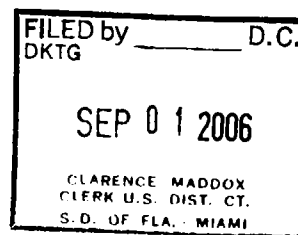


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-22572-Civ-King



EMMA YAIZA DIAZ et al.,

Plaintiffs,

v.

SUE M. COBB, Secretary of State of Florida,
et al.,

Defendants.

PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS'
MOTIONS TO DISMISS THE THIRD AMENDED COMPLAINT

1/8/06

Table of Contents

Table of Authorities iii

Preliminary Statement 1

Statement of the Case 4

Argument 7

I. STANDARD OF REVIEW 7

II. THE COMPLAINT STATES A CLAIM UNDER THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION 8

A. Legal Standard for Evaluating Plaintiffs’ Claims.....8

B. Plaintiffs State a Claim As To The Mental Incapacity Affirmation12

 1. Plaintiffs Have Alleged That The Mental Incapacity Affirmation Imposes A Significant Burden on Plaintiffs’ First and Fourteenth Amendment Rights..... 12

 2. Plaintiffs Have Alleged That The Mental Incapacity Affirmation Does Not Serve A Legitimate, Let Alone Compelling, State Interest, and is Arbitrary and Irrational 13

 3. Plaintiffs Have Alleged that The Mental Incapacity Affirmation Is Both Unreasonable And “Discriminatory” 14

 4. Defendants Cannot Show that Plaintiffs’ Claim as to the Mental Incapacity Affirmation Must be Dismissed as a Matter of Law. 15

C. Lack of Timely Notice and Opportunity To Cure 16

 1. Plaintiffs Have Alleged That Defendants’ Practices Impose a Significant Burden on Eligible Voters..... 16

 2. Defendants’ Lack of Timely Notice and Opportunity To Cure Are Arbitrary and Irrational. 19

 3. Defendants Cannot Show that Plaintiffs’ Claims Related to Notice and Opportunity To Correct Must be Dismissed as a Matter of Law. 19

III. DEFENDANTS' FAILURE TO PROVIDE NOTICE OF INCOMPLETE APPLICATIONS TO PROSPECTIVE VOTERS, AS ALLEGED, SUPPORTS AN OFFICIAL-CAPACITY ACTION 21

IV. AN ACTION AGAINST THE COUNTY SUPERVISORS OF ELECTIONS IS NOT BARRED BY THE ELEVENTH AMENDMENT 23

CONCLUSION..... 28

Table of Authorities

CASES

ACLU v. The Fla. Bar, 999 F.2d 1486 (11th Cir. 1993) 17

ACORN v. Miller, 129 F.3d 833 (6th Cir. 1997) 9

Acorn v. Bysiewicz, 413 F. Supp. 2d 119 (D.Conn. 2005) 10, 21

Al-Hakim v. State of Fla., 892 F. Supp. 1964 (M.D. Fla 1995) 24

Anderson v. Celebrezze, 460 U.S. 780 (1983)..... *passim*

Ayers-Schaffner v. DiStefano, 37 F.3d 726 (1st Cir. 1994) 12, 20

Bishop v. Lomenzo, 350 F. Supp. 576 (E.D.N.Y. 1972)..... 9

Burdick v. Takushi, 504 U.S. 428 (1992) 8, 9, 10

Burns v. Fortson, 410 U.S. 686 (1973) 20

Caruso v. City of Cocoa, Florida, 260 F. Supp. 2d 1191 (M.D. Fla. 2003) 22

Chepstow Ltd. v. Hunt, 381 F.3d 1077 (11th Cir. 2004) 7, 13, 15, 16

Common Cause of Georgia v. Billups,
406 F. Supp. 2d 1326 (N.D. Ga. 2005)..... 10, 11, 12, 14

Condon v. Reno, 913 F. Supp. 946 (D.S.C. 1995)..... 9

Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99 (1957)..... 7, 8

Diaz, et al. v. Secretary of the State of Florida, et al.,
No. 04-15539 (11th Cir. Sept. 28, 2005) 13, 17

Dunn v. Blumstein, 405 U.S. 330 (1972)..... 3, 9, 11, 12, 19

Friedman v. Snipes, 345 F. Supp. 2d 1356 (S.D. Fla. 2004)..... 10

Fulani v. Krivanek, 973 F.2d 1539 (11th Cir. 1992)..... 10, 14

Grech v. Clayton County, Georgia, 335 F.3d 1326 (11th Cir. 2003)..... 22

Griffin v. Roupas, 285 F.3d 1128 (7th Cir. 2004) 11

Harper v. Virginia State Bd. Of Elections, 383 U.S. 883 (1966) 9

Harris v. Iorio, No. 96-2682, 1998 WL 34309464 (11th Cir. Jan. 26, 1998) 23

<i>Hufford v. Rodgers</i> , 912 F.2d 1338 (11th Cir. 1990)	25
<i>Kemp v. Tucker</i> , 396 F. Supp. 737 (M.D. Pa. 1975)	11
<i>Lawson v. Shelby County</i> , 211 F.3d 331 (6th Cir. 2000).....	24
<i>Lincoln County v. Luning</i> , 133 U.S. 529 (1890)	24
<i>Manders v. Lee</i> , 338 F.3d 1304 (11th Cir. 2003)	3, 23, 24, 26, 27
<i>Marston v. Lewis</i> , 410 U.S. 679 (1973).....	10, 11, 20
<i>Miccosukee Tribe of Indians of Fla. v. Fla. State Athletic Comm.</i> , 226 F.3d 1226 (11th Cir. 2000)	24
<i>Milburn v. United States</i> , 734 F.2d 762 (11th Cir. 1984).....	8, 13, 15, 16
<i>Moor v. County of Alameda</i> , 411 U.S. 693 (1973).....	24
<i>Mt. Healthy Board of Education v. Doyle</i> , 429 U.S. 274 (1977)	24
<i>Oklahoma City v. Tuttle</i> , 471 U.S. 808 (1985).....	21
<i>Pembaur v. Cincinnati</i> , 475 U.S. 469 (1986).....	21
<i>In re Polygraphex Systems, Inc.</i> , 275 B.R. 408 (M.D. Fla. 2002).....	25
<i>Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp.</i> , 711 F.2d 989 (11th Cir. 1983)	8
<i>Regents of the Univ. of Cal. v. Doe</i> , 519 U.S. 425	26
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	9
<i>Rosario v. Rockefeller</i> , 410 U.S. 752 (1973).....	3, 10, 21
<i>Sandusky County Democratic Party v. Blackwell</i> , 387 F.3d 565 (6th Cir. 2004)	18
<i>Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Communications, Inc.</i> , 376 F.3d 1065 (11th Cir. 2004)	8
<i>Stewart v. Blackwell</i> , 444 F.3d 843 (6th Cir. 2006).....	9
<i>Storer v. Brown</i> , 415 U.S. 724 (1974).....	10, 17
<i>Swierkiewicz v. Sorema N.A.</i> , 534 U.S. 506, 122 S. Ct. 992 (2002)	7
<i>Teper v. Miller</i> , 82 F.3d 989 (11th Cir. 1996).....	17

<i>Timmons v. Twin Cities Area New Party</i> , 520 U.S. 351	10
<i>Touchston v. McDermott</i> , 234 F.3d 1133 (11th Cir. 2000)	25
<i>Troiano v. Supervisor of Elections in Palm Beach County, Fla.</i> , 382 F.3d 1276 (11th Cir. 2004)	23
<i>United States v. Baxter Int'l, Inc.</i> , 345 F.3d 866 (11th Cir. 2003)	8, 15, 16
<i>Wexler v. Lepore</i> , 342 F. Supp. 2d 1097 (S.D. Fla. 2004)	23
<i>Wexler v. Lepore</i> , 385 F.3d 1336 (11th Cir. 2004)	23
<i>Wyke v. Polk County Sch. Bd.</i> , 129 F.3d 560 (11th Cir. 1997)	21
<i>Ex parte Yarborough</i> , 110 U.S. 651 (1884)	9

STATUTES

F.R.C.P. 8(a)	15
Fla. Const. Art. 8, Sec. 1(d)	25
Fla. Stat. § 92.295	26
Fla. Stat. §§ 97.052(6), 97.053(7)	23
Fla. Stat. § 97.053	26
Fla. Stat. § 98.015(2)	27
Fla. Stat. § 101.733(1)	25
Fla. Stat. § 102.012	26
Fla. Stat. § 102.021	27
Fla. Stat. § 102.031	26
Fla. Stat. § 102.111(1)	27
Fla. Stat. § 102.112	27
Fla. Stat. § 102.141	26
Fla. Stat. § 102.166(3)	26
Fla. Stat. § 104.42	27
Fla. Stat. § 129.202	27

Plaintiffs submit this Opposition to the Motion to Dismiss the Third Amended Complaint (“TAC”) by Defendant Cobb, the Motion to Dismiss the TAC by Defendant Sola, the Motion to Dismiss the TAC by Defendants Cobb, Snipes, Holland, Cowles, and Anderson, and the further Motion to Dismiss the TAC by Defendant Holland.

Preliminary Statement

In 2004, Defendants denied thousands of eligible Florida electors the right to vote in the November general elections due to Defendants’ unconstitutionally restrictive voter registration policies. Thousands of additional prospective registrants face certain disenfranchisement during this year’s registration cycle, due to Florida’s recent amendments to its election code, which needlessly and unlawfully burden voter registration applicants who inadvertently do not check certain boxes on their application or who seek to correct their application after the registration deadline in time to be added to the voter rolls for the upcoming election.

Plaintiffs’ allegations more than suffice to state a claim for relief that Defendants have unconstitutionally burdened their right to vote by refusing to process applications on which the applicant has not checked the mental incapacity box and by refusing to permit applicants who timely submitted a voter registration application notice or an opportunity to cure their applications in time to be added to the voter rolls for the following elections. In 2004, Plaintiffs, their members, and thousands of other eligible Florida citizens timely submitted voter registration applications yet inadvertently did not check one or more of the boxes concerning mental incapacity, felon status, or citizenship. Although all, or nearly all, of the applicants who did not check the mental incapacity box had not been adjudicated mentally incapacitated with regard to voting, election officials nevertheless rejected those applications. Additionally, notwithstanding the timely submission of these applications, many Supervisors of Elections refused to provide applicants with timely notice or an opportunity to cure the deficiencies in their applications in time to be added to the voter rolls prior to the November 2004 elections.

Plaintiffs have alleged that Defendants did not have any rational, let alone compelling, basis for their refusal to permit applicants to correct their applications or add those applicants to the voter rolls before the November 2004 elections. Indeed, Defendant Duval County Supervisor of Elections, and other Supervisors, allowed applicants to correct their applications and added qualified applicants to the rolls in time for the November elections.

After the 2004 elections, Florida amended its election code to bar Supervisors of Elections from processing applications on which the applicant has not checked the citizenship, felon status, or mental incapacity box or processing corrections to applications after the registration deadline in time for the upcoming elections. Florida adopted these measures notwithstanding its implementation its statewide voter registration database pursuant to the Help America Vote Act, which will increase the efficient processing of voter registration applications. Plaintiffs have alleged that Defendants unconstitutionally burdened their right to vote and that there is no rational basis for prohibiting Supervisors from offering applicants a grace period, after the book closing date, to submit corrections to their application and placing such eligible applicants on the voter rolls in time for them to vote in the upcoming elections.

Defendants have moved to dismiss the TAC for failure to state a claim upon which relief may be granted yet have failed to set forth any statutory or decisional law that supports dismissal of the Complaint as a matter of law. Defendants have not shown, and indeed cannot show, that Plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. Instead, Defendants argue the merits of Plaintiffs' claims by referring to supposed facts that are outside of the Complaint, wholly unsupported, and must not be considered on a motion to dismiss. As to Plaintiffs' claim concerning the mental incapacity box, Defendants have failed to show that Plaintiffs' allegations that the patently confusing language of the mental incapacity and consequent rejection of thousands of voter registration applications for failure to check the mental incapacity box—where in fact the applicants are not mentally incapacitated—does not, as a matter of law, unconstitutionally burden Plaintiffs' right to vote and deny Plaintiffs (and other similarly situated voters) Equal Protection. Likewise, as to Plaintiffs' claims that

Defendants failed to provide Plaintiffs with adequate notice or an opportunity to correct deficiencies in their application, Defendants have failed to show as a matter of law that Plaintiffs' claims are inadequate and must be dismissed at this juncture. Defendants' misleading discussion of Supreme Court precedent concerning constitutional challenges to states' durational residency requirements or registration deadlines, *Dunn*, *Rosario*, and *Marsten*, lends them no support. Because none of the cases cited by Defendants hold that a registration deadline of twenty-nine days, under all circumstances, does not unconstitutionally burden the right to vote, Defendants' motion to dismiss Plaintiffs' claims as to notice and grace period for failure to state a claim must be denied.

The Supervisor Defendants have also moved to dismiss on the ground that Plaintiffs do not allege that Defendants' "failure to give timely notice was the result of a policy or custom of the Defendants" and do not identify any "specific directives, policies, or customs" which violate Plaintiffs' constitutional rights that have been "adopted" by Defendants. Defendants misstate the legal standard for holding counties liable for constitutional violations; Plaintiffs need only show that Defendants engaged in "a course of action consciously chosen from among various alternatives." As to the 2004 registration cycle, because Plaintiffs have alleged that the Supervisors failed to provide proper notice or an opportunity to cure, these allegations easily meet the standard for stating a claim against the Supervisors. And even if, as Defendants argue, the Supervisors' discretion is more limited in 2006 under Florida's new laws, the Supervisors are necessary parties and must not be dismissed at this stage of the litigation. Because Florida's Supervisors of Elections, not the Secretary of State, are charged with registering voters, if Plaintiffs prevail and the Court orders that certain categories of voter registration applicants must be added to the rolls, the Supervisors will remain necessary parties.

Finally, the Supervisor Defendants have moved to dismiss on the ground that they are entitled to Eleventh Amendment immunity because they function as "arms of the state" according to the test outlined by the Eleventh Circuit in *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003) (en banc), and that, as a result, Plaintiffs' claims against them should be dismissed. Based upon the facts alleged in the TAC, however, Defendants'

application of *Manders* is incorrect and thus Eleventh Amendment immunity does not apply and dismissal is not warranted at this stage.

Accordingly, Defendants' motion to dismiss should be denied.

Statement of the Case

Plaintiffs are eligible voters who have been denied the right to vote as a result of Florida's unduly restrictive voter registration requirements. The Florida Voter Registration Application Form requires that all citizens registering to vote check a box next to a statement which led many applicants to with the formulation, "I affirm that I have not been adjudicated mentally incapacitated with respect to voting or, if I have, my competency has been restored." (TAC at ¶¶13, 85) Applicants' inability to understand this puzzling and confusing statement, which led many applicants to fail to check the box, caused many applicants, including Diaz and the injured union members, to leave the mental incapacity checkbox blank, notwithstanding that they have not been adjudicated mentally incapacitated with regard to voting. (TAC at ¶¶12-13) As a result of the box not having been checked, the Defendant Supervisors designated these applications incomplete and Plaintiffs were denied the right to vote in the 2004 elections. (TAC at ¶¶3, 16.)

Plaintiffs have alleged that the mental incapacity box does not serve to exclude persons adjudicated mentally incapacitated, nor does it prevent voter fraud. (TAC at ¶¶14, 84.) As a consequence, the mental incapacity box serves no legitimate, let alone compelling, state interest. As employed by Defendant Supervisors in the months preceding the 2004 election, the mental incapacity box therefore impermissibly burdened the fundamental right to vote of all applicants under the United States Constitution; and denied the right to vote to the Individual Plaintiffs and the injured union members who were eligible to vote but were not given the opportunity to correct their applications prior to the close of books. (TAC at ¶¶15-16.)

In many cases, Defendants failed to provide timely notice to individuals whose applications were deemed incomplete in time for those individuals to amend their applications before the close of the books prior to the 2004 election. (TAC at ¶¶ 4-5, 59.)

Further, Defendant Supervisors, with the exception of Duval County, did not provide such applicants with an opportunity to provide the missing information after the close of books, thus preventing them from being placed on the voter rolls for the upcoming elections. (TAC ¶ 5, 61). Defendant Supervisors could have permitted applicants to supply corrections to their applications after the close of books and added all eligible applicants to the rolls prior to the 2004 election, as was the practice of Duval County. (TAC ¶¶ 9, 63-66.) Moreover, Defendant Supervisors permitted applicants to correct information, such as names and addresses, after the close of books, but not the missing information as to the mental incapacity affirmation. (TAC ¶ 5.)

As the date of election and the application deadline approaches each election cycle, the number of voter registration applications progressively and dramatically increases due to the increased public interest generated by the political parties' and candidates' campaigns. (TAC at ¶¶ 7, 62.) Consequently, the refusal by Defendant Supervisors of Elections (with the exception of Duval County) to accept corrections to timely submitted voter registration applications after the close of books has had the devastating effect of denying thousands of eligible voters, who were motivated to register during this period of most vigorous public political debate, the right to vote. (TAC at ¶ 8.)

Lack of notice and failure to provide a grace period also unlawfully disenfranchised additional thousands of eligible voters, including the injured union members, whose applications were designated incomplete because they did not check one or both checkboxes pertaining to citizenship and felon status. (TAC at ¶¶ 3-6, 59.) Defendants failed to process these applications because they deemed such applications incomplete. Excepting the Duval County Supervisor, Defendants did not accept missing information with regard to the citizenship and felon status checkboxes after the close of books. (TAC at ¶¶ 5, 59.)

For these reasons, the Defendant Supervisors' refusal to process the applications of the Individual Plaintiffs, the injured union members, and additional thousands of eligible voters, denied them the right to vote for President, Vice President,

and other federal officials in the 2004 federal elections, in violation of their First, Fifth, and Fourteenth Amendments of the United States Constitution.

Effective in 2006, the Florida legislature amended the State's election code to include the precise wording of the puzzling and confusing mental incapacity affirmation. (TAC at ¶ 101). Further, the amendments required Florida County Supervisors of Elections ("County Supervisors") to deem incomplete applications in which the mental incapacity box was not checked. (TAC at 17.) Thus, the Florida legislators made mandatory Defendants' 2004 practice of rejecting applications on which the mental incapacity box was not checked. Further they prohibited any grace period for providing such missing information after the close of books. (TAC at ¶¶ 75-77.) The same additional restrictions were adopted by the legislature with regard to the felon status and/or citizenship boxes. (TAC at ¶ 77.)

Also, effective in 2006, Florida implemented its computerized statewide voter registration application database, as required by the Help America Vote Act. (TAC at ¶¶ 18, 70.) Plaintiffs have alleged that this database has increased, and will continue to increase, the efficient processing of voter registration applications. (TAC at ¶¶ 18-19, 71.) The availability of such increased technology in the administration of Florida's voter registration system renders the Defendants' refusal to provide a grace period after the close of books, during which applicants may submit corrections to applications deemed incomplete, arbitrary and irrational, let alone necessary. (TAC at ¶¶ 18-19.)

As in past election cycles, as the date of the November 2006 election and the corresponding registration deadlines approach, public interest in the elections will increase and spur the submission of large numbers of voter registration applications. (TAC at ¶¶ 7, 62.) As in 2004, thousands of applicants who submit their application in 2006 near or on the registration deadline but do not check the confusing mental incapacity affirmation will not receive timely notice or an opportunity to cure their application to be eligible to vote in the November 2006 general elections. (TAC at ¶ 20.) Similarly, voters who submit their application near or on the registration deadline but inadvertently do not check the citizenship and/or felon status box will not receive timely

notice or an opportunity to cure their application to be eligible to vote in the November 2006 general elections. (TAC at ¶¶ 77, 98-103.) Accordingly, such eligible electors will be disenfranchised and unlawfully denied the fundamental right to vote in 2006 and future federal elections. (TAC at ¶¶ 103, 154-55, 139.)

Because County Supervisors need not provide notice of such deficiencies – including the deficiency as to the mental incapacity affirmation, until twenty days after receipt of the application, (TAC ¶¶ 72-74), applicants who do not check the confusing mental incapacity box (or the citizenship and/or felon status box) and submit incomplete applications within the twenty day period prior to the book closing deadline will likely not receive notice of their incomplete application. Further, even assuming prompt notice, because the deadline to correct one’s application is the same as the deadline for voter registration, applicants who timely submitted their applications weeks before the book closing deadline, but who received notice of a deficiency immediately preceding the voter registration deadline, will likely not have sufficient time to submit a correction before the deadline in order to be placed on the voter rolls in time for the following election. (TAC ¶¶ 75-80.) Thus, such eligible electors will be disenfranchised and unlawfully denied the fundamental right to vote in 2006. (TAC at ¶¶ 20, 61, 77.)

Argument

I. STANDARD OF REVIEW

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) should not be granted “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957); *Chepstow Ltd. v. Hunt*, 381 F.3d 1077, 1080 (11th Cir. 2004); *accord Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 998 (2002). In considering a motion to dismiss, the court must “accept as true the factual allegations in the plaintiff’s complaint and construe the facts in the light most favorable to the plaintiff as the non-moving party.” *Chepstow Ltd.*, 381 F.3d at 1080. Further,

“[c]onsideration of matters beyond the complaint is improper in the context of a motion to dismiss” *Milburn v. United States*, 734 F.2d 762, 765 (11th Cir. 1984).

The Court of Appeals for the Eleventh Circuit has cautioned that courts “must be mindful that the Federal Rules require only that the complaint contain ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’” *United States v. Baxter Int’l, Inc.*, 345 F.3d 866, 880 (11th Cir. 2003). “Because the Federal Rules embody the concept of liberalized ‘notice pleading,’ a complaint need contain only a statement calculated to ‘give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.’” *Baxter Int’l, Inc.*, 345 F.3d at 881 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957)). Accordingly, “the threshold of sufficiency to which a complaint is held at the motion-to-dismiss stage is ‘exceedingly low.’” *Baxter Int’l, Inc.*, 345 F.3d at 881; *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Communications, Inc.*, 376 F.3d 1065, 1070 (11th Cir. 2004) (same). As a result, “rarely will a motion to dismiss for failure to state a claim be granted.” *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp.*, 711 F.2d 989, 995 (11th Cir. 1983).

Exceptions to the rule of notice pleading exist only where Congress has explicitly imposed heightened pleading standards on plaintiffs, which Congress has not done in the area of voting rights litigation. To the contrary, “[c]onstitutional challenges to specific provisions of a State’s election laws . . . cannot be resolved by any ‘litmus-paper test’ that will separate valid from invalid restrictions. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation.” *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

II.

THE COMPLAINT STATES A CLAIM UNDER THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

A. Legal Standard for Evaluating Plaintiffs’ Claims

The First and Fourteenth Amendments protect the right to vote as a fundamental right. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“It is beyond cavil that ‘voting is of the most fundamental significance under our constitutional

structure.”) (citation omitted); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (“[T]he right of suffrage is a fundamental matter in a free and democratic society.”). The right to vote is “preservative” of other rights, and is one that bears the strictest of scrutiny. *Harper v. Virginia State Bd. Of Elections*, 383 U.S. 883 (1966). The right to vote extends to all phases of the voting process, including registration. *See Ex parte Yarborough*, 110 U.S. 651 (1884); *ACORN v. Miller*, 129 F.3d 833, 834-35 (6th Cir. 1997) (unconstitutional election regulations include “restrictive or prohibitively inconvenient voter registration requirements that discourage or even prevent qualified voters from registering and participating in elections”); *Condon v. Reno*, 913 F. Supp. 946, 949 (D.S.C. 1995) (“[R]egistration, rather than being simply a mechanism to facilitate orderly elections, [may be] in fact a significant barrier to voting.”); *Bishop v. Lomenzo*, 350 F. Supp. 576, 587 (E.D.N.Y. 1972) (“The state may not deny a voter the right to register (and hence to vote) because of clerical deficiencies.”). Accordingly, all qualified voters have a constitutionally protected right to vote. *See Stewart v. Blackwell*, 444 F.3d 843, 856 (6th Cir. 2006) (citing *Ex parte Yarborough*, 110 U.S. 651 (1884)).

Laws that deny the franchise to eligible voters must be narrowly tailored to advance a compelling state interest. *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). Even when assessing regulations that impact the right to vote only indirectly – e.g., restrictions on candidates’ access to the ballot – the Supreme Court has made clear that courts must apply strict scrutiny when the alleged practices impose severe burdens on voting rights. *See Burdick*, 504 U.S. at 434 (1992). Defendants’ restrictions on Plaintiffs’ register are therefore subject to strict scrutiny.

Recognizing the need to reconcile tensions between the States’ interest in a fair and efficient election process and the need to protect against state regulations that may suppress the fundamental right to vote, the Supreme Court adopted a balancing test:

[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court

must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Burdick v. Takushi, 504 U.S. at 434 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789) (internal quotation marks and citations omitted); *see also*, *Fulani v Krivanek*, 973 F.1539 (11th Cir. 1992) (adopting *Anderson* “balancing” test.) As the Supreme Court has made clear, “[n]o bright line separates permissible election-related regulation from unconstitutional infringement of First Amendment freedoms.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (citation omitted). The test is the same when analyzing whether a state election law violates the equal protection clause or the due process clause of the Fourteenth Amendment. *Fulani v. Krivanek*, 973 F.2d 1539, 1543 (11th Cir. 1992); *Acorn v. Bysiewicz*, 413 F.Supp.2d 119, 140 (2005) (“In the context of challenges to election regulations, the Supreme Court has acknowledged that claims under the due process and equal protection doctrines, as well as analysis of those claims, often merge.”) (citing *Anderson*, 460 U.S. at 787).

Under *Anderson*, courts must “realistic[ally] appraise [] the extent and nature” of the burdens placed on voters’ exercise of their constitutionally protected liberties and weigh the burden against the State’s legitimate interest furthered by the challenged regulation. 460 U.S. at 806. The court’s inquiry is “not automatic” and “there is no substitute for the hard judgments that must be made.” *Anderson*, 460 U.S. at 789. Indeed, the Supreme Court has consistently held that constitutional challenges to specific provisions of a State’s election laws cannot be resolved by any ‘litmus paper’ test that will separate valid from invalid restrictions. *Anderson*, 460 U.S. at 789; *Storer*, 415 U.S. at 730.

Hence courts have rarely decided challenges to a state’s election laws under *Anderson* or its predecessors at the pleading stage.¹ “Instead, a court must resolve

¹ *Burdick v. Takushi*, 460 U.S. 780 (1983) (reversal of summary judgment affirmed); *Anderson v. Celebrezze*, 504 U.S. 428 (1983) (awarding summary judgment to plaintiffs); *Storer v. Brown*, 415 U.S. 724 (1974) (vacating judgment upon detailed consideration of the evidentiary

such a challenge by an analytical process that parallels its work in ordinary litigation.” *Anderson*, 460 U.S. 489. The results of this evaluation are not automatic and there is “no substitute for the hard judgments that must be made.” *Anderson*, 460 U.S. at 789. Indeed, every case cited by Defendants in favor of dismissal demonstrates that Plaintiffs are entitled to discovery and Defendants motion to dismiss must be denied.²

Although “the State’s important regulatory interests are generally sufficient to justify” “reasonable nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters,” when voters’ rights are subjected to “severe” restrictions, strict scrutiny applies and the statute must be “narrowly drawn to advance a state interest of compelling importance.” *Id.* In cases adjudicating registration requirements for voters, rather than candidates or ballot initiatives, courts have frequently applied heightened scrutiny, depending on the type of election regulation at issue and the corresponding burden imposed by that regulation on plaintiff’s constitutional rights.³

record); *Rosario v. Rockefeller*, 410 U.S. 752 (1973) (affirming reversal of judgment upon detailed consideration of the evidentiary record); *Marston v. Lewis*, 410 U.S. 679 (1973) (reversing injunction granted upon detailed consideration of the evidentiary record); *Fulani v Krivanek*, 973 F.1539 (11th Cir. 1992) (reversing district court’s judgment and remanding); *Friedman v. Snipes*, 345 F.Supp.2d 1356, 1359 (S.D. Fla. 2004) (refusing to grant preliminary injunction after conducting an evidentiary hearing); *Acorn v. Bysiewicz*, 413 F.Supp.2d 199 (D.Conn. 2005) (entering judgment after five day trial); *Common Cause of Georgia v. Billups*, 406 F.Supp.2d 1326 (N.D. Ga. 2005) (granting preliminary injunction).

² Defendants have cited two cases that dismiss Constitutional challenges to election regulations at the pleading stage, *Kemp v. Tucker*, 396 F. Supp. 737 (M.D. Pa. 1975) (dismissing challenge to requirement that registrants identify themselves by race on their voter registration application, because regulation was reasonably related to legitimate state interest of preventing fraud) and *Griffin v. Roupas*, 285 F.3d 1128 (7th Cir. 2004) (dismissing challenge to state’s refusal to allow working mothers to vote by absentee ballot), neither of which are binding precedent in this circuit. These cases heavily support dismissal. *Kemp* predates *Anderson* and was never once cited, according to Shephard’s. *Griffin* concerns absentee ballots but not registration requirements and does not make clear what standard it applies. Moreover, it appears to take facts outside the complaint into account of violation of the federal rules.

³ *Marston v. Lewis*, 410 U.S. 679, 679-681 (1973) (on appeal of permanent injunction, upholding registration deadline based on testimony and other facts in record that demonstrated necessity of such deadline); *Dunn*, 405 U.S. 330, 336, 338 (1972) (striking down Tennessee residency requirement under compelling state interest test); *Common Cause of Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (striking down Georgia’s photo I.D. requirement under both strict scrutiny and rational basis review).

Defendants' unduly restrictive registration requirements are subject to strict scrutiny, because they disenfranchise eligible voters. Alternatively, the *Anderson* "balancing test" applies. Even if the more flexible *Anderson* standard applies, Plaintiffs have alleged more than sufficient facts to support their claims that Defendants have unfairly and impermissibly burdened Plaintiffs' right to vote, Defendants' motion to dismiss must be denied.

B. Plaintiffs State a Claim As To The Mental Incapacity Affirmation

1. Plaintiffs Have Alleged That The Mental Incapacity Affirmation Imposes A Significant Burden on Plaintiffs' First and Fourteenth Amendment Rights.

Plaintiffs have alleged that the affirmation concerning mental incapacity on Florida's 2004 and 2006 voter registration application was incomprehensible to the Individual Plaintiffs, injured union members, and many eligible electors, and as a result of this inordinately confusing language, many eligible applicants left the mental capacity checkbox blank. (TAC at ¶¶ 89-90.) In turn, Defendants refused to process those applications for failure to check the mental capacity box, even though the applicants had not been deemed mentally incapacitated, thereby depriving those applicants of the right to vote. (TAC at ¶¶ 86-87, 104-119.)

State regulations that disenfranchise eligible voters severely burden the voting rights of those prospective voters. Thus, Plaintiffs have pled severe burden to their right to vote. *Dunn*, 405 U.S. at 336; *Ayers-Schaffner v. DiStefano*, 37 F.3d 726, 729 (1st Cir. 1994) ("The foundation of our 'democratic process' is the right of all qualified voters to cast their votes effectively" and "[d]epriving eligible voters of the right to vote . . . shakes that foundation and weakens, rather than supports, the broad goal of preserving the integrity of the electoral process"); cf. *Common Cause of Georgia v. Billups*, 406 F.Supp.2d 1326, 1362 (2005) (Photo ID imposed significant burden on voter registrants). Plaintiffs allege that thousands of eligible voters did not check the box in the 2004 registration cycle, and will not during the 2006 cycle, because they do not understand the question. (TAC ¶¶ 12-13, 89-90, 95, 146.)

Regardless of the level of scrutiny, however, Plaintiffs' allegations concerning Defendants' refusal to process voter registration applications on which the applicant did not check the mental incapacity box easily state a claim of burdening Plaintiffs' right to vote in violation of the First and Fourteenth Amendments and denying Plaintiffs Equal Protection, because Defendants practices are not "reasonable, nondiscriminatory restrictions" that advance an important state interest.⁴ *Anderson*, 460 U.S. at 788 ("the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.")

2. Plaintiffs Have Alleged That The Mental Incapacity Affirmation Does Not Serve A Legitimate, Let Alone Compelling, State Interest, and is Arbitrary and Irrational

Plaintiffs have alleged facts that show that Defendants' rejection of voter registration applications on which the mental incapacity box is unchecked, yet the applicant is not mentally incapacitated, serves no rational purpose at all. In particular, Plaintiffs have alleged that Defendants' rejection of applications on which the mental incapacity box is unchecked does not prevent ineligible applicants who have been adjudicated mentally incapacitated from registering and voting. (TAC at ¶ 14). Defendants' checkmark requirement as to mental capacity excludes far more eligible voters than persons adjudicated mentally incapacitated each year in each County's Circuit Court. (TAC at ¶¶ 91-92.) Moreover, Defendants do not use the information derived from checking or failing to check the mental incapacity box to prevent ineligible voters from registering and voting. (TAC at ¶ 84.)

Thus, rejecting applications on which the mental incapacity box is not checked bears no relationship to Defendants' interest of preventing mentally

⁴ The Secretary of State also argues that Plaintiffs cannot state a claim because they created their own injury by "failure to take timely steps to effect their enrollment." (Defendants Snipes, Holland, Cowles, and Anderson's Motion to Dismiss and Memorandum of Law in Support thereof ("Snipes Mem.") at 4.) The Eleventh Circuit Court of Appeals has made clear that this argument is irrelevant to Plaintiffs' standing. *Diaz, et al. v. Secretary of the State of Florida, et al.*, No. 04-15539 (11th Cir. Sept. 28, 2005). Likewise, whether Plaintiffs could have overcome the burdens on their voting rights that Defendants imposed is irrelevant to this Court's inquiry of whether Plaintiffs have stated a claim for relief. *Chepstow Ltd. v. Hunt*, 381 F.3d 1077, 1080 (11th Cir. 2004); *Milburn v. United States*, 734 F.2d 762, 765 (11th Cir. 1984).

incapacitated persons from voting. As such, Plaintiffs have alleged that Defendants' practice impermissibly burdens the right to vote of the Individual Plaintiffs and the injured union members, but also of all prospective eligible applicants. [TAC ¶¶ 6, 16, 20.] These facts are more than sufficient to state a claim under the First and Fourteenth Amendments. *See Common Cause of Georgia*, 406 F.Supp.2d at 1361 ("Photo ID law thus [did] nothing to address the voter fraud issues that conceivably exist in Georgia"); *Anderson*, 460 U.S. at 806 ("[E]ven when pursuing a legitimate interest, a state may not choose means that unnecessarily restrict constitutionally protected liberty"; "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."); *Fulani*, 973 F.2d 1539 ("a party's ability to pay a verification fee is not rationally related to whether that party has a modicum of support").

3. Plaintiffs Have Alleged that The Mental Incapacity Affirmation Is Both Unreasonable And "Discriminatory"

Plaintiffs have adequately alleged that Defendants' use of the mental incapacity checkbox to disqualify eligible electors is both discriminatory as well as unreasonable. Accordingly, Plaintiffs have stated a claim for denial of their right to vote under the First and Fourteenth Amendments. *Anderson*, 460 U.S. at 788 ("the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions."). It is to no avail that the restriction applies to all applicants. *Id.*, 460 U.S. at 801 ("sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." (internal citations omitted)).

Plaintiffs have alleged that Defendants' rejection of voter registration applications for failure to check the mental incapacity box burdens the right to vote by discriminating against those registrants with lower levels of literacy and/or education. (TAC at ¶ 95.) Plaintiffs have alleged that the mental incapacity question discriminates against those with lower levels of literacy, because the affirmation is unusually legalistic, technical and complicated in its construction and presupposes a high level of literacy.⁵

⁵ This Court has concluded in a previous order that Plaintiffs' statutory claims, that the mental incapacity affirmation does not constitute a literacy test, because it does not include a

(TAC at ¶¶ 90, 83.) Applicants with low levels of literacy are much more likely to make a mistake regarding the mental incapacity affirmation; applicants with high levels of literacy are unlikely to make the mistake. (TAC at ¶¶ 13, 90.)

Plaintiffs have thus stated a *prima facie* case under *Anderson* and have satisfied the notice pleading requirements under F.R.C.P. 8(a). *United States v. Baxter Int'l, Inc.*, 345 F.3d 866, 880 (11th Cir. 2003).

4. Defendants Cannot Show that Plaintiffs' Claim as to the Mental Incapacity Affirmation Must be Dismissed as a Matter of Law.

Defendant Cobb argues that the mental incapacity affirmation is not confusing; that any burden imposed on an applicant by the mental incapacity affirmation is minimal; and that the state has a legitimate interest in rejecting applicants who do not check the box. (Defendant Cobb's Motion to Dismiss the Third Amended Complaint ("Cobb Mem.") at 6-12.) None of these arguments have any merit; nor can they serve as a proper basis for dismissing Plaintiffs' claims. *Chepstow Ltd.*, 381 F.3d at 1080 (Court must "accept as true the factual allegations in the plaintiff's complaint and construe the facts in the light most favorable to the plaintiff as the non-moving party.") *Milburn v. United States*, 734 F.2d 762, 765 (11th Cir. 1984) ("Consideration of matters beyond the complaint is improper in the context of a motion to dismiss").

The Secretary's implausible insistence that the language is "short and simple" and as clear as can be imagined (Cobb Mem. at 8) misses the point that the convoluted, legalistic language on the form may explain why large numbers of applicants do not complete the mental incapacity affirmation, notwithstanding the small numbers of persons who have been adjudicated mentally incapacitated Statewide. In any case, the Secretary's unsupported factual conclusions cannot be taken into account on a motion to dismiss. *Chepstow Ltd.*, 381 F.3d at 1080; *Milburn v. United States*, 734 F.2d at 765.

critical feature common to literacy tests, i.e. that applicants must answer the question(s) without assistance. (Order of Partial Dismissal (June 20, 2006) at 17.) From this it does not follow, however, that the mental incapacity affirmation does not discriminate against those less literate.

Second, the Secretary's argument that any burden imposed on an applicant is minimal (Cobb Mem. at 10-11) fails to apprehend Plaintiffs' claim that the confusing nature of the mental incapacity affirmation, coupled with Defendants' rejection of applications on which the question is unanswered, impermissibly burdens Plaintiffs' right to vote. The Secretary's suggestion that applicants seek assistance in completing the form (Cobb Mem. at 10) only highlights the confusing and burdensome nature of the mental incapacity affirmation. In addition, the Secretary's suggestion that prospective applicants may circumvent the mental incapacity question by using the federal voter registration form relates to the merits of Plaintiffs' claims and may not be considered on a motion to dismiss. Plaintiffs have stated a *prima facie* case under *Anderson* and should have an opportunity to prove that the mental incapacity box is confusing such that it unconstitutionally burdens Plaintiffs' right to vote. In light of Plaintiffs' allegations in the TAC, dismissing these claims at this juncture would run afoul of well-established case law setting forth the standard for evaluating a motion to dismiss. *See, e.g., Baxter*, 345 F.3d at 880-81.

Finally, the Secretary's bald and unsupported assertion that the state has legitimate interests in rejecting applicants who do not check the mental incapacity (Cobb Mem. at 11-12) is not properly asserted on a motion to dismiss. As a preliminary matter, Defendants' purported defenses of their practices—that rejecting applications for failure to check the box reduces fraud and prevents registration of ineligible voters—lack factual support. Even assuming that Defendants could show facts to support such defenses, it is black letter law that matters outside of the Complaint may not be considered on a motion to dismiss. *Chepstow, Ltd.*, 381 F.3d at 1080; *Milburn*, 734 F.2d at 765. Therefore, Defendants' discussion of their rationales for the mental capacity box should be entirely disregarded.

C. Lack of Timely Notice and Opportunity To Cure

1. Plaintiffs Have Alleged That Defendants' Practices Impose a Significant Burden on Eligible Voters

Plaintiffs allege that Defendants' failure, in many cases, to provide timely notice, or no notice at all, added to the already significant burden imposed on voters by

the puzzling mental incapacity affirmation and Defendant Supervisors' refusal to process applications that did not contain the mental incapacity checkmark. (TAC at ¶ 147.) Further, the lack of a grace period compounded the injury. *Id.* The failure to provide timely notice and an opportunity to cure also affected thousands of applicants who had inadvertently neglected to check the citizenship and felon status checkboxes. (TAC at ¶¶ 3-4.)

Plaintiffs have alleged that as the election and application deadline approach, the number of voter registration applications progressively and dramatically increase due to the increased public interest generated by the campaigns (TAC at ¶¶ 7, 60-62). In 2004, thousands of eligible applicants, including Plaintiffs and injured union members, submitted applications near or on the application deadline and on many of those applications, the applicant neglected to check the mental incapacity, felon and/or citizenship box (TAC at ¶ 3); with the exception of Duval County, Defendant Supervisors did not permit applicants to correct their applications after the registration deadline in order to be added to the rolls prior to the November 2004 elections. (TAC at ¶¶ 5, 64-66.) As a result, these eligible applicants were denied their fundamental right to vote in the 2004 election without due process of law. (TAC at ¶¶ 6, 8, 69.)⁶

⁶ Thus, Plaintiff John Lanman alleges that he registered to vote just prior to the deadline for the November 2004 elections by mailing his voter registration application to the Defendant Orange County Supervisor's office. (TAC at ¶ 106.) Defendant Lanman has received no communications from the Defendant Orange County Supervisor's office concerning the status of his application. *Id.* As further alleged in the TAC, records of incomplete voter registration applications produced by Orange County reveal that Lanman's application was deemed incomplete because he did not check boxes confirming that he had not been adjudicated mentally incapacitated or convicted of a felony. *Id.* Lanman was eligible to vote. Had he received prompt notice from the Defendant Orange County Supervisor that his application was incomplete and the benefit of a grace period during which to "complete his application, he would very likely have been able to register and vote in the 2004 election.

Likewise, Plaintiff Emma Diaz alleges that she registered to vote on September 17, 2004, more than two weeks prior to the close of books on October 4, 2004, but that she received notice from the Miami-Dade Supervisor's office that her application had been deemed incomplete only on October 8, 2004, and after she had placed a call to the Supervisor's office on October 5, 2004 to inquire whether her application had been processed. (TAC at ¶¶ 104-105.) Diaz was eligible to vote; she did not check the mental incapacity box on her application form, because the affirmation was puzzling and confusing. Nevertheless, she would have been able to register and

After the 2004 election, Florida amended its election code, in part, to prohibit voters seeking to be added to the voter rolls and vote in the upcoming elections. (TAC at ¶¶ 75-77.) Due to the same patterns of voter registration present in 2004, thousands of eligible electors, including union members, will submit incomplete voter registration applications. (TAC at ¶ 20.) Plaintiffs allege that Defendants will unlawfully refuse to process the applications of registrants, including those of members of the Plaintiff unions, during the registration period before the 2006 federal elections; will fail to provide applicants with timely notice of deficiencies in their applications; and that as a result, thousands of voters will be unlawfully disenfranchised. (TAC at ¶¶ 20, 61, 77, 139.) Thus, Plaintiffs and their members have alleged that Defendants will violate their constitutional right to vote in the upcoming 2006 general elections. *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (*per curiam*) (plaintiff associations had showed “actual and imminent” injury that was not “speculative” or remote and were thus entitled to seek injunctive relief on behalf of as yet unnamed prospective voters).

vote had there been a grace period, even though the Miami-Dade Supervisor refused to process her application and failed to notify her timely prior to the close of books. (TAC at ¶ 105.)

Defendant Sola argues that because Emma Diaz has recently registered to vote, her claims for injunctive relief may be moot. (Defendant Sola’s Motion to Dismiss (“Sola Mem”) at 6.) To the contrary, Ms. Diaz’s claims for injunctive relief are capable of repetition yet evading review. *ACLU v. The Fla. Bar*, 999 F.2d 1486, 1496 (11th Cir. 1993) (“[I]n cases challenging rules governing elections, there often is not sufficient time between the filing of the complaint and the election to resolve the issues. Thus the [Supreme] Court has allowed such challenges to go forward under the ‘capable of repetition yet evading review’ exception to the mootness doctrine.”). Indeed, it is axiomatic that this exception is particularly appropriate in the election context, given the tight time frame in which voting-related injuries take place. *See, e.g., Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *Teper v. Miller*, 82 F.3d 989, 992 n.1 (11th Cir. 1996). Ebony Roberts, a plaintiff listed in the original complaint, likewise became registered to vote after the filing of the original complaint. Defendants similarly moved to dismiss Ms. Roberts’ claims for lack of standing or mootness. After this Court dismissed Ms. Roberts’ claims for lack of standing, the Eleventh Circuit Court of Appeals reversed that ruling. *Diaz, et al. v. Secretary of the State of Florida, et al.*, No. 04-15539 (11th Cir. Sept. 28, 2005). Accordingly, Ms. Diaz’s claims for injunctive relief are not moot because they are capable of repetition yet evading review.

2. Defendants' Lack of Timely Notice and Opportunity To Cure Are Arbitrary and Irrational.

Plaintiffs have alleged facts that show that Defendants' refusal in 2004 to permit corrections to incomplete voter registration applications that were timely submitted, and to add such eligible electors to the voter registration rolls prior to the November 2004 elections, served no rational purpose at all. (TAC at ¶¶ 9-10.) Plaintiffs have alleged it was feasible for Defendant Supervisors, as was the practice in Duval County, to permit a grace period after the 2004 voter registration deadline to allow registrants who had timely submitted voter registration applications to correct any deficiencies and to add those voters to the rolls in time for the November 2004 election. (TAC at ¶¶ 63-68).

Plaintiffs' allegation that there is no rational basis for Florida's statutory prohibition, effective 2006, on Supervisors affording applicants a grace period to correct their application is only strengthened by Florida's implementation of its computerized statewide voter registration application database, pursuant to the Help America Vote Act, which increases the efficient processing of voter registration applications. (TAC at ¶ 18-19); *cf. Anderson*, 460 U.S. at 796 (taking changes in information technology into account in assessing reasonableness of Ohio's statutory requirement that independents formally declare their candidacy at least seven months in advance of the general election); *Dunn*, 405 U.S. at 358 ("Given modern communications . . . the State cannot seriously maintain that it is 'necessary' to reside for a year in the State and three months in the county in order to be knowledgeable about congressional, state, or even purely local elections.").

3. Defendants Cannot Show that Plaintiffs' Claims Related to Notice and Opportunity To Correct Must be Dismissed as a Matter of Law.

Defendants argue that Florida's twenty-nine day voter registration deadline is constitutionally permissible as a matter of law and that permitting a grace period would in effect unlawfully shorten the registration deadline. Neither argument has any merit.

The Constitutionality of any given voter registration deadline is not presumed and any registration cut-off is subject to heightened scrutiny, given that such deadlines place the most severe burden on the right to vote of eligible voters: absolute denial of the right to vote in the upcoming election. *Burns v. Fortson*, 410 U.S. 686 (1973) (affirming district court's judgment upholding Georgia's 50-day registration cutoff for all but Presidential or Vice Presidential candidates after "State offered extensive evidence to establish" that "the 50-day period is necessary to promote . . . the orderly, accurate, and efficient administration of state and local elections, free from fraud"; applying strict scrutiny); *Ayers-Schaffner v. DiStefano*, 37 F.726 (1st Cir. 1994) (opportunity to vote in one election could not be relied upon to abridge total denial of the right to vote in a subsequent election).

The cases Defendants rely on for their contentions that a 29-day close of books satisfies constitutional requirements as a matter of law, and that a grace period is not required, offer them little support. To the contrary, in each case cited, the court insisted not only on "determin[ing] the legitimacy and strength of each . . . interest [set forth by the state to justify the burden]; it also . . . consider[ed] the extent to which those interests ma[de] it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 796-806 (1983). The *Anderson Court* examined at length the legitimacy of three separate interests identified by the State and the extent to which a March filing date for Presidential candidates served them. *Id.* (affirming trial courts summary judgment in favor of plaintiffs).

In *Marston v. Lewis*, the Court rested its decision to uphold 50-day close of books for registering to vote for state and local officials (but not for President or Vice President) on the "realities of Arizona's registration and voting procedures," which suffered from unusual disability due to its reliance on massive volunteer deputy registrar system making early cut-off "necessary" to ensure accurate registration lists. 410 U.S. 679, 680-81 (1973) (reversing preliminary injunction insofar as appealed from). In *Burns v. Fortson*, 410 U.S. 686 (1973) (affirming judgment), "[t]he State offered extensive evidence to establish 'the need for a 50-day registration cut-off period' for non-Presidential candidates). In *Rosario v. Rockefeller*, the Supreme Court upheld New

York's registration cut-off for party primaries based on finding that it served "particularized legitimate purpose" of preventing party "raiding." 410 U.S. 752, (1973) (confirming reversal of judgment). Finally, in *Acorn v. Bysiewicz*, 413 F.Supp.2d 119 (D. Conn. 2005), a district court rendered a judgment after trial upholding Connecticut's seven-day preregistration requirement for non-Presidential offices and, in so doing, engaged in detailed examination of the evidence in support of interests put forward by the State.

III.
DEFENDANTS' FAILURE TO PROVIDE NOTICE OF INCOMPLETE APPLICATIONS TO PROSPECTIVE VOTERS, AS ALLEGED, SUPPORTS AN OFFICIAL-CAPACITY ACTION

"To prevail on a section 1983 claim against a local government entity, a plaintiff must prove both that her harm was caused by a constitutional violation and that the government entity is responsible for that violation." *Wyke v. Polk County Sch. Bd.*, 129 F.3d 560, 568 (11th Cir. 1997). Here, contrary to Defendants' assertions, Plaintiffs clearly allege a constitutional violation, see *infra*, and, that government entities – the Defendant Supervisors of Elections – were, at a minimum, responsible for that violation by failing to provide notice to prospective voters of incomplete applications and in refusing to process applications on which the mental incapacity box had not been checked during the 2004 election cycle.

Defendants assert that the Plaintiff prospective voters do not allege that Defendants' "failure to give timely notice was the result of a policy or custom of the Defendants" and do not identify any "specific directives, policies, or customs" which violate Plaintiffs' constitutional rights that have been "adopted" by Defendants. (Snipes Mem. at 7-8.) Defendants set too high a bar. Plaintiffs need not show that any formal policies have been "adopted" by Defendants. Rather, they must only show that Defendants engaged in "a course of action consciously chosen from among various alternatives."⁷ *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985). Such a standard is

⁷ This standard is consistent with the Supreme Court's instruction that the "official policy" requirement "was intended to distinguish acts of the municipality from acts of employees in order

easily met by the allegation in the TAC that during the 2004 registration cycle the Defendant Supervisors “failed to provide timely and adequate written notice to many Floridians, including Plaintiffs and their members, that their registration forms were incomplete, and failed to provide those applicants with an opportunity to correct their application in time to be eligible to vote in the November 2004 election.” (TAC ¶ 59.)⁸ As Defendants point out, Plaintiffs also identified two specific instances of a Defendant Supervisor’s failure to timely notify prospective voters of incomplete applications in 2004. (TAC ¶¶ 104- 106; Snipes Mem. at 7.) Plaintiffs further allege that a large volume of voter registration applications will be submitted shortly before the voter registration deadline in 2006, many applicants will inadvertently neglect to check the mental incapacity, felon status, or citizenship checkbox, and Defendant Supervisors will fail to provide timely notice to applicants of the purported deficiencies in their application. (TAC at ¶20.) Of course, discovery may reveal additional formal or informal policies in this regard. Nonetheless, at this early stage, the allegations in the TAC are certainly sufficient to survive a motion to dismiss.

Defendants’ assertion that County Supervisors have no discretion to establish election policies and customs for their county and thus cannot be liable under § 1983 is absurd. As to the 2004 registration cycle, one need only look to the Duval, Hillsborough and Manatee County Supervisors who, in 2004, notified prospective voters of inadequacies in their applications and provided additional time for the voters to provide the additional necessary information. TAC ¶¶ 64- 67. Thus, the cases cited by Defendants, *Caruso v. City of Cocoa, Florida*, 260 F. Supp. 2d. 1191 (M.D. Fla. 2003) and *Grech v. Clayton County, Georgia*, 335 F. 3d 1326 (11th Cir. 2003) are inapplicable

to limit municipal liability to conduct for which the municipality is actually responsible.” *Pembaur v. Cincinnati*, 475 U.S. 469, 478 (1986) Here, the allegation, which must be accepted as true at this motion to dismiss stage, is not that the failure to provide notice was the decision of a rogue employee or an inadvertent one-time mistake, but rather was a decision made by the County Supervisor offices which affected many Floridians.

⁸ Defendants note that Plaintiffs have not provided any examples of a failure to timely notify in 2006. MTD at 7. This is rather unsurprising given that the TAC was filed before the 2006 registration deadlines and thus, by definition, no late notice could yet have occurred. Nonetheless, the TAC did allege facts from which one can infer that similar notice problems will arise in 2006. See TAC ¶20.

because, with respect to the relevant notice and grace policies the SOEs clearly do have final authority. While state election procedures have certainly become more standardized since 2004, there is no doubt that the County Supervisors still maintain significant discretion over issues such as the timing of notice of the disposition of a voter registration application that make them appropriate defendants in a § 1983 action.

In addition, none of the recent Eleventh Circuit cases addressing § 1983 claims against Florida County Supervisors of Elections have found them to be inappropriate defendants for a § 1983 action.⁹ See *Harris v. Iorio*, No. 96-2682, 1998 WL 34309464 (11th Cir. Jan. 26, 1998) (affirming district court's dismissal of § 1983 claim against County Supervisor of Election without questioning that official is appropriate defendant in § 1983 case); *Troiano v. Supervisor of Elections in Palm Beach County, Fla.*, 382 F.3d 1276 (11th Cir. 2004) (affirming dismissal of § 1983 claim against County Supervisor because controversy was moot, not because County Supervisor was not appropriate defendant); *Wexler v. Lepore*, 385 F.3d 1336, 1341 (11th Cir. 2004) (vacating a district court order that dismissed § 1983 claims against County Supervisors based on *Younger* abstention, and remanding for proceedings on the merits); see also *Wexler v. Lepore*, 342 F.Supp.2d 1097 (S.D. Fla. 2004) (reaching merits of § 1983 claims against County Supervisors on remand).

IV.

AN ACTION AGAINST THE COUNTY SUPERVISORS OF ELECTIONS IS NOT BARRED BY THE ELEVENTH AMENDMENT

The Defendant Supervisors contend that they are entitled to Eleventh Amendment immunity because they function as “arms of the state” according to the test outlined by the Eleventh Circuit in *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003) (en banc), and that, as a result, plaintiffs’ claims against them should be dismissed. Based upon the facts alleged in the TAC, however, the Defendants Supervisors’ application of

⁹ At a bare minimum, the Supervisors remain necessary parties to this litigation. Under Florida law, the Supervisors are responsible for processing determining eligibility of voter registration applicants, processing voter registration applications, and adding eligible applicants to the voter rolls. (TAC at ¶ 51). If Plaintiffs prevail and the Court orders that certain applicants be added to the rolls, the Supervisors must necessarily be parties to that relief. (TAC at ¶¶ 72-74 (citing Fla. Stat. §§ 97.052(6), 97.053(7))).

Manders is incorrect and thus Eleventh Amendment immunity does not apply and dismissal is not warranted at this stage.

Government entities properly considered “arms of the state” are entitled to Eleventh Amendment immunity. *See Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274, 280 (1977); *see also Manders*, 338 F.3d at 1308. The Eleventh Amendment, however, does not provide any protection to counties or municipal corporations. *See Mt. Healthy*, 429 U.S. at 280; *see also Lincoln County v. Luning*, 133 U.S. 529, 530 (1890); *Moor v. County of Alameda*, 411 U.S. 693, 717-721 (1973). Here, the Defendant Supervisors of Elections are county officials who cannot be considered agents of the state, and who therefore can find no protection in the Eleventh Amendment. *See* Defendant Secretary of State’s Motion to Dismiss and Memorandum of Law in Support Thereof, No. 04-22572-CIV-King/O’Sullivan, filed Oct. 19, 2004 at 13 (“Nowhere . . . did the Plaintiffs allege, nor can they allege, that the Secretary has the authority to require the supervisors of elections to undertake or not undertake – any of the acts by which Plaintiffs claim to be ‘aggrieved’.”); *see also Al-Hakim v. State of Fla.*, 892 F. Supp. 1964, 1977 (M.D. Fla 1995) (“Defendant . . . concedes that, as Supervisor of Elections in Hillsborough County, she is not entitled to Eleventh Amendment immunity from injunctive relief for her executive actions”). *Lawson v. Shelby County*, 211 F.3d 331, 335-36 (6th Cir. 2000) (overturning dismissal because county election commission is not protected by the Eleventh Amendment).

In *Manders*, the Eleventh Circuit weighed four factors in determining whether an entity is an “arm of the state” when it carries out a particular function: (1) how state law defines the entity; (2) the degree of control the state maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity. 338 F.3d at 1309; *accord Miccosukee Tribe of Indians of Fla. v. Fla. State Athletic Comm.*, 226 F.3d 1226, 1231 (11th Cir. 2000). In applying these four factors, the Eleventh Circuit examined the relevant provisions of state law. *Manders*, 388 F. 3d at 1309.

Application of the *Manders* factors makes clear that the Defendant Supervisors are agents of the county – and not “arms of the state” – and thus not entitled to Eleventh Amendment immunity.

First, Florida state law defines the Supervisors of Elections as county officers. For instance, Article VIII of the Florida Constitution, entitled Local Government, provides in part as follows:

SECTION 1. Counties.

(a) POLITICAL SUBDIVISIONS. The state shall be divided by law into political subdivisions called counties. Counties may be created, abolished or changed by law, with provision for payment or apportionment of the public debt.

....

(d) COUNTY OFFICERS. There shall be elected by the electors of each county, for terms of four years, a sheriff, a tax collector, a property appraiser, a supervisor of elections....

Fla. Const. Art. 8, Sec. 1(d); *Cf. Hufford v. Rodgers*, 912 F.2d 1338, 1341 (11th Cir. 1990) (under Section 1 of Article 8 of the Florida Constitution, sheriff is a county official, not an arm of the state); *In re Polygraphex Systems, Inc.*, 275 B.R. 408, 413-14 (M.D. Fla. 2002) (same with respect to property appraiser). Not only are County Supervisors elected by the residents of Florida’s various counties,¹⁰ but Florida law recognizes that SOEs represent the counties in which they serve, not state or municipal governments. *See* Fla. Stat. § 101.733(1) (in case of election emergency, County Supervisors represent county, not state or municipality); *see also Touchston v. McDermott*, 234 F.3d 1133, 1136 (11th Cir. 2000) (“[T]he actual conducting of elections takes place in each of the various counties of Florida under the auspices of the county supervisor of elections”). Furthermore, along with a county court judge and the chair of the board of county commissioners, the Supervisor serves on the county

¹⁰ As Defendants admit, Defendant Sola is not elected, but rather is appointed by the Miami-Dade County Commission. (Snipes Mem. at 12 n.19.)

canvassing board, which is responsible for, *inter alia*, tallying absentee and provisional ballots cast in each county. See Fla. Stat. § 102.141.

The Defendant Supervisors completely misconstrue the meaning of this *Manders* factor. They argue that, because the role of Supervisors is defined by state law, rather than county or local ordinance, the County Supervisors must be agents of the state. But the first *Manders* factor does not ask *whether* state law defines an entity, it asks “*how* state law defines the entity.” *Manders*, 388 F. 3d at 1309 (emphasis added). See *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 n. 5 (applicability of Eleventh Amendment immunity “can be answered only after considering the provisions of state law that define the agency’s character”). And, as demonstrated above, state law defines the SOEs as agents of the counties.

Second, the State has granted the Supervisors of Elections broad authority in the electoral process. The Defendant Supervisors contend that the Supervisors are agents of the state because decisions on questions such as registration deadlines and the design of registration forms are set by the state. While certain election policies are set at the State level, the Supervisors are the official custodians of the voter registration files, see Fla. Stat. § 92.295, and have the exclusive control of matters pertaining to the registration of voters, see Fla. Stat. § 97.053. The Supervisors appoint county precinct election boards, Fla. Stat. § 102.012, which “possess full authority to maintain order at the polls and enforce obedience to its lawful commands during an election and the canvass of the votes.” Fla. Stat. § 102.031.

Moreover, elections are conducted in each of the various counties under the auspices of the county Supervisor of Elections. For instance, county canvassing boards, of which the Supervisor of Elections is a member, are responsible for counting the votes given to each candidate, Fla. Stat. § 102.141, and they may, *sua sponte*, order mechanical recounts “[i]f there is a discrepancy which could affect the outcome of an election.” Fla. Stat. § 102.166(3)(c). If the Supervisor is unable to serve or is disqualified from serving on the county canvassing board, the chair of the county commission replaces the Supervisor with a member of the county commission and the Supervisor acts as an advisor to the canvassing board. Fla. Stat. § 102.141(1)(b). Only after the county

canvassing board certifies the votes are the county results in any race involving a state or federal office are forwarded to the Department of State. Fla. Stat. § 102.111(1); Fla. Stat. § 102.112. As such, the county Supervisors have extensive control separate and distinct from the State and thus the state does not “control” the Supervisors for *Manders* analysis purposes.

Third, as Defendants admit, each Supervisor of Election’s primary source of funding is from the county as approved by their respective board of county commissioners, not from the State, and the county commissioners exercise control over how the County Supervisors spend their budget. Fla. Stat. § 129.202; MTD at 13. In fact, the County Supervisors have complete independence to purchase equipment, select personnel, and set the salaries of their employees. *Id.* The Supervisors’ salaries are paid by the board of county commissioners, not the State. Fla. Stat. § 98.015(2). And all clerks, inspectors, and deputy sheriffs performing work at election precincts are paid by the county Supervisors. Fla. Stat. § 102.021. Similarly, if any county Supervisor of Elections undertakes an investigation into fraudulent registration or voting, the funds to support such an investigation are not provided from State coffers, but are appropriated by the boards of county commissioners. Fla. Stat. § 104.42.

Fourth, any costs associated with an adverse judgment against the supervisors would likely be borne by each Supervisor’s office and, as a result of primary funding by the counties, the Boards of County Commissioners’ general revenue fund. At this early stage of the proceedings, there is certainly no information to the contrary that would make this *Manders* factor lean against a finding that the Supervisors are not agents of the state.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court deny Defendants' motions to dismiss the Third Amended Complaint.

Dated: West Palm Beach
Florida, August 28, 2006

RESPECTFULLY SUBMITTED,

/s/ Mary Jill Hanson

Mary Jill Hanson, Esq.
Florida Bar No.: 0727369
Hanson, Perry & Jensen, P.A.
400 Executive Center Drive, Suite 207
West Palm Beach, Florida 33401
Telephone: 561-686-6550
Fax: 561-686-2802
E-mail:

**Judith A. Browne
**Elizabeth S. Westfall
Advancement Project
1730 M Street, NW, Suite 910
Washington, DC 20036
Phone: 202-728-9557
Fax: 202-728-9558
E-mail:

**Michael Halberstam
Paul, Weiss, Rifkind, Wharton
& Garrison LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Phone: 212-373-3000
Fax: 212-757-3990
E-mail:

* Jonathan P. Hiatt
AFL-CIO
815 Sixteenth Street, NW
Washington, DC 20006
Phone: 202-637-5053
Fax: 202-637-5323
E-mail:

Manny Anon, Jr.
Florida Public Employees Council 79
3064 Highland Oaks Terrace
Tallahassee, Florida 32301
Phone: 850-222-0842
Fax: 850-224-6926
E-mail:

**Elliot Minberg
People for the American Way Foundation
2000 M Street, Suite 400
Washington, DC 20036
Phone: 202-467-2392
Fax: 202-293-2672
E-mail:

* Judith A. Scott
* John J. Sullivan
SEIU
1313 L. Street, NW
Washington, DC 20005
Phone: 202-898-3453
Fax: 202-898-3323
E-mail:

Attorneys for Plaintiffs

* Pro hac vice motion to be filed;
** Admitted pro hac vice

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-22572-Civ-King

EMMA YAIZA DIAZ et al.,

Plaintiffs,

v.

SUE M. COBB, Secretary of State of Florida,
et al.,

Defendants.

ORDER

THIS CAUSE having come before the Court upon the Motion by the Plaintiffs for permission to file a Consolidated Memorandum of Law in Opposition to Defendants' Motions To Dismiss the Third Amended Complaint in excess of twenty pages pursuant to S.D. Fla. L.R. 7.1.C.2. The Court having reviewed the motion and being otherwise fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED that Plaintiffs' motion is granted, and the Exhibits attached to Plaintiffs' Motion are hereby deemed file by the Court.

DONE AND ORDERED this ____ day of _____, 2006 at Miami-Dade County, Florida.

HON. JAMES LAWRENCE KING
United States District Judge