

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. 4:07CV-402-SPM/WCS

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

Defendant.

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**SECRETARY OF STATE'S MOTION TO DISMISS**

Defendant Kurt S. Browning, in his official capacity as Secretary of State for the State of Florida (the "Secretary"), pursuant to Federal Rule of Civil Procedure 12(b)(6), respectfully moves this Court to dismiss Plaintiffs' Complaint. In support of this Motion, the Secretary submits the attached Memorandum of Law.

**WHEREFORE**, the Secretary respectfully seeks the entry of an Order granting this Motion and dismissing Plaintiffs' Complaint.

## MEMORANDUM OF LAW

In this case, Plaintiffs seek to undermine a specific, common-sense anti-fraud measure embodied in federal and state law. At the heart of this case is a simple question: may Florida verify the identities of voter registration applicants before registering them to vote? Florida verifies their identities by matching an applicant's driver's license number or the last four digits of the applicant's Social Security number to data in official state and federal databases. If the applicant's identifying information is not verified, an applicant is notified and may establish that the number provided is correct. The challenged provision exists for the benefit of all legally registered voters, and, by ensuring the integrity of the voter registration process, it promotes fair elections and confidence in the electoral process. Plaintiffs allege that this basic requirement is inconsistent with federal law and the United States Constitution. Their Complaint should be dismissed for the reasons set forth below.

### The Help America Vote Act of 2002

Congress enacted the Help America Vote Act of 2002 ("HAVA") in response to election deficiencies and voter fraud during the 2000 elections. Its adoption served a dual purpose: to "make it easier to vote and tougher to cheat." 148 Cong. Rec. S10488 (statement of Sen. Bond).<sup>1</sup>

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<sup>1</sup> Indeed, the Congressional Record is replete with affirmations of this dual purpose. *See, e.g., id.* at S2523 (statement of Sen. Feinstein) ("[T]he new standards . . . are meant to 'make it easier to vote, and harder to vote fraudulently.' What a laudable goal."); *id.* at S2521 (statement of Sen. Cantwell) ("[W]e all agree that any election reform . . . should be about two things: deterring voter fraud and promoting voter participation."); *id.* at S2517 (statement of Sen. Wyden) ("From the beginning of this debate, I have said that this legislation should be about deterring voter fraud and promoting voter participation."); *id.* at S2516 (statement of Sen. McConnell) ("My thanks to Senator Bond who gave us our rallying cry behind this bill, 'making it easier to vote, and harder to cheat.'"); *id.* at H7842 (statement of Rep. Ehlers) ("We must not only guarantee that each vote counts, we must also ensure these votes are not diluted by fraudulent votes."). Unquestionably, one of the main pillars of HAVA was the prevention of voter fraud.

Nor was Congress, in combating voter fraud, contending with imaginary evils. Rather, it was responding to concrete and verifiable examples of wrongdoing, including duplicate registrations. For example, more than 720,000 people were registered in more than one state. *Id.* at S10492. Of this number, 60,000 were registered in Florida and another state. *Id.* at S10490. Senator Bond found that it was “not unusual to find people who were registered four times.” *Id.* at S10491. In fact, 3,000 people were known to have double-voted in the 2000 election, when the presidential race was essentially decided by 537 votes. *Id.* at 10488.<sup>2</sup> In view of this evidence, Congress properly concluded that “[d]uplicate registrations provide the opportunity for unscrupulous people to commit fraud and undermine honest elections by, in effect, invalidating legally cast ballots.” *Id.* at S10492.<sup>3</sup>

Congress also recognized that voter registration fraud “can occur in many ways.” *Id.* at S10492. Apart from duplicate registrations, “submitting registration forms in the name of deceased or fictitious people is one of the most common. But some folks even fill out registration cards in the name of their pet.” *Id.* Senator Dodd explained that “anecdotal evidence of dogs and deceased persons registering, and perhaps even voting, and registration lists with

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<sup>2</sup> Congress also took notice of a well publicized investigation of voter registration fraud in South Dakota, where applicants were “on an ‘honor system’” and were not required to identify themselves when submitting a voter registration application. *See id.* at S10488, S10494. The South Dakota Attorney General, speaking of fraudulent activity under investigation by the FBI, lamented that “[i]t’s pretty easy to register under a false name, have the registration confirmation sent back to your home, then send in by mail an absentee ballot request, get it and vote under the false name, send it back and get it counted.” *Id.* at S10419.

<sup>3</sup> Congress understood the dangers of fraudulent registrations. Senator Bond explained that HAVA “recognizes that illegal votes dilute the value of legally cast votes—a kind of disenfranchisement no less serious than not being able to cast a ballot.” *Id.* at S10488; *accord id.* at S2517 (statement of Sen. Bond) (“Unfortunately, the votes of those who have the right to vote have been diluted and have been canceled because fraud has been prevalent . . .”). He concluded that, “[b]ased on the extensive documentation we have seen, there can be no doubt that voter fraud is a serious problem in Federal elections.” *Id.* at S10492.

duplicate names in several different jurisdictions illustrate the frailties of current registration procedures.” *Id.* at S10503. And “even an insignificant potential for fraud can undermine the confidence of voters, election officials, political parties, etc., in the results of a close election.” *Id.* at S2535 (statement of Sen. Dodd).

The remedies devised by Congress—the “anti-fraud provisions” of HAVA—include the matching provision at issue in this litigation. Title III of HAVA governs states’ election technology and administration requirements for federal elections, providing, among other items, minimum standards for voter registration. *See* 42 U.S.C. §§ 15481 through 15485. Its central voter registration mandate is the establishment by each state of “a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter . . . .” *Id.* § 15483(a)(1)(A). The statewide database was designed as “the single greatest deterrent to election fraud, whether by unscrupulous poll workers or officials, voters, or outside individuals and organizations.” *Id.* at S10509 (statement of Sen. Dodd).<sup>4</sup>

In addition, HAVA requires each voter registration applicant who has a “current and valid driver’s license” to provide the driver’s license number on the application, and it requires all other applicants (except those who do not have a Social Security number) to provide the last four digits of their Social Security numbers. 42 U.S.C. § 15483(a)(5)(A). An application “may

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<sup>4</sup> Senators agreed that the primary purpose of the database is fraud prevention. *See, e.g., id.* at S2526 (statement of Sen. McCain) (“[T]he bill establishes an interactive, computerized, statewide voter registration system that will prevent future incidents of election fraud.”); *id.* at S2523 (statement of Sen. Lieberman) (“The bill also requires the States to develop statewide computerized and interactive voter registration lists both to make it easier to vote and to deter fraud.”).

not be accepted or processed” unless it includes this information. *Id.* HAVA then requires each state to “match” driver’s license numbers provided by applicants to information in “the database of the motor vehicle authority” to enable it to “verify the accuracy of the information provided on applications for voter registration.” *Id.* § 15483(a)(5)(B)(i). It further requires the Commissioner of Social Security to “enter into an agreement with [the official responsible for a State driver’s license agency] for the purpose of verifying” the last four digits of an applicant’s Social Security number. *Id.* § 15483(a)(5)(C).

Critically, HAVA declines to determine when the identifying information provided by an applicant is adequate or to prescribe the consequences of a failed match. Rather, it expressly provides that “[t]he State shall determine whether the information provided by an individual is sufficient to meet the requirements of [Section 15483(a)(5)(A)], in accordance with State law.” Accordingly, “nothing in [HAVA] establishes a Federal definition, or standard, for when a voter is duly registered. That authority continues to reside solely with the State and local election officials pursuant to state law.” 148 Cong. Rec. S10504 (statement of Sen. Dodd). Not only does HAVA authorize states to determine whether an applicant’s identifying information has been sufficiently verified, it expressly establishes only “minimum requirements” and leaves states free to establish additional requirements that are “more strict” but not “inconsistent with” HAVA’s requirements. *Id.* § 15484. As Senator Bond noted, “[e]ach of the steps taken in this bill to address fraud shall be considered to be a minimum standard.” *Id.* at S10490.

In adopting the matching requirement, Congress was determined to “make sure we do our best to see to it that people who register to vote are who they say they are, so we don’t have people registering fictitious people and casting ballots for them.” *Id.* at S10501 (statement of Sen. Dodd). Similarly, Senator Wyden indicated that Congress would “[discourage fraud] at the

right time and in the right way, which is essentially at the front end when people come to sign up for the electoral process. But then, after we can ascertain they are who they say they are, they are not going to face innumerable hassles and barriers when they actually show up to vote.” *Id.* at S10421 (emphasis added). The intent of Congress, therefore, was clearly to establish a mechanism to allow states to verify the identity of voter registration applicants *before* those applicants ever register to cast a ballot in a federal election.

Congress believed, moreover, that the verification of an applicant’s identity was an appropriate means of deterring fraudulent registrations. As Senator Bond explained, the “[p]rovision and verification of an existing social security number is required before a person can qualify for Federal temporary assistance. . . . Surely clean elections, accurate results and faith in the election process is as important of an objective as preventing welfare fraud.” *Id.* at S10490. He continued: “The use of driver’s license numbers and full or partial social security numbers will help election officials to verify the identity and eligibility of individuals and reduce fraudulent voter registrations from being added to our voter rolls.” *Id.* at S10492. Senator McConnell explained that “the only thing that [the matching] provision impedes is voter fraud.” *Id.* at S10419. And Congress noted that “[s]tates that require additional identifying information from registrants have substantially fewer duplicate and fraudulent registrations on their voter rolls.” *Id.* at S10492-93 (statement of Sen. Bond).

Congress thus expressly crafted HAVA’s matching provision in a direct response to concerns about voter registration fraud. Responding to “many reported cases and incidents of registration and vote fraud revealed in [congressional] testimony,” Congress “made a statement that vote fraud exists in this country.” *Id.* at S10489 (statement of Sen. Bond). Senator McConnell echoed this view:

This bill makes significant changes in the voter registration process for Federal elections. These changes are designed to clean up our Nation's voter registration lists and reduce fraudulent registrations and voting. Congress has a compelling interest in protecting the integrity of the Federal election process. This legislation will further that interest by helping to ensure accurate voter rolls, which is the first step in ensuring fair elections.

*Id.* at S10492. Recognition of the threat presented by voter registration fraud was therefore a leading congressional policy in drafting and adopting HAVA. Indeed, the consistent refrain in Congress unquestionably establishes that the dominant purpose both of the statewide database in general and the matching requirement in particular was the prevention of voter registration fraud.

### **The Challenged Legislation**

Before the adoption of Section 97.053(6), Florida Statutes, Florida law provided no means of verifying the identities of voter registration applicants. In a report released on January 5, 1998, the Florida Department of Law Enforcement (“FDLE”) noted that Florida’s “[m]inimal identification . . . requirements provide ample opportunity for voter registration fraud.” *See* Exhibit A at 1. In fact, according to that report, Florida law “eliminated virtually any ability by Supervisors of Elections to independently verify whether the information provided on a registration form is in fact[] accurate,” resulting in “‘no questions asked’ voter registration.” *Id.* at 1, 6-7. It explained that “Florida has implemented a standard that is in essence little more than ‘trust me at my word alone’ in registering to vote.” *Id.* at 7. The report concluded that unless Florida establishes “a way to truly verify a registrant’s eligibility . . . , state and local officials can do little to stop the potential registration (and subsequent voting) fraud.” *Id.* at 8.

Florida adopted Section 97.053(6), Florida Statutes, in 2005 to address these concerns by implementing HAVA’s matching provision.<sup>5</sup> It provides that a “voter registration application

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<sup>5</sup> The Florida Legislature recently amended Section 97.053(6), Florida Statutes, effective January 1, 2008. *See* Ch. 2007-30, § 13, Laws of Fla. Because Plaintiffs challenge the statute as

may be accepted as valid only after the [Department of State] has verified the authenticity or nonexistence of the driver’s license number, the Florida identification card number, or the last four digits of the social security number provided by the applicant.”<sup>6</sup> Florida has accordingly determined that “the information provided by an individual is sufficient to meet the requirements of” HAVA, *see* 42 U.S.C. § 15483(a)(5)(A)(iii), and may therefore “be accepted [and] processed,” *see id.* § 15483(a)(5)(A), if the identifying information provided by the applicant is in fact verified. This is precisely what HAVA permits.

In addition, the challenged law creates a safeguard in favor of the right to vote that goes above and beyond the requirements of HAVA. Even if an application was received—but the identifying information could not be verified—prior to the book-closing deadline,<sup>7</sup> the challenged law affords the applicant an opportunity to establish the authenticity of that information. Specifically, if the identifying information does not match that in the official database, the supervisor of elections must notify the applicant, and the applicant may, at any time before 5 p.m. on the second day after the ensuing election, present evidence that the identifying information is authentic. § 97.053(6), Fla. Stat.<sup>8</sup> Thus, Florida law not only establishes a notice procedure, but it allows applicants ample time, even past election day, to establish the authenticity of the information they provided, despite the fact that the registration books are otherwise closed.

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amended, *see* doc. 1 at ¶¶ 24, 27, the analysis in this Motion also relates to the amended statute.

<sup>6</sup> As it relates to the challenged law, any reference to an applicant’s driver’s license number in this Motion alternatively includes a reference to an identification card number.

<sup>7</sup> The book-closing deadline is the last day to register in order to be eligible to vote at a given election. *See* § 97.055, Fla. Stat. In Florida, registration books close on the 29th day prior to each election. *Id.*

<sup>8</sup> If an applicant presented the evidence prior to the election, the applicant may vote a regular ballot. Otherwise, the applicant may vote a provisional ballot, and the vote will be counted if the evidence is presented before the ultimate deadline. *See* § 97.053(6), Fla. Stat.

## ARGUMENT

### **I. HAVA DOES NOT PREEMPT SECTION 97.053(6), FLORIDA STATUTES.**

In Counts I, II, and III, Plaintiffs allege that Section 97.053(6), Florida Statutes, is inconsistent with and preempted by HAVA.<sup>9</sup> They contend that HAVA “was passed . . . in large part to ensure that eligible voters would not be left off the voting rolls,” and that, consistent with this purpose, HAVA’s matching requirement was designed to “facilitate the orderly maintenance” of the statewide voter registration database. *See* doc. 4 at 13, 14. The matching requirement, Plaintiffs argue, was designed solely “to ensure confidence that the [unique identifiers] are accurately assigned.”<sup>10</sup> *Id.* at 15. Plaintiffs conclude that, by making identity verification a precondition of registration, the challenged law “hinder[s] Congress’s objectives.”

Plaintiffs’ contention totally ignores the dominant congressional policy that underlies HAVA’s matching requirement: the prevention of voter registration fraud. Worse still, it overlooks express language in HAVA and volumes of legislative history that affirm the authority of states to establish the requirements of voter registration, to determine the acceptability of identifying information submitted by applicants, and to prescribe the consequences of a failed

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<sup>9</sup> While Plaintiffs allege that Section 97.053(6), Florida Statutes, “violates” HAVA, nothing in HAVA expressly prohibits matching as a precondition of registration. Indeed, Plaintiffs suggest only that “no provision of HAVA permits a voter to be disenfranchised if the ‘match’ should fail . . . .” Doc. 4 at 13. Thus, Plaintiffs’ sole contention appears to be that HAVA preempts Section 97.053(6), Florida Statutes.

<sup>10</sup> Plaintiffs’ suggestion that the matching requirement was designed merely to facilitate the assignment of a unique identifier to each voter ignores not only the Congressional Record, but also practicality. Because any computer system is capable of randomly assigning unique identifiers to entries in a database, the use of driver’s license numbers and Social Security information is far from the “easiest” method of assigning a unique identifier. *See* doc. 4 at 14. And, because the last four digits of an applicant’s Social Security number are not at all unique, compliance with HAVA requires states—as Florida does—to assign each applicant a number distinct from the applicant’s driver’s license or Social Security number. In practice, therefore, the verification of driver’s license and Social Security numbers is completely disconnected from the assignment of HAVA’s unique identifier.

match. This ample record squarely refutes Plaintiffs’ suggestion that HAVA preempts Section 97.053(6), Florida Statutes, and affirmatively establishes that HAVA authorizes states to make the verification of identifying information a precondition of registration.

**A. Legal Standard.**

“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987). Accordingly, when courts “consider issues that arise under the Supremacy Clause (i.e., preemption issues), [they] start with the assumption that the historic police powers of the states are not superseded by federal law unless preemption is the clear and manifest purpose of Congress.” *Cliff v. Payco Gen’l Am. Credits, Inc.*, 363 F.3d 1113, 1122 (11th Cir. 2004). “The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of a state statute.” *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982). Rather, preemption occurs only if the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Thus, “[t]he purpose of Congress is the ultimate touchstone.” *Cliff*, 363 F.3d at 1122 (quoting *Retail Clerks Int’l Ass’n v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

**B. HAVA Authorizes States to Make Matching a Precondition to Registration.**

Having established the matching process, Congress left each state free, according to local policy considerations, to determine the acceptability of identifying information submitted by voter registration applicants and to prescribe the process following of a failed match. The express terms of HAVA and its legislative history are clear and consistent: Section 15483(a)(5) authorizes states to make identity verification a precondition of registration. Far from

preempting state voter registration requirements, Section 15483(a)(5) defers to the traditional authority of states to determine voter registration eligibility and empowers states to determine the consequences of a failure to verify an applicant’s identifying information. The legislative history establishes with unmistakable clarity that the requirements of HAVA are minimum standards that each state may supplement with additional and more stringent anti-fraud measures.

HAVA stops short of determining the acceptability of information provided by an applicant or of prescribing the consequences of a failed match. Instead, HAVA expressly entrusts these policy determinations to the states: “[t]he State shall determine whether the information provided by an individual is sufficient to meet the requirements of [Section 15483(a)(5)(A)], in accordance with State law.” 42 U.S.C. § 15483(a)(5)(A)(iii). By its plain terms, HAVA permits each state, according to its own laws, to determine when an applicant has supplied a valid driver’s license number or Social Security information, and, consequently, when the application “may be accepted or processed.” *See id.* § 15483(a)(5)(A). While states may choose to accept any identifying information—even incorrect information—as “sufficient to meet the requirements of” HAVA, states are equally free to insist that the information provided on the application be correct, as determined by HAVA’s matching process.

Senator Dodd, HAVA’s chief Senate sponsor and the principal Senate author of HAVA’s conference report, emphasized the discretion of states to determine the consequences of a failed match. He explained that “nothing in [HAVA] establishes a Federal definition, or standard, for when a voter is duly registered. That authority continues to reside solely with the State and local election officials pursuant to state law.” 148 Cong. Rec. S10504. In response to concerns that states would deny voter registration applications in the absence of a match, Senator Dodd explained that HAVA does not require—but does permit—this result:

[N]othing in this section prohibits a State from accepting or processing an application with incomplete or inaccurate information. Section [15483(a)(5)(A)(iii)] specifically reserves to the States the determination as to whether the information supplied by the voter is sufficient to meet the disclosure requirements of this provision. . . . Consequently, a state may establish what information is sufficient for verification, preserving the sole authority of the State to determine eligibility requirements for voters . . . .

Moreover, nothing in this section prohibits a State from registering an applicant once the verification takes place, notwithstanding that the applicant provided inaccurate or incomplete information at the time of registration . . . or that the matching process did not verify the information. The provision requires only that a verification process be established but it does not define when an applicant is a duly registered voter. Again, this conference report does not establish Federal registration eligibility requirements . . . . Section [15483(a)(5)(A)(iii)] makes it clear that State law is the ultimate determinant of whether the information supplied under this section is sufficient for determining if an applicant is duly registered under State law.

*Id.* at S10505 (emphases added). Senator Dodd agreed with the principal House author of the conference report that HAVA “provides for basic requirements that States shall meet, but leaves to the discretion of the States how they meet those requirements in order to tailor solutions to their own unique problems.”<sup>11</sup> *Id.* at S10504. Indeed, deference to the discretion of states, acting in light of their own unique circumstances, was HAVA’s “hallmark.” *Id.* at S10506 (statement of Sen. Dodd). HAVA thus “requires that States and localities meet basic requirements in . . . the verification of identification for new registrants.” *Id.* In the “implementation of these requirements,” however, “the sole determination is left to the States as to . . . whether an individual registrant is determined under State law to be duly registered and

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<sup>11</sup> This view was shared by other Senators who repeatedly reiterated the position that HAVA establishes only minimum standards. Senator Bond explained that “[e]ach of the steps taken in this bill to address fraud shall be considered to be a minimum standard.” *Id.* at S10490. Senator Kerry stated his view that “this bill will enable more people to exercise their fundamental right to vote by setting uniform, minimum standards for Federal elections.” *Id.* at S10497. Senator McConnell noted that “[t]his new registration requirement is a minimum standard,” *id.* at S10492, and he explained that “[t]his legislation will make American election systems more accurate, more accessible, and more honest while respecting the primacy of States and localities in the administration of elections,” *id.* at S2516. Indeed, considering the anti-fraud

entered into the centralized registration list.” *Id.*<sup>12</sup>

Subsequent interpretations of HAVA by federal executive agencies concur. On September 8, 2003, the Civil Rights Division of the U.S. Department of Justice explained that HAVA “leaves the ultimate decision whether to register [an] applicant, including the decision of whether the information provided by the [applicant] has been sufficiently verified, up to the State or local election official charged with that responsibility under state law.” *See* Exhibit B. “Congress obviously intended that where the verification process is working correctly and the results of that verification process indicate that the registrant is eligible, the application will be accepted.” *Id.* Where, however, “the results indicate the registrant is not eligible, has provided inaccurate or fraudulent information, or information that cannot be verified, then the application must be denied.” *Id.* (emphasis added). Thus, while Congress respected the authority of states to determine the eligibility of applicants, it expected that unverified applications would be denied.

The interpretation of HAVA by the newly created U.S. Election Assistance Commission (“EAC”) is also in accord. In its Voluntary Guidelines,<sup>13</sup> the EAC clearly anticipated the denial of unverified applications. While it recommended that states should afford applicants an

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purpose of HAVA, it is absurd to construe HAVA as a ban upon state-law anti-fraud measures.

<sup>12</sup> Remarkably, in *Washington Association of Churches v. Reed*, 492 F. Supp. 2d 1264 (W.D. Wash. 2006), which preliminarily enjoined Washington’s matching requirement and on which Plaintiffs heavily rely, the Court overlooked HAVA’s legislative history and made no mention of HAVA’s anti-fraud purpose. In fact, the Washington Secretary of State did not present to the Court the legislative history outlined here. In addition, the statute challenged in *Reed* contained no procedure—as Florida law does—for the authentication of unverifiable information, and the consent order entered in *Reed* does little more than establish such a process while upholding the matching requirement. *See* Exhibit D at ¶ 1 (“This Order does not require [the Washington Secretary of State] to tabulate ballots or count votes cast by . . . voters absent the completion of matching process or the receipt of alternative identification by no later than the day before certification of election results by the county canvassing board.”). The result of *Reed* therefore was essentially the same process which Florida law already embodies.

<sup>13</sup> HAVA required the EAC to “adopt voluntary guidance” to “assist States in meeting [certain] requirements of” HAVA, including the matching provision. *See* 42 U.S.C. § 15501(a).

opportunity—as Florida law does—to authenticate their identifying information, it noted that “[t]his does not mean that States should accept or add unverified registration applications to the statewide list. Rather, it means only that election officials should make certain efforts before an application is determined to be unverifiable and finally rejected.” *See* Exhibit C at 13. Thus, the EAC has construed HAVA to permit the rejection of unverified applications and merely counseled states to “make certain efforts” to validate the information provided before denying an application. *Id.* The express language of HAVA, the overwhelming weight of opinion in Congress, and subsequent official interpretations of HAVA each recognize the authority of states to make identity verification a precondition of registration.<sup>14</sup>

***C. Section 97.053(6), Florida Statutes, Is Not Inconsistent With HAVA’s Mail-In Registration Requirements.***

Plaintiffs next suggest that the use of identity verification as a precondition to registration is inconsistent with the first-time mail registration provisions of Section 15483(b). Specifically, Plaintiffs suggest that matching as a precondition to registration conflicts with HAVA provisions that appear to allow unmatched mail-in applicants, when they first present themselves to vote, either to vote a regular ballot after producing photo identification or to cast a provisional ballot in the absence of photo identification. This, Plaintiffs say, is proof that Congress did not intend matching to be a precondition to registration.

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<sup>14</sup> Section 244(b) of HAVA also indicates Congress’s understanding that states were authorized to make identity verification a precondition of registration. In Section 244(b), Congress directed the EAC to “study and report to Congress on the feasibility and advisability of using Social Security identification numbers . . . to establish voter registration or other election law eligibility or identification requirements . . . .” This provision demonstrates that Congress clearly contemplated the use of Social Security information to establish voter registration eligibility. In light of the EAC’s reporting responsibility, Senator Dodd concluded that “[i]f the results of these studies indicate . . . that these new anti-fraud provisions are disenfranchising voters, . . . Congress will be in a position to modify or repeal these provisions.” 148 Cong. Rec. S10504. The EAC has not yet completed the report required by Section 244(b).

The supposed conflict asserted by Plaintiffs is easily resolved by reference to HAVA's legislative history. Until April 10, 2002, the bill which became HAVA did not contain any matching provisions. That day, Senator Dodd, on behalf of Senator Wyden, introduced an amendment, now codified as Section 15483(b)(3)(B), to exempt any mail-in applicant who submits a driver's license number or the last four digits of the applicant's Social Security number, and whose number matched official records, from the requirement that such applicants show photo identification when first presenting themselves to vote. *See* 148 Cong. Rec. S2500. The Senate adopted the Wyden amendment on the same day and passed the Senate version of the bill on the following day. *See* <http://thomas.loc.gov>.

With the adoption of the Wyden amendment—before the matching provisions of Section 15483(a)(5) even existed—the provision by an applicant of identifying information was optional and merely afforded a mail-in applicant an opportunity to avoid the photo identification requirement. Senator Wyden explained that, instead of producing photo identification, mail-in applicants “may put their driver's license number or the last four digits of their social security card on their registration card.” 148 Cong. Rec. S2522. “If that number . . . matches another State record . . . the voter won't be required to provide any further identification. This means they won't have to stop by a copy center before they register or before they vote.” *Id.*

The matching provision contained in Section 15483(a), which applies to all voters, did not appear until six months later, when, on October 8, 2002, House and Senate conferees filed the conference report. *See id.* at H7259. The conference report also included the Wyden amendment without modification. The House passed HAVA two days later, and the Senate did the same on October 16, 2002. *See* <http://thomas.loc.gov>. As Senator Dodd explained, the late addition of Section 15483(a)'s matching requirement “obviated and essentially rendered moot”

the photo identification requirement of Section 15483(b):

The Wyden amendment included in the Senate-passed bill, and retained without modification in the conference report, provides a means by which first-time mail registrant voters can avoid the [photo identification] requirements of section [15483(b)] altogether. At the choice of the individual, under section [15483(b)(3)], a first-time mail registrant can opt to submit their drivers license number, or at least the last 4 digits of their Social Security number, on the mail-in voter registration form in order for the State to match the information against a State database . . . . If such information matches, the additional identification requirements of section [15483(b)(2)] do not apply to that individual.

Under the new requirements added in conference as section [15483(a)(5)], . . . all new applicants must provide at the time of registration, a valid drivers license number, or if the individual does not have such, the last 4 digits of their Social Security number . . . . States must then attempt to match such information, thereby satisfying the provisions of section [15483(b)(3)] which renders the first-time mail applicant provisions of section [15483(b)(1)] inapplicable. By operation of section [15483(a)(5)] added in conference, in conjunction with the existing language of the Senate-passed bill (as added by Senator Wyden) in section [15483(b)(3)], the first-time voter identification requirement is obviated and essentially rendered moot.

*See* 148 Cong. Rec. S10504 (emphases added). Thus, Congress itself recognized that HAVA’s matching requirement, added to the bill at the end of the legislative process, rendered Section 15483(b)’s photo identification provision meaningless. It made clear, however, that this was the intended result—not an argument against matching as a precondition of registration.<sup>15</sup>

Even if the legislative history were less conclusive than it is, however, Plaintiffs contention would still be mistaken. It overlooks the fact that HAVA permits—but does not require—states to make matching a precondition of registration. As discussed above, HAVA expressly authorizes states to determine the sufficiency of the identifying information provided by an applicant. Thus, while some states might make a match a precondition to registration, others might choose to forego this precaution. HAVA’s mail-in provisions are not, therefore,

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<sup>15</sup> Indeed, Senator Dodd’s explanation assumes that all states would make matching a precondition of registration, because only then would the photo identification and provisional ballot provisions be “obviated and essentially rendered moot.”

superfluous, because Congress might have expected that some states would not require matching as a precondition to voting. In these states, Section 15483(b) applies in full force and requires the state to permit mail-in registrants to vote either by regular ballot (if the applicant produces photo identification) or by provisional ballot. And, even in states that require matching as a precondition of registration, Section 15483(b) is not a dead letter. First-time mail applicants who have neither a driver’s license nor a Social Security number—and to whom, consequently, matching is inapplicable—benefit from Section 15483(b) in every state.

The argument, therefore, that matching as a precondition of registration is inconsistent with the provisions of Section 15483(b), which permit first-time mail applicants to vote by regular ballot (if they produce photo identification) or provisional ballot, is unfounded. It ignores the legislative history, which fully explains the seemingly discordant provisions and confirms the position that Congress intended to enable states to make matching a precondition of registration, even if it “obviated and essentially rendered moot” the provisions of Section 15483(b). It also overlooks the option which HAVA expressly affords states to determine the sufficiency of identifying information submitted on voter registration applications, and thus fails to recognize that Section 15483(b) will continue to operate in those states that do not require a match as a precondition of registration. Because the use of matching as a precondition of registration is consistent with HAVA’s terms and intent, this Court should dismiss the allegation that HAVA preempts Section 97.053(6), Florida Statutes.

**II. SECTION 97.053(6), FLORIDA STATUTES, DOES NOT VIOLATE THE MATERIALITY PROVISION OF THE VOTING RIGHTS ACT.**

***A. HAVA’s Specific Matching Provision Takes Precedence Over the General Materiality Provision of the Voting Rights Act.***

Plaintiffs’ Voting Rights Act (“VRA”) claim fails to state a claim upon which relief can

be granted because Congress specifically determined that a matching requirement is an appropriate and material means of combating voter registration fraud. Plaintiffs nevertheless allege that a failed match is immaterial under the VRA and that the VRA requires states to register all applicants—real or fictitious—whether or not their identities can be established. As shown above, however, HAVA expressly permits states to verify the identities of voter registration applicants and to determine the adequacy of the identifying information provided by an applicant. The verification of an applicant’s identity is thus undeniably material because Congress has made it so.

It is a basic “canon of statutory construction that the more specific takes precedence over the more general.” *Medberry v. Crosby*, 351 F.3d 1049, 1060 (11th Cir. 2003). Alternatively stated, “where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one . . . .” *In re Cox*, 338 F.3d 1238, 1243 (11th Cir. 2003). Here, Congress has carefully crafted specific “anti-fraud provisions” authorizing states to deny the voter registration applications of unverified applicants. It would be anomalous for the broad statutory provisions of the VRA, addressing “immaterial” voting requirements, to supersede a more specific and more recent federal enactment intended to combat voter registration fraud.

***B. The Verification of a Voter Registration Applicant’s Identity is a Material Requirement.***

In Florida, “[e]very citizen of the United States who is at least eighteen years of age and who is a permanent resident of the state, if registered as provided by law, shall be an elector of the county where registered.” Art. VI, § 2, Fla. Const. For these eligibility requirements to have any meaning, it is imperative that election officials be able to determine “that people who register to vote are who they say they are . . . .” 148 Cong. Rec. S10501 (statement of Sen. Dodd). Moreover, the phrase “if registered as provided by law” recognizes the authority of

Congress and the Florida Legislature to establish a registration process which might require applicants to verify their identities. Nevertheless, Plaintiffs allege that an applicant's failure to provide verifiable identifying information is immaterial, and that the VRA mandates an "honor system" of voter registration. Plaintiffs' interpretation is implausible, since it would destroy the common-sense method established by Congress to combat voter registration fraud.

Anti-fraud measures such as that challenged here are not inconsistent with the VRA's materiality provision. For example, in *Howlette v. City of Richmond, Virginia*, 485 F. Supp. 17, 22-23 (E.D. Va.), *aff'd*, 580 F.2d 704 (4th Cir. 1978), the Court rejected a challenge brought under the materiality provision and upheld a notarization requirement for petition signatures as an anti-fraud measure. *See also Hoyle v. Priest*, 265 F.3d 699, 704-05 (8th Cir. 2001) ("Requiring that petition signers be qualified electors simply protects the state and its citizens against both fraud and caprice, valid concerns considering the time and expense needed to undertake the initiative process. We conclude that the challenged practice is material, and thus outside the scope of [the materiality provision].").

In *Schwier v. Cox*, 412 F. Supp. 2d 1266 (N.D. Ga. 2005), voter registration applicants challenged a Georgia law that required applicants who had Social Security numbers to provide those numbers on their applications. *Id.* at 1268. They contended that, because the federal Privacy Act prohibited any state from denying "any right, benefit, or privilege . . . because of [an] individual's refusal to disclose his social security account number," the omission of an applicant's Social Security number was immaterial under the VRA. *Id.* at 1276. The Court "agree[d] with [the Georgia Secretary of State] that requiring disclosure of a registrant's SSN could help to prevent voter fraud," but it concluded that "disclosing one's SSN cannot be material . . . if Georgia is not permitted to require this disclosure." *Id.* (emphasis added).

Here, by contrast, Congress expressly directed states to require disclosure of identifying information. In fact, HAVA specifically provides that the disclosure of the last four digits of a Social Security number on a voter registration application does not violate the Privacy Act. *See* 42 U.S.C. § 15483(c) (“The last 4 digits of a social security number . . . shall not be considered to be a social security number for purposes of . . . the Privacy Act . . .”). Congress required the disclosure of Social Security numbers for anti-fraud purposes and required states to verify them. *Accord Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1212-13 (S.D. Fla. 2006) (holding that a requirement that an applicant affirm citizenship and mental competence are not immaterial because, unlike *Schwier*, the disclosure of such information is not prohibited, and its disclosure is relevant to determining eligibility).

In addition, Plaintiffs’ facial attack on Section 97.053(6), Florida Statutes, is based on the insufficient allegation that, “for some voters,” the omission of identifying information would be immaterial. Every anti-fraud measure will impose requirements on valid and legal, as well as fraudulent and illegal voter registration applications. In *Diaz*, for example, the Court upheld a requirement that applicants affirm their citizenship and mental competence. 435 F. Supp. 2d at 1212-13. It did so despite the fact that applicants who are both citizens and mentally competent might inadvertently fail to check the necessary boxes on their voter registration applications. The Court concluded that these affirmations were relevant to the eligibility of an applicant. Likewise, in the present case, identity is unquestionably relevant to an applicant’s eligibility. An applicant’s failure to provide a valid identifying number cannot, therefore, be an immaterial omission—even if the particular applicant was otherwise eligible to register.

### **III. SECTION 97.053(6), FLORIDA STATUTES, DOES NOT VIOLATE SECTION 2 OF THE VOTING RIGHTS ACT.**

Courts have long recognized that a disproportionate impact on racial minorities does not,

without more, establish a violation of Section 2 of the VRA. Plaintiffs, nevertheless, allege that the verification requirement disproportionately affects racial and ethnic minorities who, Plaintiffs allege, are more likely than other applicants to have foreign-language surnames, compound names, unique names, and westernized names. Plaintiffs' allegation, unaccompanied by any suggestion of interacting racial or ethnic biases, is insufficient to state a claim under Section 2.

Section 2 prohibits any “voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right . . . to vote on account of race or color . . . .” 42 U.S.C. § 1973(a). A “court must assess the impact of the contested structure or practice on minority electoral opportunities on the basis of objective factors.” *Burton v. City of Belle Glade*, 178 F.3d 1175, 1198 (11th Cir. 1999) (marks omitted).<sup>16</sup> “Despite its broad language, Section 2 does not prohibit all voting restrictions that may have a racially disproportionate effect.” *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1228 (11th Cir. 2005). On the contrary, “the existence of some form of racial discrimination . . . remains the cornerstone of section 2 claims . . . .” *Nipper v. Smith*, 39 F.3d 1494, 1515 (11th Cir. 1994).

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<sup>16</sup> These factors—the so-called “Senate factors”—include (i) the extent of any history of official discrimination . . . that touched the right of the members of the minority group to . . . participate in the political process; (ii) the extent to which voting in the elections of the state . . . is racially polarized; (iii) the extent to which the state . . . has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination . . . ; (iv) if there is a candidate slating process, whether the members of the minority group have been denied access to that process; (v) the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; (vi) whether political campaigns have been characterized by racial appeals; (vii) the extent to which members of the minority group have been elected to public office; (viii) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and (iv) whether the policy underlying the [state’s] use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous. *Burton*, 178 F.3d at 1196 n.20. Plaintiffs have made no allegation of these factors, and, in light of the strength of the policy underlying the verification requirement, the factors weigh against Plaintiffs’ claim.

“[T]o be actionable, a deprivation of the minority group’s right to equal participation in the political process must be on account of a classification, decision, or practice that depends on race or color, *not on account of some other racially neutral cause.*” *Johnson*, 405 F.3d at 1229 n.30 (quoting *Nipper*, 39 F.3d at 1515) (emphasis in original). To prevail, the “plaintiffs would have to demonstrate that specific and relevant racial biases in society interact with [the challenged practice], resulting in a denial of the franchise ‘*on account of race or color.*’” *Johnson*, 405 F.3d at 1230 n.31 (citing *Thornburg v. Gingles*, 478 U.S. 30, 47 (1987)) (emphasis in original); accord *Ortiz v. City of Philadelphia*, 824 F. Supp. 514 (E.D. Pa. 1993) (Section 2 is not violated where the challenged law does not “interact[] with social and historical conditions to deny minority voters equal access to the political process . . .”).

Circuit courts have consistently “rejected [Section] 2 challenges based purely on a showing of some relevant statistical disparity between minorities and whites.” See *Smith v. Salt River Project Ag. Imp. & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997). In *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986), the Court rejected a Section 2 challenge to Tennessee’s felon-disenfranchisement law that relied chiefly on disparities in conviction rates among minorities and whites. In *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989), the Court rejected a Section 2 challenge to Virginia’s system of appointing school board members—despite a “significant disparity” between the proportions of minorities in the population and on the school board—because the under-representation of minorities resulted from the fact that minorities were “not seeking school board seats in numbers consistent with their percentage of the population.” Similarly, in *Salas v. Southwest Texas Junior College Dist.*, 964 F.2d 1542 (5th Cir. 1992), the Court rejected a Section 2 challenge to at-large elections that was premised exclusively on the lower voter turnout of minority electors.

More recently, in *Ortiz v. City of Philadelphia Office of the City Comm'rs*, 28 F.3d 306 (3d Cir. 1994), the Court upheld a voter-purge statute against a Section 2 allegation that a greater proportion of minority voters was inactive, and the names of minorities were thus more likely to be purged from the list. And, in *Smith*, the Court upheld water district elections in which electors were required to own real property and could cast one vote for each acre they owned. 109 F.3d at 589. Though minorities owned a lesser percentage of real property than whites, *see id.* at 589-90, the Court explained that “a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the [Section] 2 ‘results’ inquiry,” *id.* at 595 (emphasis in original). Rather, the intent of Congress was to “prohibit election practices that accommodate or amplify the effect that private discrimination has on the voting process.” *Id.* at 595 n.7 (quoting *Solomon v. Liberty County, Florida*, 899 F.2d 1012 (11th Cir. 1990) (Tjoflat, J., concurring)).<sup>17</sup>

In the present case, Plaintiffs do not allege that underlying racial biases cooperate with Section 97.053(6), Florida Statutes, to occasion a disproportionate impact. They make no allegation either of discriminatory intent or the objective factors a court must consider when analyzing a Section 2 challenge. *See* note 16, *supra*. Rather, Plaintiffs merely hypothesize a statistical disparity between whites and minorities in the verification of applicants’ identities, resulting from the specific names of individual minority applicants. The allegation of a numerical disparity arising from conditions totally unrelated to past or present racial discrimination or bias is insufficient under well settled precedent to state a claim under Section 2.

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<sup>17</sup> While the Ninth Circuit abruptly departed from this line of cases in *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), when it reversed the entry of summary judgment against a challenge to Washington’s felon-disenfranchisement law, the Eleventh Circuit has maintained the opposite position. In *Johnson*, the Court held that disparities resulting from a felon-disenfranchisement law “do not demonstrate a racial bias” and that, despite the disproportionate impact, the law did not deny “the right to vote on account of . . . race.” 405 F.3d at 1230 at n.31.

Further, the anti-fraud policy of the challenged law, together with the absence of any allegation of the objective factors that control the Section 2 analysis, negate the hypothesis that the challenged law denies the right to vote “on account of race or color.” 42 U.S.C. § 1973(a).

**IV. SECTION 97.053(6), FLORIDA STATUTES, DOES NOT VIOLATE THE NATIONAL VOTER REGISTRATION ACT.**

Plaintiffs’ claim under the National Voter Registration Act (“NVRA”) rests on a fundamental misreading of its provisions. Plaintiffs allege that, because the NVRA requires a state to ensure an eligible applicant’s right to vote if a valid application is submitted no later than 30 days before a federal election, *see* 42 U.S.C. § 1973gg-6(a)(1)(A)-(D), it prohibits a state from verifying the authenticity of an applicant’s identifying information. The design of this provision, however, is to establish that book closing may not occur earlier than 30 days prior to a federal election. It does not purport to define whether an applicant is eligible or whether a registration application is valid under state law.

Section 1973gg-6(a)(1) requires each state to “ensure that any eligible applicant is registered to vote in an election . . . if the valid voter registration form of the applicant” is submitted, postmarked, accepted, or received (depending on the form of application) “not later than the lesser of 30 days, or the period provided by State law, before the date of the election.” It does not define which applicants are “eligible” or which applications are “valid.” These determinations remain with the states, and nothing in the NVRA precludes states from making these determinations according to state law. Rather, the NVRA simply establishes a book-closing deadline by “provid[ing] that the registration cutoff may be no more than 30 days before election or such lesser period as State may provide.” H.R. Conf. Rep. No. 103-66, at 20 (1993).

In *Association of Community Organizations for Reform Now v. Miller*, 912 F. Supp. 976 (W.D. Mich. 1995), the plaintiffs challenged a Michigan law which provided that an applicant is

not registered until receipt of a voter identification card. They contended that Section 1973gg-6(a)(1) required the state to register an applicant as long as the application was completed no later than the book-closing deadline. *Id.* at 986. The Court rejected this position, explaining that “[t]his section deals with time deadlines in the registration process. It requires a state to ensure that an eligible applicant is registered to vote in an election so long as the applicant’s valid voter registration form is submitted to or received by the appropriate official or agency, or is postmarked, by the registration deadline for an election.” *Id.* Significantly, the Court explained that the NVRA “still left [to the states] the task of determining that an applicant is eligible, and that the registration form as submitted complies with state law.” *Id.* at 987; accord *Charles H. Wesley Educ. Found. Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005) (“The [NVRA] simply requires that valid registration forms delivered . . . in time be processed.”).

Though the NVRA limits the discretion of states in establishing a book-closing deadline, it does not preclude states from considering an applicant “eligible” or a voter registration application “valid” only on the condition that the applicant’s identifying information has been verified (whether by a database match or by evidence provided by the applicant). In fact, HAVA expressly authorizes states to do exactly that. Plaintiffs’ NVRA claim must be dismissed.

V. **SECTION 97.053(6), FLORIDA STATUTES, DOES NOT UNDULY BURDEN THE RIGHT TO VOTE.**

A. *Legal Standard.*

“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). Indeed, the right of states to regulate the

manner of conducting elections derives from the U.S. Constitution. *See* U.S. Const. art. I, § 4. As a result, “[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 v. Celebrezze*, 460 U.S. 780, 788 (1983).

“Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.” *Burdick*, 504 U.S. at 434. A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments . . . against the precise interests put forward by the State as justifications for the burden imposed by its rule . . . .” *Id.* (marks omitted). Under this test, the “State’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.” *Anderson*, 460 U.S. at 788. Only when such restrictions are “severe” must the regulation be “narrowly drawn to advance a state interest of compelling importance.” *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

“A strict standard would be especially inappropriate in a case . . . in which the right to vote is on both sides of the ledger.” *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007). This occurs where the challenged law seeks to protect legitimate votes against dilution or invalidation by fraudulent votes. “[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006)

(quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). As the Supreme Court recognized:

Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.

*Purcell*, 127 S. Ct. at 7. Thus, a “State indisputably has a compelling interest in preserving the integrity of its election process.” *Id.* at 7 (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989)).<sup>18</sup>

***B. Florida’s Verification Process is Justified by the State’s Compelling Interest in the Prevention of Voter Fraud.***

The verification of an applicant’s identity under the process established by Congress is a reasonable, nondiscriminatory regulation amply justified by the state’s important—indeed, compelling—regulatory interest in preventing voter registration fraud. Driver’s license and Social Security numbers, because “they are issued by government entities and are truly unique to the voter,” *see* 148 Cong. Rec. S10490 (statement of Sen. Bond), afford not only the most logical but perhaps the only practicable means of verifying the identities of voter registration applicants. By matching the number provided to information in official databases, election officials are quickly able to ensure that applicants are who they claim they are. The recognition by the Supreme Court and Congress of the dangers of voter fraud and the compelling importance of fair and honest elections counsels strongly against the unconstitutionality of this most basic and logical method of verifying applicants’ identities. Indeed, nothing in the Constitution compels a

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<sup>18</sup> Circuit courts have long been in accord. *See, e.g., Lerman v. Board of Elections*, 232 F.3d 135, 149 (2d Cir. 2000) (“[T]he first interest asserted by the defendants—ensuring the integrity and preventing fraud in the electoral process—is unquestionably compelling.”); *Krislov v. Rednour*, 226 F.3d 851, 859 (7th Cir. 2000) (“Because elections must be regulated to remain free from fraud and coercion, some latitude is given to regulations designed to serve these purposes.”).

no-questions-asked “honor system” of voter registration.

Section 97.053(6), Florida Statutes, does not impose “severe” burdens on voter registration applicants. Instead, it simply asks applicants who have a driver’s license number to place that number on their applications, and asks all other applicants who have Social Security numbers to indicate the last four digits of that number. Florida protects each applicant’s identifying information from public disclosure, *see* § 97.0585(1)(c), Fla. Stat., and it does not ask any applicant to obtain a driver’s license or Social Security number which they do not have. The challenged law even allows applicants whose identifying information was not timely verifiable to validate their registrations after the book-closing deadline. The supervisors of elections are required to notify such applicants of the insufficiency of their applications, and applicants are afforded more than 30 days after registration books close—up to 5 p.m. two days after the election—to provide evidence of the correctness of the identifying information they provided.

Similar anti-fraud measures have been held not to impose “severe” burdens. In *Crawford*, the Court declined to apply exacting scrutiny to a state law requiring voters to present “a government-issued photo ID” when presenting themselves to vote. 472 F.3d at 950, 952. It did so despite the fact that the law would require some voters to procure a photo ID before voting, noting that a strict standard would be inappropriate where the challenged legislation, by combating voter fraud, secures the fundamental right to vote of legitimate voters. *Id.* at 951-52; *accord Common Cause/Georgia v. Billups*, --- F. Supp. 2d ----, 2007 U.S. Dist. LEXIS 68950, at \*129 (N.D. Ga. Sep. 6, 2007) (holding that a photo ID requirement like that in *Crawford* did not “severely burden[] the right to vote”).<sup>19</sup> And, significantly, the Fourth Circuit has concluded that

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<sup>19</sup> Plaintiffs misunderstand the nature of this inquiry. They suggest that because the consequence of a failed match is a denial of the ballot to the applicant, the challenged law imposes the “severest of burdens.” Doc. 4 at 21. The relevant question, however, examines the

though the *public* disclosure of a Social Security number on a voter registration application compelled a “profound invasion of privacy,” “no substantial burden would exist” if the disclosure were required only for the “internal use” of election officials. *Greidinger v. Davis*, 988 F.2d 1344, 1354 & n.10 (4th Cir. 1993).

Even if Section 97.053(6), Florida Statutes, imposes severe burdens on an applicant’s right to vote (which it does not), the regulation would still be constitutional because it is narrowly drawn to advance a state interest of compelling importance. It is indisputable that the prevention of voter registration fraud is compellingly important. *See, e.g., Purcell*, 127 S. Ct. at 7 (“A State indisputably has a compelling interest in preserving the integrity of its election process.”) (emphasis added). As explained *supra*, the dominant purpose both of HAVA and the challenged law is the prevention of voter registration fraud. The challenged law, moreover, is narrowly drawn to serve this interest. It requires applicants who have a driver’s license or Social Security number to provide it, thus enabling the verification of applicant’s identities. It imposes no burden on applicants who have neither.<sup>20</sup>

Where for any reason an applicant’s identity cannot be verified in time for any election, the law requires the applicant to be notified and affords the applicant not only the entire period between the book-closing deadline and the election, but also two days after the election to establish the authenticity of the information provided. This process, while it eliminates the

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magnitude of the burden imposed by state law in order to secure the right to vote—*i.e.*, providing identifying information or evidence that such information was accurate—not the consequence of an applicant’s failure to comply with that requirement. Plaintiffs’ interpretation would subject every voter registration requirement to strict scrutiny simply because non-compliance would result in the ineligibility of the voter.

<sup>20</sup> The fact that HAVA and the challenged law do not burden such applicants, and thus do not completely eradicate all voter registration fraud, does not render them constitutionally infirm. *See Vance v. Bradley*, 440 U.S. 93, 108 (1979) (“Even if the classification . . . is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is

discredited “honor system” of registration, places only a minimal, initial burden on all applicants, and affords unmatched applicants all possible time (consistent with the necessary administration of elections) to establish that the number provided is theirs. It is therefore narrowly tailored to advance the compelling interest of the state—and of legitimate voters—to prevent voter fraud.<sup>21</sup>

**VI. SECTION 97.053(6), FLORIDA STATUTES, DOES NOT VIOLATE EQUAL PROTECTION.**

**A. *Legal Standard.***

“The right to vote is fundamental, forming the bedrock of our democracy. . . . Nevertheless, states are entitled to burden that right to ensure that elections are fair, honest and efficient.” *Wexler v. Anderson*, 452 F.3d 1226, 1232 (11th Cir. 2006). While equal protection prohibits a state from imposing restrictions that result in the “arbitrary and disparate treatment of members of the electorate,” *Bush v. Gore*, 531 U.S. 98, 105 (2000), it does not preclude “reasonable, nondiscriminatory restrictions” justified by the state’s “important regulatory interests.” *Wexler*, 452 F.3d at 1232-33. Because “[a]ny [election] restriction is going to exclude, either *de jure* or *de facto*, some people from voting, the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves.” *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004).<sup>22</sup>

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nevertheless the rule that . . . perfection is by no means required.”) (marks omitted).

<sup>21</sup> Notably, nothing in HAVA even requires state law to create a procedure by which applicants can authenticate unverifiable information. A finding, therefore, that Section 97.053(6), Florida Statutes, imposes unconstitutional burdens on the right to vote would more than call into question the constitutionality of HAVA itself.

<sup>22</sup> “[S]trict scrutiny of an election law is not warranted merely because it may prevent some otherwise eligible voters from exercising that right.” *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 822 (S.D. Ind. 2006) (rejecting the “oft-criticized, but nonetheless frequently invoked, erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny”). Plaintiffs accordingly do not appear to contend that strict scrutiny applies to their equal protection claims. *See* doc. 4 at 23.

***B. Section 97.053(6), Florida Statutes, Does Not Arbitrarily Discriminate Between Applicants Whose Identities Are Verified and Those Whose Identities are Not Verified.***

Plaintiffs first allege that the challenged law violates equal protection because it “arbitrarily and unreasonably” differentiates applicants whose identifying information has not been verified from those whose information has been verified. The statute, however, does not bar unmatched applicants from voting. It recognizes that error, in a system as large as Florida’s statewide database (which includes about 12 million voters), is inseparable from any system of verification and affords unmatched applicants ample time to establish the authenticity of the information they provided. In fact, the law requires the supervisor of elections to notify the applicant, and the applicant may establish the authenticity of the information at any time between book closing 29 days before the election and 5 p.m. on the second day after the election. Given the state’s compelling interest in the detection and prevention of fraudulent voter registrations by the verification of applicants’ identities, the notice and opportunity given to applicants to supply authenticating evidence completely remove the risk of arbitrary and disparate treatment.

The U.S. Supreme Court has recognized that, to promote a legitimate state interest, a state may require applicants to take affirmative steps to effectuate their registrations. In *Rosario v. Rockefeller*, 410 U.S. 752 (1973), the U.S. Supreme Court upheld a state law requiring primary election voters to register before the last preceding general election. The Court, in rejecting an equal protection challenge that characterized the period as too long, concluded that any disenfranchisement resulted from the applicants’ “own failure to take timely steps to effect their enrollment.” *Id.* at 758; *accord Crawford*, 472 F.3d at 951 (upholding photo identification requirement despite the fact that “some people who have not bothered to obtain a photo ID will not bother to do so just to be allowed to vote”). Similarly, in *Carrington v. Rash*, 380 U.S. 89

(1965), the Court invalidated a state law prohibiting members of the Armed Forces from registering to vote. The Court, recognizing the state's interest in precluding the registration of "transient" residents, found fault with the statute because it did not provide soldiers an opportunity "to controvert the presumption of non-residence." *Id.* at 96. Accordingly, because Section 97.053(6), Florida Statutes, provides all applicants both notice and an opportunity "to controvert" any failed match, it does not violate equal protection.

Plaintiffs also suggest that the challenged law violates equal protection because, with respect to applicants whose identifying information could not be verified by the book-closing deadline, it permits those who submitted correct identifying information to authenticate that information, but does not permit those who submitted incorrect identifying information to establish their identities. *See* doc. 1 at ¶ 36. Equal protection, however, requires only that the challenged law "treat similarly situated people alike." *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1313 (11th Cir. 2006). The applicants hypothesized by Plaintiffs are not similarly situated. One submitted an application with erroneous information, while the other did not.

***C. Section 97.053(6), Florida Statutes, Does Not Arbitrarily Discriminate Between Applicants Who Provide Their Driver's License Numbers and Those Who Provide Their Social Security Numbers.***

Plaintiffs suggest that because the different might databases yield different rates of successful matches, equal protection prohibits the state from using these databases. Plaintiffs' interpretation, however, would entirely subvert the available means of verifying applicants' identities by precluding the use of one or both databases, opening the door to unverifiable voter registration applications and consequent fraud and abuse. "[I]n requiring that the state use to a proper end the means designed to impinge minimally on fundamental rights, the Constitution does not require that the state choose ineffectual means." *Rosario*, 410 U.S. at 762 n.10. In

enacting HAVA, Congress clearly regarded the use of both driver's license and Social Security databases for matching purposes as a proper and effective means of combating voter registration fraud. Moreover, because the challenged law provides all applicants notice and ample opportunity to correct any failed match, an initial failed match does not preclude any applicant from authenticating the information and being registered as an active voter. Equal protection does not require Florida to decline the use of available and effective means toward the prevention of voter registration fraud.

***D. Section 97.053(6), Florida Statutes, Does Not Arbitrarily Discriminate Between Applicants Based On Their Residences.***

Plaintiffs next contend that the challenged statute's silence regarding the substance of the notices to be provided to applicants, the nature of the evidence required of applicants whose identities are not verified, and the information poll workers should provide to an unmatched applicant who must vote a provisional ballot, violates equal protection. Equal protection does not, however, mandate exact uniformity in election procedures. In *Bush*, on which Plaintiffs rely, the Supreme Court held that, "where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards," "the rudimentary requirements of equal treatment and fundamental fairness" were not satisfied. 531 U.S. at 109. It noted, however, that "[t]he question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id.*

Indeed, consistent with the principle that "federal court intrusion into state electoral processes is disfavored without a compelling justification," *Hall v. Holder*, 117 F.3d 1222, 1231 (11th Cir. 1997), local discretion and flexibility in the administration of elections has consistently been affirmed. *See, e.g., Wexler*, 452 F.3d at 1233 ("[L]ocal variety [in voting systems] can be justified by concerns about cost, the potential value of innovation, and so on.");

*cf. Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 181 (4th Cir. 1983) (“A state may employ diverse methods of voting, and the methods by which a voter casts his vote may vary throughout the state.”); *Pettengill v. Putnam County R-1 Sch. Dist.* 472 F.2d 121, 122 (8th Cir. 1973) (“The appellants’ [vote dilution] complaint asks the federal court to oversee the administrative details of a local election. We find no constitutional basis for doing so . . . .”); *Powell v. Power*, 436 F.2d 84, 86 (2d Cir. 1970) (“Were we to embrace plaintiffs’ theory, this court would henceforth be thrust into the details of virtually every election, tinkering with the state’s election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law.”). The implementation by local officials of the requirements established by the challenged law is thus consistent with the “rudimentary requirements of equal treatment and fundamental fairness.”

***E. Section 97.053(6), Florida Statutes, Does Not Arbitrarily Discriminate Against Racial, Ethnic, and Language Minorities.***

Finally, Plaintiffs suggest that the challenged law violates the equal protection rights of racial, ethnic, and language minorities because, Plaintiffs conjecture, administrative errors are more likely to occur in the verification of their names. “Of course, the Equal Protection Clause prohibits a state from using a facially neutral law to *intentionally* discriminate on the basis of race.” *Johnson*, 405 F.3d at 1218 (quoting *Washington v. Davis*, 426 U.S. 229, 239-40 (1976)) (emphasis in original); *accord Clark v. Putnam County*, 293 F.3d 1261, 1266 (11th Cir. 2002) (“Electoral schemes which cancel out or dilute the voting strength of racial groups are unconstitutional when they are adopted with a discriminatory purpose.”). Specifically, a facially neutral state law:

Will not be held unconstitutional solely because it results in a racially disproportionate impact . . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. Once racial discrimination is shown to have been a “substantial” or “motivating” factor behind the enactment of the law, the burden shifts to the law’s defenders to demonstrate that

the law would have been enacted without this factor.

*Johnson*, 405 F.3d at 1223 (quoting *Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985)). Here, Plaintiffs do not allege that the enactment of the challenged statute, which unquestionably is neutral on its face with respect to minorities, was motivated by racial animus. In addition, minorities have the same ample opportunity as all other applicants whose identifying information could not be verified to authenticate the information provided. Under these circumstances, Plaintiffs' claim that Section 97.053(6), Florida Statutes, invidiously discriminates against minority applicants must fail.

**VII. SECTION 97.053(6), FLORIDA STATUTES, DOES NOT VIOLATE DUE PROCESS.**

As noted, the challenged law requires the supervisors of elections, in case of a failed match, to notify the applicant that the application was insufficient. The applicant may, at any time after the book-closing deadline (29 days before the election) and before 5 p.m. two days after the election, contact the supervisor's office and establish the correctness of the identifying information provided on the application. The challenged law thus provides applicants every opportunity consistent with practical realities to establish the correctness of the identifying information submitted on their applications. Plaintiffs nevertheless speculate that the statute will violate the "fundamental fairness" that due process ensures, *see Wexler*, 452 F.3d at 1233, because the notice provided "will not" be "sufficient," "meaningful," "adequate," or "timely."<sup>23</sup>

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<sup>23</sup> The period afforded applicants to authenticate their identifying information cannot realistically be longer than it is. As noted in Section IV, *supra*, registration books cannot close earlier than they do. 42 U.S.C. § 1973gg-6(a)(1). And, because Florida law requires votes cast by provisional ballot to be included in the first set of unofficial returns due on the third day after a primary election or the fourth day after a general election, *see* § 102.141(5), Fla. Stat., as amended by Ch. 2007-30, § 33, Laws of Fla., the deadline two days after the election is necessarily the same to which all voters casting provisional ballots are subject, *see* § 101.148(1), Fla. Stat. Florida law also mandates the prompt processing of voter registration applications, requiring all applications to be entered into the statewide database within thirteen days after receipt and to be forwarded to the supervisor of elections "immediately" thereafter. *See id.* at

*See* doc. 1 at ¶¶ 79, 80, 189. Plaintiffs’ vague and purely conjectural allegations of unconstitutional implementation are insufficient to state a claim for which relief can be granted.

Moreover, a “facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.” *Salerno*, 481 U.S. at 745. The fact that the challenged law “might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.” *Id.* Because the law includes a notice provision and affords applicants an opportunity to correct verification errors, and because Plaintiffs’ claims of inadequate notice are, on their face, totally hypothetical, Count IX fails to state a claim upon which relief can be granted and must be dismissed.

### **Conclusion**

Florida has an undeniable interest in limiting voting to those who are legally entitled to vote. Section 97.053(6), Florida Statutes, and the verification of the identities of voter registration applicants further that important interest. In availing itself of the anti-fraud mechanism established by Congress, the Florida Legislature did not burden the right to vote. Though it eliminated the discredited no-questions-asked “honor system” of voter registration, the Legislature established precautions in favor of eligible applicants to minimize the burden on the right to vote. Because the challenged law is not inconsistent with HAVA and does not violate the VRA, the NVRA, or the United States Constitution, Plaintiffs’ Complaint must be dismissed.

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§ 97.053(7), Fla. Stat. The thirteen day limit was reduced from fifteen by the Legislature in 2007 and becomes effective January 1, 2008. *See* Ch. 2007-30, §§ 13, 57, Laws of Fla.

**CERTIFICATE OF SERVICE**

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

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