *creates* two classes of voters: one class of voters with a candidate on the ballot and one without. *See, e.g.*, *Fulani v. Krivanek*, 973 F.2d 1539, 1542-44 (11th Cir. 1992) (applying *Burdick* to an equal protection ballot-access claim).

When the law applies differently to pre-existing classes of similarly situated citizens seeking to exercise their fundamental rights, however, the distinction is analyzed under strict scrutiny. *See, e.g.*, *Wexler v. Anderson*, 452 F.3d 1226, 1231-32 (11th Cir. 2006) (indicating heightened scrutiny if the plaintiffs had pled that voters in touchscreen counties were less likely to cast an effective vote than voters in optical scan counties, and citing *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.")); *cf. Bush v. Gore*, 531 U.S. 98 (2000) (declining to apply *Burdick* to differential burdens on voters depending on the county in which they resided). This analysis makes sense in light of *Burdick*'s command that only "nondiscriminatory" burdens on voters avoid strict scrutiny. *Burdick*, 504 U.S. at 434.

the detection and prevention of fraudulent voter registrations by the verification of applicants' identities. But Subsection 6 separates similarly situated eligible citizens into different classes -- registered and unregistered -- not based on whether they have confirmed their identity, but based on the arbitrary circumstance of whether the numbers on their forms have been matched or verified.[8] *Cf. O'Brien v. Skinner*, 414 U.S. 524, 530 (1974) (invalidating an arbitrary classification burdening voters incarcerated outside of their county of residence but not within their county of residence). This restriction -- which precludes a citizen from registering if she supplies proof of her identity but does not rectify the state's failure to verify the number on the application form -- is unreasonably arbitrary given the State's asserted interest in the law.[9]

Subsection 6 also arbitrarily and unjustifiably treats similarly situated voters differently in that eligible applicants who submit an accurate number on the registration

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[8] Defendant seems to argue for some sort of "harmless error" rule for equal protection analysis, claiming that even if it impermissibly imposes arbitrary burdens on different classes of similarly situated voters, notice and an opportunity to cure will erase the constitutional defect. Whether the State provides adequate notice and an opportunity to cure before depriving citizens of a liberty interest is more properly addressed with respect to the due process claim, discussed below. However, to the extent that defendant alleges that the ostensible notice and opportunity to cure erases all harm from the impermissible classification, plaintiffs have amply alleged that the notice is misleading or inadequate and the opportunity to cure illusory. Am. Compl. ¶¶ 34-35, 79-80. Defendant may not defeat this allegation on a motion to dismiss simply by asserting that it is untrue.

[9] Defendant asserts that the U.S. Supreme Court has allowed states to require applicants to take affirmative steps to "effectuate" their registrations. The sole case cited, however, does not support this proposition. *Rosario v. Rockefeller*, 410 U.S. 752 (1973), concerned a particular voter registration deadline -- that is, a deadline by which eligible citizens had to submit their registration form. It did not sanction any requirement that citizens take additional steps to "effectuate" their registration once a complete form was timely submitted.

form at least have a chance to become registered, while those who mistakenly transpose two digits of that number do not. Am. Compl. ¶ 179. Defendant claims that these voters are not similarly situated because one submitted an application with an erroneous piece of information. MTD at 29. Yet this distinction is not constitutionally meaningful. The voters are similarly situated in that they have both timely submitted a registration form, they are both eligible, and they both have the ability to prove their eligibility. A typographical error in a recordkeeping number -- like a typographical error in a phone number or email address -- cannot create a constitutionally meaningful distinct class when the right to vote is at issue. *Burdick*, 504 U.S. at 434.

Subsection 6 also arbitrarily and unjustifiably treats similarly situated voters differently in that it subjects applicants who submit Social Security digits on their forms to far more risk than other voters, based solely on the distinction -- wholly irrelevant for voting purposes -- that such applicants do not possess a current and valid driver's license. Despite defendant's contention, this claim has nothing to do with prohibiting the State from using various databases; the State may continue to use as helpful tools whatever databases it wishes, including using Social Security and driver's license databases as HAVA intended, to double-check the accuracy of a recordkeeping number. It may not, however, create a process substantially more burdensome for some would-be voters than others, dependent on whether the would-be voter is licensed to drive an automobile.[10]

[10] Just as defendant may not create a more burdensome registration process for voters whose last names begin with the letters M-Z, or for voters of one particular political party, the Equal Protection Clause does not permit defendant to create a more burdensome process for voters who submit Social Security digits but not driver's license numbers. In this respect, equal protection *does* "require Florida to decline the use of available . . . means [ostensibly aimed] toward the prevention of voter

Finally, Subsection 6 arbitrarily and unjustifiably treats similarly situated voters differently based on their county of residence, because the State has created a uniform mess -- including a uniformly misleading notice that a voter with an unverified number be informed that her application is "incomplete," Fla. Stat. § 97.053(6) -- without providing a uniform way out. In the "absence of specific standards to ensure [the] equal application" of Subsection 6, *see Bush v. Gore*, 531 U.S. 98, 106 (2000), as pled, different counties are employing arbitrarily different procedures to process voters caught by the flawed State policy. *See also Duke v. Smith*, 13 F. 3d 388, 395 (11th Cir. 1994).

Defendant invokes a slippery slope, claiming that court action here will inevitably lead to statewide uniformity preempting all local discretion in the administration of elections. MTD at 10-12. But this Court need only follow *Bush v. Gore* in requiring statewide uniformity when the State affirmatively creates a new barrier to casting a valid vote, and does so in a manner that invites arbitrarily different follow-through by local election officials. Plaintiffs' claims of an equal protection violation are well-pled.

C. Plaintiffs Have Stated A Claim That Subsection 6 Violates The Due Process Clause

Finally, plaintiffs have adequately alleged that Subsection 6, as implemented by the State, will deprive them of due process guaranteed by the Constitution. Am. Compl. ¶¶ 172-74.

"The right to vote is . . . a liberty interest which may not be withheld or withdrawn without due process. . . . An elector cannot be disenfranchised without notice

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registration fraud," MTD at 32, when such means impermissibly burden some voters substantially more than others based on an irrelevant distinction.

and an opportunity to be heard." *Bell v. Marinko*, 235 F. Supp. 2d 772, 777 (N.D. Ohio 2002). The sufficiency of this notice and opportunity to correct depend on three factors: the private interest affected, the risk of an erroneous deprivation of such interest through the procedures used, and the State's interest, including the burdens of additional procedural requirements. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). This is, necessarily, a fact-intensive inquiry -- and one that defendant would avoid without rebutting any alleged facts.

Here, plaintiffs have alleged that the State's arbitrary errors in matching a number on the registration form will render registrations incomplete, that the State will provide misleading notice of this deprivation, that the notice will be untimely in part due to the volume of registrations as the registration deadline approaches, and that the miserly opportunity to correct permitted by the State will be inadequate. Am. Compl. ¶¶ 50-76, 36-37. This is more than sufficient to state a claim for the deprivation of due process under the Constitution.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully submit that defendant's motion to dismiss should be denied in its entirety.

Dated: October 26, 2007

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CERTIFICATE OF SERVICE

Undersigned counsel herby certifies that a copy of the foregoing *Memorandum of Law in Opposition to Secretary's Motion to Dismiss* was served via the Court's CM/ECF electronic filing system this day, October 26, 2007, upon the following counsel of record:

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