

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

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

Plaintiffs,

v.

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

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

Defendant.

**SECRETARY OF STATE'S REPLY TO PLAINTIFFS'
RESPONSE TO THE SECRETARY'S MOTION TO DISMISS**

Defendant Kurt S. Browning, in his official capacity as Secretary of State for the State of Florida (the "Secretary"), files this reply to Plaintiffs' Memorandum of Law in Opposition to the Secretary of State's Motion to Dismiss (the "Memorandum") (doc. 38).

MEMORANDUM OF LAW

Disgruntled over congressional and legislative policy, Plaintiffs ask the Court to strike down a centerpiece of Florida's efforts to respond to election irregularities, protect the right to vote of lawful voters, and restore public confidence in the integrity of the electoral process. In doing so, Plaintiffs seek to roll back the clock on reforms that reject the unacceptable no-questions-asked "honor system" of voter registration with a common-sense process that verifies the identities of voter registration applicants. The challenged provision serves the state's most critical interests, is directly authorized by the Help America Vote Act of 2002 ("HAVA"), and is not barred the United States Constitution. This Court should dismiss Plaintiffs' claims.¹

I. COUNT I: HAVA SECTION 303(a) DOES NOT PREEMPT SECTION 97.053(6), FLORIDA STATUTES.

Far from preempting the challenged law, HAVA directly authorizes it. HAVA provides that a voter registration application "may not be accepted or processed" unless, in the case of "an applicant who has been issued a current and valid driver's license," the application includes the applicant's "driver's license number." 42 U.S.C. § 15483(a)(5)(A)(i). In the case of an applicant who has not been issued "a current and valid driver's license," but who has a Social Security number, the application "may not be accepted or processed" unless it includes "the last 4 digits of the applicant's social security number." *Id.* HAVA then expressly authorizes states to "determine whether the information provided by an applicant is sufficient to meet [these requirements], in accordance with State law." 42 U.S.C. § 15483(a)(5)(A)(iii). This is precisely what the challenged law does. It determines that the information provided by an applicant is

¹ In this Reply, the Secretary addresses Plaintiffs' HAVA claims—Counts I, II, and III of Plaintiffs' Amended Complaint. Because Plaintiffs' Memorandum gave only passing treatment to Plaintiffs' remaining claims, offering little new argument, these will be discussed more fully in the Secretary's forthcoming response to Plaintiffs' Motion for Preliminary Injunction.

sufficient—and that the application may therefore be accepted and processed—if the information provided can be either matched to data in an official database or authenticated by the applicant. § 97.053(6), Fla. Stat. The challenged law rests squarely on HAVA’s express terms, and nothing in HAVA expressly prohibits the means of implementation chosen by Florida.

Plaintiffs resort to a variety of transparently fatal rhetorical shifts to avoid this conclusion. While they suggest that the challenged law directly conflicts with HAVA, *see doc.* 38 at 9 (stating that Section 97.053(6), Florida Statutes, “directly conflicts with the text of HAVA”), they once again fail to cite the HAVA provision—which they otherwise loudly maintain—that expressly prohibits it. Elsewhere, Plaintiffs suggest that the challenged law is invalid simply because HAVA does not *require* matching, *see id.* at 8, as though state election regulations not federally mandated are necessarily prohibited. Ultimately, Plaintiffs contend that HAVA preempts the challenged law because it “conflicts with and obstructs the goals of Section 303(a),” *see id.* at 20, yet they merely mock the Secretary’s ample citation to the Congressional Record to demonstrate what the “goals of Section 303(a)” in fact are, and that they are precisely those served by the challenged statute: the prevention of voter registration fraud.

Plaintiffs first concede, as they must, that the prevention of voter fraud was a leading purpose of HAVA, *see id.* 38 at 9, 15, then belittle the importance of HAVA’s legislative history, *see id.* 38 at 9 (“Defendant stitches together pieces of Senate speeches”); *id.* at 14 (“[D]efendant relies on snippets of Senate speeches”), and finally, without citation, wishfully rewrite a legislative history more to their liking, *see id.* at 9, 19 (contending that the purpose of HAVA was “to ensure that eligible citizens are not prevented from voting because of bureaucratic errors” or “so that voters are not enrolled under the wrong identifier”). In their gymnastics to avoid congressional intent of record, Plaintiffs not only disparage reality and write a revisionist

theory of legislative history, they completely ignore HAVA's express pronouncements that its requirements "are minimum requirements" that must not be construed to prevent a state from establishing requirements that are "more strict," and that the "specific choices on the methods of complying with the requirements of [Title III of HAVA] shall be left to the discretion of the State." 42 U.S.C. §§ 15484, 15485. Indeed, the palpable silence with which Plaintiffs treat these authorizing provisions disables Plaintiffs' accusation that it is the Secretary who "ignores the statutory text of HAVA." *See* doc. 38 at 9.

Finally, beset by HAVA provisions that recognize the continuing discretion of states to combat fraud, *see* 42 U.S.C. §§ 15483(a)(5)(A)(iii), 15484, 15485, and a legislative history of identical import, *see, e.g.*, doc. 23 at 12-13, Plaintiffs make one futile effort to explain away Section 15483(a)(5)(A)(iii), which, entitled "Determination of validity of numbers provided," authorizes each state to "determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law." Plaintiffs contend that a state may not determine whether the information provided by an individual is sufficient to meet the requirements of subparagraph (A)—namely, that applicants place their driver's license or Social Security numbers on their applications—by means of the very matching system described in subparagraph (B). *See* doc. 38 at 18-19. Neither HAVA's text nor logic supports this upside-down position. The purpose of Section 15483(a)(5)(A)(iii) is to empower states, according to their own laws, to determine whether an applicant has provided a valid driver's license or Social Security number, and, consequently, whether the application may be "accepted [and] processed." Nothing in HAVA bars states from using the process established by subparagraph (B) as the means of determining whether the requirements of

subparagraph (A) have been satisfied.²

Plaintiffs' concession that HAVA serves an anti-fraud purpose, *see* doc. 38 at 9, 15, is, without more, fatal to their claim that the challenged law—an anti-fraud provision—“obstructs the goals” of HAVA. Indeed, their dismissive treatment of congressional intent is particularly ill-suited to a preemption claim.³ “When determining whether a state law is preempted . . . , we look to the intent of Congress” *Foley v. Luster*, 249 F.3d 1281, 1286 (11th Cir. 2001); *accord Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (“The purpose of Congress is the ultimate touchstone [of preemption]”). Plaintiffs attempt to deflect this result by advancing alternative “goals”—goals with little or no basis in fact. For example, Plaintiffs suggest that one purpose of Section 303(a)(5)(A) was to “ensure that eligible citizens are not prevented from voting.” Doc. 38 at 19. There is no support for this position in HAVA’s text or legislative history, and Plaintiffs cite none.⁴ While the computerized database established by Section 303(a)(1) may well serve this function, Section 303(a)(5)’s identification and verification provisions serve a strictly anti-fraud purpose. *See, e.g.*, 148 Cong. Rec. S10503 (statement of Sen. Dodd) (describing Section 305(a)(5) as one of HAVA’s three “anti-fraud provisions”); doc. 23 at 2-7. This intent is unmistakable in the restrictive nature of Section 303(a)(5)’s operative

² Indeed, Plaintiffs’ interpretation rewrites Section 15483(a)(5)(A) to read that a “State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law, except that a State shall not determine the sufficiency of such information by means of the verification procedures established in subparagraph (B).” This interpretation is just plain wrong.

³ It is also inconsistent with the Northern District’s decision in *Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073 (N.D. Fla. 2004), which relied on remarks in the Congressional Record as an aid in the interpretation of HAVA. *See id.* at 1076-77, 1080 n.7.

⁴ While HAVA in its totality serves two purposes—“to make it easier to vote and tougher to cheat,” *see* 148 Cong. Rec. S10488 (statement of Sen. Bond)—not all HAVA provisions further both purposes. In general, HAVA contains three strictly “anti-fraud provisions,” including Sections 303(a)(5) and 303(b)(1)-(3). The other is Section 303(b)(4), which provides for a citizenship checkbox on certain mail registration forms. *See* 148 Cong. Rec. 10503.

words. If Congress in fact intended Section 303(a)(5) to facilitate voter registration rather than operate as a necessary check upon fraudulent applications, its choice of words to express that intent—“may not be accepted or processed”—was highly unfortunate.

Plaintiffs next contend that the purpose of Section 303(a)(5)(A)’s requirement that an applicant provide a driver’s license or Social Security number is to enable the subsequent assignment of a “unique identifier” to each voter.⁵ *See, e.g.*, doc. 38 at 9. This is flatly wrong. The requirement that a state assign a “unique identifier” to each voter is clearly separate in HAVA’s structure, arising from Section 303(a)(1)—not Section 303(a)(5). In fact, nothing in Section 303(a)(5) suggests that the number provided by an applicant and the unique identifier assigned to a registrant by the state were ever intended to be one and the same. As Plaintiffs note, the last four digits of an applicant’s Social Security number are anything but “unique”: “every ‘last four’ digit combination returns approximately 40,000 Social Security numbers.” *See* doc. 1 at ¶ 45. As a result, there is and can be no relationship between the number provided by an applicant pursuant to Section 303(a)(5) and the “unique identifier” assigned pursuant to Section 303(a)(1).⁶ Finally, even if the purpose of Section 303(a)(5) was simply the assignment

⁵ Curiously, while Plaintiffs acknowledge that a leading purpose of HAVA was fraud prevention, their interpretation of Section 303(a)(5) would serve no legitimate fraud prevention purpose. For example, under Plaintiffs’ theory, election officials would be compelled to accept and process the application of Goon E. Bird, residing at 123 Goon E. Bird Lane, with Social Security digits 1234, even if Goon E. Bird’s identifying number was unverifiable and his address nonexistent. Officials would be powerless to prevent Goon E. Bird from appearing in state’s official database of registered voters. Thus, while the use of a driver’s license or Social Security number to assign unique identifiers might prevent accidental duplications when voters move, *see* doc. 38 at 17, it would not prevent fraud unless registration was conditioned upon the applicant’s provision of an authentic, accurate, verifiable number. Plaintiffs’ theory is premised on the myth of fraud prevention in the absence of consequences.

⁶ Tellingly, while HAVA requires states to assign a number to applicants with no driver’s license or Social Security number, and expressly provides that the assigned number will become the applicant’s unique identifier once the applicant is registered, *see* 42 U.S.C.

of a unique identifier, Section 97.053(6), Florida Statutes, *in no way* “obstructs” that purpose.

In contending that HAVA silently prohibits identity verification as a precondition of registration, Plaintiffs dismiss the intent of Congress,⁷ *see* doc. 38 at 9, 14, 21, the legal opinion of the Civil Rights Division of the U.S. Department of Justice, *see id.* at 22, the HAVA-mandated Voluntary Guidelines issued by the Election Assistance Commission (the “EAC”),⁸ *see id.* at 22-23, and the final opinion in *Washington Association of Churches v. Reed*, which upheld Washington state’s matching requirement, *see* Section IV, *infra*.⁹ Ignoring the extensive

§ 15483(a)(5)(A)(ii), there is no analogous provision requiring an applicant’s driver’s license or Social Security number to become that applicant’s unique identifier.

⁷ They also quote it out of context. While Senator Dodd did say that “it is not an accurate reading of this section to conclude that a lack of a match . . . will result in the invalidation of a voter’s registration application,” *see* doc. 38 at 12, he proceeded to explain in detail that the ultimate determination rests with the states. *See* doc. 23 at 11. The proper reading of the solitary sentence that Plaintiffs wrest to their purpose, therefore, is that HAVA does not *require* the lack of a match to result in the denial of a voter registration application.

⁸ While Plaintiffs attempt to minimize the importance of the Voluntary Guidelines, their counsel provided testimony to the EAC urging it to include language in the Guidelines precluding states from “reject[ing] voter registration applications merely because they are unable to find matching records in another database.” *See* Testimony of Wendy R. Weiser, Associate Counsel, Brennan Center, before the Election Assistance Commission, April 26, 2005 (*available at* http://www.eac.gov/News/meetings/042605/ploneexfile.2006-04-19.1204088075/attachment_download/file). Three months later, the EAC issued the final Guidelines without a trace of the language which Plaintiffs’ counsel sought. Mindful of the flimsy support for its HAVA argument in this litigation, the Brennan Center more recently lobbied for legislative change, providing testimony to Congress seeking a prohibition against the rejection of applications “solely because information on that application does not match a record in an existing government database.” *See* Testimony of Brennan Center Director, Subcommittee on Elections, Committee on House Administration, United States Congress, October 23, 2007 (*available at* http://brennancenter.org/dynamic/subpages/download_file_50749.pdf). Congress, like the EAC, has not accepted the recommendations of Plaintiffs’ counsel. Notably, the challenged law would not violate such a prohibition, since it allows applicants to authenticate the numbers they provide and thus does not reject applications “merely” because of a failed match.

⁹ Plaintiffs’ extreme position is at odds with the views of similarly situated advocacy groups, *see, e.g.*, League of Women Voters, *Helping America Vote*, June 2005 (“As HAVA is silent on how states should treat the results of this database matching, states must determine how to conduct these matches as well as what to do with the results.”) (*available at* http://www.lwv.org/Content/ContentGroups/Publications/VoterInformation/voting_statewidelists_color.pdf), and

congressional record, Plaintiffs continue to understate HAVA's fraud prevention purpose and fail to appreciate the real dangers posed by election fraud. As the Baker-Carter Commission on Federal Election Reform noted, "[f]raud in any degree and in any circumstance is subversive to the electoral process." *See* Report of the Commission on Federal Election Reform, September 2005, at 45 (*available at* http://www.american.edu/ia/cfer/report/full_report.pdf).¹⁰ "If elections are not substantially free from fraud and other irregularities, public confidence in their integrity and the validity of their results, which is essential to the maintenance of ordered liberty, is threatened. Few can doubt that deterrence, detection, and avoidance of election fraud are fundamentally important state and public concerns and interests."¹¹ *League of Women Voters v.*

even with that of the Brennan Center, *see* Remarks of Wendy Weiser, Associate Counsel, Brennan Center, before the National Association of Secretaries of State, July 25, 2005 ("HAVA leaves it to states to determine *how* to conduct matches, and *what to do* if no match can be found.") (*available at* http://brennancenter.org/dynamic/subpages/download_file_35563.pdf) (emphases in original), an advocacy group that serves as Plaintiffs' counsel in this case and as counsel to the League of Women Voters in *League of Women Voters of Florida v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006). While the Brennan Center has opined that a system which unconditionally denies a voter registration application upon the failure of a match would violate HAVA, this is not the case here. Florida law permits an applicant whose identifying number could not be matched to authenticate that number—a practice established by the Secretary and subsequently codified by the Florida Legislature. *See* Ch. 2007-30, § 13, Laws of Fla.

¹⁰ The Baker-Carter Commission concluded that election fraud was a significant threat. While the Commission was "divided on the magnitude of voter fraud—with some believing the problem is widespread and others believing that it is minor," the Commission had "no doubt that it occurs." It explained that the "problem . . . is not the magnitude of the fraud" but that "the perception of possible fraud contributes to low confidence in the system." *Id.* at 18. The Commission, noting that the U.S. Department of Justice initiated over 180 investigations into voter fraud since October of 2002, charging 89 individuals and convicting 52, recommended that states "consider new legislation to minimize fraud in voter registration." *Id.* at 45-46.

¹¹ Despite this, the abolition not only of identity verification but also of all book-closing deadlines remains a cherished policy objective of Plaintiffs' counsel. In *An Agenda for Election Reform*, the Brennan Center advocates (i) federally mandated election-day voter registration; (ii) the extreme position that "states should not be allowed to require identity documentation . . . as a condition of voter registration"; and (iii) congressional "resist[ance to] any attempt to make . . . photo ID a pre-condition of voting." Brennan Center, *An Agenda for Election Reform*, 2007, at 2-3, 7, 12 (*available at* <http://www.federalelectionreform.com/pdf/Federal%20Agenda%20Policy%20Paper.pdf>). Plaintiffs' counsel accordingly initiated a related action challenging the

Blackwell, 340 F. Supp. 2d 823, 829 (N.D. Ohio 2004). Unable to accomplish their objectives legislatively, Plaintiffs ask the federal courts to impose them. This Court should decline to take the first step judicially to transform Florida's election processes and eviscerate the progress Florida has made to restore public confidence in the integrity of its elections.

II. COUNT II: SECTION 97.053(6), FLORIDA STATUTES, DOES NOT CONFLICT WITH HAVA SECTION 303(b).

Like Section 303(a)(5), Section 303(b) is an anti-fraud provision.¹² It provides that an applicant who submits a registration by mail must, when first presenting himself to vote, produce either a "current and valid photo identification" or "a copy of a current utility bill, bank statement, government check, paycheck, or other government document." 42 U.S.C. § 15483(b). This anti-fraud requirement does not apply to a voter "with respect to whom [the number provided on the voter registration application] matches" the information contained in an official

validity of Florida's book-closing deadline, *see Diaz v. Browning*, 04-22572 (S.D. Fla.) (King, J.), and have twice intervened (both times unsuccessfully) as *amicus curiae* in litigation to invalidate state law photo identification requirements, *see Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007); *In re Request for an Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1 (2007). A scheme that permits any person to appear at a polling place on election day and register and vote for the first time without any identity documentation at all is grossly incompatible with reality and with public confidence in our electoral process.

¹² Senator Bond explained the function of Section 303(b) as follows:

A principal concern of Congress addressed in this bill is the abuse of mail registration cards . . . for the purpose of committing vote fraud. The creation . . . of the mail registration cards opened a new avenue for vote fraud in many States. . . . [M]ail-in registration cards have become a means of unscrupulous individuals to register the names of deceased, ineligible or simply non-existent people to vote.

* * *

To address this, we created [in Section 303(b)] an identification requirement for first-time voters who register by mail. The security of the registration . . . process is of paramount concern to Congress and . . . the fraud provisions in this bill are necessary to guarantee the integrity of our public elections and to protect the vote of individual citizens from being devalued by fraud.

148 Cong. Rec. S10489 (statement of Sen. Bond).

database. *Id.* § 15483(b)(3)(B). HAVA expressly declares that the requirements of Section 303(b) are “minimum requirements” that may not be construed to prevent states from establishing requirements that are “more strict.” 42 U.S.C. § 15484; *accord* letter from Joseph D. Rich, U.S. Department of Justice, Civil Rights Division, to William F. Galvin, Secretary of the Commonwealth of Massachusetts (Feb. 11, 2004) (explaining that the requirements of Section 303(b) are “‘minimum requirements[,]’ and thus nothing prevents a State from establishing stricter requirements”) (*available at* http://www.usdoj.gov/crt//voting/hava/ma_ltr.htm).

Section 303(b) thus establishes a rule that does not prevent a state from requiring that *all* voters be matched—any more than it prevents a state from requiring that *all* voters present a “current and valid photo identification.” Rather, it requires mail-in applicants, *at the very least*, to either present identification or be matched. *Stricter* requirements are not “at war” with Section 303(b). *See* doc. 38 at 20. They are expressly permitted. 42 U.S.C. § 15484. It is only *lesser* requirements that would wage war on Section 303(b).

Plaintiffs simply avert their eyes from the words of the statute. Instead, they suggest that Section 303(b) prohibits states from requiring matching as a precondition of registration because its photo identification requirement applies only where no match has been made. *See* doc. 38 at 20-23. This view converts Section 303(b) from a *minimum* requirement into a *maximum* requirement. Indeed, according to Plaintiffs, a state would be barred from requiring all voters to present photo identification. If an unmatched mail-in applicant has a *right* to vote upon presentation of proper identification, a matched mail-in applicant has an equal *right* to vote without the presentation of such identification. In fact, Section 303(b) unequivocally excepts matched applicants from its photo identification requirement. Under Plaintiffs’ “either/or” logic,

which suggests that Section 303(b) *guarantees the right* of mail-in applicants to vote a regular ballot if they *either* present identification *or* are matched, any generally applicable photo identification requirement would render Section 303(b)(3)(B)'s matching exception meaningless.

Plaintiffs' interpretation would thus invalidate not only a generally applicable matching requirement, but also any generally applicable photo identification requirement. The fallacy of Plaintiffs' logic is illustrated by the spate of recent cases that have upheld generally applicable photo identification laws. *See, e.g., Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007); *Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333 (N.D. Ga. 2007); *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006); *Gonzalez v. State of Arizona*, No. CV 06-1268-PHX, 2006 WL 3627297 (D. Ariz. 2006); *In re Request for an Adv. Op. Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1 (2007); *cf. Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006). The adoption of Plaintiffs' theory serves the policy objectives of their counsel, but would usher in sweeping consequences contrary both to these precedents and the express language of HAVA.

No interpretation could be more absurd—or more destructive to the electoral process—than that which transforms an anti-fraud provision expressly establishing minimum requirements into a ban on all matching and photo identification laws. “[N]othing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.” *Johnson v. United States*, 529 U.S. 694, 706 n.9 (2000). The error in Plaintiffs' reasoning, of course, is their assumption that Section 303(b) grants applicants a *right* to vote upon satisfaction of one or the other requirement. It does not. It imposes only “minimum requirements” that apply to the extent state law does not impose requirements that are “more strict.” *See* 42 U.S.C. § 15484.

Plaintiffs mischaracterize the Secretary's position. Seizing on the legislative history quoted by the Secretary—a history that reveals the views of Congress to be diametrically opposite to those of Plaintiffs—Plaintiffs suggest that the Secretary “pleads with the Court to declare [Section 303(b)] a meaningless nullity.” Doc. 38 at 14. The Secretary does no such thing. On the contrary, the Secretary argues only that the Court recognize what HAVA expressly provides: that states may enact anti-fraud provisions that are “more strict” than those contained in Section 303(b).¹³ See doc. 23 at 16-17. In fact, the Secretary's position alone avoids extremes and reconciles all implicated federal and state laws. He neither suggests that HAVA mandates matching as an absolute prerequisite to registration, which *would* render Section 303(b)'s identification requirement meaningless, nor that Section 303(b), which expressly prescribes “minimum requirements,” bans state law anti-fraud measures.

Finally, even if Plaintiffs could rewrite HAVA to provide that its requirements are “maximum requirements” rather than “minimum requirements,” the challenged law would still be consistent with Section 303(b). At most, Section 303(b) contemplates the existence of *some* mail-in applicants who, upon presentation of proper identification, are entitled to vote a regular ballot despite the absence of a match. Thus, at most, it contemplates that a successful match is not an absolute prerequisite to registration. This is true in Florida, where a match is not *sine qua non* of registration. Registration can be accomplished either by a successful match or by the applicant's authentication of the number provided on the application. Accordingly, in Florida, a mail-in applicant who has not been matched but who has authenticated the number provided—as well as any applicant who does not have a driver's license or Social Security number—may vote

¹³ Plaintiffs suggest that the Secretary has previously taken a different position, *see* doc. 38 at 23, but there is no inconsistency in explaining HAVA's provisions while recognizing that those provisions are minimum requirements which the Florida Legislature is free to supplement.

a regular ballot pursuant to Section 303(b) upon presentation of proper identification. *See* §§ 97.053(6), 101.043(1), Fla. Stat. Even assuming, contrary to its plain command, that HAVA establishes maximum standards, Florida law fully answers the contemplation of Section 303(b).

III. COUNT III: SECTION 97.053(6), FLORIDA STATUTES, DOES NOT CONFLICT WITH THE FAIL-SAFE VOTING PROVISION OF HAVA SECTION 303(b)(2)(B).

In Count III, Plaintiffs contend that the challenged law conflicts with the fail-safe voting provision of Section 303(b)(2)(B). Fail-safe voting permits an applicant who registered by mail and whose driver's license or Social Security number has not been matched to vote a provisional ballot if the applicant, when first presenting himself to vote, fails to produce the identification required by Section 303(b). 42 U.S.C. § 15483(b)(2)(B). The provisional ballot will be counted if election officials "determine[] that the individual is eligible under State law to vote." *Id.*

§ 15482(a)(4). As Senator Dodd explained, "

[A] first-time mail registrant voter without proper identification . . . is entitled to vote by provisional ballot, and that ballot is counted according to State law. . . . Whether a provisional ballot is counted or not depends solely on State law, and the conferees clarified this by adding language in section 302(a)(4) stating that a voter's eligibility to vote is determined under State law.

148 Cong. Rec. S10504; *accord id.* at S10489 (statement of Sen. Bond) ("[N]o provisional ballot will be counted until it is properly verified as a legal vote under state law."). Florida law is exactly so. Any person, including a mail-in applicant, may, upon presenting himself to vote, cast a provisional ballot, even if the person was not matched and does not present identification. *See* §§ 97.053(6), 101.043(2), Fla. Stat.; *Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1081 (N.D. Fla. 2004). The provisional ballot will be counted "under State law" if (i) the driver's license or Social Security number is matched by the end of the canvassing period; or (ii) no later than 5 p.m. on the second day after the election, the applicant presents evidence

verifying the authenticity of that number. *See* § 97.053(6), Fla. Stat. Fail-safe voting requires nothing more. It permits an unmatched applicant without identification to cast a provisional ballot and requires states to determine the conditions on which the voter will be deemed eligible.

Plaintiffs argue that Florida law contravenes the fail-safe provision because the provisional ballot will not be counted “unless within two days, [the voter] verifies the number on her application.” Doc. 38 at 21. Plaintiffs appear to contend that a state may not prescribe the conditions on which a provisional ballot cast pursuant to the fail-safe provision may be counted. This is directly contrary to HAVA, *see* 42 U.S.C. § 15482(a)(4), and fundamentally misunderstands the nature of a provisional ballot. Any provisional ballot is in fact *provisional*, or “accepted or adopted tentatively; conditional.” *See* <http://dictionary.com>. Either federal or state law must prescribe the terms on which provisional ballots will be counted. Federal law not only forbears to do so, it expressly defers to state law. And Plaintiffs cite nothing for the position that the particular conditions which Florida law attaches to the validity of provisional ballots cast pursuant to HAVA’s fail-safe provision are improper.

IV. PLAINTIFFS’ RELIANCE ON *WASHINGTON ASSOCIATION OF CHURCHES V. REED* AND *AFL V. CHERTOFF* IS MISPLACED.

Plaintiffs rely heavily on a non-final order preliminarily enjoining Washington state’s matching requirement, *see Washington Association of Churches v. Reed*, 492 F. Supp. 2d 1264 (W.D. Wash. 2006), and, in doing so, entirely ignore the Court’s final stipulated order—which *upheld* it. In fact, the result of *Reed* was essentially the same process which Section 97.053(6), Florida Statutes, already embodies. Under the Court’s final order, Washington state can—and does—continue to match applicants’ identifying numbers. An applicant whose number could not be matched is required to provide election officials supplemental identification in order to be registered to vote. *See* doc. 23 Exh. 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.”¹⁴ And, even if the Court had not ultimately upheld Washington’s matching requirement (which it did), its non-final order would be entitled to little or no precedential force because it was not an adjudication on the merits. *See, e.g., Martin v. Texaco, Inc.*, 602 F. Supp. 60, 63 (N.D. Fla. 1985).

American Federation of Labor v. Chertoff, C 07-04472 CRB, 2007 WL 2972952 (N.D. Cal. 2007), also turns against Plaintiffs on a closer view. In *Chertoff*, the Court considered the validity of a rule promulgated by the U.S. Department of Homeland Security providing that the receipt by an employer of a letter from the Department indicating that information provided by the employer regarding an employee did not match data in the Social Security database constitutes constructive knowledge on the part of the employer of the unauthorized status of the employee. The Court granted the injunction because the Department failed to set forth any analysis for the new policy (which was a shift from prior policy) as required by the Administrative Procedure Act. It did *not* conclude that such an analysis *could not* be provided—noting that the Department “may well have the authority to change its position”—only that it *was not* provided. *Id.* at *10. More significantly, the Court concluded that there is a rational connection between a failed match and an employee’s employment eligibility: “A discrepancy in the SSA database is not a tell-tale sign of [employment] ineligibility, but because ineligibility

¹⁴ It is well established, moreover, that the decisions of district courts are not precedent and deserve deference only to the extent they are persuasively reasoned. *See Dow Jones & Co. v. Kaye*, 256 F.3d 1251, 1258 (11th Cir. 2001). In *Reed*, the Court overlooked critical provisions of HAVA (including Section 304), did not account for its legislative history, and made no mention of its anti-fraud purpose. Indeed, the Washington Secretary of State did not present to the Court the legislative history outlined in the present case. Any deference to which it might otherwise be entitled is extinguished by its uninformed reasoning.

is one reason why discrepancies occur, it is rational for [the Department] to use no-match letters as an indicator of a potential problem.” *Id.* (marks omitted). Thus, the Court did not, as Plaintiffs imply, enjoin the Department’s policy because of concerns about the matching process.

V. **PLAINTIFFS IMPROPERLY ATTRIBUTE FACTUAL CONCESSIONS TO THE SECRETARY.**

Without any foundation, Plaintiffs assert that the Secretary “concedes” that “the matching and verification process is an unreliable and error-riddled enterprise that will block eligible Florida citizens from voting in 2008.” Doc. 38 at 8; *accord id.* at 25. Plaintiffs’ attempt to impute factual concessions to the Secretary on a motion to dismiss—for purposes of which the Secretary is bound to accept the Plaintiffs’ allegations as true, *see Williams v. Bd. of Regents*, 477 F.3d 1282, 1288 n.2 (11th Cir. 2007)—is improper. When properly before the Court, the facts will show that the percentage of applicants whose driver’s license or Social Security number could not be matched, and who are therefore asked to authenticate that number, is not 15 to 30 percent, *see doc. 1* at ¶ 7; or 25 percent, *see id.* at ¶ 65; or 46.2 percent, *see id.* at ¶ 67; or 19.6 percent, *see id.* at ¶ 69; or 20 percent, *see id.* at ¶ 70; or 25.5 percent, *see id.* at ¶ 71; or 16 to 30 percent, *see id.* at ¶ 72; but that these projections are manifold exaggerations more consonant with Plaintiffs’ hope than with reality. Contrary to Plaintiffs’ earnest desire for pervasive error, Section 97.053(6), Florida Statutes, provides an efficient and critical safeguard against improper voter registrations, in support of the right to vote of all lawful voters.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by Notice of

Electronic Filing this 12th day of November, 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