

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

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

Plaintiffs,

v.

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

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

Defendant.

\_\_\_\_\_ /

**SECRETARY OF STATE'S RESPONSE TO  
PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW**

Defendant Kurt S. Browning, in his official capacity as Secretary of State for the State of Florida (the "Secretary"), files this response to Plaintiffs' Supplemental Memorandum of Law (doc. 135) and incorporates by reference his Motion to Dismiss (doc. 23), Reply to Plaintiffs' Response to the Secretary's Motion to Dismiss (doc. 60), and Amended Response to Plaintiffs' Motion for Preliminary Injunction (doc. 85).

## MEMORANDUM OF LAW

There is no question that Florida may collect the identifying numbers of voter registration applicants.<sup>1</sup> Plaintiffs claim, however, that a state may not require a small percentage of applicants—those whose numbers could not be verified—simply to present an identification card they already possess or send a copy of it to election officials. To so hold would be unprecedented. In an age where proof of identification is both essential and commonplace—from airport terminals to federal courthouses to supermarkets—the Constitution neither compels an anachronistic honor system of voter registration nor requires official voter rolls to serve as a graffiti wall for fraudulent registration entries.

Plaintiffs argue that Subsection Six violates the Constitution and that little has changed since this Court enjoined its operation. They are wrong. Subsection Six is and has been constitutional, and much has changed—legally and factually—in the past five months. The Legislature has amended Subsection Six to provide that *all* unverified applicants may show a driver’s license or Social Security card and become registered—even those whose non-verification resulted from their own error—before and after book closing, and even after the election. Recent procedural amendments have streamlined and enhanced the verification process and in great measure mooted Plaintiffs’ complaints. And the Supreme Court sustained against constitutional attack a strict photo identification law that served the same important interests and imposed greater burdens than Subsection Six. *Crawford v. Marion County Election Board*, 553 U.S. \_\_\_\_, 128 S. Ct. 1610 (2008).

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<sup>1</sup> *I.e.*, an applicant’s Florida driver’s license or identification card number or the last four digits of the applicant’s Social Security number. 42 U.S.C. § 15483(a)(5)(A); § 97.053(6), Fla. Stat. (2007).

Subsection Six promotes the integrity of the electoral process. It helps to prevent voter fraud in the deliberate creation of registration records that do not relate to eligible citizens and in the intentional or unintentional creation of multiple records for a single person. Indeed, this Court has already found that “Subsection Six serves to protect the integrity of the election process because there is a link between voter registration fraud and actual voter fraud.” Doc. 105 at 21. Subsection Six also serves Florida’s interests in the modernization of election procedures through improved technology and the protection of public confidence in the electoral process. Because Subsection Six promotes important interests and imposes minimal burdens, it is constitutional.

**Recent Legislative and Administrative Amendments Have  
Substantially Streamlined the Verification Process**

The essence of Plaintiffs’ quarrel with Subsection Six is that it requires a small percentage of applicants—those whose numbers could not be verified in an official database—to show a driver’s license or Social Security card. To this end, Subsection Six directs the Supervisors of Elections to notify unverified applicants of the need to validate their numbers, and Supervisors accept evidence of an applicant’s number in any visible form. Thus, an applicant may produce a driver’s license or Social Security card in person or may send a copy to the Supervisor by mail, facsimile, or email. *See* doc. 85 at 20.

Official data suggest that barely two percent of all new applicants are asked to validate their numbers—31,506 of 1,529,465 applicants for the period from January 1, 2006, to September 30, 2007. *Id.* at 2. Recent amendments to the process will greatly reduce the proportion of applicants required to validate their numbers—from their current minimal levels—and will greatly facilitate that proof where it remains necessary.

**First.** During the 2008 regular session, the Florida Legislature adopted Senate Bill 866, which amended Subsection Six to permit *all* applicants whose numbers could not be verified to provide evidence of their number and become registered.<sup>2</sup>

Prior to this amendment, Subsection Six allowed an applicant to “verify the authenticity of the number provided on the application.” If the number on the applicant’s driver’s license or Social Security card did not match that “provided on the application,” a new application was required. And if the new application followed book closing, the applicant was ineligible to vote in that election. *See* § 97.055(1), Fla. Stat. (2007).<sup>3</sup>

The amendment, by contrast, permits an applicant to “verify the authenticity of the applicant’s driver’s license number, Florida identification card number, or last four digits of the social security number.” S.B. 866, § 3, 2008 Reg. Sess. (Fla. 2008). The ability to establish one’s actual number is no longer limited to applicants whose numbers were correct as written on the application. All unverified applicants, even after book-closing, can now present their driver’s license or Social Security card—or send in a copy—and vote. Likewise, any applicant who does not validate his number before the

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<sup>2</sup> The bill passed 113-0 in the House and 36-2 in the Senate. *See* <http://tinyurl.com/5z2ugy>. While it has not yet been signed by the Governor, Plaintiffs, with good reason, now argue on the basis of the amended statute. Doc. 135 at 6 n.4. Their pleadings, motions, and evidence, however, are premised on a state of law and facts that no longer exists. Their claims, therefore, now stand in an unusual procedural posture.

<sup>3</sup> Though Plaintiffs argued that this result was too severe—and indeed based much of their argument on this feature of the law—it is not unconstitutional. Plaintiffs’ counsel recently challenged Florida’s statutory prohibition on post-book-closing corrections to voter registration applications. *Diaz v. Cobb*, \_\_\_ F. Supp. 2d \_\_\_, 2008 WL 793584 (S.D. Fla. Mar. 25, 2008). They contended there—as they insisted here—that applicants must be permitted to correct errors on their applications after book-closing and vote at the ensuing election. The Court disagreed and entered judgment for the Secretary. The *Diaz* plaintiffs, represented by the same counsel as Plaintiffs here, did not appeal.

election and thus casts a provisional ballot may, within two days after the election, provide such evidence (in person or otherwise), and the ballot will count, whether or not the number on the original form was correct. *See id.*

**Second.** Throughout this litigation, Plaintiffs have complained that the notice letters sent by the Supervisors to unverified applicants are confusing or incomplete. While these letters were more than sufficient constitutionally, the Secretary has developed detailed and uniform guidelines for such notices. The notices will state that:

- (i) the Division of Elections was unable to verify the number provided;
- (ii) the applicant must provide a copy of his Florida driver's license, Florida identification card, or Social Security card to the Supervisor by mail, facsimile, or email, or produce such documentation in person;
- (iii) if the applicant does not do so before the election, he may not vote a regular ballot, but may vote a provisional ballot; and
- (iv) for the provisional ballot to count, the applicant must provide the needed evidence not later 5 p.m. on the second day after the election.

*See Ex. A, ¶¶ 11-12 & Att. C.* The notice will also contain contact information for the applicant's Supervisor, including an email address and telephone and facsimile number, and it will invite the applicant to contact the Supervisor's office with any questions. *Id.*

**Third.** The Secretary has also taken steps to improve the verification process at the state level and thereby reduce the proportion of applicants that are asked to establish their numbers. Previously, about one half of applications for which a computerized search by the Department of Highway Safety and Motor Vehicles ("DHSMV") was unable to find an exact match—specifically, those for which DHSMV located a potential match—were first routed to the Bureau of Voter Registration Services ("BVRS") for individual review. Doc. 85 at 2, 8-14. The remaining records bypassed BVRS and were

routed directly to the Supervisors for local action. With access to DHSMV’s searchable database, BVRS staff was able to resolve about 84 percent of the records it received, and returned only unresolved records to the Supervisors. *Id.* at 2.

The Secretary is modifying this process such that *all* records for which a match is not found will now be routed to BVRS for individual review. *See* Ex. A, ¶¶ 8. BVRS staff will thus review all unmatched records against the DHSMV database—regardless of whether DHSMV located a potential match—to resolve the application. *Id.* Considering BVRS’ record of success in resolving applications for which DHSMV did not find an exact match, the modified process promises substantially to increase the proportion of applicants who clear the verification process and decrease the proportion of applicants—currently about 2.06 percent, *see infra*—who are asked to take simple further action. In fact, on a recent review of 100 applications which, under former procedures, had been returned to the Supervisors (either directly or after BVRS review), BVRS was able to resolve 71 under its amended procedures. *Id.*, ¶¶ 9-10. This success rate will reduce the percentage of applicants required to take further action from 2.06 percent to 0.6 percent.

**Fourth.** A recent systemic improvement will enhance the efficiency of BVRS’ resolution of unmatched records. In a number of cases, BVRS has had access to a scanned image of the original application form. *Id.*, ¶ 5. When these images were available, BVRS staff was able to identify and resolve data entry errors. *Id.* Thus, if an application indicated that the applicant’s name was “John,” but a data entry operator entered it as “Jon,” BVRS would easily correct this problem. *Id.*, ¶ 6. In some cases, however, individual Supervisors’ offices had not uploaded the application image before

the record reached BVRS for review. *Id.*, ¶¶ 5, 7. Consistent with protocols developed by the Florida State Association of Supervisors of Elections, the Division now requires application images to be uploaded within three days of the application’s entry, and it has modified its computer systems to submit records to BVRS as images become available. *Id.*, ¶ 7. In addition, the system now generates regular reports to identify records lacking images, and the Division prompts Supervisors with respect to such records. *Id.* This improvement ensures that application images will be available to BVRS in *all* cases.

These four modifications reflect the continuous, ongoing improvements to the verification process since its inception in January, 2006. Without impairing the verification process, they will (i) decrease the proportion of applicants who must show their identification card to complete their registrations; and (ii) extend and facilitate the process by which unverified applicants validate their numbers and become registered.

### **ARGUMENT**

The grant of a preliminary injunction is “the exception rather than the rule.” *Siegel v. LePore*, 234 F.3d 1163, 1175 (11th Cir. 2000); *id.* (quoting *McDonald’s Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998)) (A “preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the burden of persuasion.”) (marks omitted). The movant must establish, *inter alia*, “a substantial likelihood of success on the merits.” *Id.* Plaintiffs have not done so.

#### **I. PLAINTIFFS HAVE NOT CLEARLY ESTABLISHED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THEIR RIGHT-TO-VOTE CLAIM.**

“Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections . . . .” *Burdick v. Takushi*,

504 U.S. 428, 434 (1992). “[A]s a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.” *Storer v. Brown*, 415 U.S. 724, 730 (1974). “To achieve these objectives, States have enacted comprehensive and sometimes complex election codes.” *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Thus, “[e]lection laws will invariably impose some burden upon individual voters.” *Burdick*, 504 U.S. at 434. Each provision, “whether it governs the registration and qualification of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote.” *Anderson*, 460 U.S. at 788.

“[T]o subject every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.” *Burdick*, 504 U.S. at 434. Laws imposing “severe” burdens must be “narrowly drawn” to advance compelling state interests. *Id.* “But when a state election law provision imposes only reasonable, nondiscriminatory restrictions . . . , the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Id.* (marks omitted).<sup>4</sup>

A series of recent decisions has upheld election regulations that served similar interests and imposed similar or greater burdens than Subsection Six.<sup>5</sup> In *Gonzalez v.*

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<sup>4</sup> Plaintiffs argue that even laws imposing only “‘slight’ burdens” are subject to stricter analysis than rational basis. This is not so. *Fulani v. Krivanek*, 973 F.2d 1539, 1543 (11th Cir. 1993) (“The approach used by the *Anderson* Court can be described as a balancing test that ranges from strict scrutiny to a rational-basis analysis.”).

<sup>5</sup> See, e.g., *Crawford v. Marion County Election Board*, 472 F.3d 909 (7th Cir. 2007) (upholding photo identification law); *Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333 (N.D. Ga. 2007) (same); *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006) (same). This year, in *Diaz v. Cobb*, \_\_\_ F. Supp. 2d \_\_\_,

*Arizona*, 485 F.3d 1041 (9th Cir. 2007), the Court affirmed the denial of a preliminary injunction prohibiting the enforcement of a state law requiring *all* voter registration applicants to submit a verifiable driver’s license number or documentary evidence of citizenship together with their applications. *Id.* at 1047. The plaintiffs complained that such evidence might be difficult or impossible to obtain, *id.* at 1050, and noted that voter registration had declined since the law took effect, *id.* at 1048. The Court upheld the requirement as not severe because a “vast majority of Arizona citizens in all likelihood already possess at least one of the documents sufficient for registration.” *Id.* at 1050.

Last month, in *Crawford*, the Supreme Court upheld the constitutionality of an Indiana law that required all in-person voters to present government-issued photo identification. 128 S. Ct. 1610. Under this law, a voter who failed to present the necessary identification could cast a provisional ballot that would be counted only if the voter brought such identification to the county clerk’s office after the election. *Id.* at 1613-14. The Court found that the challenged law promoted three valid state interests:

***Election Modernization.*** The state had “a valid interest in participating in a nationwide effort to improve and modernize election procedures that have been criticized as antiquated and inefficient.” *Id.* at 1617. Both the National Voter Registration Act of 1993 (the “NVRA”) and the Help America Vote Act of 2002 (“HAVA”) contained provisions “consistent with a State’s choice to use government-issued photo identification

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2008 WL 793584 (S.D. Fla. Mar. 25, 2008), the Southern District concluded that the Constitution does not require Florida to permit applicants who submit incomplete applications before book-closing to complete them after the deadline and vote in the ensuing election. It did so despite stipulated evidence that more than 11,000 applicants submitted incomplete applications in the four weeks prior to the 2006 general election book-closing and that many would be unable to correct in time to cast valid ballots.

as a relevant source of information concerning a citizen's eligibility to vote." *Id.* at 1617-18. These provisions indicated that "Congress believes that photo identification is one effective method of establishing a voter's qualification to vote and that the integrity of elections is enhanced through improved technology." *Id.* at 1618.

***Voter Fraud.*** While the law addressed in-person voter fraud, there was "no evidence of any such fraud actually occurring in Indiana." *Id.* at 1619. The lead opinion, however, noted that (i) throughout history, there were "flagrant examples of such fraud in other parts of the country"; (ii) "occasional examples" had "surfaced in recent years" in other states; and (iii) Indiana had experienced absentee-ballot fraud in a recent mayoral election. *Id.* This was sufficient: "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process." *Id.*

***Safeguarding Voter Confidence.*** The law served the state's "interest in protecting public confidence in the integrity and legitimacy of representative government." *Id.* at 1620 (marks omitted). This interest had "independent significance, because it encourages citizen participation in the democratic process." *Id.* An "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." *Id.* (quoting Report of the Commission on Federal Election Reform, App. 136-37 (Sep. 2005)) (hereinafter "Carter-Baker Commission").

The lead opinion then weighed the burdens imposed by the photo identification requirement. It dismissed, as not constitutionally relevant, burdens arising from "life's

vagaries.” *Id.* at 1620. Thus, the chance that a voter “may lose his photo identification” or might not “resemble the photo in the identification because he recently grew a beard” had no constitutional significance. *Id.* The burdens deemed “relevant” were “those imposed on persons who . . . do not possess a current photo identification.” *Id.* Nevertheless, the “inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.” *Id.* at 1621.

The only burden that warranted discussion was that on voters “who find it difficult . . . to assemble the . . . required documentation to obtain a state-issued identification.”<sup>6</sup> *Id.* But this limited burden was “by no means sufficient to establish” the facial invalidity of the challenged law. *Id.* “A facial challenge must fail where the statute has a ‘plainly legitimate sweep.’” *Id.* at 1623 (quoting *Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. \_\_\_, 128 S. Ct. 1184, 1190 (2008)). Even “assuming an unjustified burden on some voters,” the “proper remedy” was not to rashly “invalidate the entire statute” and thereby “frustrate[] the intent of the elected representatives of the people.” *Id.* (quoting *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006)).

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<sup>6</sup> The concurrence, consisting of Justices Scalia, Thomas, and Alito, expressed a single disagreement with the lead opinion. It argued that the burdens imposed must be weighed “categorically” and not with an eye to “the peculiar circumstances of individual voters,” concluding that it “is for the state legislatures to weight the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote.” 128 S. Ct. at 1625, 1626-27 (Scalia, J., concurring). The concurrence found the burden imposed “minimal and justified,” reasoning that the “burden of acquiring, possessing, and showing a free photo identification is simply not severe,” and agreeing that it does not “even represent a significant increase over the usual burdens of voting.” *Id.* at 1624, 1627.

**A. Subsection Six Serves Valid and Compelling State Interests.**

*Voter Fraud.* Plaintiffs argue that the Secretary must prove the existence of in-person voter fraud in Florida to sustain Subsection Six. Doc. 135 at 17. If there was ever any doubt about this purported evidentiary burden, *Crawford* extinguished it. There, the Supreme Court upheld a voter identification law despite the fact that the record contained “no evidence of any such fraud actually occurring in Indiana at *any time in its history.*” *Crawford*, 128 S. Ct. at 1619 (emphasis added). Despite this, six Justices upheld the law. As Plaintiffs’ counsel aptly put it, the undisputed lack of evidence “didn’t matter” to the Court. *See Crawford—Just the Facts*, available at <http://tinyurl.com/5oae9a>.

Examining election fraud in the broader context, the lead opinion explained that fraud was a legitimate state concern:

[T]hat flagrant examples of [in-person] fraud in other parts of the country have been documented throughout this Nation’s history by respected historians and journalists [and] that occasional examples have surfaced in recent years . . . demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.

*Crawford*, 128 S. Ct. at 1619 (footnotes omitted). It also observed Indiana’s experience with absentee-ballot fraud in a local election, even though it involved a different type of fraud. *Id.* Florida, too, has a rich history of absentee-ballot fraud, including at least two elections in which courts invalidated every single absentee ballot because of widespread fraud. *See In re The Matter of the Protest of Election Returns & Absentee Ballots in the November 4, 1997 Election for the City of Miami, Fla.*, 707 So. 2d 1170 (Fla. 3d DCA 1998); *Bolden v. Potter*, 452 So. 2d 564 (Fla. 1984); *see also* doc. 85 at 4-6 (describing absentee-ballot fraud). Plaintiffs chided the Secretary for relating absentee-ballot fraud to

in-person voting fraud, *see* doc. 90 at 10-12, but the Supreme Court has now made the same connection. Indeed, fraud of any species threatens the electoral system, and it is undeniable that “there is a link between voter registration fraud and actual voter fraud.” Doc. 105 at 21.<sup>7</sup> While Plaintiffs might dispute the existence of widespread fraud or multiple voting, “both occur, and it could affect the outcome of a close election.” *Crawford*, 128 S. Ct. at 1618 (quoting Carter-Baker Commission, App. 136-37).<sup>8</sup>

Subsection Six also addresses another type of fraud—initiative petition fraud. Doc. 85 at 6-7. Florida citizens may amend the Constitution directly through ballot initiatives. To do so, an initiative’s sponsor must collect petitions from more than 600,000 registered Florida voters. Art. XI, § 3, Fla. Const. Fraudulent registrations can lead to fraudulent initiative petitions,<sup>9</sup> and Florida has an unenviable history of

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<sup>7</sup> Contrary to Plaintiffs’ argument, the Eleventh Circuit acknowledged that “[a]n application that fails to match up the identification numbers tends to make it more likely that the applicant is not a qualified voter than if the numbers had matched.” *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1174 (11th Cir. 2008). This Court also found that Subsection Six “does make it harder to defraud the system.” Doc. 105 at 10.

<sup>8</sup> The impact on close elections is not hypothetical. Historians will not soon forget the 537 Florida votes that separated then-Governor Bush and Vice-President Gore in 2000—out of nearly six million votes statewide and more than 105 million nationwide. *See* <http://tinyurl.com/2oxbb>. More recently, Dino Rossi was the declared winner of Washington’s 2004 gubernatorial race by 261 votes out of 2.8 million cast. A recount showed that Christine Gregorie won by 133 votes. In the ensuing election contest, the Court concluded that “1,678 illegal votes were cast”—exponentially more than the margin of victory. Unable to determine who received these illegal votes, the Court upheld the election results. *Borders v. King County*, No. 05-2-00027-3, at 9 (Wash. Super. Ct. 2005), *available at* <http://tinyurl.com/6ddtjo>. Razor-thin election results—like voter fraud—are neither new nor unusual. *See, e.g.*, Carter-Baker Commission, at 51.

<sup>9</sup> For this reason and others, Plaintiffs’ claim that “a false name on the registration rolls causes harm to the State or its citizens only through the minor incremental cost of producing and mailing an unnecessary set of election materials” is at once unmeritorious and wistful. Doc. 38 at 26.

fraudulent initiative petitions. *See, e.g., Floridians Against Expanded Gambling v. Floridians for a Level Playing Field*, 945 So. 2d 553 (Fla. 1st DCA 2006).<sup>10</sup>

Plaintiffs persist in reliance on several other arguments rejected in *Crawford*. They argue that other states' different choices somehow invalidate Florida's. Doc. 135 at 19 n.12 (“[T]he vast majority of other states also manage to preserve the integrity of their elections without the burdensome and flawed restrictions of Subsection Six.”). But in *Crawford*, despite “the fact that Indiana’s photo identification requirement is one of the most restrictive in the country,” 128 S. Ct. at 1634 (Souter, J., dissenting), the Court upheld the statute. It did so recognizing that a state’s legislative judgment “must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class.” *Id.* at 1627 (Scalia, J., concurring).<sup>11</sup>

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<sup>10</sup> Subsection Six also assists in the removal of ineligible convicted felons from the voter rolls. Since the implementation of Subsection Six in 2006, the Secretary’s duties have included determining whether any newly registered voters are convicted felons. § 98.075(5), Fla. Stat. (2007). In doing so, the Secretary relies on the accuracy of registration information. The incidence of ineligible convicted felons fraudulently registering to vote is not slight. Since 2006, the Division has identified no fewer than 3,100 convicted felons. *See* Ex. A, ¶ 18. Any applicant who was a convicted felon but nonetheless falsely affirmed that he had not been convicted of a felony (or, if so, that his civil rights had been restored) committed a fraudulent act. *Id.*

<sup>11</sup> Plaintiffs also suggest that the Legislature’s true purpose in enacting Subsection Six was compliance with HAVA—not the prevention of fraud. Doc. 135 at 10-11. But compliance with HAVA necessarily promotes HAVA’s anti-fraud purposes. And the Eleventh Circuit reached the common-sense conclusion, contrary to Plaintiffs’ argument, that Subsection Six “is and was designed to be . . . an identity verification provision.” *Browning*, 522 F.3d at 1171; *accord* H.R. Staff Analysis, H.B. 1589 (2005), *available at* <http://tinyurl.com/67qavo> (noting the purpose of Subsection Six to “provide[] for verification of authenticity of voter registration information,” an obvious anti-fraud purpose). More importantly, Plaintiffs offer no authority for the proposition that legislative committee staff must articulate the purpose of an enactment in its legislative history. Indeed, the Supreme Court rejected the relevance of legislative motivation. The

Plaintiffs next argue that Subsection Six serves no legitimate anti-fraud purpose because “[a]n 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.” Doc. 135 at 17. Thus, the argument goes, it is possible for criminals to work around Subsection Six. This was no less true of the law challenged in *Crawford*, which did not apply to absentee voters or to certain other subsets of voters. 128 S. Ct. at 1613. Indeed, the petitioners in that case, supported by Plaintiffs’ counsel as *amicus curiae*, argued that the exemptions invalidated the statute altogether: “Because Indiana’s Photo ID Law does nothing to combat [absentee ballot fraud], and instead targets a problem that is unlikely to occur, the law is not justifiable under the *Burdick* standard based on the asserted state interest in preventing election fraud.” Br. of Pet., Indiana Democratic Party, *et al.*, at 51, available at <http://tinyurl.com/5jn2ov>. The Court, of course, rejected this argument.<sup>12</sup>

To be sure, Subsection Six does not prevent all incidents of election fraud—and no statute can possibly prevent all species of crime. But, like Indiana, Florida is not limited to enacting bullet-proof statutes, only constitutional ones. “While the most effective method of preventing election fraud may well be debatable, the propriety of

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petitioners in *Crawford* argued that the party-line passage of Indiana’s statute indicated that its true purpose was partisan gain. 128 S. Ct. at 1623-24. The Court stated: “While petitioners argue that the statute was actually motivated by partisan concerns and dispute both the significance of the State’s interests, they do not question the legitimacy of the interests the State has identified. Each is unquestionably relevant to the State’s interest in protecting the integrity and reliability of the electoral process.” *Id.* at 1617. The issue is whether the Subsection Six promotes a valid purpose—not whether the Legislature or its staff documented one or more motives for enacting it.

<sup>12</sup> The *Crawford* petitioners, like Plaintiffs here, also argued that criminal sanctions were sufficient to combat voter fraud. 128 S. Ct. at 1619. This argument swayed only two Justices. *Id.* at 1638 (Souter, J., dissenting).

doing so is perfectly clear.” *Crawford*, 128 S. Ct. at 1619.<sup>13</sup>

***Election Modernization.*** *Crawford* recognized the validity of a state’s interest in participating in a “nationwide effort to improve and modernize election procedures.” *Id.* at 1617. The Court relied on HAVA and the NVRA to show Congress’ belief that the use of photo identification is a legitimate use of “improved technology” relevant to the integrity of elections. At the same time, it noted that HAVA “requires the States to verify voter information contained in a voter registration application and specifies either an ‘applicant’s driver’s license number’ or ‘the last 4 digits of the applicant’s social security number’ as acceptable verifications.” *Id.* (quoting 42 U.S.C. § 15483(a)(5)(a)(i)). Thus, the verification of an applicant’s identifying number is precisely the sort of improved election technology recommended by Congress and countenanced by the Court.

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<sup>13</sup> Because the Secretary has no burden to prove fraud, the Court need not consider Plaintiffs’ unsupported claim that none of the applicants added to the voter rolls pursuant to its injunction was illegitimate. That assertion is legally inconsequential—and factually wrong. Without verification, the state cannot effectively separate legitimate from fraudulent applications. So it cannot conclusively determine whether “Dicke Loveré,” one of the applicants activated pursuant to the injunction, is a real person. *See* Ex. A, ¶ 13 & Att. D. Mr. Loveré’s Social Security number did not match, and there is no DHSMV record associated with this name. True, the Secretary cannot *prove* that this application is fraudulent; indeed, it is possible that someone carries this unfortunate name. It is less likely, though, that such a person would include with his signature an obscene sketch of his namesake, as the putative Mr. Loveré did. Similarly, the Secretary cannot determine conclusively whether “Joe Blow” or “Ricco Suave” are legitimate voters. Both submitted unverified applications and are now registered. *Id.*

The Secretary is likewise unable to determine which, if any, of the at-least eight applications for “Derrick Brown” is legitimate. Each bears an identical signature, but the various applications have different birthdates, addresses, Social Security numbers, middle initials, and even races. *Id.*, ¶ 14 & Att. D. Because of the inconsistent data, multiple voter records exist for what appears to be the same individual. Similar examples are discussed in the declaration of the Assistant Director of the Division of Elections attached as Exhibit A.

***Safeguarding Voter Confidence.*** Finally, it is clear that “public confidence in the integrity and legitimacy of representative government” promotes “citizen participation in the democratic process.” *Id.* at 1620. This interest has “independent significance,” *id.*, and is nearly as weighty as the state’s interest in the prevention of fraud, *cf. Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (concluding the “the appearance of corruption” in public office is of “almost equal concern” as corruption itself). By securing lawful votes from debasement by unlawful votes, Subsection Six adds to public confidence and encourages citizen participation. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006) (“Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.”).

**B. Subsection Six Does Not Impose Severe Burdens.**

Subsection Six contains two requirements. First, about one half of applicants—those that do not register at DHSMV—must write their number on the applications. Plaintiffs do not contend that this initial burden is severe. Rather, they attack the second requirement: that a small percentage of applicants—those whose numbers could not initially be verified—show their driver’s license or Social Security card (or send a copy of the card) to election officials. This requirement is no more burdensome—indeed, it is less so—than those recently upheld by federal courts, including the Court in *Crawford*.<sup>14</sup>

To determine whether an election regulation imposes severe burdens, the Court must ascertain the magnitude and character of the challenged requirement. Under

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<sup>14</sup> Indeed, in *Crawford*, voters without photo identification had to obtain it, even at a demonstrable cost. Those who were indigent or had religious objections to being photographed had to physically travel to the registrar’s office—a separate trip from their visit to the polls—every time they voted. With Subsection Six, an applicant who verifies his number (with or without a trip to the Supervisor’s office) is permanently registered.

Subsection Six, the vast majority of applicants are never asked to validate their numbers. Between January 1, 2006, and September 30, 2007, Subsection Six required *at most*<sup>15</sup> 2.06 percent of new applicants—36,502 of 1,529,465—to validate their numbers.<sup>16</sup> Doc. 85 at 2. At least 97 to 98 percent of applicants have nothing more to do under Subsection Six than to provide their number with their applications.<sup>17</sup>

Recent process amendments greatly reduce this scope from its already narrow compass. Ex. A, ¶¶ 5-8. Earlier in its implementation, only about half of applicants for whom DHSMV could not locate a match were routed to BVRs for individual review. As of June 1, 2008, all records—whether or not a potential match is found—will be routed to BVRs for review. The Secretary has also directed the Supervisors to timely provide

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<sup>15</sup> An unknown number of even these applications were resolved without any need for action by the applicant. Local election officials often research records returned to them and are frequently able to resolve the matter themselves. Doc. 85 at 15-16.

<sup>16</sup> Even if, contrary to official data derived from the Florida Voter Registration System, the Court credits the information gleaned by Plaintiffs from the Internet, *see doc.* 135 at 4 n.2, the proportion of applicants required to validate their numbers is at most 2.89 percent (36,502 of 1,088,964). The Internet tally on which Plaintiffs rely, however, is not a proper measure in the present case because, among other reasons, it includes only the applications of those applicants who actually became registered voters.

<sup>17</sup> Plaintiffs' inflation of the proportion of applicants that are asked to validate their numbers must be rejected. Specifically, Plaintiffs ignore all applications initially submitted to DHSMV, presumably because these applications are accompanied with the applicant's correct driver's license number. Doc. 135 at 4 n.2. The same sophistry would exclude all applications that contain the applicant's correct number—regardless of where and how the application was submitted—and suggest that 100 percent of applicants are required to validate their numbers. This is false logic. In determining the extent to which a law burdens the right to vote, it is wrong to disregard applicants whose right to vote was not burdened *because* their right to vote was not burdened. Plaintiffs' creative math improperly converts any law of narrow application into one of broad application. More importantly, even if Florida performed no matching, and instead required *every* applicant to show his driver's license or Social Security card, it would not violate the Constitution. The law in *Crawford* essentially did just that—substantially all voters were “burdened” with having to show a photo identification to cast a valid ballot.

images of original application forms. The computer system has been modified to provide regular reports to the Supervisors of tardy image submissions and to transmit records from DHSMV to BVRS as images become available. This critical tool will enable BVRS staff to correct data entry errors without any effort by the applicant. Individual review of *all* unverified applications together with *all* application images will substantially decrease the proportion of new applicants that must take a further step to effect their registrations.

The scope of Subsection Six is narrower than that of similar election regulations recently upheld by federal courts. In *Crawford*, the District Court estimated that 43,000 voters did not possess the required photo identification.<sup>18</sup> 128 S. Ct. at 1615-16.

Plaintiffs' counsel, by contrast, estimated that 11 percent of adult Americans—or 520,865 adults in Indiana—lacked the necessary identification.<sup>19</sup> By either measure, the number of voters required to inform themselves of the identification requirement, make a trip to a government agency, and gather the documents necessary to obtain a photo identification exceeded the number affected by Subsection Six. Likewise, in *Diaz*, the Court concluded that the Constitution did not require Florida to permit applicants who submitted timely

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<sup>18</sup> Plaintiffs' attempt to distinguish the factual posture of *Crawford* defies logic. They argue that there was *no* showing of the quantity of harm in *Crawford*, but that there is proof of 14,000 harmed individuals in this case. The District Court in *Crawford* estimated that there were 43,000 voting-age citizens in Indiana who did not possess identification. Each of them necessarily would have to do something (such as obtain an ID) to vote. In this case, an estimated 14,000 applicants were not registered because of the absence of a match. They, too, have to do something (such as *show* their ID) to vote. Plaintiffs claim that the 43,000 in *Crawford* are meaningless but the 14,000 in this case are significant. They compare apples to apples while calling some oranges. The lack of proof in *Crawford* related to individuals prevented from voting by the statute—not by the application of the statute to their inaction. The same proof is lacking in this case.

<sup>19</sup> See <http://tinyurl.com/5qbetj>. The Census Bureau estimates that 75 percent of Indiana's 6,313,520 residents are over 18 years of age. See <http://tinyurl.com/6h8szr>.

but incomplete applications to complete those applications after the book-closing deadline and vote at the ensuing election—even though at least 11,000 applicants submitted incomplete applications in the four weeks preceding the 2006 general election book-closing deadline, a substantial portion of whom were unable to timely correct their applications and vote. *See* 2008 WL 793584.

The character of the requirement imposed by Subsection Six also pales in comparison with that imposed by election regulations recently upheld by federal courts. Plaintiffs pretend that an applicant whose number cannot initially be verified is forever banned from the electoral process, but this is not true. Unverified applicants are simply required to show an identification card which they already possess, either in person or by sending a copy to local election officials, before or after an election.

Plaintiffs advance no evidence—none—that applicants who are required to validate their numbers cannot comply with the law. There is no evidence that any applicant is without access to some form of transportation to the local Supervisor’s office. There is no evidence that any applicant is unable to make a copy of a driver’s license or Social Security card and send the copy to the Supervisor by mail, fax, or email. Indeed, these are not constitutionally cognizable impediments to the right to vote. To drive to the Supervisor’s office is no more onerous than to drive to a polling place on election day. And to make a copy of a card which the applicant already possesses and send it to the Supervisor is no more onerous than to obtain, complete, and submit an application.

These requirements are no different in degree or kind from those required of voters every day. The view that the Constitution bars a state from guarding the integrity

of its elections by asking a small percentage of applicants to make one trip to a local office or mail a copy of an identification card in the applicant’s wallet or purse or desk drawer is unprecedented and extraordinary—and contrary to law. No federal court has espoused a position so restrictive and crippling to the orderly administration of elections.

*Crawford* confirms this conclusion. Six Justices agreed that, for voters who lacked photo identification, the “inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.” *Id.* at 1621; *accord id.* at 1627 (Scalia, J., concurring). Thus, the requirement of a special trip with underlying documentation to obtain a government-issued identification card at a government bureau was “surely” not a substantial burden—much less a severe one. Here, any inconvenience is even less. Unverified applicants are not required to appear in person at the Supervisor’s office, but instead have the option to send a copy of their driver’s license or Social Security card by mail, facsimile, or email.

The only burden which in *Crawford* occasioned any hesitation—the burden on voters without identification who might be unable to “assemble the . . . required documentation to obtain a state-issued identification”—is not present here.<sup>20</sup> Under Subsection Six, no applicant is required to obtain an identification card he does not have.

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<sup>20</sup> Even this burden did not warrant facial invalidation of the challenged law, which had a “plainly legitimate sweep,” and the concurrence dismissed its relevance altogether. In *Gonzalez*, the Court affirmed the denial of a preliminary injunction despite the allegation that some applicants might be unable to secure the proof of citizenship required for voter registration. By contrast to *Crawford* and *Gonzalez*, Subsection Six applies only to applicants who are already positioned to comply with its requirement.

Applicants who lack identification need only “affirm this fact” where prompted on the application in order to be registered. *See* § 97.053(5)(a)5.b., Fla. Stat. (2007).<sup>21</sup>

Perhaps aware that sending a piece of mail or visiting a local office does not severely burden applicants, Plaintiffs direct their fire at the allegedly “confounding and misleading” notices sent by Supervisors to unverified applicants. Doc. 135 at 5. As this Court noted, however, “the fact that a challenged law might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid under a facial challenge.” Doc. 105 at 25 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Thus, the content of a few outdated sample notices critiqued by Plaintiffs is not grounds for a facial challenge, and Plaintiffs’ request for a statewide injunction based on the notice letters of a f of Florida’s sixty-seven counties flies in the face of this established analysis.<sup>22</sup> Even more conclusively, the Secretary has developed uniform guidelines for the content of notices under Subsection Six. Ex. A, ¶¶ 11-12. These guidelines will ensure that all applicants statewide receive clear and full information.

Plaintiffs also advance the novel suggestion that Subsection Six is facially unconstitutional because some applicants might not receive the notice letters. Doc. 135 at 5-6. But the same is true of *all* communications regarding registration applications. 42

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<sup>21</sup> Plaintiffs note that it might be feasible to permit applicants to identify themselves by a passport or military identification. As the Southern District recently explained, however, the Constitution does not require election regulations to permit everything that is “feasible” or “doable.” *Diaz*, 2008 WL 793584, at \*11. The “question is not whether Plaintiffs’ particular proposal is feasible, but whether an important regulatory interest supports the challenged law.” *Id.* at \*12.

<sup>22</sup> Plaintiffs have not asked this Court to order local Supervisors of Elections—separate constitutional officers not parties to this litigation—to provide additional notices; they have asked this Court to invalidate the verification requirement in its entirety.

U.S.C. § 1973gg-6(a)(2); § 97.073(1), Fla. Stat. (2007) (requiring Supervisors to “notify each applicant of the disposition of the applicant’s voter registration application”). If an applicant fails to sign an application, or if a data entry operator incorrectly enters the applicant’s date of birth—for example, by entering “1998” rather than “1989”—the Supervisors mail notices that might or might not reach the intended recipient. And notice letters relating to Subsection Six are automatically generated, like any other notice relating to voter registration and even the voter registration card itself. If the vagaries of postal delivery could invalidate Subsection Six, all registration requirements would fall.

Finally, Plaintiffs trivialize the verification process by decrying “typos, clerical mistakes, and data entry errors.” Doc. 135 at 1. The proximate cause of non-verification, though, is immaterial. The burden is the same whether the applicant or an election official—or neither—erred. The focus of the constitutional analysis is the burden itself—*i.e.*, that non-verification requires a small percentage of applicants to take one routine step to effect their registrations—and the validity of the interests served by the challenged law. Human error in the registration process—as in mail delivery—is inescapable. A typo in an applicant’s date of birth might result in the automatic denial of an application, but this does not invalidate minimum age requirements. And a typo in an applicant’s address might frustrate his receipt of precinct information and hinder his ability to vote, but this does not invalidate the entire registration regime. In addition, Plaintiffs offer no evidence of the proportion of non-verifications attributable to applicants and the proportion attributable to lapses by election officials. Finally, the amended procedures by which BVRS staff will review all unverified applications individually, together with all

corresponding application images, will greatly reduce any incidence of data entry error.

**II. PLAINTIFFS HAVE NOT CLEARLY ESTABLISHED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THEIR EQUAL PROTECTION CLAIM.**

“When analyzing whether a state election law violates the Equal Protection Clause of the Fourteenth Amendment, the Eleventh Circuit applies the same balancing test established in *Burdick v. Takushi*.” *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1378-79 (S.D. Fla. 2004) (citing *Fulani v. Krivanek*, 973 F.2d 1539, 1543 (11th Cir. 1993)). Thus, an election regulation that does not impose severe burdens must be sustained if it is supported by “important regulatory interests.” *Burdick*, 504 U.S. at 434.

Plaintiffs suggest that Florida may not use the Social Security database because the verification rate may differ from that of the DHSMV database. Equal protection, however, requires only that states “treat similarly situated people alike.” *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1313 (11th Cir. 2006). Florida requires applicants who have driver’s license numbers to provide their driver’s license numbers. Consistent with HAVA, it resorts to the last four digits of an applicant’s Social Security number only where the applicant does not have a driver’s license. *See* 42 U.S.C. § 15483(a)(5)(A)(i); § 97.053(5)(a)5., Fla. Stat. (2007). Because they have no driver’s license, such applicants are not similarly situated with applicants who *can* provide a driver’s license number.<sup>23</sup>

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<sup>23</sup> Similarly, applicants who have no identifying number are not similarly situated with those who do. According to Plaintiffs, because the use of different databases is unconstitutional, and an exception for individuals with no number is unconstitutional, equal protection required the Legislature to mandate that *all* applicants statewide obtain one standard card. This, of course, would have been incomparably more inconvenient to applicants than the statute Plaintiffs attack. In addition, the Legislature is not required “to cover every evil that might conceivably have been attacked.” *McDonald v. Chicago Bd.*

Equal protection does not require the Legislature to be content with the verification of only those applicants who have driver's licenses.<sup>24</sup> *McDonald v. Chicago Bd. of Elec. Comm'rs*, 394 U.S. 802, 809 (1969) (“[A] legislature traditionally has been allowed to take reform one step at a time.”) (marks omitted). And any differential rate is justified by the interests served by verification—a process that would be less comprehensive if limited to applicants with driver's licenses. Equal protection “does not require that the state choose ineffectual means” to achieve a valid purpose. *Rosario v. Rockefeller*, 410 U.S. 752, 762 n.10 (1973). In fact, since no two databases yield exactly identical results, Plaintiffs' reasoning would bar a state from ever moving beyond one database.

Next, Plaintiffs suggest that equal protection required Subsection Six to apply retroactively to all of Florida's 12 million registered voters. Doc. 135 at 22-23. The idea that a new registration requirement is unconstitutional because it does not apply retroactively to all previously registered voters is preposterous. *See Woodward v. Marsh*, 658 F.2d 989, 993 n.4 (5th Cir. 1981) (rejecting as “frivolous” an assertion that equal protection prevents the government from “changing its rules” or requires such changes to be applied “retroactively”).<sup>25</sup> The simple fact that Plaintiffs' approach would totally empty Florida's voter registration database and require 12 million people to re-register

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*of Elec. Comm'rs*, 394 U.S. 802, 809 (1969). Thus, the fact that verification does not extend to applicants without an identifying number does not invalidate Subsection Six.

<sup>24</sup> Notably, regardless of whether the applicant provided a driver's license number or the last four digits of his Social Security number, the impact of non-verification is the same as to all applicants. All unverified applicants validate their numbers in the same way: by presenting their identification card or sending a copy to local officials.

<sup>25</sup> HAVA rejects Plaintiffs' peculiar interpretation of equal protection, applying the identification requirement of Section 303(b) only prospectively to mail-in applicants “who register[] to vote on or after January 1, 2003.” 42 U.S.C. § 15483(d)(2)(B).

demonstrates the important interests that support an exclusively prospective application.

Last, Plaintiffs contend that Subsection Six discriminates between applicants because different Supervisors have different resources and are thus differently equipped to assist applicants. *See* doc. 135 at 9-10, 23-24. The Supervisors are independent constitutional officers funded by county governments primarily through local property taxes. Art. VIII, § 1(d), Fla. Const.; *Diaz*, 2008 WL 793584, at \* 18. Thus, as with countless public services delivered through Florida’s political subdivisions—such as law enforcement and education—resource disparities are to some degree inevitable. They are not, however, unconstitutional. In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the Supreme Court upheld a system of local funding for public schools that created “substantial . . . disparities.” *Id.* at 15. The Court explained that “the Equal Protection Clause does not require absolute equality or precisely equal advantages,” *id.* at 24, and held that, because the “financing system [did not] result[] in the absolute deprivation of education,” it was not unconstitutional, *id.* at 25; *cf. Wexler v. Anderson*, 452 F.3d 1226, 1233 (11th Cir. 2006) (“[L]ocal variety [in voting systems] can be justified by concerns about cost, the potential value of innovation, and so on.”). Here, any variations in local resources are insufficient to establish a constitutional violation, and have nothing whatsoever to do with the facial requirements of Subsection Six.<sup>26</sup>

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<sup>26</sup> Plaintiffs present no evidence of the resources the Supervisors do or do not have. Instead, they infer from voter registration statistics that because the rate of verification is not exactly identical in each county, there *must* be some inscrutable, underlying, systemic infirmity that warrants the facial invalidation of Subsection Six. This reasoning is unpersuasive. No area of government service—and no area of voter registration—would satisfy Plaintiffs’ demand for absolute mathematical exactness.

Respectfully submitted this 19th day of May, 2008.

*/s/ Andy Bardos*

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been served by Notice of Electronic Filing this 19th day of May, 2008, to the following:

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