

**IN THE UNITED STATES DISTRICT COURT
FOR THE 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.

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

THIS CAUSE comes before the Court upon the following:

1. "Motion for Preliminary Injunction" (doc. 4);
2. "Plaintiffs' Memorandum of Law in Support of Their Motion for Preliminary Injunction" (doc. 5);
3. "Secretary of State's Amended Response to Plaintiffs' Motion for Preliminary Injunction" (doc. 85);
4. "Plaintiffs' Reply to the Secretary of State's Response to Plaintiffs' Motion for Preliminary Injunction" (doc. 90);
5. "Secretary of State's Motion to Dismiss" (doc. 23);

6. "Plaintiffs' Memorandum of Law in Opposition to the Secretary of State's Motion to Dismiss" (doc. 38); and
7. "Secretary of State's Reply to Plaintiffs' Response to the Secretary's Motion to Dismiss" (doc. 60).

In addition, a hearing on the preliminary injunction motion was held on December 11, 2007.

Plaintiffs allege that potential voters are being disenfranchised by a Florida law that governs voting registration. This law, intended as an anti-fraud measure, requires matching between existing information and names, birth dates and an identification number on a voter's registration application before that person can be registered to vote. As a result of natural and expected human errors in data entry and possible computer glitches in the matching process, this law has resulted in more than 14,000 otherwise eligible voters being kept off the voter rolls. Plaintiffs claim that this law violates the United States Constitution, the Voting Rights Act, and the National Voter Registration Act and conflicts with the objectives and intent of the Help America Vote Act.

Plaintiffs request a preliminary injunction to enjoin the enforcement of the law. Defendant opposes the preliminary injunction and, moreover, seeks dismissal of Plaintiffs' complaint for failure to state a claim on which relief can be granted. For the reasons set forth below, the motion to dismiss will be granted in part and denied in part and the motion for preliminary injunction will be granted.

INTRODUCTION

On January 1, 2006, Subsection Six of Florida Statute 97.053 (“Subsection Six”) took effect. Subsection Six regulates the procedures for registering to vote in Florida. It prohibits a voter from being placed on the list of registered voters until after the Secretary 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” on the voter registration application. In the event that this identification number¹ is not verified or “matched” with the corresponding number in the databases of the United States Social Security Administration (“SSA”) or the Florida Department of Highway Safety and Motor Vehicles (“DHSMV”) or if the identification number is not provided to the Board of Elections for visual verification prior to election day, then that applicant is prohibited from casting a regular ballot. The applicant may vote on Election Day by provisional ballot, but in order for that ballot to be counted, the applicant must verify the authenticity of the identification number he or she provided on the voter registration application within two days of the election. This verification must be done by personal delivery, mail, facsimile, or electronic mail to the Board of Elections.

Plaintiffs claim that Subsection Six will result in the disenfranchisement of thousands of voters in the upcoming Presidential election. Specifically, Plaintiffs

¹ For purposes of simplicity, any reference to “identification number” refers to a Social Security number or driver’s license number.

claim that Subsection Six is preempted by the Help America Vote Act (“HAVA”) because it is in conflict with the intent and purposes of the Act. Additionally, Plaintiffs claim that Subsection Six violates the Voting Rights Act, the National Voter Registration Act, and the First and Fourteenth Amendments to the United States Constitution. Defendant responds that Subsection Six properly serves the goal of curbing voter fraud, consistent with HAVA. Defendant also claims that the requirements of Subsection Six are material to determining an applicant’s eligibility to vote. Further, Defendant claims that Subsection Six does not violate the Equal Protection Clause or the Due Process Clause because Subsection Six does not unduly burden the fundamental right to vote and any restrictions on the right to vote are sufficiently justified by the state’s interest in preventing voter fraud.

ANALYSIS

Standard for Motion to Dismiss and Preliminary Injunction

Defendant brings his motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. This Court may grant a motion to dismiss if it “appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim[s] which would entitle [it] to relief.” Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Thus, dismissal pursuant to Rule 12(b)(6) is warranted “only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations of the complaint.” Shands Teaching Hosp. and Clinics, Inc. v.

Beech Street Corp., 208 F.3d 1308, 1310 (11th Cir. 2000)(internal citations omitted). The threshold for a complaint to survive a 12(b)(6) motion is “exceedingly low.” Broward Garden Tenants Ass'n. v. United States Env'tl. Prot. Agency, 157 F. Supp. 2d 1329, 1337 (S.D. Fla. 2001). When determining whether a plaintiff's pleadings satisfy this standard, the court accepts the allegations in the complaint as true and evaluates all inferences derived from those facts in the light most favorable to the plaintiff. 75 Acres, LLC v. Miami-Dade County, 338 F.3d 1288, 1293 (11th Cir. 2003).

To obtain a preliminary injunction, the plaintiff has the burden to demonstrate (1) a substantial likelihood of success on the merits, (2) irreparable injury if the injunction were not granted, (3) that the threatened injury outweighs any harm an injunction may cause the defendant, and (4) that granting the injunction will not be adverse to the public interest. Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc., 299 F.3d 1242, 1246-47 (11th Cir. 2002). In this Circuit, “a preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the burden of persuasion as to the four requisites.” McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998)(citations omitted).

Help America Vote Act

The Help America Vote Act (“HAVA”) was passed in the aftermath and as a response to the turmoil created by the 2000 Presidential Election. In the face of

numerous reports of disenfranchisement and unreliable election machines and disorganized polling stations, Congress created federal legislation to establish some uniformity in the voting process and to deter fraud and eliminate barriers to voting. One solution to these problems was the creation 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 in the State.” 42 U.S.C. § 15483(a)(1)(A). The intent was to have a unique identifier for each voter, using a driver’s license or Social Security number, if available. “If an applicant for voter registration . . . has not been issued a current and valid driver's license or a Social Security number, the State shall assign the applicant a number which will serve to identify the applicant for voter registration purposes.” 42 U.S.C. § 15483. Also, as part of this new legislation, in an effort to address the increased opportunities for fraud through mail-in registration (and to respond to several anecdotes about pets and deceased people receiving registration cards²) Congress created an identification requirement for all first-time voters registering by mail. It is this section of HAVA that demonstrates that Subsection Six is preempted by federal law.

² “[T]he anecdotal evidence of dogs and deceased persons registering, and perhaps even voting, and registration lists with duplicate names in several different jurisdictions illustrate the frailties of current registration procedures.” 148 Cong. Rec. S10488, S10503(daily ed. Oct. 16, 2002)(statement of Sen. Dodd).

“Preemption fundamentally is a question of Congressional intent.” English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990). “[S]tate law is preempted to the extent that it actually conflicts with federal law.” Id. (internal citations and quotations omitted). Thus, preemption occurs “where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Id. Plaintiffs claim that Subsection Six is preempted by HAVA in three ways; by conflicting with the identification provisions for mail-in voting registrants, by conflicting with the “fail-safe” mail-in ballot provision, and by conflicting with the purpose and meaning of the Computerized Statewide List Requirements.

In Count One, Plaintiffs claim that the denial of voter registration to a person whose information cannot be verified conflicts with the identification provisions of Section 303(b) of HAVA. Section 303(b) allows first-time voters registering by mail to identify themselves either at the time of registration *or* at the time of voting. If registrants choose to verify their identity at the time of voting, then they only need to show one of the following as proof of identity: “a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.” 42 U.S.C. § 15483(b)(2)(A)(i)(II). After this information is produced for the election official at the polling location, that person may vote by regular ballot. If the mail-in registrant

chooses to verify his identity at the election location, HAVA does not require matching. In fact, HAVA expressly allows the casting of a regular ballot upon the showing of identification.

In contrast, Subsection Six does not allow the mail-in registrant to cast a regular ballot, even if the registrant offers proof of identity in accordance with HAVA. Under Subsection Six, only a provisional ballot can be cast. Furthermore, identification sufficient under HAVA is not sufficient under Subsection Six unless it also verifies or matches the identification number that was provided on the voter registration application.

Another conflict between Subsection Six and HAVA, alleged by Plaintiffs in Count Two, is with the “fail-safe” provision for mail-in ballots. Section 303(b)(2)(A) of HAVA states that if a first-time voter chooses to register by mail and then actually *votes* by mail, and he has provided proof of identity, then he may cast a ballot by mail and “the ballot shall be counted as a provisional ballot” 42 U.S.C. § 15483(b)(2)(B)(ii). This is the “fail-safe” provision. No matching is required—only proof of identity. By operation of Subsection Six, this same voter would not have his vote counted unless the identification number he entered on the voter registration application is verified.

The conflicts discussed above illustrate that Subsection Six stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in creating HAVA. One objective of HAVA is “to otherwise provide

assistance with the administration of certain Federal election laws and programs, to establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections, and for other purposes.” Public Law 107-252 (107th Congress, Oct. 29, 2002). According to the chief House sponsor of the legislation, Representative Robert Ney, the fundamental principles advanced by the legislation are as follows: “One, that every eligible citizen shall have the right to vote. Two, that no legal vote will be canceled by an illegal vote. Three, that every vote will be counted equally and fairly, according to the law.” 148 Cong. Rec. H 7836, H7837 (daily ed. Oct. 10, 2002)(statement of Rep. Ney). Representative Ney goes on to say that

[w]hen this legislation goes into effect, the voting citizens in this country will have the right to a provisional ballot, so no voter will be turned away from a polling place, no voter will be disenfranchised, just because their name does not appear on a registration list.

Id. Senator Christopher Dodd, the chief Senate sponsor of HAVA, specifically stated that the implementation of the Act by the states should not undermine the “purposes of this Act: to make it easier to vote, but harder to defraud the system.” 148 Cong. Rec. S10488,10512 (daily ed. Oct. 16, 2002)(statement of Sen. Dodd).

Though it is true that prevention of voter fraud and prevention of voter disenfranchisement were both goals of HAVA, the impetus for the Act was to respond to the millions of votes that went uncounted—not the millions of incidents of voter registration fraud. See id. at S10515 (“When we have error rates as we do and millions of people turned away at the polls, it is long overdue that we

correct the system. This bill goes a long way in doing that. . . . It ought to be for all of us here who responded to the challenge that was asked of us as a result of the elections of 2000.”). Subsection Six addresses only half of the purpose of HAVA—making it harder to cheat. But it is in direct conflict with the other purpose of HAVA—making it easier to vote. Subsection Six, admittedly, does make it “harder to defraud the system”, but the cost to the companion purpose of HAVA is one that was not intended by Congress. Therefore, Subsection Six stands in direct conflict with accomplishing the *full* purposes and objectives of HAVA.

Defendant claims, and the Court agrees, that HAVA does indeed establish basic requirements for States to prevent voter fraud. It also leaves to the discretion of the States how they meet those requirements so that the states can “tailor solutions to their own unique problems.” 148 Cong. Rec. S10488, S10504 (daily ed. Oct. 16, 2002)(statement of Sen. Dodd). However, in tailoring their solutions, States are not free to conflict with a clearly stated intention of Congress. Gonzales v. Raich, 545 U.S. 1, 29 (2005). “The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.” Id. States are not free to act in direct conflict or opposition to the stated objectives of federal legislation. Id. Subsection Six does just that. It makes it harder to vote by imposing a matching requirement that is a barrier to voter registration, despite the fact that HAVA does not require matching as a precondition to mail-in voter registration.

Defendant claims that any supposed conflict between Subsection Six and HAVA can be resolved by looking beyond the plain meaning of the statutory language and looking to the legislative history of HAVA. According to Defendant, the Congressional discussions and debates essentially rendered moot the identification provisions for mail-in registrants. Defendant asks the Court to rely on the legislative history to invalidate the clear and unambiguous words of the statute.

Though it is useful for a full understanding of the context of a statute and determining the intent of Congress, legislative history is not law and cannot be substituted for law. Consumer Lease Network, Inc. v. Puckett, 838 F.2d 470 (6th Cir. 1988)(“[A]lthough the legislative history is not ‘law’ it aids the court in statutory construction.”). The Supreme Court has “stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” Connecticut Nat’l Bank v. Germain, 503 U.S. 249, 253-54 (1992)(internal citations omitted).

Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest.

United States v. Wiltberger, 18 U.S. 76, 95-96 (1820).

The plain language of Section 303(b) confirms Congress’ intent to allow mail-in registrants to vote if they provide proof of identity. There is no federally-mandated matching requirement prior to the casting and counting of these votes.

If the statutory language were ambiguous or unclear, then a reliance on legislative history would be helpful. That is not the case here. The language of Section 303(b) is clear and the Court need not engage in an analysis of legislative history. Subjecting a mail-in registration applicant to matching before counting a provisional ballot makes the HAVA “fail-safe” null and void.

In Count Three, Plaintiffs allege that Subsection Six violates the purpose and meaning behind HAVA’s “Computerized Statewide Voter Registration List Requirements.” Plaintiffs claim that the purpose of the provision was to assist States in the creation of a statewide list of registered applicants. The appearance of a registrant on the list was not meant to be either a prerequisite to voting or to register to vote.

Defendant spends significant time discussing the authority of the states to impose their own unique requirements for the Computerized Statewide Voter Registration List. That is not an issue disputed by the Plaintiffs. Plaintiffs do not dispute the authority of the states to decide how to maintain their voter registration rolls. Plaintiffs do allege, however, and the Court agrees, that Subsection Six has transformed the record-keeping function of the computerized registration list requirement into a precondition to registration and therefore, a precondition to voting. The legislative history of HAVA demonstrates that

[t]his list is intended to help keep voter rolls current and accurate and to reduce, if not eliminate, confusion about a voter's registration and identification when a voter arrives at the polling place. This section also provides safeguards to preserve the

confidentiality of voter identification information and to protect against improper purging of names from the list.

148 Cong. Rec. S 10488, S10496(daily ed. Oct. 10, 2002)(statement of Sen. Durbin). As another federal court has already recognized, it is contrary to Congressional purposes to use the list to prevent otherwise eligible voters from voting. Wash. Ass'n of Churches v. Reed, 492 F. Supp. 2d 1264, 1268 (D. Wash. 2006)(striking down similar state matching statute as preempted by HAVA and a violation of the VRA).

Accepting Plaintiffs' allegations as true, Plaintiffs have stated a valid claim for preemption under Counts One, Two, and Three. Therefore, Defendant's motion to dismiss these counts will be denied. Furthermore, because Subsection Six is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and is likely preempted by HAVA, Plaintiffs have demonstrated a substantial likelihood of success on the merits of their HAVA claims. English, 496 U.S. at 79.

Voting Rights Act

The Voting Rights Act ("VRA") states that no person shall be denied the right to vote "because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 42 U.S.C. § 1971(a)(2)(B). This provision, referred to as the materiality provision, "was intended to address the practice of

requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters.” Schwier v. Cox, 340 F.3d 1284, 1294 (11th Cir. 2003).

Plaintiffs claim that the implementation of Subsection Six will result in the denial of numerous voter registration applications solely on the basis of “an error or omission” in the application—specifically the failure to match the identification number with the same number in a database. Plaintiffs go on to say that these errors or omissions are unrelated to the applicant’s eligibility to vote and affect a substantial number of voters. During the hearing, the parties both agreed that as of October 2007, over 14,000 people have been prevented from registering due to a failure to match their identification numbers to the corresponding SSA or DHSMV database. Possible reasons for matching mistakes may be data entry errors, complications in the retrieval of information from outside the state, technical malfunctions in the matching process, or even the failure of the applicants to take the time to contact the Supervisor of Elections to verify their identification number. Plaintiffs do not allege that these errors are the result of any ill-intent on behalf of the state. But the result is that many have been denied the right to vote for reasons unrelated to their voter qualifications under the Florida Constitution.³

³ Florida's Constitution states that in order to vote, a person must (1) be a United States citizen; (2) be at least eighteen years old; (3) be a permanent

Subsection Six imposes a matching requirement that will increase the number of errors or omissions in processing applications, thus resulting in a rejection of voter registration applications. Verification of identity is an important goal, but it can be accomplished by less burdensome means. As described above, Senator Dodd, chief co-sponsor of HAVA, stated that this verification of identity (specifically for mail-in registrants) could be satisfied by showing a bank statement, utility bill, paycheck or other government document. Therefore, the requirement to verify identity by matching the Social Security or driver's licence number to the corresponding SSA or DHSMV database before being registered to vote is not necessary in order to comply with the anti-fraud provisions of HAVA. As similarly concluded by another federal court, errors and omissions that would result from such a stringent requirement are immaterial to the voter's actual eligibility to vote. Wash. Ass'n of Churches v. Reed, 492 F. Supp. 2d 1264, 1270-71(D. Wash. 2006). Accordingly, this Court finds that Plaintiffs have demonstrated a strong likelihood of success on the merits of their claim that Subsection Six is in conflict with the VRA. Defendant's motion to dismiss Count Four will therefore be denied.

In Count Five, Plaintiffs allege that Subsection Six violates Section Two of the Voting Rights Act ("VRA"). Section Two of the VRA states that "No voting

resident of the State; (4) have not been convicted of a felony without restoration of his or her civil rights; and (5) have not been adjudicated mentally incompetent without removal of the disability. Fla. Const. Art. VI, §§ 2, 4.

qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” 42 U.S.C. §

1973(a). A violation of this provision is established if

based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process. . . .

42 U.S.C. § 1973(b).

Plaintiffs contend that Subsection Six has a disproportionate impact on Latino, Asian, African-American, or Haitian-American citizens and therefore violates Section Two of the VRA. As discussed above, successful voter registration under Subsection Six requires an exact match of every single character of the applicant’s first and last name, birth date and identification number. After the applicant puts this information on the application, a data entry processor at the Board of Elections must enter the information into the database. All of the characters must then be matched exactly with the data in the SSA or DHSMV database. The likelihood of all parties involved entering the information into the computers in exactly the same way, to produce exactly the same match, is low. This process is much more complicated when the spellings of the names are unfamiliar. Plaintiffs allege that there will be fewer data entry errors with

names like “Molly” and “Jake” than there would be with “Imani” and “DeShawn”.⁴ The data entry processors are more likely to be familiar with Westernized names and because these ethnic groups are more likely to have non-Westernized names, they are more likely to be denied their right to register to vote.

Notwithstanding the increased likelihood of disenfranchisement, as Defendant correctly argues, Plaintiffs cannot state a valid claim for violation of Section Two of the VRA. A successful claim requires discriminatory intent or a clear showing of racial bias.

Specifically, the plaintiff may prove either: (1) discriminatory intent on the part of legislators or other officials responsible for creating or maintaining the challenged system; or (2) objective factors that, under the totality of the circumstances, show the exclusion of the minority group from meaningful access to the political process due to the interaction of racial bias in the community with the challenged voting scheme.

Nipper v. Smith, 39 F.3d 1494, 1524 (11th Cir. 1994); see also Brooks v. Miller, 158 F.3d 1230, 1237-38 (11th Cir. 1998). The Eleventh Circuit, in Johnson v. Governor of Fla, held that Section Two claims must do more than simply demonstrate a relevant disparity between white voters and minority voters. They note that “despite its broad language, Section Two does not prohibit all voting restrictions that may have a racially disproportionate effect.” 405 F.3d 1214, 1228

⁴ A study done of birth names of every child born in California from 1961 through 2004 concluded that “Molly” and “Jake” were the names most often given to Caucasian children and “Imani” and “DeShawn” were the names most often given to African-American children. Roland G. Fryer & Steven D. Levitt, *The Causes and Consequences of Distinctively Black Names*, 119 Q. J. OF ECON. 3, 767 (2004).

(11th Cir. 2005). Applying this standard to this case, Plaintiffs have not stated a valid claim under Section Two of the VRA.

The hypothetical possibility that a significant number of minorities would be disenfranchised by enactment of Subsection Six does not rise to the level of a Section Two VRA violation. The process of registering to vote is open to participation by all citizens. It is the unmatched citizens that will likely be disenfranchised by this law. The fact that those unmatched citizens are more likely to be members of ethnic minorities does not, without more, demonstrate discriminatory intent or racial bias in the operation of Subsection Six. When viewing this claim in light of the totality of facts and circumstances, this Court concludes that there are no facts which could be proven that would entitle Plaintiffs to relief on these grounds. Therefore, the motion to dismiss Count Five of the complaint is hereby granted.

National Voter Registration Act

The National Voter Registration Act (“NVRA”) states that “each State shall insure that any eligible applicant is registered to vote in an election . . . if the valid voter registration form of the applicant is received by the appropriate State election official” before the state registration deadline. 42 U.S.C. § 1973gg-6(a)(1)(A)-(D). In Count Six, Plaintiffs claim that Subsection Six violates the NVRA because Subsection Six prevents the registration of citizens who adhere to this federal requirement to submit their application by a certain deadline. Plaintiffs

claim that if eligible voters adhere to this regulation, then they should be registered to vote. Furthermore, Plaintiffs claim that the NVRA does not permit states to refuse an application because that person's identification number cannot be exactly matched.

The NVRA establishes general guidelines for a state's election process. It dictates the method by which states should accept voter registrations. It does not encompass the panoply of methods available to the states with regard to its voter registration process. Rather, it sets the minimum requirements. See Charles H. Wesley Educ. Found., Inc. v. Cox, 408 F.3d 1349, 1353 (11th Cir. 2005)(the methods discussed in 42 U.S.C. § 1973gg-6(a)(1)(A)-(D) "are not intended to be exclusive; rather, the Act seeks to encourage voter registration by setting a floor on registration acceptance methods".) It primarily deals with the method of registration and the deadlines associated with registrations. It is a very broad statute that does not specifically address how a state defines voter eligibility. Defendant has chosen to exercise its discretion allowed under the NVRA to define "eligible applicant" as a person whose name and identification number has been "matched" to a database. This action does not constitute a violation of the NVRA.

Subsection Six may be preempted by federal law—but not the NVRA. When viewing the NVRA claim in light of the totality of facts and circumstances, the Court concludes that there are no facts which could be proven that would entitle Plaintiffs to relief on these grounds. Therefore, the motion to dismiss Count

Six of the Complaint is hereby granted.

United States Constitution

In Counts Seven, Eight and Nine, Plaintiffs allege that the burden imposed upon voting rights by the enactment of Subsection Six is not justified by a compelling state interest or any sufficient justification. Accordingly, Plaintiffs claim that Subsection Six will deprive otherwise eligible voters of the fundamental rights secured to them by the First and Fourteenth Amendments of the United States Constitution. Though this argument may have merit, because the Court finds that Plaintiffs have demonstrated a likelihood of success on the HAVA and VRA claims, the Court declines to reach these Constitutional issues for the purpose of the preliminary injunction. However, for the purpose of Defendant's motion to dismiss, the Court will evaluate whether Plaintiffs have stated Constitutional claims upon which relief can be granted.

In determining the Constitutionality of a state election law, a court must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.

Burdick v. Takushi, 504 U.S. 428, 434 (1992)(internal quotations and citations omitted). "Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." Id. "Thus, . . . when those

rights are subjected to “severe” restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance.” Id. (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)). “But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the state's important regulatory interests are generally sufficient to justify the restrictions.” Id.

The first step is to determine whether the restrictions imposed by Subsection Six are severe or reasonable and nondiscriminatory. Plaintiffs allege that Subsection Six is a severe restriction because it requires as a prerequisite to voting that the identification number on a voter registration form be verified or that the applicant present verification to the Board of Elections within two days after Election Day. The impact of Subsection Six is severe, Plaintiffs argue, because it has already resulted in more than 14,000 people being kept off the registration rolls. Plaintiffs allege, therefore, that the state interest supporting Subsection Six must be narrowly tailored in order to advance a compelling state interest.

Defendant contends that Subsection Six advances a compelling state interest to defeat voter fraud. The Court agrees that indeed Subsection Six serves to protect the integrity of the election process because there is a link between voter registration fraud and actual voter fraud. However, given Plaintiffs' position that it would be possible for Defendant to accomplish the same task by adhering to the minimum requirements set forth in the Help America Vote Act, the

Court cannot say that Plaintiffs are unable to state a claim for relief. Defendant's motion to dismiss Count Seven will be denied.

In Count Eight, Plaintiffs claim that Subsection Six violates the Equal Protection Clause of the Fourteenth Amendment by imposing different burdens on similarly situated eligible voters. For Equal Protection challenges to election laws, this Circuit applies the undue burden test in Burdick. See Wexler v. Anderson, 452 F.3d 1226, 1232-34 (11th Cir. 2006). The Equal Protection Clause requires Defendant to facilitate voting in a manner that is "consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate." Bush v. Gore, 531 U.S. 98, 105 (2000). However, Defendant may impose "reasonable, nondiscriminatory restrictions" that are justified by "the state's important regulatory interests." Burdick v. Takushi, 504 U.S. 428, 434 (1992).

Plaintiffs argue that Subsection Six violates the Equal Protection Clause because some voters are more likely to suffer from the errors and omissions of the matching process and therefore more likely to be disenfranchised. For example, Plaintiffs allege that because each county issues its own notice when there is a failed match, voters who live in certain counties will receive more complete information about the reason for the failed match. As a result, certain voters will be better prepared to take the necessary steps to verify their identification numbers. Plaintiffs also allege that because the successful matching rate for the SSA is lower, voters who can only be matched through the SSA

database are more likely to be disenfranchised as a result of a failed match. Plaintiffs also allege that voters with non-Westernized names are more likely to be subject to data entry errors, leading to a greater likelihood of a failed match for this group of people. Therefore, Plaintiffs allege that Subsection Six places a more substantial burden on people who submit their Social Security number, live in a certain county, and are victims of data entry errors or computer glitches.

Defendant contends that Subsection Six does not result in arbitrary and disparate treatment of voters because in the event of a failed match, all voters have an equal opportunity to verify their identification numbers and then register to vote. Defendant denies that there is any disparate treatment because people who can verify their identification numbers are not similarly situated with people who have not done so. The state interests articulated by Defendant are the same as mentioned above—prevention of voter fraud and protection of the integrity of the voting process.

Defendant's motion to dismiss will be denied however because it may be possible for Plaintiffs to prove a set of facts that will demonstrate that Subsection Six is an unreasonable restriction that results in the arbitrary and disparate treatment of members of the electorate. According to Plaintiffs' allegations, the state's matching process is arbitrary because it prohibits the registration of otherwise eligible voters for reasons that are unrelated to their eligibility to vote. Under Burdick, Plaintiffs' claim presents a plausible and valid theory of law.

Therefore, Defendant's motion to dismiss Count Eight will be denied.

In Count Nine, Plaintiffs allege that Subsection Six violates the Due Process Clause of the Fourteenth Amendment by failing to provide sufficient and meaningful notice of actions and decisions that affect a person's voter registration status. They further claim that the failure of timely process creates an unreasonably high risk that eligible voters will be erroneously denied the right to vote without an adequate pre- or post-deprivation process and that Defendant has no sufficient interest to justify this burden on the fundamental right to vote.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." Mathews v. Eldridge, 424 U.S. 319, 332 (1976). But procedural due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). A determination of a violation of due process, "requires analysis of the governmental and private interests that are affected." Mathews 424 U.S. at 334. Specifically,

identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. This involves a factual analysis that is not properly undertaken at this stage, on a motion to dismiss.

Defendant is correct that 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. United States v. Salerno, 481 U.S. 739, 745 (1987). Defendant has not demonstrated however, that Plaintiffs can make no due process challenge to the law as applied. Because there may be a set of facts under which Plaintiffs can demonstrate that Subsection Six violates due process, Defendant's motion to dismiss Count Nine will be denied.

Irreparable Harm

The parties have agreed that failure to "match" has resulted in 14,000 people being unable to register. Although Defendant attempts to minimize the effect of this number, the Court views this number as proof that Subsection Six is resulting in actual harm to real individuals. This disenfranchisement, however unintentional, causes damage to the election system that cannot be repaired after the election has passed. Further, Plaintiffs offered evidence that voter registration applications typically spike immediately before a Presidential election. As a result, it is likely that in the absence of a preliminary injunction, even more people will be prohibited from registering to vote. This impact is not "minimal." The harm to a disenfranchised voter would be impossible to repair.

Threatened Injury vs. Harm of Injunction

Defendant claims that the harm caused by an injunction will impede Florida's ability to conduct fair, orderly and legitimate elections. Defendant also claims that an injunction will jeopardize the integrity of Florida's electoral process. However, there are two sides to that coin. The integrity of the election process is harmed by both the threat of disenfranchisement by the state and the threat of voter fraud. Attempts to preserve both interests is a delicate balance. In this case, Plaintiff has demonstrated that the threatened injury of more than 14,000 people being disenfranchised as a direct result of Subsection Six outweighs the Defendant's concerns of voter fraud. Indeed, Defendant has provided no evidence that any of the 14,000 who have been denied registration were engaged in voter fraud. Defendant's concerns of voter fraud can properly be addressed through identification requirements that are consistent with HAVA and other federal law.

Public Interest

Congress has explicitly stated that "the right of citizens of the United States to vote is a fundamental right." 42 U.S.C. § 1973gg(a)(1). Protection of this fundamental right serves the public interest. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." Purcell v. Gonzalez, 127 S. Ct. 5, 7 (2006). "[D]iscriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter

participation.” 42 U.S.C. § 1973gg(a)(3). Therefore, public interest is strongly in favor of ensuring that every eligible person in Florida is guaranteed the right to vote. Plaintiffs have demonstrated a substantial likelihood of success on their claim that Subsection Six unlawfully restricts the right to vote and that the public interest will be served by enjoining its operation.

For all of the reasons stated above, it is hereby ORDERED AND ADJUDGED as follows:

1. Plaintiff’s motion for preliminary injunction (doc. 4) is hereby GRANTED.
2. Defendant, through its officers and employees, is hereby enjoined from enforcing Subsection Six of Florida Statute 97.053.
3. Defendant’s motion to dismiss is hereby DENIED as to Counts One, Two, Three, Four, Seven, Eight, and Nine (doc. 23).
4. Defendant’s motion to dismiss is hereby GRANTED as to Counts Five and Six.

DONE AND ORDERED this eighteenth day of December, 2007.

s/ Stephan P. Mickle

Stephan P. Mickle
United States District Judge