

**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' PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

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I. The Process By Which Subsection 6 Disenfranchises

1. § 97.053(6), Fla. Stat. (“Subsection 6”), prevents county supervisors from registering an otherwise eligible elector with a driver’s license¹ or Social Security number, until the elector’s driver’s license number or last four Social Security digits have been “verified.” Subsection 6 became effective on January 1, 2006, preventing the registration of any such elector submitting a voter registration form after that date, until her driver’s license number or Social Security digits have been “verified.” § 97.053(6), Fla. Stat.

A. Data Entry Errors

2. Upon submission of a complete registration form, which includes a space to submit the elector’s driver’s license number or last four Social Security digits, county or state personnel will attempt to enter the information on the form into a computerized record.

3. State law requires that data entry be performed within 13 days of the application’s receipt. Evidence in the record reflects that data entry has taken up to 13 days from the application date. [R.147:6;² Bradshaw Tr. 87:15-25; § 97.053(7), Fla. Stat.]

4. Through no fault of the elector, the data-entry process frequently

¹ The use of “driver’s license” herein shall refer to both Florida driver’s licenses and official Florida non-driver’s identification cards.

² Citations to the Record follow the format: [docket number]:[exhibit number/letter (if any)]:[page/paragraph reference]. Citations to the transcripts of depositions taken in this matter, and contained in designations submitted to the Court, follow the format: [deponent's last name] Tr. [page number]:[line number].

results in typographical and other errors. Such errors include, but are not limited to: omitted characters, extraneous characters, substituted characters, transposed characters, omitted fields, extraneous fields, substituted fields, and transposed fields. For example, “Alejandro” has been entered as “A.ejandro”, and a number ending in “9240” has been entered as “9420.” There are many such errors supported by evidence in the record. The errors occur in entering applicants’ names, dates of birth, driver’s license numbers, and Social Security digits. [R.7:¶¶ 20-27; R.7:H, I, J, K; R.67:3; R.91-1; Sola Tr. 58:19-59:13.]

5. The data-entry process also results in the entry of information inconsistent with the information reflected in other information systems, including databases maintained by the Department of Highway Safety and Motor Vehicles (“DHSMV”) and by the Social Security Administration (“SSA”). Such inconsistencies include, but are not limited to: fields combined in different ways (such as a name entered as a middle name in one database, and as part of a compound last name in another), fields separated in different ways, fields with trivial spelling or punctuation differences (such as the use of an apostrophe, hyphen, or alternative transliteration of a name), the use of initials or preferred middle names or nicknames, and information that has changed over time. For example, individuals have been entered into the voter registration system with a married name, but appear in other databases with a maiden name. [R.7:¶¶ 13, 33-44; R.7:2:L; R.8:¶14; R.66:D,K.]

6. Evidence in the record shows that, even with careful review, many such errors and inconsistencies will go unnoticed and will remain uncorrected or

unresolved. [Roberts Tr. 31:13-16; Taff Tr. 44:25-45:11; Sola Tr. 33:9-12.]

B. “Matching” Failures

7. After the information on an application has been entered into the Florida Voter Registration System (“FVRS”), with or without errors, the State transmits to the DHSMV the information entered from new applicants who have registered to vote in some manner other than at the DHSMV. The DHSMV attempts to “match” the applicant’s information to the DHSMV database or SSA database.

8. If an applicant provides a driver’s license number on her application, the DHSMV generates a target driver’s license number from data in the voter registration record. The registration record is then compared with the record (or records) associated with the entered driver’s license number and the generated driver’s license number, and if the names match exactly, the applicant’s number is considered “verified” for purposes of Subsection 6. [See R.66:E:7; R.85:C:¶6; Roberts Tr. 41:13-42:10.]

9. If an applicant without a driver’s license provides the last four digits of a Social Security number, DHSMV transmits the voter registration record to the SSA. The registration record is then compared with the records maintained by the SSA, and if the Social Security digits, first name, last name, month of birth and year of birth exactly match a record in the SSA database, the applicant’s number is considered “verified” for purposes of Subsection 6. [See R.66:E:8-9; R.66:G:21-28.]

10. The evidence in the record shows that errors or inconsistencies in voter registration records, or in records maintained by the DHSMV or SSA, predictably cause the “match” process to fail, and fail frequently. For example, an unrebutted expert

declaration by Andrew Borthwick, Ph.D., confirmed that the “matching” processes used in Florida will inevitably fail, because of these errors or inconsistencies and through no fault of the voter. [R.7:¶¶46-51; R.7:D, I, M, N; R.66:C; R.91:1.]

11. The record contains samples of applications and data entry errors that actually resulted in “matching” failures for Florida citizens. [R.67: 3; R.91:1.]

12. The record also contains declarations from individual Florida citizens left “unmatched” because of such data entry errors. For example, Jose Lopez-Sandin, an eligible but un-matched voter from Pembroke Pines, declared that his first name was input mistakenly as “Joseph,” and his last name is listed in Social Security records without a hyphen (“Lopez Sandin”) even though his name is hyphenated. And Eugene McKenna, an eligible 68-year old voter from Fort Lauderdale, testified that the State failed to “match” the information on his application – filled out by an elections official because he is blind in one eye – because the official transposed two digits of his Social Security number. [R.67:2:Lopez-Sandin ¶¶4, 9-11; R.67:2: McKenna ¶¶4,7.]

13. Particularly for electors submitting applications with Social Security digits, the failure rate is quite high. The Social Security Administration has reported that of 2.6 million voter registration records submitted for matching as of February 2007, 46.2% of the attempts failed, resulting in “no match found.” [R.7:E]

14. Some Florida registration forms — applications from existing voters, and applications submitted at the DHSMV— are not submitted to the DHSMV for “matching.” Of the 1,088,964 applications from new voters submitted between January 2006 and October 2007, 363,341 were subject to “matching.” [R.85:8; R.91:5; Roberts

Tr. 81:22-25.]

15. Of the applications submitted for “matching,” the match process initially failed for 72,924 applications. [R.85:B:¶7.]

16. The un rebutted evidence shows that most of these failures are caused by data entry errors by county or state personnel, and not by any fault or error of the applicant. As Peggy Taff, the chief of the State’s Bureau of Voter Registration Services (“BVRS”) — the division of the Secretary of State’s Office that is primarily responsible for the State’s involvement with voter registration — stated: “Most times the [voter’s registration] record is unable to be verified because of a data entry error at the time of input (i.e., misspelled names and number transpositions).” [R.67:3; R.147:15:1.]

17. Dr. Borthwick’s un rebutted expert declaration also states that failed matches are disproportionately common among minorities, because of database differences due to hyphenated and compound naming conventions (in the Hispanic and Haitian-American communities), and the use of unique and derivative spellings of names (in the African-American community). Florida’s results follow this pattern: although Hispanic Americans comprise 15% of the applicant population, they represent 39% of the voters unmatched and unregistered under Subsection 6 as of October 10, 2007. Likewise, African Americans constitute 13% of the applicants, but 26% of the un-matched voters. By contrast, Whites comprise 66% of all applicants, but account for only 17% of the un-matched voters. The State and counties are well aware of the matching issues in these communities caused by hyphenated and compound names, as well as the matching issues caused by married names. [R.7:¶¶39-40; R.66:J, K, L; R.91:2:3; Taff Tr. 43:9-25;

Roberts Tr. 87:2-12; Kelly Tr. 137:11-25, Bryant Tr. 51:10-52:12.]

C. State and County Review

18. When the “match” process fails to locate an exact match, the voter’s registration record is returned to the BVRS. Some of the applications with driver’s license numbers may be partially matched against a portion of a DHSMV record, and these records are returned with an indication of a partial match. Applications with Social Security digits that are sent for matching against the SSA database are simply returned “no match found,” without explanation, when the match process fails. [R.7:E:8-9; R.66:E:7-10; R.66:G:28; R.85:C:¶¶7,9.]

19. The BVRS holds records returned as “failed matches” until a scanned image of the applicant’s registration form is uploaded and attached to the registration record in the Florida Voter Registration System. That is, electors affected by a failed match will not have their applications reviewed by BVRS, will not be notified of any problem, and will not be able to take steps to address the State’s failure until the scanned image of the applicant’s form is attached to the application record. State policy requires counties to submit such images within three days of the data entry of the application information. In practice, the evidence shows that some registration records wait for more than two weeks after data entry before an image is attached. [R.139:2:¶7; R.147:1:3; R.147:7; R.147:10; Bradshaw Tr. 52:1-53:18, 56:11-15.]

20. Once an image of the application form is attached to the registration record, BVRS attempts to resolve the matching error. It attempts to check for typographical and data entry errors; for applications with driver’s license numbers, BVRS

may also be able to search the DHSMV database directly to attempt to resolve the error. There is no dispute that BVRS does not resolve all such errors, and no dispute that it is not able to resolve certain failed matches, including match failures caused by maiden and married names, and failures caused by an error or discrepancy in the Social Security database. From January 2006 to September 2007, during a period of comparatively modest registration activity, BVRS did not resolve 41,189 of 72,174 failed matches. [R.85:B:¶7; R.139:2:¶5; Taff Tr. 44:1-45:11.]

21. When BVRS is not able to resolve a matching failure, it sends the registration record to the appropriate county for follow-up. Most of the time, the county receives no explanation for why the match failed. (For applications with Social Security digits, 98% of the rejected applications are marked simply “no match found.” A study by the federal Government Accountability Office found that given this lack of information, election officials “are not able to efficiently resolve the non-matching problems.”) The record reflects that, during a period of comparatively modest registration activity, counties have taken more than two weeks to follow up on failed matches. [R.6:F:36; R.7:E:8, 9; R.85:B:¶10; R.147:2; Bradshaw Tr. 78:22-80:6; *see also* Roberts Tr. 65:8-12, 66:6-20; Smith Tr. 27:16-28:1.]

D. Notice

22. When county officials are unable to resolve the failed matches, the law requires notice to the applicant. Until June 5, 2008, Subsection 6 required notice that the application is “incomplete and that the voter must provide evidence to the [county] supervisor sufficient to verify the authenticity of the number provided on the

application.” Florida Chapter Law 2008-95, executed on June 5, 2008, and effective immediately but not yet precleared under the Voting Rights Act, modified the requirement to provide notice that “the number cannot be verified and that the applicant must provide evidence to the [county] supervisor sufficient to verify the authenticity of the applicant’s driver’s license number . . . or last four digits of the social security number.”³ [R.150:1; R.150:A:5.]

23. Evidence in the record shows that data entry may take up to 13 days from receipt of the application; the match process may take up to 2 days; attachment of the scanned application image to the registration record may take up to 17 days; review by the counties may take more than two weeks. Notice that the State has failed to verify information on the application may therefore be sent to the applicant for the first time more than a month after the applicant has submitted a complete, timely, and accurate application. [R.66:E:4; R.66:F:68; R.139:2:¶7; R.147:1:3; R.147:2; R.147:6; R.147:7; R.147:10; Bradshaw Tr. 52:1-53:18, 78:22-80:6, 87:15-25.]

24. Furthermore, notices may not be effective for the populations most affected by the failed matches, *see supra* ¶ 17. For example, the Supervisor of Elections in Hillsborough County stated that his county has the “original Hispanic community in Florida” and has “a large Latino population”; yet Hillsborough’s notices to “unmatched” applicants are written only in English. [Johnson Tr. 88:8-12; Smith Tr. 31:8-13.]

25. The record also contains declarations from several voters who

³ The law has not yet been precleared under section 5 of the Voting Rights Act, though neither party expects opposition to preclearance.

received no notice at all that there had been a problem with their registration. For example, Mr. McKenna, *see supra* ¶ 12, never received any notice that the State had failed to verify the number on his application. Eligible Florida citizens Amrita Hansra and Stephen Leinen likewise received no notice that they had been kept from registering because of failed matches.

26. Furthermore, several county supervisors stated that the notice letters they send are sometimes returned undelivered to the county. Dr. Borthwick explained in his unrebutted declaration that data entry errors could impact name and address fields of a voter's registration record and thereby prevent correspondence from reaching its intended target. [R.7:¶52; R.67:2:McKenna ¶5; R.67:2:Hansra ¶4; R.67:2:Leinen ¶4; Smith Tr. 31:14-22; Sola Tr. 48:20-23.]

E. Polling Place Procedures and Provisional Ballots

27. Applicants for whom the “match” process has failed are not sent notice of the location of their appropriate polling place. Unmatched applicants who nevertheless manage to find the appropriate polling place will not be permitted to cast a regular ballot. [Bradshaw Tr. 63:23-64:11, 65:8-12.]

28. State law requires each elector, upon entering the polling place, to present one of several specified current and valid picture identification cards; “[i]f the picture identification does not contain the signature of the voter, an additional identification that provides the voter's signature shall be required.” Although electors with driver's licenses may use this identification to prove their identity at the polls, the State provides no means for the elector to use that driver's license at the polls to correct

the State’s verification failure under Subsection 6. [Bradshaw Tr. 65:8-12; § 101.043(1), Fla. Stat.]

29. Instead, an elector for whom the “match” process has failed may vote only by provisional ballot. Unlike all other provisional ballots cast in Florida, this provisional ballot is presumptively invalid. Until June 5, 2008, Subsection 6 provided that “the provisional ballot shall be counted only if the application is verified by the end of the canvassing period or if the applicant presents evidence to the supervisor of elections sufficient to verify the authenticity of the driver's license number . . . or last four digits of the social security number provided on the application no later than 5 p.m. of the second day following the election.” Florida Chapter Law 2008-95, executed on June 5, 2008, and purportedly effective immediately, modified the requirement to provide that “the provisional ballot shall be counted only if the number is verified by the end of the canvassing period or if the applicant presents evidence to the supervisor of elections sufficient to verify the authenticity of the applicant’s driver's license number . . . or last four digits of the social security number no later than 5 p.m. of the second day following the election.”⁴ Under state policy, the only evidence deemed “sufficient to verify the authenticity” of the number is a copy of the applicant’s driver’s license or Social Security card. [R.66:T; R.139:C; R.150:1; R.150:A:5; Taff Tr. 61:19-63:18; Bryant Tr. 70:25-74:3; Cowles Tr. 89:2-7.]

30. Electors casting provisional ballots are given instructions different

⁴ The law has not yet been precleared under section 5 of the Voting Rights Act, though neither party expects opposition to preclearance.

from these legal requirements. State law requires that electors casting provisional ballots “be given written instructions regarding the person’s right to provide the supervisor of elections with written evidence of his or her eligibility to vote.” One county’s notice, reflected in the record, accordingly states: “You . . . have the right to present additional written evidence supporting your eligibility to vote to the Supervisor of Elections . . . If you do not present additional written evidence supporting your eligibility to vote, the Election Canvassing Board will determine your eligibility to vote based on the information you provided on the Provisional Ballot Voter’s Certificate and Affirmation.” [R.66:Y:4; § 101.048(5), Fla. Stat.]

31. Such notices are substantially likely to mislead “unmatched” provisional voters into believing that they need not submit any materials, and that they may submit information other than a copy of their driver’s license or Social Security card — when they in fact *must* submit a copy of one of these cards, and only one of these cards, to have their provisional ballot counted under Subsection 6. [§ 97.053(6), Fla. Stat.]

32. Pollworkers are not trained to counter the misleading written instructions with accurate oral instructions directed at “unmatched” citizens. [R.66:X; 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.]

33. Several county supervisors have admitted that no voter casting a provisional ballot has ever successfully provided the written evidence necessary to validate the ballot under Subsection 6. [Cowles Tr. 106:2-10; Snipes Tr. 99:23-100:2;

II. Subsection 6 Unduly Burdens the Right to Vote

A. Summary Findings

34. Reliable evidence in the record shows that a large number of otherwise eligible electors submitting complete and timely voter registration forms were barred from registration by § 97.053(6), Fla. Stat., (“Subsection 6”) in 2006 and 2007, and that the number will grow substantially in 2008 absent an injunction. *See* ¶¶ 42-59, *infra*.

35. Reliable evidence in the record shows that a large portion of otherwise eligible electors submitting complete and timely registration forms, and subject to the matching provisions of Subsection 6, were kept from the rolls by Subsection 6 in 2006 and 2007, and that the percentage would grow substantially in 2008 absent an injunction. *See* ¶¶ 60-65, *infra*.

36. Reliable evidence in the record shows that Subsection 6 has imposed and will continue to impose a qualitative burden on otherwise eligible electors that is often large and always unnecessary. *See* ¶¶ 66-72, *infra*.

37. The burdens of Subsection 6, however those burdens are measured, are insufficiently justified by any asserted State interest supported by evidence in the record. *See* ¶¶ 73-111, *infra*.

B. The Legal Standard for Evaluating Undue Burden Claims

38. 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.”).

39. This Term, the Supreme Court reaffirmed its longstanding standard for constitutional challenges to undue 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.*, 128 S. Ct. 1610, 1616 (2008) (plurality) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

40. The Court made clear that this test represents 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, however, are evaluated by a standard more stringent than the deferential rational basis test applied to economic legislation. Thus, “however slight [a] . . . burden may appear, as *Harper* demonstrates, it

must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” *Crawford*, 128 S. Ct. at 1616 (plurality) (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

41. 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 1620-22 (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).

C. The Number of Otherwise Eligible Florida Electors Burdened by Subsection 6

a. Summary Findings

42. Reliable evidence in the record shows that 12,804 electors submitting complete registration forms before the registration deadline for the 2006 elections were prevented by Subsection 6 from registering and voting a valid ballot in the 2006 elections. There is no reliable evidence in the record disputing that the vast majority of these electors were otherwise eligible to register and vote. *See* ¶¶ 45-47, *infra*.

43. Reliable evidence in the record shows that as of December 3, 2007, 14,326 electors submitting timely and complete registration forms were prevented from registering by Subsection 6. There is no reliable evidence in the record disputing that the vast majority of these electors were otherwise eligible to register and vote. *See* ¶¶ 48-50, *infra*.

44. Reliable evidence in the record shows that the number of otherwise eligible electors prevented from registering by Subsection 6 would grow substantially in 2008, a presidential election year, absent an injunction. *See* ¶¶ 51-59, *infra*.

b. Eligible Electors Disenfranchised in 2006

45. 12,804 electors who submitted complete registration forms before the registration deadline for the 2006 elections were prevented by the State from registering for the 2006 elections, solely because the State failed to “match” their information or otherwise verify their driver’s license numbers or Social Security digits. [R.85:A:15:2.]

46. As Ms. Taff stated: “Most times the [voter’s registration] record is unable to be verified because of a data entry error at the time of input (i.e., misspelled names and number transpositions).” *See* ¶ 16, *supra*.

47. The record also contains unrebutted declarations from Jose Lopez-Sandin, Eugene McKenna, Stephen Leinen, and Amrita Hansra, all of whom are eligible Florida citizens, and all of whom submitted complete forms in a timely fashion before the 2006 election. All were left unregistered for the 2006 elections solely because of

Subsection 6. All would otherwise have voted in the 2006 elections. [R.67:2:Lopez-Sandin; R.67:2:McKenna; R.67:2:Leinen; R.67:2:Hansra.]

c. **Eligible Electors Disenfranchised as of December 2007**

48. As of December 3, 2007, the State prevented 14,326 electors who timely submitted complete voter registration forms from registering to vote, solely because the State failed to “match” their information or otherwise verify their driver’s license numbers or Social Security digits. [R.85:A:15:2-3.]

49. Plaintiffs submitted un rebutted declarations from Jose Lopez-Sandin and Stephen Leinen, both of whom are eligible Florida citizens, and both of whom submitted complete forms in a timely fashion before the 2006 election. Both were left unregistered for the 2006 elections solely because of Subsection 6. Both would otherwise have voted in the 2006 elections. Both remained unregistered as of December 3, 2007, solely because of Subsection 6. [R.67-2-Lopez-Sandin; R.67-2-Leinen.]

50. As Ms. Taff stated: “Most times the [voter’s registration] record is unable to be verified because of a data entry error at the time of input (i.e., misspelled names and number transpositions).” See ¶ 16, *supra*.

d. **The Growing Wave**

51. The number of registration forms submitted in 2006 and 2007 is a small fraction of the number of forms that were submitted in 2004, 2000, 1996, and other recent presidential election years. For example, 1,179,527 voters filed new, valid

applications in 1996; 1,032,302 voters did so in 2000; and 1,591,451 did so in 2004. In contrast, only 547,455 did so in 2006; and only 37,725 did so through September of 2007. [R.66:B]

52. Based on the evidence in the record, it is substantially likely that the number of registration forms submitted in 2008, a presidential election year in which the primary elections have already set turnout records in dozens of states, will be many times the number of forms submitted in 2006 and 2007. As the number of submitted forms increases, so too will 2008 yield a substantial increase in the number of forms that the State fails to “match.”

53. The volume of failed “matches” has already begun to increase, along with the interest in the presidential election. In the few weeks between December 3, 2007, and this Court’s Order on December 18, 2007, the State was unable to “match” or otherwise verify information on approximately 2,000 complete forms, in addition to the 14,326 remaining “unmatched” over the 23 months that Subsection 6 had been in effect. [R.85:A:15:2-3; R.139:2:¶13.]

54. In prior presidential election years, the volume of submitted registration forms increases dramatically as the general election’s voter registration deadline approaches. In 1988, 1992, 2000, and 2004, for example, more than 10% of the registration forms received over the course of the entire year were received in the seven days before and including the voter registration deadline. In 1992, 19% of the forms for the entire year were received in the final week before the voter registration deadline. [R.6:E]

55. Based on the evidence in the record, it is substantially likely that the number of registration forms submitted as the voter registration deadline approaches in 2008 will be many times the number of forms submitted earlier in the year. As the number of submitted forms increases, so too will there be a substantial increase in the number of forms that the State fails to “match.”

56. The BVRS is already substantially challenged by the volume of registrations and the need to resolve applications that the State has failed to “match.” Evidence in the record shows that on February 18, 2008 — well before the historical peak of the voter registration cycle for a presidential election year — the entire staff of BVRS suspended all of its other operations in order to perform data entry and verification on a batch of thousands of voter registration applications. That is, the BVRS staff was entirely consumed by the volume of applications arriving in February, with even more forms expected later in the year. [R.147:3; Bradshaw Tr. 80:12-82:6.]

57. The BVRS was first established in 2005. It has never attempted to resolve failed “matches” during the peak registration period of a presidential election year. [Bradshaw Tr. 12:8-13:9.]

58. County supervisors are also substantially burdened with tasks other than resolving failed “matches” as the voter registration deadline approaches. The record reflects that in this period, county supervisors train poll workers, prepare voting equipment, process requests for absentee ballots, mail absentee ballots, prepare early voting sites, and set up polling locations, among other activities. They also continue to process name and address changes of voters already on the rolls. Sarah Jane Bradshaw,

Assistant Director of the State's Division of Elections, characterized the atmosphere in the counties as the voter registration deadline approaches as "[v]ery busy and hectic."

[Bradshaw Tr. 26:22-30:6.]

59. Although the BVRS and counties were able to resolve some failed "matches" in 2006 and 2007, during a comparatively moderate registration period, record evidence indicates that it is substantially likely that they will have less capacity to do so during the peak registration period of 2008, precisely when more registration forms are yielding more failed "matches." Thus, in addition to the increased volume of failed "matches" corresponding to the increased volume of overall forms submitted, it is substantially likely that the rate of unresolved failed "matches" will increase.

D. The Percentage of Otherwise Eligible Florida Electors Burdened by Subsection 6

60. In order to determine the percentage of electors burdened by the verification requirement of Subsection 6, it is appropriate to begin with the number of electors subject to that verification requirement.

61. Applications from existing voters, and applications submitted at the DHSMV, are not submitted to the DHSMV for "matching" or other verification of the driver's license number or Social Security digits. *See* ¶ 14, *supra*.

62. Of the applications submitted between January 2006 and October 2007, 363,341 were subject to "matching." *See* ¶ 14, *supra*.

63. Of the applications submitted for "matching," the match process initially failed for 72,924 applications. That is, the State was initially unable to find

matches for approximately 20% of the applications subject to “matching.” See ¶ 15, *supra*.

64. As Ms. Taff stated: “Most times the [voter’s registration] record is unable to be verified because of a data entry error at the time of input (i.e., misspelled names and number transpositions).” See ¶ 16, *supra*.

65. In 2006 and 2007, during a comparatively moderate registration period, the State and counties were able to resolve some of these failed matches. In 2008, there is substantially likely to be a large wave of applications — and failed matches — during the period when the State and counties are least able to resolve failed matches. It is therefore substantially likely that the rate of unresolved failed matches will increase. See ¶¶ 20, 51-59, *supra*.

E. The Qualitative Burden on Otherwise Eligible Florida Electors Burdened by Subsection 6

66. Subsection 6 begins to operate when eligible Florida citizens submit complete and accurate voter registration forms in a timely fashion. Under state law, Florida electors may submit registration forms up through the 29th day before an election in order to be registered for the proximate election. [§ 97.055, Fla. Stat.]

67. The attempt of State or county officials to enter data from these forms frequently yields data entry errors, or data that is inconsistent with the data maintained by the DHSMV and SSA, which may contain their own errors. See ¶¶ 4-6, *supra*.

68. These errors and inconsistencies lead to predictable failures in the

State's ability to "match" electors' driver's license numbers or Social Security digits to data maintained by the DHSMV and SSA. Once the State fails to "match" an elector's information, the elector will not be registered until the driver's license number or Social Security digits are otherwise verified. The evidence shows that election officials are sometimes able to resolve the errors, but often, they are not. *See* ¶¶ 7-21, *supra*.

69. The evidence in the record shows that the period from the time an application is submitted through the time that the county sends notice of a verification failure can be more than a month. The record also reveals that some eligible Florida citizens are never notified of any verification problem. When the match process fails, it is substantially likely based on the evidence in the record that electors submitting applications as the voter registration deadline approaches will not timely receive notice of the verification problem. *See* ¶¶ 22-25, *supra*.

70. An elector whose driver's license number or Social Security digits remain unverified by Election Day will not be able to correct a verification problem at the polls, despite Florida's requirement that he present a picture identification card in order to verify his identity. If he manages to find his polling place despite the county's failure to inform him of its location, he will be able to cast only a provisional ballot. This provisional ballot is, uniquely, presumptively invalid, and will only be counted if the elector ignores the misleading instructions that he is given at the polls, and instead understands that he must deliver a copy of his driver's license or Social Security card to the county supervisor within 48 hours. There is no evidence that any elector has yet done so. *See* ¶¶ 27-33, *supra*.

71. The evidence in the record includes declarations from several eligible Florida citizens who were prevented from voting in past elections solely because of Subsection 6. *See* ¶ 47, *supra*.

72. The evidence in the record also includes the declaration of an eligible Florida citizen who was unable to resolve the State’s verification error, despite navigating the process the State has established. Alaina Fotiu-Wojtowicz stated that she timely completed a registration form, that she was notified of a problem with the Social Security digits submitted on her form (which she believed to be correct), that she copied both her Social Security card *and* the driver’s license she acquired after submitting her registration form, and that she mailed these copies to the appropriate county supervisor. Despite taking the precise steps that the State claims will cure the problem it has created, Ms. Fotiu-Wojtowicz further states that she continued to receive notices indicating that her Social Security digits remained unverified, and that she therefore remained unregistered. [R.67:2:Fotiu-Wojtowicz.]

F. Asserted Justifications for these Burdens

a. Fraud

73. The State asserts that the burdens of Subsection 6 are justified by the State’s interest in preventing either voter fraud or registration fraud. There is no evidence in the record that Subsection 6 was intended to prevent either voter fraud or registration fraud. Still, the State claims that Subsection 6 now serves that purpose, and that this justifies the burdens that it imposes.

74. There is no dispute that preventing fraud, as a general matter, is a

legitimate State 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”). But that is not the end of the question. In order to balance that interest against the burdens of Subsection 6, it is necessary to weigh the extent to which that interest is supported by evidence in the record, and the extent to which Subsection 6 fulfills that interest.

75. There is evidence in the record that Florida elections have been subject to fraud in the past, primarily through the absentee ballot process. The State suggests that individuals might hypothetically submit fraudulent forms with illegitimate driver’s license numbers or Social Security digits in order to be able to vote illegitimate ballots, or to vote multiple times, or to sign petitions to place initiatives amending Florida’s constitution on the ballot. There is, however, absolutely no evidence in the record that any malfeasant, in Florida or anywhere else in the country, has ever submitted a fraudulent form with illegitimate driver’s license numbers or Social Security digits in order to cast a fraudulent vote or sign a fraudulent petition. [R.139:11-13.]

76. There is also no evidence in the record that Subsection 6 was necessary to prevent, or could have prevented, any incident of election fraud in the past. [Hill Tr. 40:4-20, 73:21-74:1, 112:13-114:5, 116:21-117:19.]

77. The State has offered six examples of individuals submitting registration forms whose information failed to “match.” Three forms, including one by “Joe Blow,” were purportedly submitted by fictional applicants, although the State at the hearing presented documentary evidence of a real “Joseph Blow” residing in Florida.

The other three instances included multiple forms from what appeared, based on the signature, to be the same individual, though the forms themselves contained inconsistent information. [R.139:D-G.]

78. The evidence shows that county supervisors used the “matching” procedure, *see* ¶¶ 7-9, *supra*, to help identify these eight forms. [R.139:2:¶17] The State and counties could continue to do so, of course, absent Subsection 6. There is nothing inherent in the “matching” procedure that requires any particular sanction, including the sanction that Florida has chosen: preclusion of registration until a driver’s license number or Social Security digits can be verified. A challenge to Subsection 6 in no way interferes with the use of the “matching” procedure to flag applications for follow-up, or the obligation of the county supervisors to investigate applications for ineligibility (including those submitted by applicants suspected of being “fictitious persons”), § 98.045, Fla. Stat. Nor does a challenge to Subsection 6 interfere with the ability of any elector to “challenge” applicants upon good cause to believe that the applicant is ineligible, § 101.111, Fla. Stat., or the State’s ability to require proof of identity before voters vote, §§ 97.0535, 101.043, Fla. Stat.; *cf.* 42 U.S.C. § 15483(b).

79. Subsection 6 is also a substantially inefficient — that is, poorly tailored — tool against fraud. It ensnares only malfeasors who submit forms with inaccurate driver’s license numbers or Social Security digits. But it does nothing to address malfeasors who claim to have no driver’s license or Social Security number at all; such registration forms are accepted onto the rolls, without more. Subsection 6 provides a clean path to perpetrate the very fraud it ostensibly seeks to prevent.

80. 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 a substantial 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).

b. **Identity**

81. The State also asserts that the burdens of Subsection 6 are justified by the State’s interest in requiring electors to prove their identity. There is no evidence in the record that Subsection 6 was intended to require electors to prove their identity. Still, the State claims that Subsection 6 now serves that purpose, and that this justifies the burdens that it imposes.

82. There is no dispute that requiring electors to prove their identity, as a general matter, is a legitimate State interest. But as with fraud, that is not the end of the question. In order to balance that interest against the burdens of Subsection 6, it is necessary to weigh the extent to which that interest is supported by evidence in the record, and the extent to which Subsection 6 fulfills that interest.

83. State law requires electors to prove their identity at several points in the election process. Any voter arriving in person to vote at the polls must provide

proof of identity by furnishing one of several specified photo identification cards, either with the voter's signature or accompanied by another piece of identification with the voter's signature. § 101.043, Fla. Stat. A first-time voter registering by mail who has neither driver's license nor Social Security number, outside of a few exceptions, must present a photo identification card or one of several formal documents with the elector's name and address. § 97.0535, Fla. Stat. And federal law requires a first-time voter registering by mail with an unverified driver's license or Social Security number to provide either a photo identification card or one of several formal documents with the elector's name and address. 42 U.S.C. § 15483(b).

84. In contrast, Subsection 6 does not require electors to confirm their identity; Subsection 6 depends instead on verification of the elector's driver's license or Social Security *number*. An elector may not show a current and valid U.S. passport or military identification card in order to become registered under Subsection 6. Indeed, evidence in the record shows that Florida citizens *have* shown U.S. passports and military identification cards, but have not become registered under Subsection 6. Nor can an elector bringing photo identification to the polls use that identification at the polls to resolve a verification problem under Subsection 6. [R.90:10 n.9; R.91:3; Bradshaw Tr. 65:8-12.]

85. At the same time, electors without a driver's license nor Social Security number are not required to prove their identity in any fashion before they are registered. *See* ¶¶ 79-80, *supra*.

c. **Screening for Individuals with Convictions**

86. The State also asserts that the burdens of Subsection 6 are justified by the State's interest in screening the registration list for individuals rendered ineligible to vote by a disenfranchising conviction. There is no evidence in the record that Subsection 6 was intended to achieve this end. Still, the State claims that Subsection 6 now serves that purpose, and that this justifies the burdens that it imposes.

87. There is no dispute that facilitating a state's efforts to maintain the registration rolls is, as a general matter, a legitimate State interest. But as with the other asserted interests, that is not the end of the question. In order to balance that interest against the burdens of Subsection 6, it is necessary to weigh the extent to which that interest is supported by evidence in the record, and the extent to which Subsection 6 fulfills that interest.

88. The evidence reveals that the State does not use a driver's license or Social Security number to conduct an initial screen for individuals on the rolls who may have been rendered ineligible due to conviction. Rather, once individuals on the rolls are identified as potentially ineligible, the State may use a driver's license or Social Security number, if available, as one of several pieces of evidence (such as a signature) to ascertain whether an individual who has been rendered ineligible to vote because of a disenfranchising conviction is the same individual as an elector represented on the rolls, so that eligible electors are not mistakenly removed. There is no evidence in the record that an unverified driver's license or Social Security number has either prevented or impeded the State's ability to conduct this investigation in any individual case.

[Bradshaw Tr. 75:19-77:5.]

89. Subsection 6 is a substantially inefficient — that is, poorly tailored — tool for this purpose. It penalizes eligible electors for failing to remedy the State’s error in confirming one piece of information which the State may use, along with other alternatives, to attempt to ascertain that two entries on two different lists are the same person. It only operates on new registrants; the State has not asserted an interest in confirming the driver’s license or Social Security number for the millions of voters on the rolls before Subsection 6 went into effect. Against this attenuated benefit to the State, unsupported by evidence in the record, is the demonstrated burden on eligible applicants. [Roberts Tr. 20:10-15.]

d. Election Modernization

90. The State also asserts that the burdens of Subsection 6 are justified by the State’s interest in modernizing its elections. There is no evidence in the record that Subsection 6 was intended to modernize the State’s elections, other than complying with the requirements of the federal Help America Vote Act. Still, the State claims that Subsection 6 now serves that purpose, and that this justifies the burdens that it imposes.

91. There is also no dispute that modernizing a state’s elections is, as a general matter, a legitimate State interest. But as with the other asserted interests, that is not the end of the question. In order to balance that interest against the burdens of Subsection 6, it is necessary to weigh the extent to which that interest is supported by evidence in the record, and the extent to which Subsection 6 fulfills that interest.

92. The interest in modernizing elections actually weighs against Subsection 6. As required by the Help America Vote Act, most states have in the last

two years modernized their election processes by *attempting* to confirm the driver's license number or Social Security digits of an applicant against the motor vehicle or Social Security databases. However, precluding the registration of those applicants whose numbers are not confirmed is actually a step backward. Most states did not prevent applicants from registering to vote in the event that their driver's license numbers or Social Security digits could not be verified. Of the few that once did so, most — including California, Maryland, North Carolina, Pennsylvania, Texas, Washington — have since changed their practice to a less restrictive procedure. *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://www.dos.state.pa.us/sure/lib/sure/dl_ssn_policy_change_alert--20060810.pdf; Election Advisory No. 2006-19, <http://www.sos.state.tx.us/elections/laws/advisory2006-19.shtml>; Washington Ass'n of Churches v. Reed, No. CV06-0726 (W.D.Wash. 2006) (stipulated final order and judgment) [R.6:G].

e. **Integrity of the Elections**

93. Finally, the State asserts that the burdens of Subsection 6 are justified by the State's interest in ensuring the integrity of the elections. As with the other asserted interests, there is no dispute that ensuring the integrity of a state's elections is, as a general matter, a legitimate State interest.

94. In sum, however, the evidence in the record suggests that

Subsection 6 does not further this aim. There is no evidence in the record that Subsection 6 provides a substantial defense against fraudulent applications; there *is* evidence in the record that Subsection 6 has prevented thousands of eligible Florida citizens from participating in the 2006 elections, and the evidence presents a substantial likelihood that it would again impact thousands of additional eligible citizens in 2008.

95. In these circumstances, Subsection 6 has essentially “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). As such, it does not meaningfully further the integrity of the elections.

G. Weighing Burdens and Justifications on the Evidence in the Record

96. On the evidence in the record, the burdens imposed by Subsection 6 are substantial under any applicable measure: the absolute number of applicants affected, the proportion of applicants affected, or the qualitative burdens endured by individual applicants. *See* ¶¶ 42-72, *supra*.

97. It is substantially likely that these burdens would seriously impair not only the fundamental voting rights of Plaintiffs’ members and constituents, including those whom Plaintiffs seek to register during 2008, but also Plaintiffs’ own rights of expression and association under the First and Fourteenth Amendments. When Plaintiffs’ constituents are disenfranchised, Plaintiffs lose 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).

98. Against the demonstrated burdens of Subsection 6, it is necessary

to assess the weight of the asserted justifications. Two of the asserted justifications — the need to modernize elections and the need to ensure the integrity of the election process — are not served by Subsection 6. The other two — the need to prevent fraud and the need for electors to demonstrate their identity — are poorly served by Subsection 6. The cost of the extremely limited protection that Subsection 6 offers to further these interests is that many thousands of eligible citizens who submit forms with accurate information are ensnared by a data entry error not of their own making.

99. Moreover, absolutely no interest asserted by the State justifies its refusal under Subsection 6 to process registration forms of electors who are able to provide the same evidence of identity accepted as sufficiently sound at the polls. Likewise, no interest asserted by the State justifies its refusal under Subsection 6 to allow voters presenting a driver’s license at the polls to rectify the Subsection 6 verification problem at the same time.

100. The justification for burdens on electors are also 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 other means Colorado employs to accomplish its regulatory purposes.”); *Fla. State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1188 n.30 (11th Cir. 2008) (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.”).

101. The evidence in the record shows that the vast majority of other states manage to combat the risk of fraud and preserve the integrity of their elections without the demonstrated and unnecessary burdens of Subsection 6. Most states satisfy these goals, without the risk of undue disenfranchisement demonstrated in the record, through the more narrowly tailored procedure contemplated by the Help America Vote Act: requiring registrants to prove their identity in one of several ways before voting. [R. 90:12-13; 42 U.S.C. § 15483(b).]

102. However substantial or slight the burdens imposed by Subsection 6, they are insufficiently justified by any asserted State interest supported by evidence in the record. Subsection 6 is not sufficiently tailored to advancing a legitimate interest to outweigh the injury that it causes.

H. **Evaluating the Weight of the Evidence Under *Crawford***

103. These conclusions comport with the recent analysis of the Supreme Court in *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008).

104. Several elements distinguish the instant case from that presented in *Crawford*. First, the Indiana statute at issue in *Crawford*, requiring electors to present a current government-issued photo identification at the polls before voting, gives comparatively ample notice of the identification requirement to electors who might be affected. Voters without the required photo identification have warning, at least, to gather paperwork and go to a government office at some point before the election to obtain an identification card. If a voter does not have a permissible photo identification

card on election day, the Indiana law provides ten days to obtain one, or to swear an affidavit claiming indigence.

105. In contrast, the evidence in the record here shows that Subsection 6 provides no notice of any impending problem until days, and in many cases weeks, after an elector submits her registration form. An eligible elector completing the voter registration form fully and accurately, and submitting the form in timely fashion, will find herself prevented from registering until she is able to compensate for a government error. Although the errors are systematic and predictably frequent, and fall disproportionately on particular groups, it is not possible for any given elector to predict whether her form will be one of those unable to be “matched” under Subsection 6. As a result, no individual elector is notified that there is a registration problem — not of her making — until far too late in the process, if the notice arrives at all. *Cf. Common Cause / Georgia v. Billups*, 439 F. Supp. 2d 1294, 1345-49 (N.D. Ga. 2006) (discussing the undue burdens of insufficient notice associated with a restriction on the franchise).

106. Second, notice in *Crawford* was not only comparatively ample, but also accurately described the legal obligation on Indiana electors. Indeed, the parties’ submissions in that case demonstrated that based in part on the information given to electors on election day, some voters without the required identification on election day had in fact returned after the election to correct the problem in time to have their votes counted.

107. In contrast, the evidence in the record here shows that on election day, the notice that electors with “unmatched” information receive from poll workers is

both inadequate and affirmatively misleading. Accordingly, several county supervisors have admitted that no voter casting a provisional ballot has ever successfully provided the written evidence necessary to validate the ballot under Subsection 6. *See* ¶ 30-33, *supra*.

108. Finally and perhaps most important, *Crawford* emphasized the importance of evaluating challenges to election regulation on the basis of the reliable evidence in the record. In particular, the evidence of burden evaluated in *Crawford* was strikingly sparse. On summary judgment in *Crawford*, there was at best discredited evidence of the number of voters hypothetically subject to injury, absolutely 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. *Crawford*, 128 S. Ct. at 1622-23. Against virtually no reliable evidence of burden, the slender evidence supporting Indiana's asserted justifications for its photo identification law was sufficient in *Crawford* to sustain the challenged law's constitutionality.

109. The evidence in the record here presents a stark contrast. There is ample reliable evidence of burden caused by Subsection 6, both quantitative and qualitative. In contrast, the record reveals extremely little evidence supporting the State's asserted justifications for the law.

110. As a result, on the evidence in the record, the burdens imposed by Subsection 6 outweigh the proffered justifications for the law. *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.”).

111. No asserted interest adequately justifies the burden of Subsection 6. That is, there is no asserted and supported reason for Subsection 6 that adequately justified disenfranchising more than 14,000 voters (before the high point of a presidential election year’s registration effort), and none that adequately justifies the substantially likely risk that thousands more will be unnecessarily disenfranchised.

112. Plaintiffs have shown a strong likelihood of success on their claims of undue burden under the First and Fourteenth Amendments.

III. Subsection 6 Denies Equal Protection of the Laws

A. Summary Findings

113. Under Subsection 6, electors without a driver’s license but with a Social Security number are detrimentally treated differently than electors with a driver’s license, although they are similarly situated with respect to the fundamental right to vote. The burdens of this differential treatment are insufficiently justified by any asserted State interest supported by evidence in the record. *See* ¶¶ 121-131, *infra*.

114. Under Subsection 6, electors with a driver’s license or Social

Security number are detrimentally treated differently than electors without such a number, although they are similarly situated with respect to the fundamental right to vote. The burdens of this differential treatment are insufficiently justified by any asserted State interest supported by evidence in the record. *See* ¶¶ 132-140, *infra*.

115. Under Subsection 6, electors who register after January 1, 2006, are detrimentally treated differently than electors sufficiently fortunate to register before that date, although they are similarly situated with respect to the fundamental right to vote. The burdens of this differential treatment are insufficiently justified by any asserted State interest supported by evidence in the record. *See* ¶¶ 141-150, *infra*.

116. Under Subsection 6, electors who attempt to register in certain counties are detrimentally treated differently than electors who attempt to register in others, although they are similarly situated with respect to the fundamental right to vote. These differences are not the minor and incidental vagaries of any decentralized election process, but substantial and material. The burdens of this differential treatment are insufficiently justified by any asserted State interest supported by evidence in the record. *See* ¶¶ 151-160, *infra*.

B. The Legal Standard for Evaluating Equal Protection Claims

117. Election laws — like all laws — may only treat similarly situated citizens differently for a sufficiently compelling reason. *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).

118. In this circuit, when election procedures are different for different voters — when the procedures create two different classes of similarly situated voters — courts apply the 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).

119. *Crawford*’s test, translated to unequal burdens on different classes of voters, evaluates whether the difference in burden can be justified by “the precise interests put 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 v. Takushi*, 504 U.S. 428, 434 (1992)). The greater the differential burden, the greater the degree of scrutiny, and the greater the justification required. Even slight differences must be justified by legitimate and “sufficiently weighty” interests. *See Crawford*, 128 S. Ct. at 1616.

120. Moreover, unlike differences in economic legislation, a different burden on similarly situated voters’ rights may not rest on an interest irrelevant to the voter’s qualifications, no matter how rational. *Id.* at 1615-16 (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.”).

C. Different Burdens on Electors with a Social Security Number and No Driver's License and Electors with a Driver's License

121. Under the State's implementation of Subsection 6, electors without a driver's license but with a Social Security number are treated materially differently than electors with a driver's license.

122. The evidence in the record shows that the procedures for processing applications from electors with a Social Security number but no driver's license are substantially more burdensome than the flawed procedures for processing applications from electors with a driver's license. *See* ¶¶ 2-33, *supra*.

123. For electors with a driver's license, once data is entered and transmitted to the DHSMV for "matching," the match process compares records in the motor vehicle database against both the driver's license number entered from a registration form and the driver's license number generated from other demographic data in the voter registration record; this process is able to accommodate some data entry errors in the driver's license number itself. When the match process fails, some applications with driver's license numbers may be partially matched against a portion of a DHSMV record; these records are returned with an indication of a partial match. BVRS has the capacity to search the DHSMV database directly, to attempt to resolve the matching error. If BVRS is unable to resolve the problem, it will transmit as much information as it has been able to acquire to the counties, including comments about the potential source of the error. Finally, if the "matching" failure is still unable to be resolved, the elector may verify her driver's license number by presenting her driver's

license: a document by which the elector may also establish her identity at the polls, and a document that Florida residents are legally required to carry on their person whenever they operate a motor vehicle. [R.7:E:8-9; R.66:E:7; R.66:G:28; R.85:C:¶6-7, 9; R.139:2:¶5; Roberts Tr. 41:13-42:10; § 322.15(1), Fla. Stat.]

124. In contrast, for electors with a Social Security number but no driver's license, the "match" process compares the information as entered from the application, without a backup alternative, against the information in the SSA database. The system searches for an exact match, character by character, with no ability to accommodate data entry errors and no ability to seek a partial match. When the match process fails, the record is returned with only a code indicating "no match found." Neither BVRS nor any county has the capacity to search the SSA database directly, to attempt to resolve the matching error. As a result, the State has conceded that it is more difficult to resolve applications with Social Security digits. If the "matching" failure is unable to be resolved, the elector must present her Social Security card: a document that does not serve any other function in the election administration process, a document that citizens are not required to carry on their person, and a document that citizens may or may not physically possess. [R.7:E:8-9; R.66:E:7-10; Roberts Tr. 86:22-23; Bradshaw Tr. 35:15-21, 50:8-12.]

125. The "matching" failure rate for electors submitting applications with Social Security digits is quite high. The Social Security Administration has reported that of 2.6 million voter registration records submitted for matching as of February 2007, 46.2% — nearly half — of the attempts failed, resulting in "no match found." [R.7:E.]

126. A study by the federal Government Accountability Office found that given the lack of clarifying information accompanying matching failures for applications with Social Security digits, election officials “are not able to efficiently resolve the non-matching problems.” [R.6:F:36.]

127. The substantial incremental burdens on electors with a Social Security number but no driver’s license have a substantially detrimental effect. Although most Florida electors registering to vote have a driver’s license, 85% of the electors blocked from registering because of Subsection 6 — more than 12,000 of the 14,326 electors unregistered as of December 3, 2007 — submitted Social Security digits. [R.91:2:3.]

128. Whether an elector has a driver’s license is a distinction wholly unrelated to the elector’s qualifications to vote.

129. The State maintains that the process deployed is the only administrative process made available by the Social Security Administration for attempting to “match” Social Security digits on voter registration forms. However, the proximate cause of the differential burden on voters with a Social Security number is not the difference in the administrative “matching” process, but rather the sanction of Subsection 6: precluding registration for electors with numbers the State is not able to verify. It is the sanction that makes the differential process meaningful, and of constitutional magnitude.

130. The evidence in the record shows a substantial differential burden on electors with a Social Security number but without a driver’s license, and the State has

offered no legitimate justification for this differential burden that is supported by any evidence.

131. As applied to electors with a Social Security number but without a driver's license, Plaintiffs have therefore shown a strong likelihood of success on their claims of a denial of equal protection under the Fourteenth Amendment.

D. Different Burdens on Electors with a Driver's License or Social Security Number and Electors with No Such Number

132. Under the State's implementation of Subsection 6, electors with a driver's license or Social Security number are treated materially differently than electors with no such number.

133. The evidence in the record shows that the procedures for processing applications from electors with a driver's license or Social Security number are substantially more burdensome than the procedures for processing applications from electors who have no such number. *See* ¶¶ 2-33, *supra*.

134. For an elector with a driver's license or Social Security number, the data on her registration form is entered into a computer record, with or without errors, and transmitted to the DHSMV for "matching." As detailed above, the "matching" process predictably fails, because of errors or inconsistencies beyond the elector's understanding or control. When the State's matching process fails, the elector will be blocked from registration until she can compensate for the error by otherwise verifying her driver's license number or Social Security digits. If neither the BVRS nor the county is able to resolve the problem, as is frequently the case, the county will attempt to

transmit notice; the evidence in the record shows that this notice is substantially likely to be untimely and sometimes does not arrive at all. An elector with an unverified driver's license number or Social Security digits will not be informed of her polling place location. If the elector nevertheless manages to find her polling place, she will not be permitted to vote a regular ballot, no matter what proof of identity or eligibility she brings to the polls. Instead, she will be able to vote only a provisional ballot. The instructions accompanying her provisional ballot will be misleading, not only failing to mention that she must submit a copy of her driver's license or Social Security card to the county supervisor within 48 hours in order to become registered and have the provisional ballot counted, but implying that she need not submit any additional documentary evidence in order to have the ballot counted. *See* ¶¶ 2-33, *supra*.

135. In contrast, for an elector with no driver's license or Social Security number, the data on her registration form is entered into a computer record, with or without errors. Absent any other evidence of ineligibility, she is registered to vote, informed of her polling place location, and placed on the pollbook. To the extent that she is required to verify her identity, she may do so by presenting one of several different pieces of documentation at the polls, when all other electors are asked to verify their identity. [§ 97.0535, Fla. Stat.; Taff Tr. 70:20-71:9; Smith Tr. 40:13-42:17.]

136. By December 3, 2007, 14,326 individuals with driver's licenses or Social Security numbers submitting complete and timely application forms had been blocked from registering by Subsection 6. There is no evidence in the record suggesting that even one applicant without a driver's license or Social Security number submitting a

complete and timely application form had been blocked from registering. [R.85:A:15:2-3.]

137. The State asserts that it is justified in subjecting electors with driver's license or Social Security numbers to the differential burdens of Subsection 6, because it is not able to use this flawed process to verify the identity of applicants without driver's licenses or Social Security numbers. Yet the State has several procedures for verifying the identity of electors without driver's licenses or Social Security numbers, at the polls and otherwise, and there is no evidence in the record that such procedures are ineffective or less effective than Subsection 6. The State may not impose a differential and substantial burden on some voters simply because it is possible to do so. [§ 97.0535, Fla. Stat.]

138. Indeed, assuming that the state's strongest interest in Subsection 6 is to prevent fraudulent registration, and assuming for purposes of this claim only that this interest were sufficiently compelling to outweigh the substantial burden on thousands of eligible voters, there is no logical reason related to that interest explaining why the statute does not function in exactly the opposite manner: focusing more suspicion, not less, on registration forms without a driver's license or Social Security number.

139. The evidence in the record shows a substantial differential burden on electors with a driver's license or Social Security number, and the State has offered no legitimate justification for this differential burden that is supported by any evidence.

140. As applied to electors with a driver's license or Social Security number, Plaintiffs have therefore shown a strong likelihood of success on their claims of

a denial of equal protection under the Fourteenth Amendment.

E. **Different Burdens on Electors Registered After January 1, 2006 and Electors Registered Before that Date**

141. Under the State's implementation of Subsection 6, electors registering after January 1, 2006, are treated materially differently than electors who registered before that date.

142. The evidence in the record shows that the procedures for processing applications from electors registering after January 1, 2006, are substantially more burdensome than the procedures for processing applications from electors registering before that date. *See* ¶¶ 2-33, *supra*.

143. For an elector registering after January 1, 2006, the data on her registration form is entered into a computer record, with or without errors, and transmitted to the DHSMV for "matching." The "matching" process predictably fails, because of errors or inconsistencies beyond the elector's understanding or control. When the State's matching process fails, the elector will be blocked from registration until she can compensate for the error by otherwise verifying her driver's license number or Social Security digits. If neither the BVRS nor the county is able to resolve the problem, as is frequently the case, the county will attempt to transmit notice; the evidence in the record shows that this notice is substantially likely to be untimely and sometimes does not arrive at all. An elector with an unverified driver's license number or Social Security digits will not be informed of her polling place location. If the elector nevertheless manages to find her polling place, she will not be permitted to vote a regular ballot, no matter what proof

of identity or eligibility she brings to the polls. Instead, she will be able to vote only a provisional ballot. The instructions accompanying her provisional ballot will be misleading, not only failing to mention that she must submit a copy of her driver's license or Social Security card to the county supervisor within 48 hours in order to become registered and have the provisional ballot counted, but implying that she need not submit any additional documentary evidence in order to have the ballot counted. *See* ¶¶ 2-33, *supra*.

144. In contrast, for an elector who registered before January 1, 2006, the data on her registration form is entered into a computer record, with or without errors. Absent any other evidence of ineligibility, she was registered to vote, informed of her polling place location, and placed on the pollbook. To the extent that she is required to verify her identity, she may do so by presenting one of several different pieces of documentation at the polls, when all other electors are asked to verify their identity. [Roberts Tr. 81:22-25, 85:6-13; Taff Tr. 70:20-71:9; § 101.043, Fla. Stat.]

145. Whether an elector registered before or after January 1, 2006, is a distinction wholly unrelated to the elector's qualifications to vote.

146. By December 3, 2007, 14,326 individuals registering after January 1, 2006, and submitting complete and timely application forms, had been blocked from registering by Subsection 6. There is no evidence in the record suggesting that even one applicant registering before January 1, 2006, and submitting a complete and timely application form, had been blocked from registering. [R.85:A:15:2-3.]

147. January 1, 2006, was not merely an effective date, requiring all

electors after that date to verify their driver's license or Social Security number, or the fact that they have none. It is, instead, a date dividing Florida electors into two similarly situated groups, one treated in far more burdensome fashion than the other.

148. Indeed, assuming that the state's strongest interest in Subsection 6 is to prevent fraudulent registration, and assuming for purposes of this claim only that this interest were sufficiently compelling to outweigh the substantial burden on thousands of eligible voters, there is no logical reason related to that interest explaining why past registrants should be exempted from the requirement that registrants with a driver's license or Social Security number have that number verified.

149. The evidence in the record shows a substantial differential burden on electors registering after January 1, 2006, and the State has offered no legitimate justification for this differential burden that is supported by any evidence.

150. As applied to electors registering after January 1, 2006, Plaintiffs have therefore shown a strong likelihood of success on their claims of a denial of equal protection under the Fourteenth Amendment.

F. Different Burdens on Electors By County

151. Under the State's implementation of Subsection 6, electors residing in some Florida counties are treated materially differently than electors residing in others.

152. The evidence in the record shows that the degree to which applications from some counties are subject to data entry errors — and the degree to which the county compensates for or compounds those errors — renders the process for

applying for registration under Subsection 6 substantially more burdensome in some counties than in others.

153. For example, the evidence shows that some counties make several attempts to follow-up on failed matches, reaching out to register an applicant when the State fails to verify their information; others send one notice and consider their duty complete. The notices that have been sent to voters, and the notices that are provided at the polls, vary by county; some notices are more misleading than others. Some, but not all, counties have polling-place access to the Electronic Voter Identification system — known as “EViD”; this system allows pollworkers in some counties, but not others, to investigate and inform provisional ballot voters of problems with mismatched driver’s license numbers. [R.66:P, Y; Bryant Tr. 55:6-22; Sola Tr. 38:13-39:2, 40:6-12; Smith Tr. 31:5-7.]

154. In total, “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.” *Fla. State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1186 (11th Cir. 2008) (Barkett, J., dissenting).

155. As with the other differential equal protection claims above, the disparate implementation would not be of constitutional magnitude if voters were not

injured as a result. The evidence in the record, however, shows that voters in some counties are burdened to a far greater degree than voters in others.

156. The differential results of these differential burdens are not merely trivial. The unrebutted evidence shows that although 9% of all applicants registering since January 1, 2006, came from Miami-Dade County, that county is responsible for 35% of the applicants still blocked from the rolls by Subsection 6 as of December 3, 2007. That is, the rate of disproportionate disenfranchisement is more than 4 times higher in Miami-Dade than in other counties. Similarly, Orange County represented 5% of all applicants registering since January 1, 2006, but 15% of the applicants still blocked by Subsection 6 as of December 3, 2007. [R. 91:2:3.]

157. Whether an elector attempting to register resides in one Florida county or another is a distinction wholly unrelated to the elector's qualifications to vote.

158. 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.”).

159. The State has presented no legitimate interest supported by record evidence that 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. This has created disparate treatment of otherwise similar voters, resulting in substantially disparate burden. 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).

160. The evidence in the record shows a substantial differential burden on electors registering in some counties, but not others, and the State has offered no legitimate justification for this differential burden that is supported by any evidence.

161. Plaintiffs have therefore shown a strong likelihood of success on their claims of a denial of equal protection under the Fourteenth Amendment.

IV. The Preliminary Injunction Should Be Maintained

162. Plaintiffs have demonstrated a substantial likelihood of success on the merits of their constitutional claims. *See* ¶¶ 34-161, *supra*.

163. Plaintiffs, and their members and constituents, will suffer irreparable injury absent an injunction against the enforcement of Subsection 6. Absent an injunction, the law would continue to result in actual harm to real individuals. When eligible electors are unlawfully prevented from registering to vote for a particular election, it is not possible to remedy that substantial injury after the election has passed.

See Charles H. Wesley Educ. Foundation, Inc. v. Cox, 408 F.3d 1349, 1355-56 (11th Cir. 2005); *Siegel v. LePore*, 234 F.3d 1163, 1177 (11th Cir. 2000) (en banc) (distinguishing the claims in that case by noting that “[n]o voter Plaintiff claims that in this election he was prevented from registering to vote, prevented from voting or prevented from voting for the candidate of his choice. Nor does any voter claim that his vote was rejected or not counted. The cases called to our attention by the parties that have warranted immediate injunctive relief have involved these kind of circumstances.”).

164. The threatened injury to Plaintiffs, growing larger as the presidential election approaches, outweighs any potential injury to the State that would result from an injunction against the enforcement of Subsection 6. The integrity of Florida’s elections only grows eligible individuals are permitted to register without undue or unequal burden, and without sacrificing the ability of the State and counties to guard against wrongdoing. Indeed, the State has reported no injury at all in connection with its conduct of the presidential primary election on January 29, 2008, pursuant to the terms of the injunction entered against Subsection 6 on December 18, 2007.

165. An injunction against the enforcement of Subsection 6 would also benefit the public interest. Protection of the fundamental right to vote is unquestionably in the public interest, and preserves confidence in the integrity of our electoral processes. In contrast, “discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation.” 42 U.S.C. § 1973gg(a)(3). The public interest continues to be strongly in favor of ensuring that every eligible Florida citizen is

guaranteed the right to vote.

166. The injunction against Subsection 6 is narrow in its effect, and does not invalidate or otherwise impact the vast majority of Florida’s statutory registration scheme. The State can and will continue to collect an elector’s driver’s license number or Social Security digits on each registration form. The State can and will continue to attempt to “match” those numbers to information maintained by the DHSMV or SSA. The State can and will continue to investigate the applications of those electors for whom the “matching” process fails, and county supervisors can and will continue to do the same. If there is an indication that any applicant is not eligible to register or vote, county supervisors can and will continue to exercise their statutory authority to refuse to register ineligible applicants, and other electors may use the statutory challenge process where there is convincing evidence of ineligibility. The State can and will continue to require that electors identify themselves before voting, including by means of the requirement to show a photo identification card at the polls.

167. What the State cannot do is establish a flawed procedure that will demonstrably, predictably, and unequally disenfranchise eligible voters by imposing burdens that are insufficiently justified by any interest supported in the record.

For all of the reasons stated above, it is hereby ORDERED AND

ADJUDGED as follows:

1. Plaintiffs' motion for preliminary injunction (doc. 4) is hereby GRANTED.
2. Defendant, through its officers and employees, is hereby enjoined from enforcing Subsection Six of § 97.053, Florida Statutes, as applied to deny registration to an otherwise eligible elector.
3. Specifically, Defendant, through its officers and employees, is hereby enjoined from precluding the registration of an otherwise eligible elector solely because the elector's driver's license number or last four digits of the elector's Social Security number have not been "matched" or otherwise verified.

DONE AND ORDERED this _____ day of _____, 2008.

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a copy of the foregoing was served via the Court's CM/ECF electronic filing system this day, June 16, 2008, upon the following counsel of record:

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