

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' MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION
TO DISMISS THE SECOND AMENDED COMPLAINT BY DEFENDANTS
COBB, SNIPES, HOLLAND, COWLES, AND ANDERSON**

TABLE OF CONTENTS

I. STANDARD OF REVIEW 4

II. PLAINTIFFS DO NOT SEEK NOMINAL DAMAGES FROM THE FLORIDA SECRETARY OF STATE, BUT ONLY INJUNCTIVE AND DECLARATORY RELIEF TO WHICH THEY ARE ENTITLED..... 4

III. THE COMPLAINT STATES CLAIMS UNDER THE VRA AND THE NVRA 6

 A. Defendants’ Actions Violate the Materiality Provision of the VRA and the Necessity Provision of the NVRA..... 6

 1. The VRA and the NVRA Prohibit States From Disqualifying Voters Based on Immaterial Errors or Omissions on Their Voter Registration Applications 6

 2. Failure To Check the Citizenship Box on the 2004 Form Was an Immaterial Omission..... 7

 3. Failure To Check the Citizenship Box on the 2006 Form and Failure To Check the Mental Capacity and Felon Boxes on both the 2004 and 2006 Forms Were Immaterial Omissions..... 9

 4. Defendants’ Ongoing Violation of the VRA (in 2006)..... 10

 5. The NVRA And HAVA Do Not Nullify The Materiality Provision of the VRA 11

 B. Defendants’ Unequal Treatment of Applicants Violates Section 1971(A)(2)(A) of the VRA..... 12

 C. Requiring Applicants to Check the Mental Incapacity Box Functions as A Literacy Test in Violation of the VRA..... 14

IV. THE COMPLAINT STATES A CLAIM UNDER THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION..... 15

 1. Defendants’ Policy of Rejecting Applications Fails Even a Rational Basis Test..... 18

 2. Defendants’ Practices With Regard to the Checkboxes Are Not Reasonable Time, Place or Manner Restrictions..... 19

V. DEFENDANTS’ CONTENTION THAT A CLASS SHOULD NOT BE CERTIFIED DOES NOT SUPPORT THEIR MOTION TO DISMISS..... 20

TABLE OF AUTHORITIES

Page

CASES

<i>Bullock v. Carter</i> , 405 U.S. 134 (1972)	19
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992)	15, 16, 18, 19
<i>Chepstow Ltd. v. Hunt</i> , 381 F.3d 1077 (11th Cir. 2004).....	4
<i>Common Cause of Georgia v. Billups</i> , 406 F. Supp. 2d 1326 (N.D.Ga. 2005).....	16, 19
<i>Condon v. Reno</i> , 913 F. Supp. 946 (D.S.C. 1995).....	6
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972)	16
<i>Friedman v. Snipes</i> , 345 F. Supp. 2d 1356 (S.D. Fla. 2004).....	6, 16, 19
<i>Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.</i> , 528 U.S. 167, 180-81 (2000)	10
<i>Fulani v. Krivanek</i> , 973 F.2d 1539 (11th Cir. 1992).....	16
<i>Howlette v. City of Richmond</i> , 485 F. Supp. 17 (E.D. Va. 1978).....	8
<i>Hoyle v. Priest</i> , 265 F.3d 699 (8th Cir. 2001)	8
<i>Hutton v. Strickland</i> , 919 F.2d 1531 (11th Cir. 1990).....	4
<i>Katzenbach v. Morgan</i> , 384 U.S. 641 (1966)	14
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	10
<i>Marston v. Lewis</i> , 410 U.S. 679 (1973)	16, 17
<i>McKay v. Altobello</i> , Civ. No. 96-3458, 1996 WL 635987 (E.D. La. Oct. 31, 1996)	6
<i>Milburn v. United States</i> , 734 F.2d 762 (11th Cir. 1984).....	4
<i>Montero v. Meyer</i> , 861 F.2d 603 (10th Cir. 1988), <i>cert. denied</i> , 492 U.S. 921 (1989).....	8
<i>Mt. Healthy School District v. Doyle</i> , 429 U.S. 274 (1977)	4
<i>Oregon v. Mitchell</i> , 400 U.S. 112 (1970)	13
<i>Presley v. Etowah County</i> , 502 U.S. 491 (1992)	13

<i>Rosario v. Rockefeller</i> , 410 U.S. 752 (1973)	16, 17, 19
<i>Sandusky County Democratic Party v. Blackwell</i> , 387 F.3d 565 (6th Cir. 2004)	10, 18
<i>Schwier v. Cox</i> , 412 F. Supp. 2d 1266 (N.D. Ga. 2005).....	6, 8, 9
<i>Schwier v. Cox</i> , 439 F.3d 1285 (11th Cir. 2006).....	9
<i>Shivelhood v. Davis</i> , 336 F. Supp. 1111 (D.Vt. 1971).....	12
<i>Stewart v. Blackwell</i> , 2006 WL 1042326 (6th Cir. 2006).....	19
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	16, 19
<i>Swierkiewicz v. Sorema N.A.</i> , 534 U.S. 506 (2002)	4
<i>Timmons v. Twin Cities Area New Party</i> , 520 U.S. 351 (1997)	16
<i>United States v. State of Louisiana</i> , 265 F. Supp. 703 (E.D. La. 1966)	14
<i>Ex Parte Young</i> , 209 U.S. 123 (1908)	4

STATUTES

Fla. Stat. ch. 97.041 (2005)	7
Fla. Stat. ch. 97.051 (2006)	9
Fla. Stat. ch. 97.061 (2006)	3
H.R. Rep. No. 89-439, <i>reprinted in</i> 1965 U.S.C.C.A.N. 2437, 2442	14
H.R. Rep. No. 91-397, <i>reprinted in</i> 1970 U.S.C.C.A.N. 3277, 3277, 3279, 3284.....	12
H.R. Rep. No. 103-9, <i>reprinted in</i> 1993 U.S.C.C.A.N. 105	10, 12
S. Rep. No. 103-6.....	12
42 U.S.C. § 1971(a)(2).....	12
42 U.S.C. § 1971(a)(1) (2006).....	6
42 U.S.C. § 1971(a)(2).....	6, 12
42 U.S.C. § 1973aa (2006).....	14
42 U.S.C. § 1973b(c) (2006)	14
42 U.S.C. § 1973gg-4(a) (2006)	13
42 U.S.C. § 1973gg-7(b)(1) (2006)	11
42 U.S.C. § 1973gg-7(b) (2006).....	6, 13
42 U.S.C. § 15483(b)(4) (2006)	11, 12

Plaintiffs submit this Opposition to the Motion to Dismiss the Second Amended Complaint (“SAC”)¹ by Defendants Cobb, Snipes, Holland, Cowles, and Anderson (the “Motion to Dismiss”).²

Preliminary Statement

Thousands of eligible Florida electors were denied the right to vote in the November 2004 federal elections as a result of Defendants’ improperly restrictive voter registration policies – and thousands more face certain disenfranchisement in November 2006 if Plaintiffs are denied declaratory and injunctive relief in this action. In 2004, and thereafter, Defendants refused to process voter registration forms where the applicant neglected to check one of three redundant boxes, even though the applicants provided the very information elicited by the checkboxes by signing an oath attesting to their eligibility to vote. Indeed, effective in 2006, Defendants’ policy of rejecting such “incomplete” applications became mandatory under Florida law.

Defendants’ policies and practices clearly violate the materiality provision of the Voting Rights Act (“VRA”), which prohibits the rejection of voter registration applications that omit information that is immaterial to determining whether the applicant is eligible to vote, as well as other federal statutes and constitutional provisions. Information that is redundant of information provided elsewhere on the form – such as that sought by the three redundant checkboxes at issue here – is by definition immaterial. What is more, as far as Plaintiffs are aware, Defendants do not make any use of the information elicited by the checkboxes to determine if applicants are eligible electors.

Defendants fail to cite any cases holding that their actions do not violate federal statutory and constitutional law. Instead, Defendants make the wholly unsubstantiated claim that accepting applications omitting any of the required checkmarks, no matter how redundant, would result in widespread voter registration fraud. This defense necessarily fails at this stage in the litigation. On a motion to dismiss, all of Plaintiffs’ allegations must be accepted as true, and all

¹ This brief responds to Defendants’ motion to dismiss the SAC, which was filed on May 16, 2006, after the Court granted Plaintiffs’ leave to submit the Second Amended Complaint. It differs from Plaintiffs’ response, on May 8, 2006 to moving Defendants’ motion to dismiss the First Amended Complaint, filed April 21, 2006, only to the extent that it (1) references the new plaintiff, John Lanham, and (2) responds to Defendants’ new arguments regarding sovereign immunity and this Court’s jurisdiction under Article III of the U.S. Constitution.

inferences must be drawn in Plaintiffs' favor. Where, as here, Plaintiffs' complaint states valid claims, Plaintiffs are entitled to the opportunity to take discovery to test Defendants' unsubstantiated factual allegations.

Accordingly, Defendants' motion to dismiss should be denied.

Statement of the Case

The Individual Plaintiffs, as well as many members of the Union Plaintiffs (the "Injured Union Members"), are eligible electors who have been, and continue to be, denied the right to vote because of Defendants' unduly restrictive voter registration practices and procedures. (SAC, ¶ 28-35.) In 2004, prior to the federal elections, the Individual Plaintiffs and the Injured Union Members affirmed under oath on their Florida voter registration forms that they met each of the eligibility requirements for voting set forth in plain language on the face of the application.³ The Individual Plaintiffs and the Injured Union Members therefore provided all the information necessary for the Defendant County Supervisors of Elections to determine their eligibility to vote under the Constitution and the laws of the State of Florida. However, the Individual Plaintiffs as well as the Injured Union Members each failed to check one or more of three boxes: a box indicating that he or she is a citizen, a box indicating that he or she has not been declared mentally incapacitated, and a box indicating that he or she is not a convicted felon. The statement next to the box concerning mental capacity – "I affirm that I have not been adjudicated mentally incapacitated with respect to voting, or, if I have, my competency has been restored." – was particularly confusing. (SAC, p. 22.)

All of the Defendant County Supervisors considered applications incomplete if checks were omitted in the mental incapacity or felon status boxes, even though, by swearing to the oath at the end of the form, applicants provided all of the information that would be conveyed by checking the boxes at issue. (SAC, p. 17.) One of the Defendant County Supervisors also rejected applications where the citizen box was not checked. Four of the five Defendant County Supervisors of Elections were willing to process forms where the applicant had failed to check only the citizenship box; they apparently deemed the omission of the citizenship checkmark immaterial where the applicant had already signed the oath. (SAC, pp. 18-19.) The Defendant

² Defendant Miami-Dade Supervisor of Elections has filed a separate motion for a more definite statement and does not join this Motion.

County Supervisors of Elections refused to process the voter registration applications of the Individual Plaintiffs they deemed incomplete. Individual Plaintiffs and the Injured Union Members were not added to the voter rolls notwithstanding that they were otherwise eligible electors, and had so indicated once (by signing the oath) but not twice (by not checking the boxes at issue). (SAC, pp. 27-32.) The Defendant Florida Secretary of State, Florida's chief election officer, failed to address – and in some instances affirmatively directed and even encouraged – the Defendant County Supervisors of Elections' unlawful failure to process applications. (SAC, pp. 18-19.)

In many cases, Defendants failed to provide notice to individuals whose applications were deemed incomplete in time for those individuals to amend their applications before the close of the rolls prior to the 2004 election. (SAC, pp. 25-27.) As a result, the Individual Plaintiffs, each of the Injured Union Members, and over 14,000 of Florida's eligible electors, all of whom timely submitted applications prior to the 2004 federal elections, but failed to check one or more of the three redundant boxes on the form, were denied their right to vote in the 2004 federal elections. (SAC, p. 3.)

Effective in 2006, the Florida legislature prescribed a slightly modified voter registration form. Fla. Stat. ch. 97.061 (2006). The language next to the three checkboxes at issue in this case remained the same. The oath on the 2006 form was changed to state: "I do solemnly swear (or affirm) that . . . I am qualified to register as an elector under the Constitution and the laws of the State of Florida, and that all information provided in this application is true." It no longer states: "I am a citizen of the United States and a legal resident of Florida. *Id.* (SAC, p. 34.)

Also effective in 2006, the Florida legislature enacted laws *requiring* the Defendant Supervisors to deem incomplete applications in which any of the three boxes at issue were not checked. (SAC, p. 32.) Thus, the Florida legislators made mandatory Defendants' unlawful 2004 practice. Indeed, applications that would have been processed by four out of the five Defendant County Supervisors in 2004 – because the only omission was a mark in the citizenship box – have not been and will not be processed in 2006. Accordingly, Defendants continue to violate the Individual Plaintiffs' and the Injured Union Members' fundamental rights to vote. (SAC, p. 35-36.)

³ The top of the Florida voter registration form used in 2004 clearly indicated that in order to be eligible to vote, an applicant must be a U.S. citizen, mentally competent, and not be a convicted felon.

Argument

I. STANDARD OF REVIEW

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) “may be granted only when the defendant demonstrates ‘beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” *Chepstow Ltd. v. Hunt*, 381 F.3d 1077, 1080 (11th Cir. 2004) (citation omitted); *accord Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (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).

II. PLAINTIFFS DO NOT SEEK NOMINAL DAMAGES FROM THE FLORIDA SECRETARY OF STATE, BUT ONLY INJUNCTIVE AND DECLARATORY RELIEF TO WHICH THEY ARE ENTITLED

Defendants contend that Plaintiffs have sought nominal damages from the Secretary of State of Florida, Defendant Cobb, and that this relief is barred by Eleventh Amendment immunity, which prohibits lawsuits by citizens against the States. (Motion to Dismiss at 5). Defendants misread the SAC, which seeks nominal damages from the Defendant County Supervisors of Elections, but not from Defendant Cobb.⁴ (SAC, pp. 6, 48). Rather, Plaintiffs seek declaratory and injunctive relief against Defendant Cobb. Defendants do not contest – and they cannot – that the Eleventh Amendment permits suits for declaratory and injunctive relief against officers of the several States, *Ex Parte Young*, 209 U.S. 123 (1908) (Eleventh Amendment did not bar action in federal court seeking to enjoin State attorney general from enforcing unconstitutional statute), as well as suits for damages against county officials, *Mt. Healthy School District v. Doyle*, 429 U.S. 274, 280 (1977); *Hutton v. Strickland*, 919 F.2d 1531, 1542 (11th Cir. 1990) (Eleventh Amendment does not prevent damages aware against county).

Defendants erroneously argue in their present motion that Plaintiffs’ claims against the Secretary must fail, because there is no case or controversy and the requested injunctive or declaratory relief against the Secretary would not redress Plaintiffs’ injuries. (Motion to

⁴ What is plain from the SAC is that Plaintiffs have made no “concession” at all in this regard – as Defendants claim in their Motion to Dismiss. (Motion to Dismiss, p. 5 n.5).

Dismiss, p. 5-6). But Plaintiffs seek the registration of eligible voters, whose applications were deemed incomplete at any time between 2004 and the present, because they did not check the boxes at issue. Defendants expressly seek that this Court direct Defendant Cobb to instruct all Supervisors of Elections to register such voters.⁵

Further, as the complaint alleges, in 2004 the Secretary sent a letter to each of Florida's 67 Supervisors of Elections, including the Defendant Supervisors, that purported to "conclude" as a matter of law that an application is incomplete and cannot be processed unless the citizenship box has been checked, even if the applicant has signed the oath affirming that he or she is a U.S. Citizen. (SAC, p. 18). As a result, the applications of hundreds, if not thousands of eligible Florida electors, were not processed, including applications in defendant Palm Beach County. Plaintiffs seek a declaratory judgment that this directive violated the federal laws and the U.S. Constitution. In order to place eligible voters on the rolls in 2006, the Defendant Supervisors of Elections must disregard the Secretary's determination. Therefore, declaratory judgment that such determination was unlawful is appropriate and necessary to redress Plaintiffs' injuries.

New Florida statutes also give rise to a case or controversy against the Secretary. The new laws prohibit the Secretary from permitting that voter applicants whose forms are missing a checkmark in any of the described checkboxes be listed as "active" voters on the new statewide registration system, which system is created and maintained by the Secretary. (SAC, pp. 32-33 (citing Fla. Stat. chs. 97.012(2), 97.052 and 97.053 (2006))). The new laws further leave no doubt that neither the Secretary of State nor the Defendant Supervisors has any discretion with regard to the manner of eliciting information concerning the legal competence of applicants. *Id.* For these and other reasons, the relief Plaintiffs seek must include relief against the Secretary.⁶

⁵ The Secretary is necessarily involved in the registration process, because the Secretary is ultimately responsible for ensuring that every eligible applicant for voter registration is registered to vote. (SAC, p. 12-13 (citing 42 U.S.C. § 1973gg-6(a)(1)); the Secretary issues rules and regulations governing the circumstances under which Supervisors of Elections are permitted to place voter applicants onto the new statewide voter registration system in 2006, and creates and maintains that statewide voter registration system.

⁶ Defendants incongruously assert that Plaintiffs include claims against the Secretary for the sole purpose of obtaining attorneys fees. (Motion to Dismiss, p. 6). This assertion is nonsensical, given that Plaintiffs may recover fees from the County Defendants if they prevail on the merits, pursuant to 42 U.S.C. § 1988.

III. THE COMPLAINT STATES CLAIMS UNDER THE VRA AND THE NVRA

A. Defendants' Actions Violate the Materiality Provision of the VRA and the Necessity Provision of the NVRA

1. *The VRA and the NVRA Prohibit States From Disqualifying Voters Based on Immaterial Errors or Omissions on Their Voter Registration Applications*

The VRA prohibits any person acting under color of state law from denying an eligible elector the right to vote based on an error or omission on an application form where “*such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.*” 42 U.S.C. § 1971(a)(2)(B) (2006) (emphasis is supplied); *Schwier v. Cox*, 439 F.3d 1285 (11th Cir. 2006) (Georgia’s requirement that voter applicants supply their Social Security Number on voter registration violated the VRA’s materiality provision and was actionable under § 1983).⁷ Thus, under the VRA, not every failure to comply with a State’s registration laws and procedures prevents the applicant from being placed on the voter rolls. Only material errors or omissions may be grounds for vote denial.

An error or omission is immaterial if the erroneous or omitted information is not necessary or required for the registrar to determine whether the applicant is qualified to vote. *Schwier v. Cox*, 412 F. Supp.2d 1266, 1276 (N.D.Ga. 2005) (VRA forbids the practice of disqualifying potential voters for their failure to provide information irrelevant to their eligibility to vote).⁸ The NVRA similarly instructs States that State voter registration forms may require only such information “*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) (2006); *Condon v. Reno*, 913 F. Supp. 946, 953 (D.S.C. 1995) (“the NVRA requires the state mail registration form to include only such identifying

⁷ Defendants argue that § 1973(a)(2)(B) is inapplicable to this case, because it pertains only to racial and other minorities protected under the VRA and Plaintiffs have not alleged disparate impact. The statute, however, makes clear that “any individual” is protected “without distinction of race, color, or previous condition of servitude.” 42 U.S.C. § 1971(a)(1) (2006); *see also Schwier*, 412 F. Supp.2d 1266 (N.D. Ga. 2005) (prevailing under § 1971(a)(2)(B) where plaintiffs were white and no disparate impact was alleged), *aff’d on appeal*, 439 F.3d 1285 (11th Cir. 2006).

⁸ *See also Friedman v. Snipes*, 345 F.Supp.2d 1356, 1371 (S.D. Fla. 2004) (VRA prohibits states from disqualifying potential voters based on accidental errors or omissions on a voter registration application); *Condon v. Reno*, 913 F. Supp. 946, 949-50 (D.S.C. 1995) (Congress adopted materiality provision specifically “to deal with the problem of registering as a deterrent to voting.”); *McKay v. Altobello*, Civ. A. No. 96-3458, 1996 WL 635987, at *1 (E.D. La. Oct. 31, 1996) (Section 1971 designed to eliminate discriminatory practices of by “address[ing] errors and accidental omissions in registration . . .”).

information as is necessary to enable the state elections officials to assess the eligibility of the applicants”). Defendants’ challenged policies and practices have the effect of disqualifying voters based on immaterial errors or omissions on their voter registration forms, and for failure to supply information that is not necessary to determine eligibility to vote, all in violation of the VRA and the NVRA.

2. *Failure To Check the Citizenship Box on the 2004 Form Was an Immaterial Omission*

Plaintiffs do not dispute that as a condition to registering its citizens to vote, Florida may ask them to affirm that they are citizens of the United States. Federal and Florida law both require that the State’s registration application ask whether the applicant is a U.S. citizen. In this case, however, the 2004 Florida voter registration form elicited the applicant’s citizenship status by obligating each applicant to sign an oath, under penalty of perjury, attesting that he was “qualified to register as an elector under the Constitution and laws of the State of Florida” as well as that he was “a U.S. citizen.” (SAC, p. 16, Ex. A.)

Additionally, the top of the 2004 registration form prominently identifies and displays the qualifications for eligibility to vote in Florida, including the requirement that the applicant be a U.S. citizen. (SAC, p. 16, Ex. A); *see also* Fla. Stat. ch. 97.041 (2005) (specifying eligibility requirements); Fl. Stat. ch. 97.052(3)(b) (2005) (requiring that the application form be “in plain language” and must contain a “statement specifying each eligibility requirement under s. 97.041.”). Accordingly, the citizenship checkbox is redundant of the oath and therefore immaterial and unnecessary in determining whether applicants are qualified to vote, provided that they have signed the oath stating that they are eligible to vote and that they are U.S. citizens.

The Second Amended Complaint more than adequately stated claims under the materiality provision of the VRA and the necessity provision of the NVRA by alleging that Plaintiffs or their members indicated their status as U.S. citizens by signing the oath on the 2004 registration form, and were improperly not registered and were denied the right to vote based on an immaterial omission on their applications. (SAC, p. 27-31.)

Defendants contend that the information gained from the additional checkmark in the citizenship box is material, because it prevents voter fraud. (Motion to Dismiss at 2, 19). But Defendants’ factual assertion is not a proper ground for dismissing Plaintiffs’ materiality claim as a matter of law. To the contrary, Defendants’ assertions demonstrate the necessity for

discovery related to Defendants' processing of voter registration applications and whether or not the checkboxes deter fraud.

Defendants rely on *Hoyle v. Priest*, 265 F.3d 699 (8th Cir. 2001) and *Howlette v. City of Richmond*, 485 F. Supp. 17 (E.D. Va. 1978), for the proposition that "anti-fraud measures . . . are not inconsistent with the 'materiality' provision of the Voting Rights Act." (Motion to Dismiss at 14.) However, *Hoyle* and *Howlette* are wholly irrelevant to whether Plaintiffs have stated a claim under the VRA or NVRA.⁹ As there has been virtually no discovery in this case since its filing in 2004, there are no facts in the records to support Defendants' contention that requiring applicants to check boxes prevents fraud. In any event, Defendants' unsupported allegations have no bearing on whether Plaintiffs have properly stated a claim, which they have.

Schwier v. Cox, 412 F.Supp.2d 1266 (N.D. Ga. 2005), *aff'd*, 439 F.3d 1285 (11th Cir. 2006), is instructive on the relationship between purported anti-fraud measures and the materiality provisions of the VRA. In *Schwier*, plaintiffs brought suit challenging Georgia's requirement that applicants registering to vote provide their Social Security Numbers, as required by statute, on the ground that the requirement violated the VRA's materiality provision. Georgia law did not require that a person have a Social Security Number in order to be eligible to vote, but the defendants argued, in opposing the plaintiffs' motion for summary judgment, that requiring prospective electors to provide a Social Security Number helped prevent voter fraud.

The district court in *Schwier* granted plaintiffs' motion for summary judgment. While recognizing that "requiring disclosure of a registrant's SSN could help to prevent voter fraud," the district court held that Georgia could not refuse to process an applicant's voter registration form for failing to provide a Social Security Number, because that information was irrelevant to the question of whether the applicant was eligible to vote. *Schwier*, 412 F.Supp.2d at 1276. Here, as in *Schwier*, the information sought is immaterial to determining the voter eligibility. In this case, the information is immaterial in that it is redundant of information already provided by the applicant by signing the required oath. Accordingly, in this case, Plaintiffs' allegations of redundancy and immateriality are more than sufficient to defeat a motion to dismiss.

⁹ Apart from the fact that these cases lack precedential value for this court, both cases are distinguishable in that they involve notarization requirements for signatures on ballot petitions or initiatives, not voter registration applications. States are permitted to impose significant burdens on those who would seek to place an initiative on the ballot, and some courts have even gone so far as to hold that

Footnote con't.

3. *Failure To Check the Citizenship Box on the 2006 Form and Failure To Check the Mental Capacity and Felon Boxes on both the 2004 and 2006 Forms Were Immaterial Omissions*

Effective January 1, 2006, Florida has revised its registration form. The oath no longer contains the words “I am a citizen of the United States.” Fla. Stat. ch. 97.051 (2006). However, both the 2004 and the 2006 Florida forms prominently state the requirements for voter eligibility – including U.S. citizenship, mental competence, and non-felon status – and require the applicant to sign an oath under penalty of perjury including that he is eligible to vote. Thus, the information elicited by the citizenship, mental capacity and felon status checkboxes is redundant of information elicited when the applicant signs the oath attesting to his eligibility to vote. Plaintiffs have alleged that Defendants’ rejection of applications on which the applicant omitted to check any of the three boxes, but has signed the oath attesting to eligibility, violates both the materiality provision of the VRA and the necessity provision of the NVRA.

Defendants’ argument that the mental capacity and felon status checkboxes (as well as the citizenship checkboxes on the 2006 Florida forms) constitute anti-fraud measures that are not inconsistent with the “materiality” provision of the VRA or the “necessity” provision of the NVRA fails for the same reasons set forth above (*see supra*, pp. 6-8).¹⁰

Defendants’ assertion that the mental capacity checkbox serves as an anti-fraud device is particularly thin. Plaintiffs have alleged that thousands of voters have been disenfranchised because they did not check the mental capacity box; that the voters so prevented from registering have not been adjudicated mentally incapacitated; that far more voters are prevented from registering each year on this ground than persons are adjudicated mentally incapacitated with regard to voting in Florida each year; and that the mental capacity checkbox is not referred to in purging voter rolls of ineligible voters. (SAC, p. 21-22.) Further, Plaintiffs could not locate a single case in which a registrant was prosecuted under Florida anti-fraud statutes for wrongfully checking the mental incapacity box, or, for that matter, for attempting to vote, although he had been adjudicated mentally incapacitated. In any case, the parties contradictory assertions only

the VRA does not apply to ballot initiative petitions. *Montero v. Meyer*, 861 F.2d 603, 607 (10th Cir. 1988), *cert. denied*, 492 U.S. 921 (1989).

¹⁰ *See also*, H.R. Rep No. 103-9, *reprinted in* 1993 U.S.C.C.A.N. 105, 114 (statement of voter qualification requirements, penalties for fraud, and follow-up mailing “are sufficient to deter fraudulent registrations”).

highlight the need for discovery on this issue and that dismissal of Plaintiffs' VRA and NVRA claims is unwarranted.

Nor is Defendants' argument common-sensical on its face: indeed it defies all logic that one who is adjudicated "totally mentally incapacitated" under Florida's laws – *i.e.*, one who cannot work, sign a check, ride on a bus, decide where to live, or make basic decisions – would be informed of his or her ineligibility by the checkbox on the voter registration form, but not by the prominently displayed eligibility requirement with regard to mental capacity on the application; would be deterred from registering to vote because of a checkbox on a form, but not by the prominently displayed eligibility requirement with regard to mental capacity; or would strategize not to check a box, but to sign the oath affirming eligibility calculating so as to evade scrutiny by the registrar. The checkbox as to mental capacity appears utterly devoid of purpose, serving only to introduce inaccuracies into the voter registration process and to prevent thousands of eligible voters from registering to vote.

The facts alleged in the SAC are more than sufficient to state a claim under the materiality provision of the VRA and the necessity provision of the NVRA.

4. Defendants' Ongoing Violation of the VRA (in 2006)

Defendants' violation of the materiality requirement is ongoing, both because the 2004 registration forms continue to be used,¹¹ and because the 2006 forms request the same redundant information as the 2004 forms. (SAC, p. 34.) Indeed, Florida law now *requires* Defendants to reject applications where any of the three checkboxes are not filled in, whereas until 2006, rejecting such applications was Defendants' practice, but was not required by state law. On information and belief, dozens, if not hundreds of union members who have filed or will file "incomplete" applications in 2006 will be disenfranchised. (SAC, p. 36). Plaintiffs have thus alleged that the risk of injury is "actual and imminent," not "merely speculative" or remote, entitling them to seek injunctive relief. *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (*per curiam*) (association had standing to seek injunctive relief on behalf of their members, *i.e.* voters, where plaintiffs alleged that Secretary of State's directive allowing poll workers to withhold provisional ballots would cause future injury to as of yet

¹¹ Forms that are phased out typically continue to be used for two years after the new forms are distributed.

unidentified voters) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

5. *The NVRA And HAVA Do Not Nullify The Materiality Provision of the VRA*

Defendants unpersuasively argue that the SAC fails to state a claim under the VRA or the NVRA because the 2004 and the 2006 Florida voter application forms are consistent with the forms specified under HAVA, which was enacted after the VRA and the NVRA. In support of this theory, Defendants cite language in HAVA which states: “[t]he mail voter registration form developed under section 6 of the National Voter Registration Act of 1993 . . . shall include . . . [t]he 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.” *See* 42 U.S.C. § 15483(b)(4)(A)(i) (2006). However, Defendants’ argument fails because HAVA does not require States to reject an application on which the applicant has not checked the citizenship box, but has signed an oath attesting to his eligibility to vote. Indeed, HAVA defines an “incomplete” application as one in which the applicant “fails to answer the question” “Are you a citizen of the United States of America?” *See id.* § 15483(b)(4) (2006). Notably, the oath contained in the 2004 Florida mail-in and in-person forms, include the statement “I am a U.S. citizen.” By signing the oath, an applicant answers the question “Are you a citizen of the United States of America?” Nothing in HAVA requires the applicant to answer the question twice.

Defendants argue that this interpretation of HAVA renders HAVA’s definition of an “incomplete application” superfluous, and cite to canons of statutory construction that disfavor construing any statutory language as redundant. Notably, however, HAVA does not require that the federal mail-in form instruct applicants that they must complete the checkbox or put them on notice that failure to do so will cause their applications to be rejected as incomplete. 42 U.S.C. § 15483(b) (2006). The provision does provide that first-time applicants will be informed that they “must” submit certain information or be subject to identification requirements when they vote. *Id.* § 15483(b)(4)(iv). As to the citizenship box, the statute requires only that applicants be instructed that “[i]f you checked ‘no’ in response to either [the citizenship or minimum age] questions, do not complete this form.” *Id.* § 15483(b)(4)(iii). The fact that HAVA does not require the mail-in form to place voters on notice that their failure to check any of the boxes

would result in disqualification of their applications clearly proves that Congress did not intend that applications be rejected for failure to check those boxes.¹²

Defendants further misread HAVA by arguing that because the statute states that the federal mail-in registration form “shall” include the question “are you a citizen of the United States,” *id.* §15483(b)(4)(A), applicants may not disregard the citizenship question. In fact, the provision says nothing of the sort. The language is binding on the officials who develop the mail-in federal form, not on voters.

Defendants also in effect argue that the NVRA, and its amendment by HAVA, nullify the materiality provision of the VRA. Defendants would have this Court interpret the NVRA provision that the State may require information necessary to “administer voter registration and other parts of the election process,” *see* 42 U.S.C. § 1973gg-7(b)(1) (2006), as blanket permission for States to impose restrictive voter registration requirements. But the NVRA is consistent with the VRA’s materiality provision – state officials may only require necessary information. Defendants cite no law to support the proposition that this clause function as a “safe harbor” that would shield any measure that the State contends may advance its administrative goals from the VRA’s materiality provision. Defendants’ interpretation of this provision of the NVRA perverts the very purpose of the statute, which was “to reduce the[] obstacles to voting to the absolute minimum while maintaining the integrity of the electoral process.” *See* S. Rep. No. 103-6; H.R. Rep. No. 103-9, *reprinted in* 1993 U.S.C.A.N. 107-08.

B. Defendants’ Unequal Treatment of Applicants Violates Section 1971(A)(2)(A) of the VRA

The VRA prohibits state election officials from applying different “standards, practices or procedures” to individuals within the same county in order to determine voter eligibility. *See* 42 U.S.C. § 1971(a)(2)(A) (2006); *Shivelhood v. Davis*, 336 F.Supp. 1111 (D.Vt. 1971) (granting preliminary injunction to students in Middlebury College who were subject to separate registration requirements, and denying motion to dismiss). Plaintiffs allege that Defendants have violated, and continue to violate, this provision by registering applicants who submit either of the

¹² Even if the test of HAVA requires the applicant to check the citizenship box in addition to signing an oath, nothing in the statute requires that an applicant check a box to establish felon status and mental competency. Thus, even if Defendants were correct in their view that HAVA requires them to reject applications that omit a mark in the citizenship checkbox – and they are not – their argument fails with regard to the felon and mental incapacity boxes.

federal voter registration applications, which do not require a separate indication of felon status or mental incapacity in a checkbox, while rejecting applicants who submit the Florida form without a second, separate indication of felon status or mental incapacity. As a result, *all of the applicants* whose applications were rejected as incomplete for failure to indicate felon status or mental incapacity submitted the State's forms. *None of the applicants* who submitted either of the federal forms have been rejected on such basis, nor could they.

Thus, Plaintiffs' allegations that Defendants have processed federal forms, on which the felon status and mental incapacity boxes do not appear, while rejecting State forms on which the applicant has not checked one or both of these boxes, more than adequately demonstrate that Defendants' registration practices are not uniform and violate the VRA's uniformity provision. Likewise, Defendants' disparate treatment of federal and State forms also states a claim under the Equal Protection clause of the U.S. Constitution. The precise measure of the disparity in treatment is provided by the thousands of eligible voters rejected based on their failure to check the felon or mental capacity boxes on the Florida state forms.

Defendants erroneously conclude that the NVRA vitiates the VRA's uniformity provision, because it expressly authorizes States to "develop and use a mail voter registration form that meets all of the criteria states in section 1973gg-7(b)." (Motion to Dismiss, p. 12) (citing 42 U.S.C. § 1973gg-4(a) (2006)). But the NVRA permits the State to require only such identifying information 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) (2006). Because the information conveyed by the felon status and mental capacity checkmarks is redundant of information conveyed when the applicant signs the oath attesting to his eligibility to vote, such information is not necessary, as required by the NVRA, or material under the VRA. Thus, Defendants' argument that the NVRA permitted disuniform treatment of State and federal applications must be dismissed.

Defendants further argue that Plaintiffs' interpretation of the NVRA would render certain sections of the NVRA meaningless and without purpose, because "Congress did not intend to allow *only* the nationwide form." (Motion to Dismiss, p. 13). But Plaintiffs' interpretation of the statute gives States ample room to design their own form without placing unnecessary and unlawful burdens on applicants.

C. Requiring Applicants to Check the Mental Incapacity Box Functions as A Literacy Test in Violation of the VRA

The VRA has banned all literacy “tests or devices” nationwide since 1970. *See* 42 U.S.C. § 1973aa (2006); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (unanimously upholding the nationwide ban and striking down Arizona’s literacy test). The VRA defines “test or device” to encompass, among other things, “any requirement that a person as a prerequisite for voting or registration for voting . . . demonstrate the ability to read, write, understand, or interpret any matter” 42 U.S.C. § 1973b(c) (2006).

The legislative history of the VRA demonstrates that the term “test or device” can include complex registration applications, and tests of understanding, as well as literacy tests. *See, e.g.*, H.R. Rep. No. 91-397, *reprinted in* 1970 U.S.C.C.A.N. 3277, 3277, 3279, 3284. As the Supreme Court has frequently asserted, “the Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote.” *Presley v. Etowah County*, 502 U.S. 491, 501 (1992). Accordingly, the “test or device” language of the VRA sought to reach such diverse practices as: the requirement that applicants spell “difficult and technical words,” such as ‘emolument,’ ‘impeachment,’ ‘apportionment,’ and “despotism”;¹³ the requirement that applicants comply with hypertechnical “perfect form” requirements;¹⁴ and even the requirement that an applicant fill in his or her registration form in that applicants own handwriting.¹⁵ The common thread running through all registration requirements that fall under the VRA’s prohibition against literacy tests is that the requirements serve only to exclude eligible voters. *United States v. State of Louisiana*, 265 F.Supp. 703, 705, 714 (E.D. La. 1966) (striking down complex registration form used in Louisiana that relied on “insignificant errors” and complex “age computation, preamble, householder, and have/have not sections of the form” as a test of literacy but was “designed and used to discriminate”; and noting that the purpose of the VRA was “to eliminate discrimination in the exercise of the franchise” and that eliminating literacy tests as a means of testing voter qualifications accomplished this purpose).

¹³ H.R. Rep. No. 89-439, *reprinted in* 1965 U.S.C.C.A.N. 2437, 2442.

¹⁴ *Id.* at 2444.

¹⁵ The VRA thus struck down a Virginia registration form that was racially neutral on its face. H.R. Rep. No. 89-439, *reprinted in* 1965 U.S.C.C.A.N. 2492.

Refusing to process registrations where an applicant failed to check the mental incapacity box easily fits this description. Plaintiffs allege that the language next to the checkbox is extremely difficult to understand: “I affirm that I have not been adjudicated mentally incapacitated, and if I have, my competency has been restored.” To check the box, the voter applicant must be capable of understanding and interpreting legal terminology (“adjudicated mentally incapacitated”) further complicated by the addition of a double negative, which entire phrase then is made the object of an affirmation (“I affirm that I have not been adjudicated mentally incapacitated.”). Finally, the phrase “I affirm that I have not been adjudicated mentally incapacitated,” is then turned into a disjunction subject to a conditional sentence (“or, if I have, my competency has been restored”). This statement presupposes a far higher degree of literacy than the sixth grade literacy required of non-English speakers under Section 4(e) of the VRA, which was upheld in *Katzenbach v. Morgan*, 384 U.S. 641 (1966). And the complexity is entirely unnecessary. The phrase, “I am legally competent to vote” would suffice. Moreover, as set forth above, the mental incapacity checkmark requirement does not suitably, if at all, serve the purpose of excluding ineligible applicants. *See supra*, pp. 9 -10.

Defendants argument – that “literacy tests” as contemplated by the VRA require a “demonstration” of comprehension, which is not present in the instant case, where all that is alleged is the failure to comprehend difficult language – entirely misses the point. (Motion to Dismiss, pp. 15-16). It is simply not the case that Congress intended to target only tests that announce themselves as such. Rather, if the *function* of the “test or *similar device*” is to exclude eligible voters, as it is in the instant case, it is deemed to violate the VRA. But even under their own implausible interpretation, that the VRA targets only required “demonstrations” of understanding or comprehension, Defendants only prove Plaintiffs’ point. The checkmark requirement serves precisely as a demonstration of understanding or comprehension. Requiring an applicant to check the box requires the applicant to demonstrate, by the act of checking the box, that he or she has read and understood the accompanying highly difficult to understand statement.

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

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

Burdick v. Takushi, 504 U.S. 428, 434 (1992) (internal quotation marks and citations omitted). As a general rule, “[r]egulations imposing severe burdens on plaintiffs’ right must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State’s important regulatory interests will usually be enough to justify reasonable nondiscriminatory restrictions. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997) (quotation marks and citations omitted). But as the Court made clear, “[n]o bright line separates permissible election-related regulation from unconstitutional infringement of First Amendment freedoms. *Id.* at 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); *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1379 (S.D.Fla. 2004).¹⁶

Cases adjudicating a States’ regulation of candidates’ access to the ballot, primaries, ballot initiatives, and the channeling of expression at the ballot box, have frequently been reviewed deferentially by courts under this test.¹⁷ In cases adjudicating registration requirements for voters, rather than candidates or ballot initiatives, courts have frequently applied heightened

¹⁶ The analysis under *Burdick* applies with equal force in the equal protection context as well as under the Due Process clause. *Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992).

¹⁷ See, e.g., *Burdick*, 504 U.S. 428 (upholding Hawaii’s prohibition of write-in candidates), *Rosario v. Rockefeller*, 410 U.S. 752 (1973) (upholding New York’s two-year advance registration requirement for voting in party primaries), *Storer v. Brown*, 415 U.S. 724 (1974) (upholding California ballot access provision preventing candidate from ballot position as an independent candidate if he voted in the immediately preceding primary), *Timmons*, 520 U.S. 351 (upholding Minnesota’s antifusion laws prohibiting candidates from appearing on ballot as candidate of more than one political party). *But see Fulani v. Krivanek*, 973 F.2d 1539, 1345-48 (11th Cir. 1992) (finding that Florida statute, that required signature verification fee of minor party candidates, moderately burdened a minor party candidate’s First Amendment rights and applying the *Burdick* balancing test.).

scrutiny, depending on the burden imposed upon the plaintiff's constitutional rights and the type of State provision that was challenged.¹⁸

There can be no more severe restriction on the right to vote than a regulatory scheme that outright rejects registration applications timely submitted by eligible voters. Plaintiffs allege that Defendants issued registration applications that were confusing and ambiguous as to the three checkboxes at issue; required that voter applicants undergo the functional equivalent of a literacy and comprehension test in order to affirm mental capacity to vote; failed to process applications with immaterial omissions; failed timely to notify applicants that their registration forms had been rejected, or failed to notify rejected applicants at all, in order that the omissions might be cured before the close of the rolls of registered voters; and failed to provide for a grace period after the close of the rolls during which omissions could be cured. Because the regulatory scheme at issue in this case severely burdens the fundamental right to vote, this Court should review the regulatory scheme using strict scrutiny. Accordingly, the Defendants must show that the regulations were narrowly tailored to meet a compelling government interest.

Defendants utterly fail to make the case that the regulations at issue meet this test. Instead, Defendants cite to *Rosario v. Rockefeller*, 410 U.S. 752 (1973), and *Marston v. Lewis*, 410 U.S. 679 (1973), for the proposition that registration deadlines have never been subject to strict scrutiny. But the unduly restrictive registration practices alleged in the complaint should not be analyzed separately, because they do not function separately. Rather, functioning in combination as an unduly restrictive regulatory scheme, these registration practices – which require a “perfect form”, provide inadequate notice, and fail to provide an opportunity to correct an immaterial error, because of the lack of a grace period – have disenfranchised over 14,000 eligible voters in Florida in 2004 alone.¹⁹ In 2004, the burden placed on voters increased

¹⁸ *Dunn v. Blumstein*, 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.); *Marston v. Lewis*, 410 U.S. 679 (1973) (upholding registration deadline).

¹⁹ 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. (SAC, pp. 27-28). Defendant Lanham has received no communications from the Defendant Orange County Supervisor's office concerning the status of his application. *Id.* As further alleged in the SAC, 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 convicted of a felony and that he had not been adjudicated mentally incapacitated. *Id.* Lanman was eligible to vote; he made an immaterial error on a confusing form. Had he received prompt notice from Footnote con't.

dramatically as election day approached, because more registration applications were filed, and Defendants' ability to correspond in a timely manner with voters was further compromised.²⁰

1. *Defendants' Policy of Rejecting Applications Fails Even a Rational Basis Test.*

Even under the less stringent "rational basis" test, Defendants' practice of declining to process applications of eligible electors who fail to check any of the three redundant boxes fails to pass muster because the policy is arbitrary and irrational. This is seen most starkly in the case of the rejection of applications where an eligible elector failed to check the mental capacity box. Plaintiffs allege that this practice is arbitrary and irrational because Defendants' checkmark requirement as to mental capacity excludes far more eligible voters than persons adjudicated mentally incapacitated each year in each counties' Circuit Court. (SAC, p. 22.)²¹ Plaintiffs allege that Defendants never ascertained that any of the applicants so rejected had been adjudicated mentally incapacitated. (SAC, pp. 23.) Therefore, the checkmark requirement with respect to mental capacity does not in any way advance the stated governmental interest of keeping the mentally incapacitated from voting, and so is entirely arbitrary and irrational.

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 elections.

²⁰ Thus, 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 until only on October 8, 2004. Diaz was eligible to vote; she made an immaterial error on a confusing form. Nevertheless, she would have been able to register and 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. Plaintiffs allege that Defendants will unlawfully refuse to process the applications of registrants 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. Thus, Plaintiffs and their members have alleged that Defendants will violate their constitutional rights in connection with the 2006 federal election. *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 of yet unnamed prospective voters).

²¹ There have been around 7,000 guardianship dispositions statewide in the Probate Divisions of Florida's Circuit Courts in the most recent year between 2004 and 2005 for which such statistics are available. Twenty to twenty-five percent of these cases result in dispositions of mental incapacity with respect to voting, which amounts to around 1400-1650 cases in all of Florida per year. Based on raw data received from Orange County, 1329 of applications were rejected in the seven months between April 4, 2004 and October 15, 2005 in Orange County alone, due to applicants not having checked the mental incapacity box. (SAC, pp. 22-23.)

Additionally, as discussed above (*see supra* pp. 2-3) all three of the checkmarks required on the forms are redundant, since the voter applicant must affirm, under oath, and under penalty of felony conviction and prison sentence, that he is qualified to vote and that he meets the eligibility requirements. Accordingly, because the checkmark requirements are unnecessary, they are arbitrary and irrational and rejection of applications on one or more of these grounds violates Plaintiffs' constitutional rights under the First, Fourth, and Fourteenth Amendments.

2. *Defendants' Practices With Regard to the Checkboxes Are Not Reasonable Time, Place or Manner Restrictions*

Defendants argue that the checkmark requirements are a reasonable time, place, and manner restriction arising from the State's legitimate interest in the regulation of elections and that the checkmark requirements serve as "logical, simple, and common-sense anti-fraud provision," thus satisfying the rational basis test. (Motion to Dismiss, pp. 14, 19.) However, the cases Defendants cite in support of this contention – *Storer v. Brown*, 415 U.S. 724, 730 (1974); and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) – are inapposite. *Storer* and *Burdick* concern qualifications for placing candidates on the ballot rather than for qualifications for registering voters, where "[o]ther variables must be considered." *Storer*, 415 U.S. at 732; accord *Stewart v. Blackwell*, 2006 WL 1042326, at *14 (6th Cir. 2006) (dissent's reliance on *Burdick* was misplaced because "Burdick was about a candidate's access to the ballot; it was not a case that addressed a voter being denied an equal chance to have her vote counted.").²²

Even if a lesser level of scrutiny did apply, under the *Storer*, *Anderson*, and *Takushi* line of cases a State's interest must advance an "important state goal," and be "tied to [[a] particularized legitimate purpose." *Storer* 415 U.S. at 760 (citing *Rosario v. Rockefeller*, 410 U.S. 752 (1973)). Defendants have not shown that the challenged policy of rejecting applications where eligible electors neglected to check a redundant box in fact advances such an interest, and they cannot do so at this stage in the litigation. Defendants' unsubstantiated and untested assertion that the checkmark requirement is "essential to Florida's goal of registering only those who are eligible to vote," (Motion to Dismiss, p. 19), is irrelevant to evaluating the

²² *But see, Friedman v. Snipes*, 345 F.Supp.2d at 1379 (S.D.Fla. 2004) (Noting that the Supreme Court in *Bullock v. Carter*, [405 U.S. 134, 143 (1972)] "made clear that voting rights cases are relatively indistinguishable from ballot access cases"). In any event, whether strict scrutiny or a lesser level of scrutiny applies, is very much a "matter of degree . . . of consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Storer*, 415 U.S. at 723 (internal quotations omitted).

sufficiency of Plaintiffs' constitutional claims in a motion to dismiss. Defendants' purported use of information ascertained via the checkboxes will be thoroughly explored at later stages in the litigation but should not serve as a basis for dismissing the Second Amended Complaint. *See, e.g., Common Cause of Georgia v. Billups*, 406 F.Supp.2d 1326, (where the court renders decision only after making extensive findings concerning likelihood of voter fraud).

V. DEFENDANTS' CONTENTION THAT A CLASS SHOULD NOT BE CERTIFIED DOES NOT SUPPORT THEIR MOTION TO DISMISS

Defendants' lead argument in support of their motion to dismiss is that "Plaintiffs' request for class certification is entirely inappropriate." (Motion to Dismiss, p. 4). Plaintiffs believe that this case is suitable to proceed on as a class action, and intend to promptly file a motion to certify a class. However, even if Defendants were correct that this case is not appropriate for class treatment – and they are not – they would not as a result be entitled to a dismissal of the SAC. The question of whether a complaint should survive a motion to dismiss is entirely distinct from the question of whether a class should be certified. Defendants' arguments as to Plaintiffs' class allegations are not a proper basis for dismissing the SAC and should be deferred until Plaintiffs move for class certification. Moreover, Defendants have failed to discuss, let alone demonstrate, that Plaintiffs have not satisfied the standard under Federal Rule 23 for class certification.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court deny Defendants' motion to dismiss.

Dated: West Palm Beach
Florida, May 19, 2006

RESPECTFULLY SUBMITTED,

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