**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,

vs.

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

Defendant.

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

**SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

## PRELIMINARY STATEMENT

This Court has already determined that irreparable injury will be suffered absent an injunction, that the threatened injury to Plaintiffs (and otherwise eligible voters denied registration due to § 97.053(6), Fla. Stat. ("Subsection 6")) outweighs any potential damage to the State, and that an injunction would benefit the public interest.

Nothing has changed since the Court's determination that would alter its earlier conclusion. Nearly 13,000 voters were kept off of the registration rolls for the 2006 election by Subsection 6 because the driver's license or Social Security number on their applications was not "matched" or otherwise verified. This Court also found that more than 14,000 voters were likewise disenfranchised as of December 2007. The reason was not lack of eligibility or proof of identity — indeed, voters showing passports have been blocked from the rolls by Subsection 6. Instead, these voters have been blocked by election officials' typos, clerical mistakes, and data entry errors; meaningless spelling and punctuation differences in computerized records; and confusing and misleading government notices. The citizens affected — none of whom was shown to be a fraud or a fiction — came disproportionately from minority communities. They were all seeking to exercise the most fundamental of American rights: the right to vote.

Based on the actual and impending harm to Plaintiffs and the voters of Florida, on December 18, 2007, this Court granted a preliminary injunction on the grounds that Subsection 6 was preempted by and conflicted with the Help America Vote Act and the Voting Rights Act. Since that time, the State has reported no injury whatsoever in connection with the presidential primaries conducted pursuant to the terms of the

injunction. And with more than 200,000 registration forms submitted since this Court's injunction went into effect, and hundreds of thousands of additional registrations expected as the presidential election grows closer, the threatened injury only grows more severe.

Although a split panel of the Eleventh Circuit reversed the statutory preemption holding and remanded, it did not cast doubt on, and did not disturb, this Court's findings of harm, need, and urgency. Moreover, the panel majority expressed no opinion on the merits of Plaintiffs' constitutional claims, which this Court had prudentially declined to reach given the statutory preemption issues previously raised in the preliminary injunction motion. The Court must now assess whether the United States Constitution permits a registration and voting regime that, as the record evidence proves and as this Court found, unnecessarily denies the vote to thousands of eligible citizens because of typographical errors and bureaucratic mistakes, and does not meaningfully prevent fraud. Plaintiffs respectfully urge this Court to hold that it does not.

Because Plaintiffs have a strong likelihood of success on their claims under the Constitution, supported by this Court's prior factual findings, this Court should continue to enjoin the application of Subsection 6 to deny otherwise eligible citizens registration.

## THE RECORD EVIDENCE OF DISENFRANCHISEMENT

### I. BEFORE IT WAS ENJOINED, SUBSECTION 6 IMPOSED SEVERE BURDENS ON THE VOTING RIGHTS OF THOUSANDS OF ELIGIBLE FLORIDA VOTERS.

The undisputed evidence demonstrates that Subsection 6 imposes heavy burdens on the voting rights of Plaintiffs, their members, and other eligible Florida voters. It also

establishes that absent an injunction, the harm would grow as Florida approaches the historically important federal elections this Fall. On this record, the burdens on the right to vote created by Subsection 6 are real and severe by every measure: the sheer number of voters denied the vote, the percentage of voters affected, and the multitude of hurdles and obstacles faced by individual voters in their attempts to exercise the right to vote.

*First*, the number of voters affected by Subsection 6 is in the tens of thousands. In the 2006 election cycle, the Secretary was initially unable to match more than 20,000 applicants, and 12,804 voters — 58.6% of voters who failed to match following the implementation of Subsection 6 — remained unregistered, blocked from the registration rolls for the 2006 national election despite the fact that they had timely submitted complete forms. Doc. 67 at 4. By October 2007, more than 14,000 applicants had been blocked from registering because they had not been matched or verified, Doc. 85, ex. A, att. 15, at 3, and these voters would have been unable to cast a regular ballot in Florida's presidential primary elections had this Court not enjoined the Secretary from enforcing Subsection 6. Between the close of the expedited discovery period and the issuance of this Court's injunction, 2,000 additional applicants were blocked by Subsection 6, and likewise would have been prevented from casting regular ballots absent this Court's injunction. *See* Jim Ash, *16,000 Florida Voters Back on Rolls After Ruling*, The News-Press (Ft. Myers, Fla.), Dec. 28, 2007, at 3B.[1]

[1] Rather than repeat in full here, Plaintiffs refer the Court to the previous evidentiary submissions demonstrating that these voters were disenfranchised due to, *inter alia*, misspellings, clerical errors, and data entry mistakes by elections officials and trivial spelling or punctuation differences between registration forms and the Social Security or motor vehicle databases. *See*, *e.g.*, Doc. 67 at 7-17 & Appx. 3; Doc. 91, ex.1.

The evidence is also uncontroverted that, if Subsection 6 were enforced for the remainder of the 2008 election cycle, many more thousands of voters would be blocked from the registration rolls for the national elections this Fall. The surge in voter registration applications acknowledged by this Court, Doc. 105 at 25, has begun to occur: more than 350,000 new registration forms have been submitted from October 2007 through March 2008 alone, *see* Fla. Dep't of State, Voter Registration Report Archives, *at* http://tinyurl.com/58oway. The potential injury caused by Subsection 6 would continue to multiply over the coming months, when election officials are at their busiest, with the fewest resources to resolve failed matches. Doc 5 at 9.

*Second*, Subsection 6 has injured not only a high absolute number of applicable registrants, but also a very substantial percentage of them. From January 1, 2006, through the end of October, 2007, approximately 363,341 registration forms were subject to Subsection 6.[2] Because of some failed match, 72,924 forms (20%) were initially blocked from the rolls. Doc. 85, ex. B, ¶ 7. That is, *20%* of applicants subject to Subsection 6 were disenfranchised unless and until state and county officials were able to correct the error. In the relative calm of a midterm year (2006) and an off-cycle year (2007), state and county officials were able to review many of the non-matches to ferret

[2] 1,529,465 applicants submitted registration forms from January 1, 2006, through September 30, 2007; more forms arrived in October. Doc. 85, ex. A, att. 15, at 2. Of these, only 1,088,964 were new registrations; updates to existing registrations are not subject to Subsection 6. *See* Fla. Dept. of State, Voter Registration Year to Date Report: December 2006, *at* http://tinyurl.com/5parpk; Fla. Dept. of State, Voter Registration Year to Date Report: October 2007, *at* http://tinyurl.com/5k8n2m. Of these, 725,623 were submitted at the DHSMV; DHSMV applications are also not subject to Subsection 6. *See id*. This leaves approximately 363,341 new applications submitted other than in conjunction with driver's license transactions, and therefore subject to Subsection 6.

out mistakes, but even after this review, 14,326 applicants — *20%* of those initially blocked — remained unregistered due to Subsection 6. Doc. 85, ex. A, att. 15, at 3.

*Finally*, the burdens imposed by Subsection 6 on individual applicants are numerous, varied and often impossible to overcome. As the evidence proves, applicants who fully comply with the law and accurately provide their Social Security or driver's license number[3] can be denied registration because of mistakes made by government employees, confounding and misleading notices sent by government offices, and failed database "matches" that they did not cause and do not know how to fix. *See generally* Doc. 67.

The burden begins when eligible voters — who have no idea that their applications are subject to database "matching" and number verification — are kept off the registration rolls by all sorts of clerical errors made by elections workers, including data-entry mistakes, misspellings, typos, dropped digits, as well as other computer errors. Florida's voter registration application nowhere states that the information provided will be matched against other databases. Likewise, voters cannot control the data entry errors embedded in these systems or mis-keys by election workers that prevent them from having their votes counted. *See*, *e.g.*, Doc. 67, ex. 3; Doc. 91, ex. 1.

Then, Subsection 6 shifts the burden of overcoming those government-made mistakes back to the applicants — *if* the government succeeds in making contact with these un-matched and un-registered voters. Although county election officials are

[3] The use of "driver's license" herein refers both to Florida driver's licenses and Florida identification cards.

required to send a notice that voters "must provide evidence . . . sufficient to verify the authenticity" of their license or Social Security numbers, § 97.053(6), Fla. Stat., many individuals never receive these notices. *See* Doc. 67, Appx. 2, McKenna Decl. ¶ 5; Lopez-Sandin Decl ¶ 5; Hansra Decl. ¶ 4; Leinen Decl. ¶ 4.[4] Even when they do, applicants are not told why their numbers failed to match and, thus, are given no clue how to "verify" the information. An applicant whose Social Security number does not match because of a nickname or a spelling difference is left in the dark. As a result, applicants will be discouraged from taking further affirmative steps, or worse, will submit multiple and futile applications containing the same correct information that does not match with the database — which will fail to successfully register them to vote. *See* Doc. 67 at 25-26; *id.*, Appx. 2, Uwechue Decl. ¶¶ 7-8.

Eugene McKenna and Oke Uwechue, misled by elections officials into believing their registrations had been rejected, reasonably believed that a trip to the polls would have been futile. Doc. 67, Appx. 2, McKenna Decl. ¶ 5; Uwechue Decl. ¶ 8. Other

[4] The arguments presented here apply not only to Subsection 6 as it currently stands, but also to a likely change in the law. When this brief was filed, Senate Bill 866, which would amend Subsection 6, had passed the Florida legislature but had not been signed by the Governor or precleared. In relevant respect, the bill would continue unduly to preclude registration unless an applicant's driver's license number or Social Security digits have been "matched" or otherwise verified. Rather than absolutely bar applicants who transpose digits on their own registration form, however, the bill would subject such applicants to the same byzantine process awaiting applicants who suffer a matching error perpetrated by the State. Because of the uncertain status of the bill, none of the arguments in this brief depend on the current rule absolutely precluding registration for applicants who make minor and inconsequential errors in the driver's license number or Social Security digits on their own form.

applicants did not know of a problem with their applications until they arrived at the polls on election day. *Id.*, Appx. 2, Leinen Decl. ¶ 5; Hansra Decl. ¶ 5.

If un-matched voters have not been derailed before election day, there are more obstacles thrown in their way at the polls. Even if such voters appear with the required photo identification, they will not be able to cure the Subsection 6 problem there. *See* §97.053(6), Fla. Stat. (requiring evidence to be presented to the supervisor of elections). Rather, they will vote a presumptively invalid provisional ballot; to have that ballot counted, these voters must decipher an affirmatively misleading notice which states that they may show evidence of their "eligibility to vote," § 101.048(5), Fla. Stat., when the only evidence that will in fact suffice is the actual driver's license or Social Security card.[5] This evidence must be presented at the county supervisor's office within *48 hours* of the election.[6] This explains, in part, the total absence of record evidence that any voter has ever successfully verified the number under Subsection 6 in the days after an election. *See* Cowles Tr. 106:2-10; Snipes Tr. 99:23-100:2; Sola Tr. 107:4-15; *see also* Doc. 75, ex. U.

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[5] Under Subsection 6, no other form of identification will suffice — even a Military ID or passport. Taff Tr. 61:19-63:18; Bryant Tr. 70:25-74:3; Cowles Tr. 89:2-7; *see also* Doc. 75, ex. T; Doc. 90 at 10 n.9. Moreover, poll workers cannot compensate for the misleading notice. They are not trained in how to instruct these voters, nor told anything about how to handle individuals who failed to match. Reed Tr. 29:20-32:15; Sola Tr. 82:9-83:19; Kelly Tr. 78:5-22; Cowles Tr. 80:25-81:6; Snipes Tr. 63:21-64:1; *see also* Doc. 66-4, ex. X.

[6] These notices do not mention fax or e-mail as an option, *see* Doc. 66-4, ex. Y, and postal mail is unreliable for these purposes, as the U.S. Postal Service refuses to guarantee that first-class mail will arrive within 48 hours. U.S. Postal Service, Domestic Mail Manual § 133, ¶ 2.1.1.

## II. THE BURDENS IMPOSED BY SUBSECTION 6 DISPROPORTIONATELY AFFECT CERTAIN GROUPS.

Under Subsection 6, similarly situated applicants are treated differently based on characteristics that have nothing to do with their eligibility to vote. As a consequence, the odds that a voter can successfully register under Subsection 6 differ dramatically depending on whether or not she has a driver's license and where she resides. Moreover, new registrants are treated differently than all Florida citizens who registered to vote prior to January 1, 2006, and registrants who have a driver's license or a Social Security number are treated differently than those who have neither. Those who registered to vote prior to January 1, 2006, as well as those assigned identifying numbers by the State, are not subject to matching. § 97.053(6), Fla. Stat.; Roberts Tr. 85:6-13; Taff Tr. 70:20-71:9.[7]

The different procedures and different burdens that apply to voters with and without driver's licenses create a distinction wholly unrelated to applicants' voting qualifications. Applicants with a driver's license are sent for matching, evaluated for a

[7] The evidence also reveals that Subsection 6 has a disproportionate impact on Latino and African-American citizens — in part, as this Court recognized, due to data entry clerks' lack of familiarity with their naming conventions — which results in an "increased likelihood of disenfranchisement" for these groups. Doc. 105 at 17, 18. The matching issues that hyphenated and compound names have caused in these communities have been documented by experts and observed by the State and counties. *See* Doc. 7 at 19-21; Taff Tr. 43:9-25; Roberts Tr. 87:2-12; Kelly Tr. 137:11-25; Bryant Tr. 51:10-52:2; *see also* Doc. 66-2, ex. E at 18; Doc. 75-J; Doc. 76; Doc. 77. As a result of these issues, although Hispanic Americans and African Americans comprised only 15% and 13% of all applicants, respectively, they made up 39% and 26%, respectively, of un-matched and unregistered voters as of October 10, 2007. In contrast, while Whites comprised 66% of the applicants, they comprised only 17% of un-matched and unregistered voters. Doc. 91, ex. 2, at 3.

"partial match," manually reviewed by the State, and returned to the counties with individualized comments regarding the likely nature of the problem, whereupon they are given further manual review. *See* Doc. 67 at 12-20; Doc. 85-4, ¶7; Doc. 85-5, ¶7. In contrast, applicants without driver's licenses, who instead submit Social Security digits, get second-class treatment: they are sent through a matching process with a 46% failure rate — only slightly more reliable than a coin flip. Doc.7, ex. E, at 9. For 98% of the failed matches with the Social Security Administration database, the only information received by the State and counties is "no match found" — precluding any further review of the failed match. *See* Doc. 7, ex. E, at 8, 9; *see also* Doc. 85-4, ¶ 10; Doc. 85-5, ¶ 9; Roberts Tr. 65:8-12, 66:6-20.[8]

As a result, under Subsection 6, a voter's odds of being successfully registered are dramatically reduced if she has no driver's license: though most applicants have driver's licenses, applicants who submitted Social Security digits made up 68% of those ever blocked by Subsection 6 — and 85% of those blocked at the time the law was enjoined. Doc. 91, ex. 2, at 4.

The record evidence also demonstrates that the obstacles to successful registration under Subsection 6 vary from county to county, meaning that similarly situated applicants have markedly different chances of being able to register, based on the arbitrary happenstance of geography. The resources that election officials have to follow-up on unmatched voters' applications vary dramatically: some counties make

[8] Indeed, the General Accounting Office has stated that given this lack of information, election officials "are not able to efficiently resolve the non-matching problems." Doc. 6, ex. F, at 36.

several attempts to follow-up on failed matches, reaching out to register the applicant; others send one misleading notice and consider their duty complete. Doc. 67 at 28.

In addition, the notices sent to voters indicating that their numbers could not be verified vary by county, with some notices more misleading than others. Doc. 67 at 22-26. Similarly, there is county variance in the Notices of Rights given to provisional ballot voters. *See id.* Some, but not all, counties have polling-place access to the Electronic Voter Identification system ("EViD") that allows pollworkers to investigate and inform provisional ballot voters of mismatched driver's license numbers. Doc. 85 at 21; Reed Tr. 38:5-39:18, 46:9-47:21. Finally, there is no one standard followed by the canvassing boards deciding whether the evidence provided by a voter is sufficient to verify the number provided, and practices vary by county. Doc. 67 at 33-35. These are not trivial variations, but rather arbitrary procedural differences that have a meaningful impact on voters' ability to register. The evidence shows, for example, that Miami-Dade, Broward, Orange and Hillsborough counties have blocked registrations at a rate largely disproportionate to their tally of new applicants. Doc. 91, ex. 2 at 3.

## III. SUBSECTION 6 IS NOT AN EFFECTIVE ANTI-FRAUD MECHANISM.

The record evidence also establishes that Subsection 6 was neither intended to prevent, nor actually prevents, voter fraud. Although the State has in the course of this litigation asserted that Subsection 6 is designed to prevent voter fraud, this interest appears absolutely nowhere in the legislative record for Subsection 6, either for the provision as originally passed in 2005 or for the provision as amended in 2007 and 2008. 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.[9]

Moreover, there is no evidence that the statute functions as an anti-fraud mechanism. Under Subsection 6, an individual intent on registering under a fictitious name need only claim that he has no driver's license or Social Security number, and he will be fully registered, with no questions asked. Taff Tr. 70:20-71:9. By contrast, honest voters who submit timely and truthful applications can be denied access to the registration rolls because of government mistakes and misspellings.

Most importantly, on the factual record now before the Court, the Secretary has failed to present a shred of evidence to indicate that *any* of the more than 14,000 forms blocked by Subsection 6 was in any way fraudulent. Indeed, the very fact that the Secretary did not seek to prevent the registration of a single unmatched applicant after this Court enjoined Subsection 6, *see* Jim Ash, *16,000 Florida Voters Back on Rolls After Ruling*, The News-Press (Ft. Myers, Fla.), Dec. 28, 2007, at 3B, demonstrates that there was no reason to believe any of these registrants was fraudulent. In addition, the Secretary was unable to present evidence that the statute had prevented — or could have prevented — even a single incident of election fraud in the past. *See* Doc. 97, ex. B, Hill

[9] Indeed, in 2005, the legislature *rejected* an amendment to H.B. 1589 that was designed to deter fraud. *See* H.R. J., 2005 Reg. Sess., No. 25 (Fla. 2005) (Amd. 6) (rejected anti-fraud amendment pertaining to the absentee balloting process); *see also* Doc. 90 at 10-12 (explaining Florida's approach to voter fraud).

Tr. 40:4-20; 73:21-74:1; 112:13-114:5; *see also* Doc. 97 at 2.

Nothing has changed since this Court found in December that "Subsection 6 is resulting in real harm to real individuals" and that "[t]his disenfranchisement, however unintentional, causes damage to the election system that cannot be repaired after the election has passed." Doc. 105 at 25. There is no evidence that Subsection 6 either could have prevented, has prevented, or would in the future prevent fraud — but the evidence does show that it has prevented thousands of eligible citizens from registering to vote.

## ARGUMENT

### I. PLAINTIFFS HAVE SHOWN A LIKELIHOOD OF SUCCESS ON THEIR CLAIMS THAT SUBSECTION 6 VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION.

The First and Fourteenth Amendments to the U.S. Constitution protect the right to vote as a fundamental right. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'") (citation omitted); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The right to vote extends to all phases of the voting process, including registration. *See Condon v. Reno*, 913 F. Supp. 946, 949 (D.S.C. 1995) ("[R]egistration, rather than being simply a mechanism to facilitate orderly elections, [may be] in fact a significant barrier to voting."); *Bishop v. Lomenzo*, 350 F. Supp. 576, 587 (E.D.N.Y. 1972) ("The state may not deny a voter the right to register (and hence to vote) because of clerical deficiencies.").

Just last week, the Supreme Court reaffirmed its longstanding standard for constitutional challenges to regulatory burdens upon the right to vote. "[A] court

evaluating a constitutional challenge to an election regulation [must] weigh the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Crawford v. Marion County Election Bd.*, ___ S. Ct. ___, 2008 WL 1848103, at *5 (2008) (plurality) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

This is a sliding scale: the more severe the injury, the greater the justification required, and the more tightly the challenged law must be tailored to the justification. Severe injuries receive the closest scrutiny. *Burdick*, 504 U.S. at 434. Even "slight" burdens are evaluated by a standard more stringent than the deferential rational basis test applied to economic legislation. Thus, "slight" burdens "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford*, 2008 WL 1848103, at *6 (plurality) (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

There is no single "litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters." *Id*. Nevertheless, in cases concerning the ability to cast a valid ballot, courts have indicated that a law's burden will be considered increasingly "severe" as it affects a larger number of voters, as it affects a larger percentage of voters subject to the law, or as it makes casting a valid ballot more difficult or costly for a significant set of individual voters. *See id*. at *9-10 (noting all three); *see also, e.g.*, *Wexler v. Anderson*, 452 F.3d 1226, 1232-33 (11th Cir. 2006) (difficulty); *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007) (number); *Gonzalez v. Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007)

(percentage, difficulty).

As demonstrated by the evidence discussed above, the burdens imposed by Subsection 6 are severe under any of these measures. Thousands of applicants, and a significant proportion — 20% — of voters subject to matching, were barred from the registration rolls by Subsection 6 before it was enjoined, and exponentially more will be kept from registering if Subsection 6 is enforced in the Fall elections. With respect to the burden on the individual voter, after State errors initially block applicants under Subsection 6, the State confronts each voter with a complicated, confusing process to overcome the error, with misleading and inaccurate instructions from election officials — when the voters are notified of the problem at all. Even for the most dogged and determined voters these burdens often proved insuperable in practice.[10] *See supra* at 3-7.

By comparison, the evidence of burden evaluated in *Crawford* was minimal, and certainly less than the substantial evidence of burden Plaintiffs have presented here, in a different procedural posture. On summary judgment in the *Crawford* case, there was no credited evidence in the record of the number or portion of voters injured, and little qualitative evidence on the nature of any burden imposed. The Indiana statute at issue there was a comparatively straightforward photo ID requirement. Voters without a photo ID at least had warning to gather paperwork and go to a government office at some point before the election to obtain an ID. If a voter did not have a permissible photo ID on

[10] These burdens severely impair not only the fundamental voting rights of Plaintiffs' members, but also Plaintiffs' own rights of expression and association under the First and Fourteenth Amendments. When Plaintiffs' constituents are disenfranchised, they lose the concomitant strength in advocating in the political arena for their policy priorities. *Cf. Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986).

election day, he had ten days to obtain one or to swear an affidavit explaining that he was unable to do so because of indigency. Plaintiffs in *Crawford* presented no evidence that on election day, voters received inadequate or misleading notice from poll workers on the required procedures; indeed, the parties' submissions showed that some voters had in fact returned after the election to correct the problem in time to have their votes counted.

The record before the Court here stands in stark contrast. First, there is the clear and unrebutted evidence of thousands of disenfranchised voters that was entirely absent from the *Crawford* record. Moreover, the process of registering and voting under Subsection 6, compared to Indiana's law, is a blind-folded obstacle course. As the evidence shows, voters who have done everything the law asks of them will be confronted with an error by the State, and if they have not received or understood the inadequate and misleading notices to resolve the problem by election day, they must ignore the misleading information accompanying their provisional ballot, and present one particular document and no other at a county supervisor's office within 48 hours. Voters who present a passport on election day remain blocked from the rolls. *See supra* at 7 and n.5.

Unlike the identification requirement in *Crawford*, aspiring voters in Florida are not told up front anything about database matching or number verification. They are not told that if county data operators misspell their name or invert their birth date, their application will not be accepted and it will be up to them to correct a problem that they have no idea exists, and have no idea how to fix. Subsection 6 imposes a series of unnecessary and unreasonable hurdles that precluded thousands of eligible Floridians

from registering and voting before it was enjoined, and would continue to do so in the absence of an injunction. *See 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.").

The process established by Subsection 6 is difficult to navigate, as the thousands of disenfranchised voters reveal. The State has claimed, in the past, that some voters may be able to overcome these burdens — but this is not the legal standard. None of these burdens need be impossible to surmount in order to be held unconstitutional. They need only be insufficiently justified. *See New Alliance Party v. Hand*, 933 F.2d 1568, 1576 (11th Cir. 1991) ("Although the Court finds that the burden imposed . . . is not insurmountable, the Court determines that plaintiffs are due to be granted the relief requested because the interests put forth by the defendant do not adequately justify the restriction imposed."); *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995) ("We believe that a regulation which imposes only moderate burdens could well fail the [Supreme Court's] balancing test when the interests that it serves are minor, notwithstanding that the regulation is rational."); *cf. 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.").[11]

[11] Whether a particular burdens is justified is informed, in part, by whether there are other means available to accomplish the State's asserted regulatory purposes. *See Buckley v. Am. Constitutional L. Found.*, 525 U.S. 182, 192 (1999) ("Our judgment is informed by

Here, even if the demonstrated burdens of Subsection 6 were considered less than severe, under *Burdick* and *Crawford*, they still would not be sufficiently justified by the State's asserted interests. This is because Subsection 6 is not sufficiently tailored to advancing a legitimate interest to outweigh the injury that it undisputedly causes.

Plaintiffs do not dispute that preventing fraud, as a general matter, is a legitimate interest. *See Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006); *but cf. id.* ("[T]he possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs' challenges"). As shown above, however, Subsection 6 is not designed to prevent individual voter fraud and does not prevent such fraud. An individual intent on fraud need only say he has no driver's license or Social Security number to be added to the registration rolls without further ado, *see* Taff Tr. 70:20-71:9, while the legitimate voter who submits her Social Security digits faces the real possibility of being unduly blocked from the rolls. 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). This is supported by the evidence in the record: thousands have been disenfranchised, but the Secretary has failed to present even a single example of fraud actually prevented by Subsection 6. *See supra* at 11. Subsection 6 cannot be adequately justified as a fraud prevention measure.

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other means Colorado employs to accomplish its regulatory purposes."); *Fla. State Conference of the NAACP v. Browning*, 2008 WL 880569, at *29 n.30 (Barkett, J., dissenting) ("When there are less burdensome means to achieve a state's goal of preventing voter fraud, we should be very hesitant to uphold a registration system that decreases the number of registered voters and, as a result, chisels away at 'the foundation of our representative form of Government.' H.R.Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 1977.").

Nor can Subsection 6 be justified as an identity verification measure. Plaintiffs accept that requiring registration applicants to verify their identity in some way is a legitimate interest. Indeed, both federal and state laws other than Subsection 6 advance the State's interest in ensuring that voters are who they say they are: § 101.043, Fla. Stat., furthers that interest by requiring citizens voting in person to provide proof of identity; and 42 U.S.C. § 15483(b) does so by requiring voters who register by mail to provide proof of identity before they vote in person or absentee. Subsection 6, by contrast, does *not* require voters to verify their identity — and, indeed, it does not accept proof of identity. Subsection 6 precludes a citizen with a driver's license number or Social Security number 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 the number. Real voters have shown election officials real passports, and real military IDs, and have nevertheless been blocked from registering under Subsection 6. *See* Doc. 90 at 10 n.9. Meanwhile, an applicant who says he has no driver's license or Social Security number need not show any proof of identity in order to be registered. *See* Taff Tr. 70:20-71:9.

Plaintiffs also do not dispute that maintaining the integrity of the election process is a legitimate interest. But Subsection 6 does not advance this goal by excluding only eligible voters; it has kept thousands of new legitimate voters off of the rolls because of typographical errors and the like, while doing nothing to prevent fraud. Maintaining the law only breeds suspicion that the elections system is serving Florida's citizens poorly. Subsection 6 undermines the very objective that the State has used to justify it.

There is further evidence that Subsection 6's burdens are not sufficiently justified

in the fact that Subsection 6 exempts vast portions of the Florida electorate from its reach. No voter registered before January 1, 2006 is subject to Subsection 6. No applicant submitting a form without a driver's license or Social Security number is subject to Subsection 6. Subsection 6 cannot be deemed necessary to maintain the integrity of the election process[12] when the vast majority of current voters get a free pass, avoiding the Subsection 6 process entirely.[13]

Since no interest adequately justifies the burden of Subsection 6 — since there is no legitimate reason for Subsection 6 that adequately justifies disenfranchising more than 14,000 voters (before the high point of a presidential election year's registration effort) — it must be enjoined.[14] Plaintiffs have shown a strong likelihood of success on their

[12] As Plaintiffs have shown, the vast majority of other states also manage to preserve the integrity of their elections without the burdensome and flawed restrictions of Subsection 6. Doc. 90 at 12-13. Most satisfy the goals above, without disenfranchising thousands of eligible citizens, through the more narrowly tailored procedure contemplated by the Help America Vote Act: requiring registrants — those with a driver's license or Social Security number and those without — to prove their identity in one of several ways before voting. *See* 42 U.S.C. § 15483(b).

[13] Although the Florida legislature is not required to address every conceivable ill at once, the fact that Subsection 6 purports to prevent fraud while leaving open a gaping channel for such fraud undermines the weight of the interest asserted. "[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction" on a fundamental right "when it leaves appreciable damage to that supposedly vital interest unprohibited." *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in judgment) (internal quotation marks and citation omitted)); *cf. Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (quoting same).

[14] Again, the Supreme Court's recent *Crawford* opinion supports this outcome. There, on a motion for summary judgment after full discovery, the record revealed only scant evidence of any burden on voting rights, and the photo ID law in question might have meaningfully furthered the stated justification of preventing in-person impersonation fraud, however minimal its incidence. The instant case is stronger in each relevant respect. At this juncture in the litigation, on Plaintiffs' motion for a preliminary

claims of undue burden under the First and Fourteenth Amendments.

## II. PLAINTIFFS HAVE SHOWN A LIKELIHOOD OF SUCCESS ON THEIR EQUAL PROTECTION CLAIM UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION.

In addition to the constitutional requirement that election regulations not unduly burden the right to vote, election laws — like all laws — must treat similarly situated citizens equally. *See Bullock v. Carter*, 405 U.S. 134, 141 (1972) (in regulating elections, states' "power must be exercised in a manner consistent with the Equal Protection Clause"); *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."); *Bush v. Gore*, 531 U.S. 98, 105 (2000).

In other circuits, when election procedures are different for different voters — when the procedures create two different classes of similarly situated voters — courts evaluate the claims using a distinct framework developed under the Equal Protection Clause, and applying strict scrutiny when the distinctions impact the fundamental right to vote. The Eleventh Circuit, however, applies the undue burden test of *Anderson* and *Burdick* (and now *Crawford*) to determine whether the difference in treatment is justified. *Fulani v. Krivanek*, 973 F.2d 1539, 1543 (11th Cir. 1992); *Wexler v. Anderson*, 452 F.3d 1226, 1232-33 (11th Cir. 2006).

*Crawford*'s basic test, translated to unequal burdens on different classes of voters, evaluates whether the difference in burden can be justified by "the precise interests put

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injunction, Plaintiffs here have presented abundant evidence that Subsection 6 severely burdens voting rights, and has not furthered any of the ostensible justifications.

forward by the state," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Wexler*, 452 F.3d at 1232 (quoting *Burdick*, 504 U.S. at 434). The greater the differential burden, the greater the degree of scrutiny, and even slight differences must be justified by "sufficiently weighty" legitimate interests. *See Crawford*, 2008 WL 1848103, at *6. Moreover, unlike differences in economic legislation, a different burden on similarly situated voters' rights may not merely be premised on an interest irrelevant to the voter's qualifications, no matter how rational. *Id*. at *5 (discussing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966)); *Carrington* v. *Rash*, 380 U.S. 89, 96 (1965) ("States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State."). Subsection 6's disparate treatment of several different classes of similarly situated eligible voters cannot survive the *Crawford* test.

As shown above, Defendant's implementation of Subsection 6 creates different classes of voters subject to different burdens based on whether they have a driver's license, a distinction wholly unrelated to voting qualifications. Applications containing a driver's license number are placed on a track allowing officials to attempt to match or verify information with a series of tools at their disposal, while applications with a Social Security number get second-class treatment that initially fails about half the time. *See supra* at 8-9. Different procedures are used for different classes of similarly situated voters, with the predictable result that one class fares far worse than the other. The Constitution does not permit the establishment of a secondary class of voters.

Subsection 6 also creates different burdens for different classes of applicants

based on whether they (a) have a driver's license or Social Security number, or (b) say they have no such number. *See supra* at 17-18. Under Subsection 6, the applicants with no number are registered, no questions asked. The applicants with a number, in contrast, are denied the right to register and vote unless they manage to overcome a flawed and burdensome verification regime. No legitimate state interest relevant to the applicant's qualifications, much less an interest sufficiently weighty to withstand close scrutiny, justifies arbitrarily subjecting those without any number to a *less* burdensome registration process.[15]

In addition, Subsection 6 creates different classes of voters based on whether they registered before January 1, 2006: a distinction similarly unrelated to voting qualifications. Applicants who registered before 2006 remain registered under Subsection 6, with no obligation to have a record-keeping number matched or verified. Only new registrants are subjected to the burdensome and flawed verification regime.[16] *See* Roberts Tr. 81:22-25. No state interest other than administrative convenience, and certainly no legitimate state interest relevant to voters' qualifications, justifies this

[15] Indeed, if the state's interest in Subsection 6 were to prevent fraudulent registration, and this interest were sufficiently compelling to outweigh the mass disenfranchisement of eligible voters that Subsection 6 causes, the statute should logically work in exactly the opposite manner: focusing more suspicion, not less, on registration forms without a driver's license or Social Security number.

[16] This is not simply about an effective date for a new law. Other election provisions, once in place, apply to voters across the board: *all* voters must sign in at the polls, for example, or *all* voters must show a photo identification — regardless of when they registered. Not so for Subsection 6. It instead creates two classes of voters: voters who were already registered and are safe from Subsection 6, and new voters, who are uniquely subject to the risk of disenfranchisement imposed by Subsection 6.

disparate treatment.[17]

Finally, as implemented, Subsection 6 treats voters differently depending on where they live. The Equal Protection Clause protects voters against arbitrary treatment based on geography. *See Bush v. Gore*, 531 U.S. 98, 104-05 ("The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."); *O'Brien v. Skinner*, 414 U.S. 524, 530-31 (1974) (holding that "wholly arbitrary" statutes allowing detainees held outside home counties to vote while disenfranchising detainees held within home counties "deny appellants the equal protection of the laws guaranteed by the Fourteenth Amendment"); *Reynolds v. Sims*, 377 U.S. 533, 563 (1964) ("Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable."). As Plaintiffs' evidence shows, and as Judge Barkett recognized:

> Florida's registration scheme is not a process with sufficient guarantees of equal treatment because it is completely devoid of specific standards to ensure that the right to vote is available equally to all potential voters. From the lack of a procedure to discern whether the state or the applicant herself committed a matching error, to the different notices and processes to correct unmatched applications, Florida's matching scheme is subject to disparate implementation among Florida's sixty-seven counties.

[17] As above, if the state's interest in Subsection 6 were to prevent fraudulent registration, and this interest were sufficiently compelling to outweigh the mass disenfranchisement of eligible voters that Subsection 6 causes, there would be no reason to exempt past registrants from Subsection 6's reach.

*Fla. State Conference of the NAACP v. Browning*, 2008 WL 880569, at *28 (11th Cir. 2008) (Barkett, J., dissenting); *see also supra* at 9-10. The disparate implementation would not be of constitutional magnitude if voters were not injured as a result. Here, however, Plaintiffs have shown that voters in some counties are simply less able to register than voters in others. Miami-Dade, Broward, Orange, and Hillsborough, for example, have blocked registrations at a rate largely disproportionate to their tally of new applicants. Doc. 91, ex. 2 at 3.

No legitimate State interest justifies this disparate treatment. Florida has established a barrier to the registration rolls in Subsection 6, and has not ensured that efforts to mitigate the damage are reasonably uniform, leading to disparate treatment of otherwise similar voters. This is not "consistent with [the State's] obligation to avoid arbitrary and disparate treatment of the members of its electorate." *Bush* v. *Gore*, 531 U.S. 98, 105 (2000). Plaintiffs have thus shown a strong likelihood of success on their equal protection claims.[18]

* * *

As shown above, Plaintiffs have demonstrated a substantial likelihood of success on the merits of their constitutional claims. This Court has already determined that irreparable injury will be suffered absent an injunction, that the threatened injury to Plaintiffs outweighs any potential damage to the State, and that an injunction would benefit the public interest, which this Court determined to be "strongly in favor of

[18] In part because of the need for further discovery to prosecute adequately their due process claim (Count IX), Plaintiffs did not move for preliminary injunctive relief with respect to this claim, which remains to be adjudicated.

ensuring that every eligible person in Florida is guaranteed the right to vote." Doc. 105-27. *See also Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1231 (11th Cir. 2005) (preliminary injunction standard). Nothing has changed since the Court reached those conclusions.[19] Indeed, the State has reported no injury whatsoever in connection with the presidential primary conducted pursuant to the terms of the injunction. And with more than 200,000 registration forms submitted since this Court's injunction went into effect, and hundreds of thousands of additional registrations expected as the presidential election grows closer, the threatened injury only grows larger.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court continue to enjoin the application of Subsection 6, and prevent the Secretary from denying registration to any registrant whose driver's license or Social Security number has not been matched or otherwise verified.

[19] It is important to recognize that Plaintiffs do not seek to enjoin Defendant's registration scheme in its entirety, or for all registrants; nor do Plaintiffs seek to enjoin Defendant from continuing to collect applicants' driver's license number or Social Security digits and attempting to match them. All this can and will continue. Plaintiffs seek to enjoin only Subsection 6, which prohibits the State from registering voters whose digits have not been "matched" or otherwise verified. Plaintiffs' challenge, therefore, is targeted to apply only to those voters who are actually injured by the failure of the State's flawed verification process.

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## CERTIFICATE OF SERVICE

Undersigned counsel herby certifies that a copy of the foregoing *Supplemental Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction* was served via the Court's CM/ECF electronic filing system this day, May 5, 2008, upon the following counsel of record:

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