

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-22572-CIV-KING

EMMA YAIZA DIAZ;  
AMERICAN FEDERATION OF LABOR AND  
CONGRESS OF INDUSTRIAL  
ORGANIZATIONS; AMERICAN FEDERATION OF  
STATE, COUNTY AND LOCAL EMPLOYEES,  
AFL-CIO; FLORIDA PUBLIC EMPLOYEES COUNCIL  
79, AFSCME, AFL-CIO; and SERVICE EMPLOYEES  
INTERNATIONAL UNION,

Plaintiffs,

v.

SUE M. COBB, Secretary of State of Florida;  
BRENDA SNIPES, Broward County Supervisor of  
Elections; JERRY HOLLAND, Duval County Supervisor  
of Elections; LESTER SOLA, Miami-Dade  
Supervisor of Elections; BILL COWLES, Orange County  
Supervisor of Elections; and ARTHUR ANDERSON,  
Palm Beach County Supervisor of Elections,

Defendants.

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**DEFENDANTS COBB, SNIPES, HOLLAND, COWLES, AND ANDERSON'S  
MOTION TO DISMISS AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

Based on Federal Rule of Civil Procedure 12(b)(6), Defendants Sue M. Cobb, Secretary of State of the State of Florida; Brenda Snipes, Broward County Supervisor of Elections; Jerry Holland, Duval County Supervisor of Elections; Bill Cowles, Orange County Supervisor of Elections; and Arthur Anderson, Palm Beach County Supervisor of Elections, jointly move to dismiss Plaintiffs' Amended Complaint. Defendants submit the following Memorandum of Law in support thereof.

## MEMORANDUM OF LAW

In this case, the Plaintiffs seek to undermine the application of specific, common-sense anti-fraud measures embodied in federal and state law. At the heart of this case is a simple question: May Florida require a voter registration applicant to check three plain boxes on an application? The boxes ask applicants to affirm that (i) they are a United States citizen, (ii) they are not a convicted felon, or if so, their civil rights have been restored, and (iii) they have not been adjudicated mentally incapacitated, or if so, their competency has been restored. The challenged provisions exist for the benefit of all voters, and they support the goal of fair elections by ensuring an accurate and accountable voter registration process. The Plaintiffs allege that these simple requirements are not only unreasonable, but also prohibited by federal law and the United States Constitution. The Plaintiffs' Amended Complaint should be dismissed for the reasons set forth below.

### **ARGUMENT**

Plaintiffs filed their Amended Complaint on April 7, 2006, thereby reviving this case some six months after the Eleventh Circuit issued its opinion reversing this Court's order of dismissal. In between the order of dismissal and the filing of the Amended Complaint, much has happened: The looming 2004 federal election, which led to the expedited administration of this case, has gone forward, and in 2005, the Florida Legislature substantially amended Florida's election code. The former mooted the injunctive and declaratory relief sought by the Plaintiffs—at least with respect to the 2004 election—and the latter altered the legal landscape surrounding the Plaintiffs' claims.

The Eleventh Circuit noted the intervening change in Florida law and invited the Plaintiffs to submit an amended complaint in light of it. The Amended Complaint includes allegations related to the change in state law, but it includes substantial other matters unrelated to the new law. The primary differences between the original Complaint and the Amended Complaint are as follows:

- The Amended Complaint is styled as a class action and includes various class action allegations. (Amended Compl. ¶¶ 133-141.) The original Complaint sought relief on behalf of the named plaintiffs only.

- The Amended Complaint includes fewer named plaintiffs than did the original Complaint. Both Complaints name the same Union Plaintiffs, but the Amended Complaint names only one individual plaintiff, Emma Yaiza Diaz. The original Complaint named Ebony Roberts and Andre Neal Bembry, in addition to Diaz.<sup>1</sup>
- The Amended Complaint includes separate counts for the purported harm related to the 2004 election, for which the Plaintiffs seek nominal damages. (Amended Compl. ¶¶ 149-153.) The original Complaint sought only injunctive and declaratory relief. (Compl. ¶ 4.)
- The Amended Complaint includes a new claim based on the Voting Rights Act, claiming that the state registration form essentially functions as a literacy or comprehension test. (Amended Compl. ¶¶ 162-163.) The original Complaint included no such claim even though there has been no relevant change in either the form or the law. *See* Exhibits A & B to Amended Complaint (voter registration forms).
- The Amended Complaint abandons the Voting Rights Act claim that the Defendants' conduct disproportionately impacted black and Hispanic applicants, which was included in the original Complaint as the second cause of action. (Compl. ¶¶ 72-74.)
- The Amended Complaint abandons the claim that the Defendants improperly refused to register applicants who failed to include personal identification numbers. (Compl. ¶¶ 41-46.)

Although the Amended Complaint differs from the original Complaint in several ways, the two complaints have at least one thing in common: They fail to state a claim upon which relief can be granted. Accordingly, this Court should dismiss the Amended Complaint.

**I. THE PLAINTIFFS' REQUEST FOR CLASS CERTIFICATION IS ENTIRELY INAPPROPRIATE.**

The Amended Complaint includes a request for class certification, but a certified class is neither necessary nor permitted. The primary relief the Plaintiffs seek would necessarily inure to all affected individuals—with or without class certification. The Plaintiffs allege that Florida's

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<sup>1</sup> Contemporaneously with the filing of the Amended Complaint, the Plaintiffs filed a Motion for Leave to Substitute Parties and Submit an Amended Complaint (document no. 122). That motion, which is pending, seeks to add a second individual plaintiff.

election code, which requires rejection of applications without all eligibility boxes checked violates the Voting Rights Act and other provisions of federal law. (Amended Compl. ¶¶ 120-121.) If the Plaintiffs are correct, this Court will declare the challenged Florida statute invalid and enjoin its enforcement. That relief, of course, will bind all the defendants and allow any similarly situated individuals to register without checking the required boxes.<sup>2</sup> Accordingly, class certification is unnecessary and inappropriate. *See United Farmworkers of Florida Housing Project, Inc. v. Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974) (“Even with the denial of class action status, the requested injunctive and declaratory relief will benefit not only the individual appellants and the nonprofit corporation but all other persons subject to the practice under attack.”); *Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973) (“[I]nsofar as the relief sought is prohibitory, an action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality, at least for the plaintiffs.”).

Moreover, this case may not proceed as a class action because it does not meet the requirements of Federal Rule of Civil Procedure 23. Most significantly, there is no commonality among members of the purported class. Diaz, the sole individual plaintiff, wishes to represent “a class consisting of all eligible electors who reside in Broward, Duval, Miami-Dade, Orange, or Palm Beach County and who have been *or will be*, harmed by the Defendants’ unlawful voter registration practices.” (Amended Compl. ¶ 134) (emphasis added). This “class” includes at least two distinct groups of people: those who were allegedly harmed before the 2004 election—for whom injunctive and declaratory relief will provide no benefit—and those allegedly in line to be harmed before the 2006 election.<sup>3</sup> Many in the second group have no interest in the pre-2006 practices because they were ineligible, unable, or uninterested in participating in the 2004 election. Others, who were denied registration in 2004, may be duly registered and ready to vote

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<sup>2</sup> Indeed, it is the statutory duty of the Secretary of State to prescribe the uniform statewide voter registration application, § 97.052(1), Fla. Stat. (2006), and to “[e]nsure that all registration applications and forms prescribed or approved by the department are in compliance with the Voting Rights Act of 1965 and the National Voter Registration Act of 1993.” § 97.012(7), Fla. Stat. (2006). Therefore, any injunctive or declaratory relief against the Secretary relating to the propriety of the challenged form would affect all voter registration applicants.

<sup>3</sup> Individuals could volunteer to join this second group by filling out a voter registration form without checking the required boxes, mailing it in, refusing to correct their error, and then claiming the same “harm” the Plaintiffs claim.

in 2006. And more importantly, because of the intervening change in Florida election law, the two discrete groups' claims would be based on different laws. *See* Chs. 2005-277 § 5; 2005-278 § 6, Laws of Fla. (significantly revising Florida election law, effective January 1, 2006). The issues of law and fact related to the claims of these two groups differ, so the Rule 23(a)(2) commonality requirement is not satisfied.

Last, if a named representative lacks standing to raise a legal claim, that representative party cannot satisfy the typicality requirement under Rule 23(a). *Hines v. Widnall*, 334 F.3d 1253, 1256 (11th Cir. 2003). Diaz has alleged no injury stemming from the conduct of the supervisors of elections other than Miami-Dade County's, so she is without standing to represent a class that includes claims against those other supervisors.

Class relief is inappropriate in this case. But with or without the class action allegations, the Amended Complaint fails to state a claim upon which relief can be granted.<sup>4</sup>

## **II. PLAINTIFFS' CLAIMS FOR DAMAGES AGAINST THE SECRETARY OF STATE ARE BARRED BY THE ELEVENTH AMENDMENT.**

Many of the Plaintiffs' claims are barred by Eleventh Amendment immunity. The Eleventh Amendment "protects a State from being sued in federal court without the State's consent." *Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003), *cert. denied*, 540 U.S. 1107 (2004). This immunity applies not only to states themselves, but also to their officers. *Id.* The Secretary of State is unquestionably a state officer subject to Eleventh Amendment immunity. *See* § 20.10(a), Fla. Stat. ("The Secretary of State shall be appointed by the Governor, subject to confirmation by the Senate, and shall serve at the pleasure of the Governor.").

In *Ex Parte Young*, the Supreme Court recognized a narrow exception to Eleventh Amendment immunity, holding that a federal court can enjoin federal officials from prospectively violating federal law. 209 U.S. 123, 156 (1908). When, however, "the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its immunity from suit even though individual officials are nominal defendants." *Ford Motor Co. v. Dep't of Treas. of Ind.*, 323 U.S. 459, 464 (1945). Throughout the Amended Complaint, the Plaintiffs allege that the Secretary of State violated

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<sup>4</sup> There are additional reasons that class certification is inappropriate, and Defendants reserve all defenses applicable to the class certification issue.

their rights leading up to the November, 2004 election. (*E.g.*, Amended Compl. ¶¶ 145, 148, 151, 159, 165, 169.) The original Complaint sought injunctive relief before the 2004 election. Because the 2004 election has come and gone, any such request for injunctive relief is now moot. Accordingly, the Amended Complaint includes no such request. Instead, it seeks nominal damages for the alleged harm in 2004. To the extent the Plaintiffs seek these damages from the Secretary of State, the Eleventh Amendment precludes such an award.

### **III. PLAINTIFFS FAIL TO STATE A CLAIM BASED ON THE VOTING RIGHTS ACT OR THE NATIONAL VOTER REGISTRATION ACT.**

The Plaintiffs allege that the Defendants refused to register applicants who refused to check all three boxes. (Amended Compl. ¶¶ 144, 170.) These allegations are insufficient to state a claim upon which relief can be granted, because neither the checkbox requirements nor the rejection of incomplete applications violates federal law.

#### **A. The Citizenship Checkbox Requirement Does Not Violate Federal Law.**

##### **1. The citizenship “checkbox” and “attestation” requirements on the application are specifically mandated by federal law.**

The citizenship “checkbox” and “attestation” requirements are explicitly required by federal law. The application attached to the Amended Complaint as Exhibit A is the voter registration form used leading up to the 2004 election (and throughout 2005). Exhibit B is the 2006 form, which is substantially identical.<sup>5</sup> Both were developed by the State of Florida pursuant to Section 1973gg-4(a)(2) of the National Voter Registration Act (“NVRA”). *See* 42 U.S.C. § 1973gg-4 (“a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b) of this title for the registration of voters in elections for federal office”). Section 1973gg-7(b)(1) of the NVRA, in turn, requires that the voter registration forms developed by the State meet certain requirements, including the following:

[The form] may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous

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<sup>5</sup> The Florida voter registration form used leading up to the 2004 election (and throughout 2005) included both the checkbox and an oath line that read: “I am a U.S. citizen.” *See* Exhibit A to Amended Compl. The oath on the 2006 revised form does not include the line “I am a U.S. citizen.” Both forms include the statement “I am qualified to register as an elector under the Constitution and the laws of the State of Florida.” In any event, Plaintiffs allege that the oath of either form makes the check boxes redundant. (Amended Comp. ¶ 57, 124-125.)

registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.

42 U.S.C. § 1973gg-7(b)(1).

After providing this general admonition against requiring unnecessary information, Section 1973gg-7(b) requires that the application contain certain items. Specifically, the voter registration application “shall include a statement that (A) specifies each eligibility requirement (including citizenship), (B) contains an attestation that the applicant meets each such requirement, and (C) requires the signature of the applicant, under penalty of perjury.” *Id.* (emphasis added). In other words, the NVRA (i) sets forth the type of information that may be sought by a state on its voter registration form and (ii) requires the state-adopted form to meet certain specific requirements.

Section 15483(b) of the Help America Vote Act of 2002 (“HAVA”) added to the requirements for the state-created voter registration applications:

The mail voter registration form developed under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. § 1973gg-4) shall include the following:

(i) The question “Are you a citizen of the United States of America?” and boxes for the applicant to check to indicate whether the applicant is or is not a citizen of the United States.

42 U.S.C. § 15483(b)(4)(A) (emphasis added). Congress clearly intended this section of HAVA to supersede the NVRA: “*Except as specifically provided in section 15483(b)* [quoted above] . . . , nothing in this Act may be construed . . . to supersede, restrict, or limit the application of . . . [NVRA].” 42 U.S.C. § 15545(a) (emphasis added).

The additions in Section 15483(b) of HAVA are consistent with the Congressional intent to make it “tougher to cheat” in elections. *See* 148 Cong. Rec. S10488 (daily ed. Oct. 16, 2002) (Sen. Bond succinctly summarizing the purpose of HAVA as to “make it easier to vote but tougher to cheat.”) Congress clearly enacted the “check the box” citizenship requirement as a “new anti-vote fraud provision.” H.R. Rep. 107-807, Report on the Activities of the Committee on the Judiciary, 2003 WL 131168, at \*80 (“voter registration applicants must specifically affirm their American citizenship”). In fact, this provision is listed as one of seven anti-fraud provisions in the Report. *Id.* And Congress likewise fully understood and expected that the checkbox requirement would be enforced and incomplete applications returned to the applicants

and not processed until completed. See 148 Cong. Rec. S10488, S10493 (Oct. 16, 2002) ( Sen. McConnell: “This legislation requires that voter registration applications contain a question asking whether the applicant is a U.S. citizen and boxes for the applicant to answer the question by checking ‘yes’ or ‘no.’ If neither box is checked, the election official must return the application to the individual with instructions to complete the form. In effect, we have created a second-chance registration opportunity. The individual’s registration application cannot be processed and the individual cannot be registered unless the citizenship question is answered—and answered affirmatively.”); *id.* (Sen. Bond: “Some jurisdictions simply discard registration applications or do not process the application when an individual does not answer the citizenship question. Other jurisdictions register individuals even though the individual did not answer the citizenship question. *Both of these scenarios threaten the integrity of Federal elections.*”) (emphasis added).

It is clear that states are *required* to ask “Are you a citizen of the United States of America?” It is equally clear that this requirement is in addition to the NVRA attestation requirement—under penalty of perjury—that the applicant meets the state qualification requirements, including the citizenship requirement. Federal law requires both, and the requirement of both is incorporated in the form created by the federal Election Assistance Commission (“EAC”).<sup>6</sup> The nationwide voter registration form promulgated by the EAC requires applicants to check a box affirming citizenship *and also* swear that “I am a United States citizen.” See EAC Publication, entitled “Register To Vote In Your State By Using This Postcard Form and Guide,” (attached to Amended Compl. as Exhibit C). Thus, the EAC recognizes that both inquiries are necessary elements of voter registration applications.

**2. An applicant’s failure to complete the citizenship checkbox renders the application incomplete and invalid.**

The issue, of course, is not just whether the citizenship inquiries violate federal law, but also the effect of not checking the box. As stated above, HAVA states that the application “shall” include the checkbox. “Shall” means shall—not may, could, or should. See *Hill v. Winn-Dixie Stores, Inc.*, 934 F.2d 1518, 1525 (11th Cir. 1991) (“The mandatory language of the statute . . . (‘shall be liable . . .’) contrasts with the discretionary language with respect to equitable relief

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<sup>6</sup> The Federal Election Commission “transferred to the Election Assistance Commission” the responsibility for creating the Nationwide Voter Registration Form. See [www.fec.gov/votregis/vr.shtml](http://www.fec.gov/votregis/vr.shtml).

(‘may be enjoined’)). Furthermore, HAVA addresses the treatment of incomplete forms. Section 15483(b)(4)(B)—in a section appropriately entitled “Incomplete Forms”—states the following:

If an applicant for voter registration fails to answer the question included on the mail voter registration form pursuant to subparagraph (A)(i) [“Are you a citizen of the United States of America?”], the registrar shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the *completion* of the registration form prior to the next election for Federal office (subject to State law).

42 U.S.C. § 15483(b)(4)(B) (emphasis added). It is clear from this provision that the form is not complete until the applicant checks the box in the affirmative next to the question, “Are you a citizen of the United States of America?” If, as Plaintiffs allege, the Application must be deemed complete as a matter of law without the required response to the citizenship question, then the referenced language of the statute serves no purpose. And a statute should not be interpreted in a manner that makes it meaningless. *Thomas v. Crosby*, 371 F.3d 782, 807 (11th Cir. 2004), *cert. denied*, 543 U.S. 1063 (2005).

**3. The specific provisions of HAVA requiring the citizenship “checkbox” preclude Plaintiffs’ claims under the NVRA and the Voting Rights Act.**

Plaintiffs’ Voting Rights Act and NVRA claims fail to state a claim upon which relief can be granted because Congress determined that the citizenship “checkbox” requirement is material. Nevertheless, Plaintiffs allege that an individual’s failure to check the “citizenship box” is immaterial under the Voting Rights Act when the voter has generally affirmed that he is qualified. (Amended Compl. ¶¶ 57, 124-125, 144.) However, as shown above, HAVA and the NVRA require the “checkboxes” *and* the attestation of eligibility. The citizenship inquiry is thus undeniably material, and Plaintiffs’ Voting Rights Act and NVRA claims must be dismissed.<sup>7</sup>

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), *cert. denied*, 541 U.S. 1032 (2004). Alternatively stated, “where there is no clear intention otherwise, a specific

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<sup>7</sup> Furthermore, “[t]he Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.” *State of South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). Because the Plaintiffs make no allegation of racial discrimination in their Amended Complaint, their reliance on the Section 1971 of the VRA is suspect.

statute will not be controlled or nullified by a general one, regardless of the priority of enactment.” *In re Cox*, 338 F.3d 1238, 1243 (11th Cir. 2003), *cert. denied*, 541 U.S. 991 (2004). Here, the NVRA and HAVA have carefully crafted “anti-fraud” provisions to prevent non-citizens from voting. It would be anomalous for broad statutory provisions addressing “immaterial” voting requirements (the Voting Rights Act) and “unnecessary” information (NVRA) to trump two specific federal laws intended to combat a particular species of voter registration fraud (the specific provisions of NVRA and HAVA cited above).

**4. The citizenship checkbox and attestation requirements on the applications are also required by Florida law.**

The citizenship box requirement is also found in Florida law. Under Section 97.052(2)(r), Florida Statutes, the voter registration form must “ask[] the question ‘Are you a citizen of the United States of America?’ and provide boxes for the applicant to check.” And under Section 97.053(5)(a)(4), Florida Statutes, a voter application is not complete unless it includes a mark in the yes box. The Plaintiffs allege that these statutes, which were modified effective January 1, 2006 to include the language quoted above, violate federal law. (Amended Compl. ¶ 10.) But as discussed above, HAVA requires the citizenship checkbox in the same manner that Sections 97.052-053 do. Rather than violate federal law, Florida law is fully consistent with it.

Even in 2004, before the provisions quoted above were effective, Florida law was already consistent with HAVA’s requirements. The then-current version of Section 97.052(2), Florida Statutes, stated that “the uniform statewide voter registration application must be designed to elicit the following information from the applicant”:

(p) Signature of applicant under penalty for false swearing pursuant to s. 104.011, by which the person subscribes to the oath required by s. 3, Art. VI of the State Constitution and s. 97.051, and swears or affirms that the information contained in the registration application is true.

\* \* \*

(r) Whether the applicant is a citizen of the United States.

Additionally, the 2004 version of Section 97.053(5)(a), Florida Statutes, required that before a voter registration application could be deemed complete, the applicant must have completed eight separate elements on the voter registration application, including (i) providing an “indication that the applicant is a citizen of the United States” and (ii) furnishing the “[s]ignature of the applicant swearing or affirming under penalty” the oath required by Section 97.051,

Florida Statutes. In 2004, the statutory oath contained the affirmation that the registrant is “a citizen of the United States and a legal resident of Florida.” § 97.051, Fla. Stat. (2004).

Florida law—both now and in 2004—is consistent with the federal requirement that registration forms include a citizenship checkbox.

**B. The Felon and Mental Incapacity Checkboxes are Reasonable Conditions Created by the Legislature Regulating Elections.**

**1. The Florida voter registration application does not violate the “uniformity” provision of the Voting Rights Act.**

Plaintiffs allege that under the “uniformity” provision of the Voting Rights Act, the Defendants are applying inconsistent standards for registering voters in this state. (Amended Compl. ¶¶ 147-148.) The alleged lack of uniformity results from Florida’s acceptance of its own statewide registration form *and* national forms, which are not identical. This claim is foreclosed by specific provisions of the NVRA, which expressly authorize the acceptance of different state and federal forms.

The NVRA provides for a national form, which Florida is required to accept. 42 U.S.C. § 1973gg-4. (The current version of this form is attached to the Amended Complaint as Exhibit C.) This form does not include checkboxes for felon status or mental capacity. This is not surprising because it is a national form, and Florida is among the few states that prohibit convicted felons from voting unless their civil rights have been restored.<sup>8</sup> Given that the form must be accepted in nearly all fifty states,<sup>9</sup> each state’s eligibility requirements do not appear on the application form. Instead, the nationwide form directs applicants to review their state’s instructions for eligibility information and then affirm that “*I meet the eligibility requirements of my state* and subscribe to any oath required.” Form instructions at 2 & Application (emphasis added). The Florida instructions state that an applicant’s felon status or mental incapacity renders them ineligible to vote. *Id.* at 8.

In addition to the nationwide form, Florida must accept a separate postcard application from certain applicants. 42 U.S.C. § 1973ff-1(a)(1-4). (The postcard application is attached to

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<sup>8</sup> This Court has already upheld Florida’s prohibition of felon voters on Equal Protection and VRA challenges. *See Johnson v. Bush*, 214 F. Supp. 2d 1333 (S.D. Fla. 2002) (King, J.). The Eleventh Circuit recently affirmed this Court’s decision. *See Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir.) (en banc), *cert. denied* 126 S. Ct. 650 (2005).

<sup>9</sup> Specific exceptions exist for New Hampshire, North Dakota, and Wyoming. None exists for Florida. *See* Exhibit C to Amended Complaint.

the Amended Complaint as Exhibit D.) This provision allows the postcard application to be used for overseas military personnel and for overseas civilian voters who were “qualified to vote in the last place in which [they were] domiciled.” 42 U.S.C. § 1973ff-6(5). Section 1983ff, “Title I – Registration and Voting By Absentee Uniformed Services Voters and Overseas Voters in Elections for Federal Office,” requires the President to designate an individual to be responsible for the creation of the postcard form. *Id.* The postcard application is a special registration process created by Congress for a discrete group of individuals, none of whom is before the Court.

Although the NVRA requires Florida to accept the nationwide forms, it expressly authorizes it to develop its own form for use in federal elections, so long as the form complies with Section 1973gg-7(b) of the NVRA. 42 U.S.C. § 1973gg-4(a). That section requires the state application to request only such identifying information and other information as is necessary to allow the state election official to:

- (1) assess the eligibility of the applicant;
- (2) administer voter registration; and
- (3) administer other parts of the election process.

42 U.S.C. § 1973gg-7(b). As discussed *infra*, the felon and mental capacity checkboxes allow state officials to assess the eligibility of the applicant. The state forms comply with Section 1973gg-7(b), so they are specifically authorized by NVRA.

If *any* difference between a state form and the nationwide form amounted to a violation of the uniformity requirements of the Voting Rights Act, then Sections 1973gg-4(a)(2) and 1973gg-7(b) would have no purpose. Congress obviously did not intend to allow *only* the nationwide form. Florida’s acceptance of the various forms does not violate federal law, as Plaintiffs allege. Instead, it is authorized by federal law, so Plaintiffs have failed to state a claim upon which relief can be granted.

**2. The felon and mental capacity checkboxes are necessary and material requirements of registration.**

Under the Florida Constitution and statutory law, felons who have not had their rights restored may not vote. Fla. Const. art. VI, § 4; § 97.052(2)(s), Fla. Stat. Nor may those adjudicated mentally incompetent. Fla. Const. art. VI, § 4; § 97.052(2)(t), Fla. Stat. For these eligibility requirements to have any meaning, elections officials must be able to determine whether applicants are felons or adjudicated mentally incompetent. Nevertheless, the Plaintiffs

allege that an applicant's failure to check the boxes affirming satisfaction of these conditions is immaterial. (Amended Compl. ¶¶ 143-145.) Accordingly, they allege that the rejection of applications without checks in the relevant boxes violates the materiality provision of the Voting Rights Act—at least when the applicant has completed a nonspecific affirmation that she is “qualified” to vote.

Significantly, the state has made *precisely the same determination* regarding the need to affirm non-felon and mental capacity status that Congress made regarding affirmation of citizenship. *See supra*. Much like the citizenship checkboxes mandated by HAVA, the felon and mental capacity “checkboxes” require applicants to make an affirmative and volitional indication of their status. The Amended Complaint notes that the instructions at the top of the application form include statements that felons and mentally incompetent applicants may not register to vote. Plaintiffs allege that these prefatory statements, coupled with an affirmation by the applicants at the end of the form that they are “qualified to register as an elector,” render the “checkbox” requirements “redundant” and “non-material.” (Amended Compl. ¶¶ 57, 124-25, 144.)

Anti-fraud measures, such as those challenged here, are not inconsistent with the “materiality” provision of the Voting Rights Act or the “necessity” provision of the NVRA. For example, the court in *Howlette v. City of Richmond, Virginia*, 485 F. Supp. 17, 22-23 (E.D. Va.), *aff'd*, 580 F.2d 704, 705 (4th Cir. 1978), rejected a challenge brought under the Voting Rights Act's “materiality” provision in upholding a notarization requirement for petition signatures as an anti-fraud measure.<sup>10</sup> *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.).

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<sup>10</sup> The NVRA of 1993 specifically proscribed requiring notarizations for mail-in voter registrations. *See* 42 U.S.C. § 1973gg-7(b)(3). The checkboxes at issue impose a much lighter burden on applicants than notarizations and are not specifically proscribed anywhere in federal law. Rather, the use of checkboxes is *expressly mandated* for affirming citizenship under HAVA. Certainly, if the notarization requirement is consistent with the Voting Rights Act and legal but for a specific prohibition subsequently adopted by the NVRA, a state's use of the checkboxes containing its specific eligibility requirements must be consistent with the Voting Rights Act.

**3. The checkboxes are reasonable time, place, and manner regulations consistent with federal law.**

The Secretary of State is given discretion regarding the time, place, and manner of administering elections. *See Storer v. Brown*, 415 U.S. 724, 730 (1974) (“[T]he States have evolved comprehensive . . . election codes regulating in most substantial ways . . . the time, place, and manner of holding primary and general elections [and] the registration and qualifications of voters.”); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (a state may impose “reasonable, nondiscriminatory restrictions upon the . . . rights of voters”); *id.* at 441 (“[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system.”).

Federal law expressly provides states with the authority to administer their respective eligibility requirements. Title III of HAVA governs states’ election technology and administration requirements for federal elections. *See* 42 U.S.C. §§ 15481 through 15485. Specifically, Title III provides standards for voting systems, provisional voting, and voter registration requirements, among other items. *See id.* §§ 15481 through 15483. HAVA establishes minimum requirements, but does not prevent states from establishing requirements, “more strict,” but not “inconsistent with,” HAVA’s requirements. *Id.* § 15484. The felon and mental capacity “checkboxes” emanate from the state’s inherent right to administer the election process. As a matter of law, they are reasonable and material. Accordingly, Plaintiffs’ claims must fail.

**C. The Language Accompanying the Mental Incompetence Box Does Not Amount to a Literacy Test.**

The Amended Complaint includes the new and novel allegation that Florida’s voter registration form includes language so confusing that it amounts to a literacy test, as prohibited by the Voting Rights Act. (Amended Compl. ¶¶ 78-79, 162-65.) The offending language is this: “I affirm that I have not been adjudicated mentally incapacitated.”

The literal meaning of the Voting Rights Act, its legislative history, and common sense all lead to the conclusion that this claim must fail. Section 1973aa of the Voting Rights Act provides that:

(a) No citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State.

(b) As used in this section, the term “test or device” means any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

42 U.S.C. § 1973aa.<sup>11</sup> In short, voting may not be conditioned on a demonstration of an applicant’s ability. The “central purpose” of the Voting Rights Act “was to eliminate the various devices, such as literacy tests, requirements of ‘good moral character,’ vouchers, and poll taxes, that had excluded black voters from the registration and voting process in the southern States for decades.” *Presley v. Etowah County Comm’n*, 502 U.S. 491 (1992) (Stevens, J., dissenting). In an earlier era, literacy tests were commonly imposed in a “humiliating and harassing fashion” to deny equal rights to minorities.<sup>12</sup> See S. Rep. 94-295, Judiciary Committee, 94th Cong., 1st Sess. 787, 789 (1975). While Congress acted to end this practice, it did not intend to prohibit double negatives on voter registration forms.<sup>13</sup>

The Plaintiffs essentially allege that Section 1973aa prohibits material that is *not plain enough*. There is no authority to support such a claim. If courts were to read the clear language of Section 1973aa to include a new “plain language” requirement, there would be a substantial change in election law. A “plain language” standard would subject *all* election material to line-by-line, word-by-word scrutiny. The result would be based in large part on the opinions of

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<sup>11</sup> Similarly, Merriam-Webster defines “test” to mean “something (as a series of questions or exercises) for measuring the skill, knowledge, intelligence, capacities, or aptitudes of an individual or group.”

<sup>12</sup> The Plaintiffs do not allege that the challenged language was designed to deny minorities the right to vote.

<sup>13</sup> Plaintiffs contend that the sentence in question contains a double negative. (Amended Compl. ¶ 79.) Double negatives, however, become anathematic only where they might be expressed more simply as a single affirmative. See *The American Heritage Dictionary of the English Language: Fourth Edition*, 2000 (“[G]rammarians since the Renaissance have objected to the double negative in English. In their eagerness to make English conform to formal logic, they conceived and promulgated the notion that two negatives destroy each other and make a positive”). The affirmative here would read: “I affirm that I have been adjudicated mentally capacitated.” Because this is not equivalent in meaning, a double negative is not exceptionable in a grammatical sense.

dueling experts and, in any event, inevitably unpredictable and subjective.<sup>14</sup> But more importantly, even if there were a “plain language” requirement, the challenged sentence clearly satisfies that standard. The sentence is short and simple. Indeed, it is difficult to imagine a better or clearer way to communicate the requirement that the applicant not be adjudicated mentally incompetent. Adjudications of mental incompetence may not be familiar concepts to many, but they nonetheless relate to a critical limitation on voting rights in Florida.

The challenged ten-word sentence on the voter registration form and a literacy test are two entirely different things. The Voting Rights Act prohibits literacy tests—not allegedly imperfect sentences. The Amended Complaint’s Sixth Cause of Action fails to state a claim upon which relief may be granted. It should be dismissed.

## V. PLAINTIFFS FAIL TO STATE A COGNIZABLE CONSTITUTIONAL VIOLATION.

The Plaintiffs allege that the Defendants’ challenged practices violate their First, Fifth, Fourteenth, and Fifteenth Amendment rights. (Amended Compl. ¶¶ 157, 159, 164.) They allege that the constitutional violations flow from the checkbox requirements, the purported literacy test, the rejection of forms with “immaterial” omissions, the failure to allow a “grace period” beyond the book closing date,<sup>15</sup> and the acceptance of the national *and* state forms, and the

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<sup>14</sup> Moreover, invalidating language that would be incomprehensible to some voters would logically lead to the invalidation of *all* written material. Some registrants are completely illiterate, so even the plainest language would not be effective for them. As to those individuals, any written word would function as a “literacy test.” But that is not the case. It is well established that, with respect to the illiterate, the Voting Rights Act is satisfied by the availability of assistance. See *U.S. v. State of Louisiana*, 265 F. Supp. 703, 708 (E.D. La. 1966); *U.S. v. State of Mississippi*, 256 F. Supp. 344, 348 (S.D. Miss. 1966). The Amended Complaint does not allege the unavailability of assistance.

<sup>15</sup> The basis for a purported right to a “grace period” is not clear from the Amended Complaint. Presumably, the Plaintiffs wish to invalidate the Florida statute that sets a clear book-closing date of 29 days before an election. § 97.055(1), Fla. Stat. The book-closing date, though, is an essential part of the Election Code because it allows elections officials to verify applicants’ eligibility and to prepare for the election. The divided U.S. Supreme Court in *Rosario v. Rockefeller* disagreed on whether an eleven-month cutoff period was permissible, but agreed that registration deadlines are permissible. “Certainly, the State is justified in imposing a reasonable registration cutoff prior to any primary or general election, beyond which a citizen’s failure to register may be presumed a negligent or willful act forfeiting his right to vote in a particular election.” *Rosario*, 410 U.S. 752, 765 (1973) (Powell, J., dissenting).

“confusing” application language. (Amended Compl. ¶¶ 157, 159, 164.) They also allege that in 2004, the Defendants failed to notify or timely notify Plaintiffs that the Plaintiffs’ omissions could be cured before the close of books. (Amended Compl. ¶ 151.) None of these allegations is sufficient to support a constitutional claim.

**A. The Voting Requirements and Procedures are Reasonable Conditions on the Applicant’s Registration.**

Notwithstanding the fundamental nature of the right to vote, states may require certain reasonable and even-handed qualifications and regulations on the exercise of the franchise without violating the Constitution. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 50 (1959). These regulations play an integral and essential role in our democracy. The Supreme Court in *Storer v. Brown* recognized that:

as a practical matter, there must be a substantial regulation of the elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.

In any event, the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, *the registration and qualifications of voters*, and the selection and qualification of candidate.

415 U.S. 724, 730 (1974) (emphasis added).

Given the essential role of such regulations, a provision regulating the registration of voters that does not absolutely disenfranchise a class of individuals does not impinge on the fundamental right to vote as long as it advances a legitimate state interest. *See Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973).<sup>16</sup> In *Rosario*, the Supreme Court upheld a New York law

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<sup>16</sup> This case is not one that implicates strict scrutiny of the voter registration application requirements in question. *See MacDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 809. The application requirements in question are consistent with even-handed regulatory mechanisms to administer elections that have been upheld based on rational basis review. *See id.* (applying rational basis to absentee ballot provision). But even if strict scrutiny were applicable, restrictions intended to prevent election fraud serve a compelling governmental interest. *See Burson v. Freeman*, 504 U.S. 191, 199 (1992); *Kemp v. Tucker*, 396 F. Supp. 737, 739 (M.D. Pa.), *aff’d*, 423 U.S. 803 (1975). Moreover, in light of the direct and minor “burdens” imposed by the state in requiring a voter application registrant to complete a few questions, as compared to their essential purpose with respect to preventing and prosecuting voter fraud, the state’s requirements are narrowly tailored in furtherance of that compelling interest.

that limited participation in a party primary to those voters that registered as members of the party within thirty (30) days of the previous general election. The Court reviewed all prior cases applying strict scrutiny to voting regulations and concluded that “[i]n each of those cases, the State totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote.” *Id.* at 757. The Court differentiated those cases from a regulation that simply required voters to register to participate in an election within a specified time and that thus “did not absolutely disenfranchise the class to which petitioners belong.” *Id.* The Court found that so long as the questioned regulation advanced an “important state goal” it would pass constitutional muster. *Id.* at 760. In words applicable to this context, the Court admonished the plaintiffs that “if their plight can be characterized as disenfranchisement at all, it was not caused by [the challenged law], but by their own failure to take timely steps to effect their enrollment.” *Id.* at 757. The Court thus upheld the challenged law as advancing the important state interest of preventing party raiding in a primary election.

As explained *supra*, the requirement that applicants check the boxes affirming their eligibility to vote and the denial of registration to applicants who fail to check the boxes are essential to Florida’s goal of registering only those who are eligible to vote.<sup>17</sup>

**B. Plaintiffs’ Allegations that Defendants Failed to Notify Them of Their Applications’ Incompletion are Insufficient to State a Claim.**

Plaintiffs allege one specific example of a delayed notification of an incomplete application. (Amended Compl. ¶ 101.) “It is not every election irregularity, however, which will give rise to a constitutional claim and an action under section 1983.” *See Bodine v. Elkhart County Election Bd*, 788 F.2d 1270, 1271 (7th Cir. 1986) (quoting *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975)). Furthermore, in an official-capacity action like this one, “a governmental entity is liable under § 1983 only when the entity itself is a ‘moving force’ behind the deprivation; thus, in an official-capacity suit the entity’s ‘policy or custom’ must have played a part in the violation of federal law.” *Ky. v. Graham*, 473 U.S. 159, 166 (1985); *accord Cook v. Sheriff of Monroe County*, 402 F.3d 1092, 1116 (11th Cir. 2005). The Amended Complaint includes no allegation that the failure to give timely notice was the result of a policy or custom of

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<sup>17</sup> For this reason, Plaintiffs’ alternative argument—that these requirements are arbitrary and irrational—must fail. (Amended Compl. ¶ 153.)

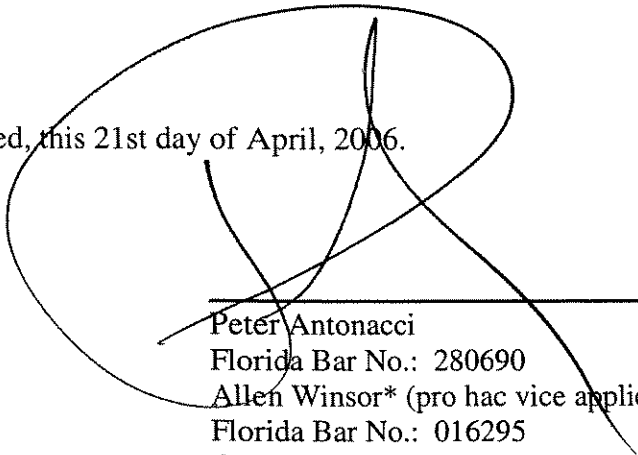
the Defendants. To the contrary, the Plaintiffs allege that the Secretary of State articulated a policy of providing applicants the opportunity to complete their incomplete applications. (Amended Compl. ¶ 96.)

### CONCLUSION

The State of Florida has simple, logical, and common-sense anti-fraud provisions in its election code. These provisions serve the essential purpose of ensuring that those who register to vote—and ultimately do vote—are qualified to do so under state and federal law. The Plaintiffs seek to invalidate these provisions so that the polls can be opened to those who refuse to fully and consistently affirm their eligibility to vote by completing the same simple and clear form that hundreds of thousands of Florida voters successfully complete every year.

In their attempts to invalidate these crucial anti-fraud provisions, Plaintiffs rely on various federal statutes and constitutional provisions, which they allege forbid the Defendants' practices. But for the reasons articulated above, the Plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted. For these reasons, the Amended Complaint must be dismissed.

Respectfully submitted, this 21st day of April, 2006.



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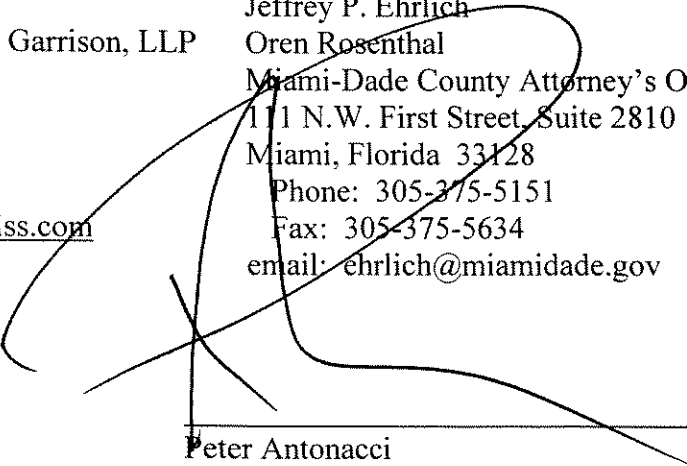
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