

**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.*,

Case No. 4:07-cv-402-SPM-WCS

Plaintiffs,

vs.

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

Defendant.

**PLAINTIFFS' REPLY TO THE SECRETARY OF STATE'S RESPONSE TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs file this reply to the Secretary's Response to Plaintiffs' Motion for Preliminary Injunction ("Response") and in further support of their Motion for Preliminary Injunction.

PRELIMINARY STATEMENT

In the past week since filing his opposition brief -- in which he proclaimed the near infallibility of the registration matching system and dismissed its impact on Florida voters -- the Secretary has confessed to being confused himself by that system and vastly understating the number of potentially disenfranchised citizens. After insisting that "only" 6,000 voters are still excluded from the registration rolls due to Subsection 6, the Secretary now admits that he misread the data and the actual count is at least 14,326. And that is during an off-year before the inevitable surge in registrations in the run-up to the 2008 presidential election.

This mistake reveals more than just a doubling of injured voters. It is another concrete example of what is wrong with making "number verification" a precondition to voter registration: computers are as confounding and error-prone as the people who use them and, as an undeniable consequence, thousands upon thousands of eligible Florida voters have been and will be labeled "un-matched" and denied their right to register. It is therefore *undisputed* that almost 13,000 voters were kept off the rolls for the 2006 election, and that the number of excluded voters for 2008 is already 14,000 -- and heading north.

With that evidentiary record, the question is this: what legally sufficient justification does the State have for sacrificing the franchise of so many of its own citizens? With all respect, the Secretary's answers are not sufficient.

Contrary to the Secretary's repeated invocation of potential voter fraud, Subsection 6 is neither designed to meaningfully prevent voter fraud nor necessary to accomplish that end. Given the list-making provisions of HAVA that Subsection 6 purports to implement, Subsection 6 requires that the *number* on a form -- not the identity or eligibility of an applicant -- be verified. That is why applicants with no driver's license or Social Security number are simply registered without any hassle over their identity. Perversely, under Subsection 6, an individual intent on fraudulently registering can submit a fictional name with no number and he will be registered; but a real and eligible voter who submits her number with two digits flipped will be prevented from registering and voting despite unimpeachable proof of her identity -- and despite the absence of any trace of fraud.

Such an absurd and unjust system would be hard to defend even if it truly were intended as an identity verification program for fighting voter fraud. But that is not the case. Florida does have an identification verification program to prevent fraud at the polls, and it is *not* Subsection 6: every voter must show photo ID. *See* § 101.043, Fla. Stat. Thus, even if the cartoon characters imagined by the Secretary managed to get registered, they could not vote a regular ballot "in person." Which is why the Secretary's opposition does not defend Subsection 6 as an anti-fraud weapon at the polls. He retreats to arguing that Subsection 6 is needed to combat absentee ballot fraud.

That post-hoc justification is no better. The voter identification provisions for mail-in registrants and voters adopted by Congress in HAVA (Section 303(b)) were designed among other purposes to prevent absentee ballot fraud. Indeed, that is the section of HAVA that makes clear that matching is not a precondition to registration but,

rather, only an alternative to documentary proof of identity for such voters. Ironically, if Florida had properly implemented HAVA -- like almost every other state in the nation -- it would be hard for the Secretary to claim concern about absentee ballot fraud.

Plaintiffs have shown a likelihood of success on the merits and irreparable harm by presenting evidence of thousands of voters unjustifiably left off the registration rolls; testimony from real Florida voters denied the right to register and vote; numerous examples of erroneous “failed matches” due to typos, data-entry errors, and other meaningless discrepancies; unrebutted expert testimony about the inherent flaws in database matching and the errors imbedded in the Social Security database; and the disproportionate impact on Latinos, Haitian Americans and African Americans because of naming conventions and punctuation, and on those with no driver’s license.

Against all that, the Secretary has not proven any cases of fraud among the tens of thousands of applications processed or the 14,000 applicants now denied registration. Subsection 6 has “become[] an effective voting obstacle only to residents who tell the truth and have no fraudulent purposes.” *Dunn v. Blumstein*, 405 U.S. 330, 346-47 (1972). Enjoining the enforcement of Subsection 6 and permitting the smooth operation of Federal law will further, not compromise, the integrity of Florida’s elections.

ARGUMENT

I. THE INJURIES CAUSED BY SUBSECTION 6 ARE REAL, AND THERE IS NO ADEQUATE JUSTIFICATION FOR THIS HARM

A. Discovery Has Confirmed Concrete Harm to Thousands of Voters

1. Thousands of Voters Have Been and Will Be Impacted. Thousands of voters have already been harmed by Subsection 6. By the State's own admission, 12,804 voters were blocked from registering for the 2006 elections solely because of Subsection 6.¹ On December 2, 2007, the Secretary informed Plaintiffs that 14,326 voters are still blocked from the rolls.² This "harm is not theoretical, it is actual." *See Wash. Assoc. of Churches v. Reed*, 492 F. Supp. 2d 1264, 1271 (W.D. Wash. 2006).

Moreover, the State does not dispute that many more voters will be rejected in 2008 when many more voters will apply near the registration deadline. That rush in registrations will not only yield increased data entry errors, but will make election officials less able to resolve matching errors in time for the 2008 elections. *See McCormack Decl.* ¶¶ 16-18 (doc. 8).

2. Real, Not Hypothetical, Voters Are Being Harmed. The Secretary hypothesizes that those who fail the matching process may be fictional or ineligible. *See Response* at 35. But he has produced no evidence that any one of the 72,924 applications thus far blocked or delayed by Subsection 6, *see Response*, Ex. A, ¶ 7, belonged to an ineligible voter. In contrast, Plaintiffs have produced declarations from several eligible

¹ *See* Def. Browning's Amended Answer to Plaintiff's Interrog. 4 (Nov. 8, 2007) (Burhans Supp. Decl., Ex. H (doc. 66-2)).

² *See* Def. Browning's Amended Answer to Plaintiff's Interrog. 4 (Dec. 3, 2007) (Bardos Decl., Att. 15 (doc. 85-3)).

voters harmed by Subsection 6 -- including two who timely submitted complete forms before the 2006 election and cast ballots that were not counted -- and have submitted numerous examples of typos and data-entry errors blocking others.³

The Secretary tries to minimize Subsection 6's burden by arguing that Plaintiffs have not named a specific member of their own organizations injured by the law in the past two years. But this does not show that Subsection 6 has only a "minimal burden," and the case relied on by the Secretary is entirely inapposite: in that case, the plaintiff organizations could not identify *any* voter (whether a member or non-member) who was prevented from voting by the challenged law. Response at 36-37 (citing *Indiana Dem. Party v. Rokita*, 458 F. Supp. 2d 775, 823 (S.D. Ind. 2006)). Here, by contrast, the Secretary acknowledges that 12,804 specific individuals were denied registration in time for the 2006 elections. The Secretary concedes that more than 14,000 individuals have been denied registration at present. And the Secretary does not dispute that the scale of registration activity -- and therefore harm -- will increase substantially before the pivotal 2008 elections.⁴ These are not minimal burdens.

³ The Secretary asserts that Plaintiffs have identified only "tens" of errors after thousands of hours "ransacking the records of six of Florida's most populous counties." Response at 10. The implication that Plaintiffs have searched a vast reservoir of applications is false. At the time Plaintiffs filed their Supplemental Submission, they had obtained unredacted images of original applications -- the only means to determine data-entry errors -- from only Orange and Osceola Counties (the latter of which produced only a small fraction of its un-matched applications). Since then, a few other counties have produced applications, and we now have even more examples (included in Burhans Reply Decl., Ex. 1 (filed under seal)), merely to show the nature of the problems.

⁴ The likelihood of harm to Plaintiffs is discussed in Part III, *infra*. It suffices here to note that the new-voter registration activities of the two membership-based plaintiff

3. The Means for Catching Errors Are Insufficient. The Secretary contends that the problems with failed matches and false negatives are mitigated by various work-arounds that the Secretary claims eliminate the statute's disenfranchising potential. *See* Response at 11-15. This is wrong. While the measures to catch mistakes are laudable, the fact that they are even necessary only highlights that there are tens of thousands of mistakes. And the evidence shows that these fixes are not a cure-all for the unjustifiable rejection of eligible voters.

The Secretary touts the county "override" feature in the registration system, but that was in place in June 2006 and 12,804 voters still were kept off the rolls for the 2006 election, and at least 14,326 are excluded today. The "override" merely gives the county the ability to activate an un-matched application if the voter presents a copy of their driver's license or Social Security card; it does nothing to help counties find mistakes or inform rejected applicants how they might fix a mistake. *See* Response, Ex. C, Att. 15.⁵

organizations were significantly restricted in 2006-2007, largely because of onerous restrictions -- since enjoined -- that threatened severe penalties for groups engaged in voter registration activities. *See generally League of Women Voters of Florida v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006); *see also* Neal Dep. 33:7-13. All Plaintiffs have extensive recruitment and registration plans for the 2008 presidential election cycle. *See* Neal Dep. 47:12-19; Lafortune Dep 49:16-24, 50:7-19. (Plaintiffs' Designation of Deposition Testimony of Alvaro Fernandez and Beverlye Colson Neal is attached to the Burhans Reply Declaration as Exhibit 4.)

⁵ Even if an un-matched applicant somehow learns that her registration was rejected, the "override" only permits the county to register that voter if she provides the county supervisor with a copy of the document underlying the number on her application -- a driver's license or Social Security card. *See* Response, Ex. C, Att. 15. That is more of a burden on the voter than a fix: citizens in most counties are not allowed to solve the problem at the polls with the photo ID they are required to bring, but must both understand and clear an additional hurdle by showing the particular underlying document to the county supervisor at a different place and time. And for those voters

The Secretary boasts that the “vast majority” of applications returned to the counties were “successfully resolved at the local level,” Response at 2, 16, yet that leaves many thousands unregistered for no legitimate reason. Miami-Dade County, for example, has testified that it has a list of 14,839 unresolved applications. Sola Dep. Tr. at 50:9-51:10.⁶ Likewise, the efforts by the State’s “BQRS” and county officials to clear and correct “partially matched” and “un-matched” applications may well catch lots of mistakes or glitches, *see* Response at 11-12, 14, but many thousands remain.⁷

Finally, the prospect for an un-matched voter to cast a provisional ballot on election day is another obstacle to voting, not a solution to a needlessly rejected application. Provisional ballots from un-matched voters do not enjoy the presumption of validity asserted by the Secretary, *see* Response at 21, but have a unique presumption of *invalidity*: “The provisional ballot shall be counted *only* if . . . the applicant presents evidence to the supervisor of elections sufficient to verify the authenticity of the . . .

who happen to mistakenly transpose or omit one of 13 digits on their application, the “override” is entirely useless.

⁶ The State and County processes and records appear to be out of sync. The Secretary represents that 31,506 applications were ever un-matched at any point in time, and of that number, 9,425 came from Miami-Dade County. Yet Miami-Dade maintains a current list of close to 15,000. *See* Sola Dep. 50:9-51:10.

⁷ The Secretary also overstates the degree to which the State assists the counties. He asserts that county “Supervisors are . . . privy to any useful information the state can provide.” Response at 14. The State, however, is usually not able to provide useful information. Most of the applications that are un-matched are those with Social Security digits. *See* Suppl. Submission, Amended Appendix 1, tbl. 3 (attached to Burhans Reply Decl. as Exhibit 2). And 98.7% of the applications returned by the Social Security Administration are simply marked “no match found.” *See* Decl. of Andrew Borthwick in Supp. of Pls.’ Mot. for Prelim. Inj., Ex. E at 8-9 (doc. 7-1); *see, e.g.,* Smith Dep. 27:16-28:1.

number provided on the application no later than 5 p.m. of the second day following the election.” § 97.053(6), Fla. Stat. (emphasis added). As we previously demonstrated -- and the Secretary offers no evidence to refute -- this extra burden is extremely difficult or impossible (for voters with an immaterial error on the form) to meet. *See* Suppl. Submission at 30. The provisional ballot fix exists only in theory, not reality.

B. There Is No Adequate Justification for the Harms Imposed

Where the fundamental right to vote is at stake, courts must decide cases on the basis of “facts rather than speculation.” *Purcell v. Gonzalez*, 127 S. Ct. 5, 8 (2006) (Stevens, J., concurring). Yet speculation is all the Secretary offers when he argues that Subsection 6 is needed to discourage fraud by “fictitious” and “illegitimate registrants.” Response at 4-7. He presents no evidence of such fraud among the thousands and thousands of applications rejected by Subsection 6. Indeed, the strongest description he gives to those applications is “questionable.” *Id.* at 3. That will not suffice.

For Plaintiffs’ part, the obstacles to voting need not be proven to be “insuperable,” as the Secretary suggests. Response at 19. They need only be unjustified. *See, e.g., New Alliance Party v. Hand*, 933 F.2d 1568, 1576 (11th Cir. 1991). Such is the case with Subsection 6.

1. Subsection 6 Does Not Do What the Secretary Claims It Does. The Secretary tries to justify Subsection 6 as an identity verification mechanism designed to prevent voter fraud. But it is plain from the face of Subsection 6 -- and from the discovery -- that this is *not* what the challenged statute does.⁸

⁸ There is also no contemporaneous evidence before the Court that this was the purpose behind Subsection 6. The legislature intended to implement HAVA. *See* H. 1589

Subsection 6 does not require proof of identity and does not accept proof of identity. Rather, it requires that a recordkeeping number on a registration form be verified -- first, by “matching” and, when that fails, by forcing the voter to produce a copy of the underlying document with that number (driver’s license or Social Security card). *See* Response, Ex. C, Att. 15, at 2. Those voters without a driver’s license or Social Security number need not verify their identity at all before becoming registered. *See* Taff Dep. 70:20-71:9.

2. There Is No Justification for Disenfranchising Voters With Proof of Identity. The truth is that Subsection 6 defeats the purpose the Secretary claims it serves by excluding voters with unquestionable proof of identity. If Subsection 6 is not enjoined, Florida will be left with a registration system that welcomes applicants with no number and no proof of identity, while it deters or turns away applicants with proof of identity but a misplaced digit, typo or data-entry error. Even if the State had reason to suspect fraud when an applicant’s driver’s license number does not match -- and there is no evidence to support that -- the Secretary has offered no justification for disenfranchising that applicant if she can prove her identity.

Nonetheless, a voter with an un-matched driver’s license number who shows a passport or military ID to a county supervisor will be blocked by Subsection 6. Taff Dep.

Analyses, <http://tinyurl.com/2ot2ft>; S. 2176 Staff Analyses, <http://tinyurl.com/3cpdgw>. Fraud is not even mentioned in any of the ten separate committee analyses of H.B. 1589 or its Senate counterpart. *Id.* In the same bill enacting Subsection 6, the legislature actually *rejected* a proposed amendment to regulate fraud in the absentee balloting process. H.R. J., 2005 Sess., No. 25, at 228 (Fla. Apr. 28, 2005).

62:17-63:18⁹ Another voter with un-matched Social Security digits, though prepared to show photo ID at the polls as required by Florida law, will be blocked by Subsection 6.¹⁰ And any voter who applies at the registration deadline and mistakenly omits a single digit of her 13-digit driver's license number is barred from voting by Subsection 6, even if she has irrefutable proof of identity and eligibility. *See* Taff Dep. 79:5-11. The Secretary's representative conceded that this rule serves no purpose in facilitating the State's efforts to register eligible voters and prevent ineligible registrations. *See* Taff Dep. 80:16-22.

3. Enjoining Subsection 6 Will Not Open the Door to Fraud. Because Florida law already requires voters at the polls to show a valid photo ID, *see* § 101.043, Fla. Stat., the Secretary makes little attempt to justify Subsection 6 as an “anti-fraud” measure for in-person voting. Instead, he reaches back to the fraudulent 1997 Miami mayoral election, and claims that Subsection 6 is needed to impede absentee ballot fraud “on a mass scale.” *See* Response at 5; *see also id.* at 3-4.

That is not so. Florida addressed the Miami absentee ballot fraud in 1998 when it adopted the omnibus election bill SB 1402 “targeted at reforming Florida's voter

⁹ Data produced by the State includes examples of voters who remain unregistered despite showing proof of identity: *e.g.*, 83-year-old Gloria Barea, who applied in January 2006, showed her passport and is still unregistered; 70-year-old Raama Minguela, who applied in December 2006, showed her passport and is still unregistered; 60-year-old Raymond Nieminem, who applied in March 2007, showed his passport and is still unregistered; 27-year-old Brooke O'Brien-Meza, who applied in August 2006, showed her military ID, and is still unregistered; and 43-year-old Wilfredo Hernandez Padilla, who applied in January 2007, showed his military ID, and is still unregistered. *See* Burhans Reply Decl., Exhibit 3; *see also* Roberts Dep. 133:22-134:13.

¹⁰ Though some counties may have a system (“EViD”), allowing some poll workers to perform verification at the polls, Response at 21, not every county has access to the

registration and absentee voting system,” which, *inter alia*, narrowed the qualifications for absentee ballots and required signed and witnessed Voter Certificates. 1998 Fla. Laws Ch. 1998-129, § 13. Since then, Florida has deliberately “*relaxed* its standards for voting by absentee ballot” by eliminating the requirement that the voter’s signature be witnessed, Fla. Staff Analysis, S.B. 2566 (Apr. 8, 2004) (emphasis added), and removing the “for cause” requirements, 2001 Fla. Laws Ch. 2001-40, § 34. As the Florida Department of State itself explained, Senate Bill 2566 was “passed overwhelmingly” in 2004 to make “it easier to cast an absentee ballot” and “[t]he voter signature verification process that is currently in place is, *hands-down, the best defense against voter fraud.*” Fla. Dep’t of State, Fact Sheet: Senate Bill 2566 Related to Absentee Ballots (2004), <http://election.dos.state.fl.us/pdf/absenteeVotingFacts.pdf> (emphasis added).

Even if there were concern about absentee ballot fraud, Section 303(b) of HAVA (passed in 2002) already provides an identity verification requirement to prevent mail-in voting fraud. Indeed, although the Secretary cites the Report of the Carter-Baker Commission on Federal Election Reform for its discussion of absentee ballot fraud, he fails to tell the Court that the Commission pointed to full implementation of 303(b) of HAVA as a means to deter such fraud. Comm’n on Fed. Election Reform, Building Confidence in U.S. Elections 46-47 (2005), http://www.american.edu/ia/cfer/report/full_report.pdf.

Section 303(b) requires that new voters who register by mail must verify their identity before casting a regular ballot, whether in person, 42 U.S.C. § 15483(b)(2)(A)(i),

system. *See* Bryant Dep. 55:16-17; Reed Dep. 38:5-39:18, 46:9-47:21.

or by mail, *id.* § 15483(b)(2)(A)(ii). This identification requirement can be satisfied either by submitting documentary proof of identity (at the time of registration or with the absentee ballot) *or* by having a driver's license or Social Security number matched. Florida has only partially implemented this law, confining its reach to applicants with no driver's license or Social Security number. *See* §§ 97.0535, 101.6921, Fla. Stat.

The irony here is that while the Secretary claims an abiding concern about absentee ballot fraud, the provision of HAVA that addresses that problem is the very one that the Secretary argues is a meaningless nullity. *See* Mot. to Dismiss at 14-15. He does so because he cannot reconcile Subsection 6 with Section 303(b), which makes clear that matching is *not* a prerequisite to registration. Virtually all of Florida's sister states have avoided this perverse situation by not ignoring 303(b), but by properly applying it to mail-in registrants: if the number on an application does not match or cannot be verified, the voter is registered but must present documentary proof of identity before casting a regular ballot, whether in person or by absentee ballot. *See generally* Brennan Center for Justice, Making the List 16-17 (2006), <http://tinyurl.com/32gaqc> (summarizing state

policies).¹¹ Indeed, almost all the handful of states that, like Florida, initially made matching a precondition to registration have since changed their policies.¹²

II. THE PLAINTIFFS HAVE ESTABLISHED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiffs have established a substantial likelihood of success on the merits of their claims under HAVA, the Voting Rights Act's materiality provision, and the Constitution.

A. HAVA

The parties agree that the analysis of conflict with and preemption under HAVA is an issue of statutory interpretation, Response at 24, which “must begin, and often should end as well, with the language of the statute itself.” *PhRMA v. Meadows*, 304 F.3d 1197, 1199 (11th Cir. 2002). Plaintiffs have shown that the text of HAVA cannot accommodate Subsection 6, and it certainly does not “authorize” Subsection 6. Nothing in Section 303(a) states that voters submitting forms with un-matched numbers should be rejected. However, the text of Section 303(b) is unambiguous that voters need not be

¹¹ The Secretary also asserts that registration fraud might further fraudulent access to the ballot, but has cited no evidence that this danger is anything other than “imaginary.” Response at 7. The sole case cited did concern allegations of fraud in the petitioning process to qualify an amendment for the ballot, but involved allegedly fraudulent signatures on the petitioning forms themselves, not fraudulent *registration*. See *Floridians for a Level Playing Field v. Floridians Against Expanded Gambling*, ___ So. 2d ___ (2007) (No. SC06-2505), Answer Br. of Respondents at 9-10, 2007 WL 1622885.

¹² See Cal. Code Regs., tit. 2, §§ 20108.38(c), 20108.65(e), 20108.71; Md. Regs. Code tit. 33, §§ 33.05.04.04(A)(3), (B)(3)-(4), 33.05.04.05(C)(5); N.C. Gen. Stat. § 163-166.12(b2); Alert Re: Driver's License and Social Security Data Comparison Processes Required by the Help America Vote Act (HAVA), <http://tinyurl.com/36o2lt> (Pennsylvania); Election Advisory No. 2006-19, <http://tinyurl.com/2stlcp> (Texas); *Washington Ass'n of Churches v. Reed*, No. CV06-0726 (W.D.Wash. 2006) (stipulated final order and judgment) (Burhans Decl., Ex. G) (doc. 6-2).

matched in order to be registered and to vote a regular in-person or absentee ballot -- they can do so by showing documentary proof of identity. *See Wash. Assoc. of Churches*, 492 F. Supp. 2d at 1269.

Though utterly at odds with his professed concern with absentee ballot fraud, the Secretary moved to dismiss on the ground that this Court should use legislative history to nullify Section 303(b). *See Mot. to Dismiss* at 14-15. In reply, however, he took a different tack, asserting that Section 304 of HAVA allows the State to ignore Section 303(b). *See Reply to Pls.’ Response to Mot. to Dismiss* (“Def. Reply”) at 8-10.

That is not how Section 304 works. Section 304 broadly establishes that HAVA’s requirements with respect to election technology and administration -- including requirements for voting system design, disability access, and technological security safeguards -- should not be construed to “prevent a State from establishing election technology and administration requirements that are more strict than the requirements established under this subchapter *so long as such State requirements are not inconsistent with the Federal requirements under this subchapter or any law* described in section 15545 of this title,” including the Voting Rights Act. 42 U.S.C. §§ 15484, 15545 (emphasis added). Thus, for example, a state may require its voting systems to have less tolerance for error than HAVA’s minimum standards, *see id.* § 15481(a)(5),¹³ because this is not inconsistent with HAVA. But Subsection 6 *is* inconsistent with Section

¹³ A state may also enact laws that are more strict than, but still consistent with, Section 303(b) by expanding Section 303(b) to apply to all voters, and not merely those who have registered by mail. Section 303(b) does not specify a procedure to apply to voters who have registered other than by mail. Because HAVA and other federal

HAVA's 303(b), because Section 303(b) identifies a specific procedure for mail-in registrants who have submitted a driver's license number or Social Security digits on the form: such voters must either be matched *or* show the ID established by HAVA in order to vote.

Plaintiffs have not disregarded congressional intent. *See* Def. Reply at 4. The best evidence of congressional intent is the text of the statute in question. *See PhRMA*, 304 F.3d at 1199. To the extent that the Court looks to legislative statements of purpose, HAVA represents a "compromise," 148 Cong. Rec. at S10488 (Sen. Bond), S10495 (Sen. Hatch), S10498 (Sen. McCain), S10505 (Sen. Dodd), S10510-11 (Sen. Dodd), S10515 (Sen. Dodd), between ensuring that "the franchise is preserved and protected for all eligible American voters" and that "the integrity and security of the elections system is protected from corruption." *Id.* at S10511 (Sen. Dodd). Section 303(b) reflects that compromise: it requires that certain voters identify themselves before voting, which protects against fraud, while offering two different methods (matching or documentary ID) to ensure that the franchise is protected against bureaucratic mishaps. Pushing one aspect of the compromise at the expense of the other contravenes congressional intent.

B. VRA Materiality

The issue under the Voting Rights Act is whether an error in the matching process -- *i.e.*, an erroneous failed match or "false negative" -- is material in "determining whether such individual is qualified" to vote. 42 U.S.C. § 1971(a)(2)(B). The evidence shows that under Subsection 6, immaterial errors like typos, data-entry errors, trivial

laws are silent in this respect, with no clear contrary intent, such an expansion would not be "inconsistent."

discrepancies between government databases (such as the separation of a compound last name) and meaningless spelling differences, have prevented and will prevent the registration of voters who submit timely and complete applications. Such “errors” are not material in determining an applicant’s eligibility to vote under the Florida Constitution.

The Secretary’s response to the VRA claim is to misstate it. He states (wrongly) that Plaintiffs’ entire claim is that applicants who write down an erroneous number have not made a material error. *See* Response at 24-25. He thus ignores the myriad other reasons for failed matches, including data-entry errors by elections officials and mistakes imbedded in the Social Security database. *See, e.g.*, Suppl. Submission at 7-12; Borthwick Decl. ¶¶ 22-27 (doc. 7); Burhans Supp. Decl. Ex. I (doc. 75). Accordingly, the Secretary does not even try to explain how, for example, a driver’s license digit misplaced or misread by a county computer operator is material to determining the applicant’s qualifications to vote. Nor does he try to defend as material the failed matches caused by minor differences in the spelling and punctuation of names. *See* Borthwick Decl. ¶¶ 34-44 (doc. 7).

Even as to the sub-category of applicants the Secretary focuses on, he is wrong. Voters who make minor errors on their forms -- such as dropping a digit or inverting two digits -- are denied registration by Subsection 6 even when they are able to provide proof of their identity and eligibility (such as a U.S. passport). *See supra* n.9. As such, an error in the number on the application is not material to establishing eligibility or identity. As the Secretary’s representative testified, the fact that a voter has transposed two digits of a driver’s license number gives the State no material information about whether the

individual is a citizen, whether she is over 18, whether she is a resident, or whether she has been rendered ineligible by conviction. Taff Dep. 63:19-64:23.¹⁴

The Secretary appears to argue that because voter registration is mandatory under Florida law, every element of the registration process -- and not just those that concern the state's substantive conditions of eligibility -- is necessarily material in determining whether an individual is "qualified under State law to vote." Response at 27 n.14. This procedural bootstrapping would void the VRA's materiality section. If a state can require that registration be completed without any errors or omissions, then there is no error or omission, no matter how minuscule, that would be immaterial. That is not the law.

C. Constitutional Claims

Plaintiffs have demonstrated the severe and increasing burden imposed by Subsection 6, and its lack of justification. *See* Part I, *supra*. With respect to the burden that Subsection 6 is likely to cause in 2008, Plaintiffs have established a substantial likelihood of success on their claims under the First and Fourteenth Amendments.¹⁵

¹⁴ The Secretary argues that Subsection 6 does not bar registration because the voter can always submit a new form, and this suffices to comply with federal law, even if the voter will not be registered to vote in the proximate election. *See* Response at 30. Once again, the actual text of the federal law refutes that: "No person acting under color of law shall . . . deny the right of any individual to vote *in any election* because of an [immaterial] error or omission . . ." 42 U.S.C. § 1971(a)(2)(B) (emphasis added). The Voting Rights Act does not permit Florida to force a voter to sit out an election because of an immaterial error in matching the number on a form.

¹⁵ Plaintiffs acknowledge that it is important for a State to maintain the integrity of its elections. Subsection 6, however, is poorly tailored to this end. In the same case cited by the Secretary for the proposition that voter fraud is, in general, a legitimate concern, *Purcell v. Gonzalez*, the Supreme Court reiterated that courts must closely scrutinize laws ostensibly designed to prevent fraud to ensure that there is sufficient justification for any law that potentially precludes voters from casting a valid ballot. *See* 127 S. Ct. at 7 ("the possibility that qualified voters might be turned away from

Plaintiffs also have established a substantial likelihood of success on their claims that Subsection 6 violates the Equal Protection Clause. Applicants who are matched are added directly to the registration rolls, while those who are un-matched because of trivial clerical errors or data-entry mistakes are forced to navigate onerous, and often insuperable, hurdles. Un-matched applicants living in counties with access to the EvID system have a greater chance of being added to the rolls than voters in other counties. And applicants who submit Social Security numbers on their applications are far more likely to be blocked from the registration rolls than applicants with driver's licenses. Applicants with a Florida driver's license are sent for matching, evaluated for a "partial match," submitted to the BVRS for a follow-up search the state's motor vehicle system, and returned to the county with individualized comments regarding the likely nature of the problem. Un-matched applicants without driver's licenses, on the other hand, are returned directly to the county with only a code meaning "no match found." This is why applicants who submitted Social Security numbers make up more than two-thirds of those ever blocked by Subsection 6 -- and 85% of those still blocked. *See* Burhans Reply Decl., Ex. 2.

III. THE PLAINTIFFS HAVE ESTABLISHED IRREPARABLE HARM

The evidence of irreparable harm is uncontested. Almost 13,000 voters were forced to sit out the 2006 election by Subsection 6, and at least 14,326 are now excluded from the registration rolls -- before the registration wave of the 2008 election cycle. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably

the polls would caution any district judge to give careful consideration to the plaintiffs' challenges").

constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).

Along with the tens of thousands of impacted voters, Plaintiffs will be directly -- and irreparably -- harmed. Plaintiffs will conduct voter registration programs in 2008, including programs to recruit and register members. *See* Neal Dep. 47:12-19; Lafortune Dep. 49:16-24, 50:7-19; Fernandez Dep. 20:18-25, 21:15-24. These efforts are central to their missions. *See* Neal Dep. 42:24-43:5, 26:16-24; Lafortune Dep. 7:3-5, 10:10-17; Fernandez Dep. 41:20-42:9. Where, as here, voter registration is integral to a plaintiff organization’s mission, that plaintiff is irreparably harmed when State policy impedes the registration of applicants it seeks to register. *See, e.g., Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005).

Significantly, Plaintiffs’ registration drives will aim to register precisely the populations that are most harmed by Subsection 6: Latinos and African Americans who are not registering through the DHSMV and do not have the luxury of avoiding the Subsection 6 process. *See* Neal Dep. 49:11-18; Fernandez Dep. 8:15-25. Subsection 6 will thus frustrate the efforts and significant investments Plaintiffs have made to further the cause of increased civic participation and voter registration for their constituents. Plaintiffs will have to divert organizational resources in order ensure that those they seek to register -- including unregistered new members -- work through the obstacle course awaiting voters who have been un-matched. *See* Fernandez Dep. 26:16-27:5, 28:13-29:8, 42:19-43:5; Neal Dep. 43:20-25, 47:2-8; Lafortune Dep. 26:14-27:21.

IV. AN INJUNCTION WILL NOT HARM THE PUBLIC INTEREST

Judicial caution is indeed warranted on the eve of an election, *Purcell*, 127 S. Ct. at 7, but an injunction against the implementation of Subsection 6 would preserve, not jeopardize, the clarity and integrity of the upcoming election. At present, more than 14,000 voters have submitted complete registration forms timely for the 2008 presidential primary, but have been denied registration due to Subsection 6. In the next month leading up to the registration deadline, tens of thousands more will register, in part to take advantage of Florida's substantially increased importance in the presidential primary schedule. *See* H.B. 537 (2007).

An injunction against Subsection 6, allowing citizens with complete and timely forms to register even though a recordkeeping number on the application has not been "verified," will enfranchise these voters without any jeopardy to the integrity of the election. Supervisors would retain their existing authority under § 98.045(1), Fla. Stat., to determine that an applicant is ineligible to be registered, for any reason other than a number failing to be verified. Citizens voting in person would still be required to present current photo identification, under § 101.043, Fla. Stat. Citizens voting absentee would still be subject not only to the signature check of § 101.68, Fla. Stat., but also any identification requirement in HAVA. 42 U.S.C. § 15483(b); U.S. Const., art. VI. And with thousands of eligible citizens justly able to participate, the integrity of the election would be well-secured.

For the foregoing reasons, Plaintiffs' Motion for a Preliminary Injunction should be granted.

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a copy of the foregoing *Plaintiffs' Reply To The Secretary Of State's Response To Plaintiffs' Motion For Preliminary Injunction* was served via the Court's CM/ECF electronic filing system this day, December 6, 2007, upon the following:

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