

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-22572-Civ-King

EMMA YAIZA DIAZ <i>et al.</i> , Plaintiffs, v. SUE M. COBB, Secretary of State of Florida, <i>et al.</i> , Defendants.

**PLAINTIFFS’ PROPOSED OPINION AND ORDER DENYING DEFENDANTS’
MOTION TO DISMISS THE THIRD AMENDED COMPLAINT**

Pursuant to Federal Rules of Civil Procedure 12(b)(6), Defendants Cobb, Anderson, Cowles, Holland, and Snipes (“Defendants”) have moved to dismiss the Third Amended Class Action Complaint For Declaratory Relief, Injunctive Relief, and Nominal Damages (“Third Amended Complaint” or “TAC”) for failure to state a claim upon which relief may be granted. Defendant County Supervisors of Elections (“Supervisors”) have also moved for dismissal on grounds that Plaintiffs have not alleged facts to support an official capacity action and that Plaintiffs’ claims are barred by the Eleventh Amendment.

As explained below, the Third Amended Complaint more than adequately pleads facts in support of Plaintiffs’ claims that Defendants burdened their voting rights in violation of the First and Fourteenth Amendments to the U.S. Constitution. Therefore, this Court cannot dismiss the Third Amended Complaint at this juncture. Under the applicable legal standard, *if, after discovery, Plaintiffs withstand a motion for summary judgment and sustain their burden of proof at trial,*¹ Defendants must prove that their purported interests in support of the restrictive voter registration practices that Plaintiffs challenge are genuine and that the burdens on Plaintiffs’ voting rights are necessary to further those

¹ To prevail at trial, Plaintiffs must prove these allegations with admissible evidence that demonstrates that Defendants’ policies and practices, and Florida’s election laws, burdened the voting rights of Plaintiffs and their members. As discussed in the section entitled “Standard of Review,” *supra*, what types of evidence discovery might produce, or how Plaintiffs will meet their burden at trial, are wholly irrelevant in deciding a motion to dismiss.

interests.² Because a motion to dismiss tests only the sufficiency of the allegations pled to state a claim, and the allegations of the Third Amended Complaint indisputably plead that Defendants have substantially burdened Plaintiffs' voting rights, Defendants' motions to dismiss for failure to state a claim must be denied. Defendants' arguments that dismissal is appropriate because the Third Amended Complaint does not support an official capacity action and the Eleventh Amendment bars Plaintiffs' claims are equally unavailing.

Accordingly, Defendants' motions to dismiss are denied.

THE THIRD AMENDED COMPLAINT

Plaintiffs allege that they 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 voter registration applicants check a box next to a statement, "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.) Plaintiffs allege that applicants' inability to understand that statement caused many eligible applicants, including Plaintiff Emma Diaz and the injured union members, to leave the mental incapacity checkbox blank, notwithstanding that they have not been adjudicated mentally incompetent with regard to voting. (*Id.* at ¶¶ 12-13) As a result of the box not having been checked, the Defendant Supervisors designated these applications incomplete and denied Plaintiffs the right to vote in the 2004 elections. (*Id.* at ¶¶ 3, 16.)

Plaintiffs allege that the mental incapacity box does not serve to exclude persons adjudicated mentally incompetent, nor does it prevent voter fraud. (*Id.* at ¶¶ 14, 84.) As a consequence, the mental incapacity box serves no legitimate, let alone compelling, state interest. The Third Amended Complaint alleges that 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 U.S. Constitution and denied the right to vote to the Individual Plaintiffs and the

² The burden that Defendants must meet will depend upon the legal standard that this Court finds to be applicable. Plaintiffs may then challenge Defendants' proof by offering evidence to show that the challenged voter registration practices do not reasonably serve Defendants' asserted interests.

injured union members who were eligible to vote but were denied an opportunity to correct their applications prior to the close of books. (*Id.* at ¶¶ 15-16.)

Plaintiffs further allege that in many cases, Defendants failed to provide timely notice to applicants whose applications were deemed incomplete in order for those applicants to amend their applications before the close of the books prior to the 2004 election. (*Id.* at ¶¶ 4-5, 59.) Additionally, 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. (*Id.* at ¶ 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 Duval County's practice. (*Id.* at ¶¶ 9, 63-66.) Moreover, Defendant Supervisors permitted registered voters to correct information, such as names and addresses, after the close of books, but not the missing information as to the mental incapacity affirmation. (*Id.* at ¶ 5.)

Plaintiffs allege that as the date of election and the application deadline approaches each election cycle and interest in the election increases, the number of voter registration applications progressively and dramatically increases. (*Id.* 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 denied thousands of eligible voters, who were motivated to register during this period of most vigorous public political debate, the right to vote. (*Id.* at ¶ 8.)

Plaintiffs allege that 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. (*Id.* at ¶¶ 3-6, 59.) Defendants failed to process these applications because they deemed such applications incomplete. Further, except for the Duval County Supervisor, Defendant Supervisors did not accept missing information with regard to the citizenship and felon

status checkboxes after the close of books. (*Id.* at ¶¶ 5, 59.) For these reasons, Defendant Supervisors' refusal to process the applications of the Individual Plaintiffs, the injured union members, and thousands of additional eligible voters, denied them the right to vote in the 2004 federal elections, in violation of the First and Fourteenth Amendments to the U.S. Constitution.

Effective in 2006, the Florida legislature amended the State's election code to require Florida County Supervisors of Elections to deem incomplete applications on which the mental incapacity box was not checked and to prohibit applicants who timely submitted an incomplete voter registration application by the deadline to correct missing information after the close of books. (*Id.* at ¶¶ 17, 75-77.) Also effective in 2006, Florida implemented its computerized statewide voter database, as required by the Help America Vote Act. (*Id.* at ¶¶ 18, 70.) Plaintiffs allege that this database has increased, and will continue to increase, the efficient processing of voter registration applications. (*Id.* 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 an applicant could submit a correction to an application deemed incomplete, arbitrary and irrational, let alone necessary. (*Id.* at ¶¶ 18-19.)

The Third Amended Complaint alleges that as the date of the November 2006 election and the corresponding registration deadlines approached, public interest in the elections increased and spurred the submission of large numbers of voter registration applications. (*Id.* at ¶¶ 7, 62.) As in 2004, thousands of applicants who submitted their application in 2006 near or on the registration deadline but did not check the confusing mental incapacity affirmation did not receive timely notice or an opportunity to cure their application to be eligible to vote in the November 2006 general elections. (*Id.* at ¶ 20.) Similarly, voters who submitted their application near or on the registration deadline but inadvertently did not check the citizenship and/or felon status box did not receive timely notice or an opportunity to cure their application to be eligible to vote in the November 2006 general elections. (*Id.* at ¶¶ 77, 98-103.) Accordingly, such eligible electors were

disenfranchised and unlawfully denied the fundamental right to vote in 2006 and will continue to be in future federal elections. (*Id.* at ¶¶ 103, 154-55, 139.)

Plaintiffs allege that because the Defendant Supervisors need not provide applicants with notice of any deficiency in their application until twenty days after receipt of the application, (*id.* at ¶¶ 72-74), applicants who do not check the mental incapacity box, or the citizenship and/or felon status box, and submit their application within the twenty day period prior to the book closing deadline (that is, 49 days prior to the elections) will likely not receive notice that their application was denied. 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 application 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. (*Id.* at ¶¶ 75-80.) Thus, such eligible electors were disenfranchised and unlawfully denied the fundamental right to vote in 2006 (*id.* at ¶¶ 20, 61, 77) and will continue to be in future elections.

PERTINENT PROCEDURAL BACKGROUND

Plaintiffs filed their original complaint on October 12, 2004. Defendants moved to dismiss the complaint, and this Court dismissed the complaint for lack of standing. Plaintiffs appealed the dismissal of the complaint, and on September 28, 2005, the Eleventh Circuit Court of Appeals vacated this Court's order of dismissal and remanded this case for further proceedings, including the filing of an amended complaint. On December 29, 2005, the Court of Appeals issued its mandate, and on January 6, 2006, the Court of Appeals returned the record to this Court.

On April 7, 2006, Plaintiffs filed an Amended Complaint, and on April 10, moved for leave to file a Second Amended Complaint, which Defendants moved to dismiss. On June 20, 2006, this Court ordered the dismissal of Plaintiffs' statutory claims, as well as the counts against the Secretary of State relating to conduct in 2004.

On July 10, 2006, Plaintiffs filed a Third Amended Complaint now under consideration, asserting constitutional claims based on the mental capacity box and

Defendants' failure to provide Plaintiffs and other applicants with adequate notice of and an opportunity to cure deficiencies in their application relating to the checkboxes. Defendants moved to dismiss those claims, and on November 17, 2006, this Court held oral argument on Defendants' motions.

STANDARD OF REVIEW

I.

MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM

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 (1957); *Chepstow Ltd. v. Hunt*, 381 F.3d 1077, 1080 (11th Cir. 2004). In considering such motions, 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; *Jackam v. Hosp. Corp. of Am.*, 800 F.2d 1577, 1583 (11th Cir. 1986) (lower court misapplied 12(b)(6) standard by, in effect, deciding case on the merits). "[O]rdinarily, [courts] do not consider anything beyond the face of the complaint and documents attached thereto when analyzing a motion to dismiss." *Fin. Sec. Assur., Inc. v. Stephens, Inc.*, 450 F.3d 1257, 1264 (11th Cir. 2006) (internal citations omitted). The issue "is not whether [plaintiffs] may ultimately prevail . . . but whether the allegations are sufficient to allow them to conduct discovery in an attempt to prove their allegations."³ *Jackam*, 800 F.2d at 1579-80.

³ "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 Comme'ns, 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).

II.
PLEADING STANDARD FOR CONSTITUTIONAL CLAIMS ARISING FROM
BURDENS ON THE RIGHT TO VOTE

In *Anderson v. Celebrezze*, the Supreme Court set forth the applicable framework for considering challenges to election related regulations that burden or deny the right to vote. *Anderson* requires a court to balance “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.” *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (following *Anderson*). Hence, “[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.” *Anderson*, 460 U.S. at 789; *see also id.* (court’s inquiry is “not . . . automatic” and “there is no substitute for the hard judgments that must be made”). Accordingly, dismissal of such challenges at the pleadings stage is rarely appropriate. *See, e.g., Cruz v. Melecio*, 204 F.3d 14, 18-19 (1st Cir. 2000) (reversing dismissal of complaint alleging impermissible restrictions on ballot access because “fact-specific nature of the relevant inquiry [under *Anderson*] . . . obviates a resolution of this case on the basis of the complaint alone”).⁴

⁴ The cases cited by Cobb in footnote 4 of her reply brief and accompanying text involved claims that are factually inapposite to Plaintiffs’ claims in this case. As such, these cases are irrelevant to the Court’s determination of Defendants’ motions to dismiss. *Rubin v. City of Santa Monica* involved a challenge to regulations on how a candidate could describe herself on a ballot and, according to the Ninth Circuit, was “not a case where the right to vote . . . is at issue.” 308 F.3d 1008, 1016 (9th Cir. 2002). In *Wit v. Ebel*, the plaintiffs, New York residents with homes in multiple districts, brought an equal protection challenge to regulations that prevented them from voting in multiple election districts. 306 F.3d 1256 (2nd Cir. 2002). The court affirmed the lower court’s dismissal, rejecting the notion that plaintiffs had a right to vote in other districts, in addition to the ones in which they were registered, “based on their expression of subjective interests in the political decisions of those other districts.” 306 F.3d at 1261. In *McClure v. Galvin*, the court rejected plaintiff’s argument that the state’s regulations, which prohibited him from voting in a party’s presidential primary and then running for state senate as an independent, were unconstitutional, reasoning that “voting in a presidential primary has never been treated in the same way as voting in a general election, and indeed, voting in the primary of a party to which one does not belong is not a constitutional right.” 386 F.3d 36, 41 (1st Cir. 2004). In *Griffin v. Roupas*, the Seventh Circuit upheld the dismissal of a complaint filed by working mothers who claimed that “because it is a hardship for them to vote in person on election day, the U.S. Constitution requires Illinois to allow them to vote by absentee ballot.” 385 F.3d 1128,

The Eleventh Circuit Court of Appeals has recognized the difficulty of performing such balancing on the basis of the pleadings alone. In *Duke v. Cleland*, 5 F.3d 1399, 1405-06 (11th Cir. 1993), the court, reversing the dismissal of a complaint that challenged Georgia's presidential preference primary candidate selections statute, held that the posture of the case made it "impossible for [the court] to undertake the proper review required" under *Anderson* and its progeny. 5 F.3d at 1405. The court reversed the lower court's order of dismissal and remanded "for further proceedings designed to determine with particularity the interests purportedly advanced" by the regulation. It explained:

While [plaintiffs] have made clear their asserted rights under the First and Fourteenth Amendments, the record before us is devoid of evidence as to the state's interests in promulgating [the challenged statute]. This case is before us on appeal from a dismissal of the plaintiffs' amended complaint under Rule 12(b)(6). Discovery has not commenced. The state, therefore, has not as yet asserted its precise interests justifying the burden imposed by its election law.

5 F.3d at 1405. Although the state in *Duke* had articulated various interests in its motion papers, the court stressed the necessity of a factual record to perform the *Anderson* balancing, explaining that "the existence of a state interest . . . is a matter of proof" and "decline[ing] . . . to assess the importance of these alleged interests absent a factual determination by the district court below." *Id.* at n.6 (citation omitted; emphasis added). While the Eleventh Circuit took no position on the merits of plaintiffs' claims, it held that plaintiffs' allegations were "sufficient to allow the parties to conduct discovery" and vacated the district court's dismissal of the complaint for failure to state a claim pursuant to Rule 12(b)(6).⁵ *Id.* at 1405-06.

1129 (7th Cir. 2004). In *Zielasko v. Ohio*, the circuit court affirmed the lower court's dismissal of plaintiffs' challenge to a state law barring people older than seventy from being elected to judicial office. 873 F.2d 957 (6th Cir. 1989). In these cases, the courts upheld regulations in the face of arguments that plaintiffs had a constitutional right to use a ballot as "a billboard for political advertising"; to vote in multiple local elections; to run for state office as an independent candidate within 90 days of voting in a party's presidential primary; to vote by absentee ballot; or to run for judicial office after obtaining the age of 70 (or to vote for someone who has), respectively. None involved claims that were remotely similar to the claims pleaded here; therefore, they do not require dismissal of Plaintiffs' claims.

⁵ Likewise, in *Common Cause v. Jones*, 213 F. Supp. 2d 1106, 1109 (C.D. Cal. 2001), a constitutional challenge to the California Secretary of State's permission to counties to adopt either punch-card voting procedures or other voting procedures, the court denied defendant's motion for judgment on the pleadings pursuant to Rule 12(c) because plaintiffs had alleged facts

Thus, under *Anderson*, a complaint that alleges facts that defendants burdened or denied plaintiff's right to vote cannot be dismissed unless the defendant can show, as a matter of law, that the burden to the plaintiff's voting rights is insufficient to require the state to proffer reasons justifying its regulations. In most instances, courts are reluctant to dismiss a complaint that alleges a burden to the right to vote on a motion to dismiss. For instance, in *Melecio*, the First Circuit Court of Appeals found that the district court "acted too hastily" in dismissing a complaint challenging the state's ballot access procedures. 204 F.3d at 22. There, plaintiffs had challenged a law that required a party wishing to register to appear on the ballot to obtain a significant number of signatures (approximately 100,000) and required that each petition be notarized and filed within seven days. *Id.* at 17. The court reversed the lower court's order of dismissal, reasoning:

Here, the complaint alleges facts which, if true, tend to support the appellants' claims that the notarization requirement and seven-day deadline unduly burden ballot access. If, for example, the appellants can prove that notarization is prohibitively expensive or otherwise difficult to achieve (as the complaint avers), then the Commission will have to show that the notarization requirement is narrowly drawn to advance a compelling government interest. . . . Whether it ultimately can succeed in this endeavor is a sufficiently open question that we cannot conclude, on the pleadings, that no set of facts exists under which the appellants might prevail.

204 F.3d at 22. (citations omitted).

As explained below, Plaintiffs in this case have alleged facts which, if true, tend to support their claims that Defendants' rejection of voter registration applications on which the applicant has not checked the mental incapacity box and Defendants' refusal to provide applicants who have timely submitted an incomplete voter registration application with an opportunity to cure their application and be added to the voter rolls prior to the following election unconstitutionally burden their right to vote.

indicating that the challenged practice was unreasonable and discriminatory. In so ruling, the court made clear that the parties could "test their arguments regarding the evidentiary support for this allegation on summary judgment." *Id.* at 1109-10.

DISCUSSION

A. PLAINTIFFS HAVE ALLEGED FACTS THAT SUPPORT THEIR CLAIM THAT THE MENTAL INCAPACITY AFFIRMATION SEVERELY BURDENS PLAINTIFFS' VOTING RIGHTS UNDER THE U.S. CONSTITUTION.

Plaintiffs have alleged that, because of the unnecessarily technical, complicated and confusing phraseology of the mental capacity affirmation on Florida's 2004 and 2006 voter registration application, many eligible voters, including the Individual Plaintiffs and injured union members, left the corresponding checkbox blank. (TAC at ¶¶ 89-90.) Defendants refused to process those applications, even though the applicants had not been deemed mentally incompetent. (*Id.* at ¶¶ 86-87, 104-119.) As a result, Plaintiffs were denied their right to vote.

State regulations that disenfranchise eligible voters severely burden the voting rights of those prospective voters. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *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 requirement imposed significant burden on voter registrants). Plaintiffs have thus sufficiently alleged that the mental capacity affirmation severely burdened their right to vote.

The Complaint does not make mere conclusory allegations in this regard, but pleads facts sufficient to state a claim under *Anderson*. In particular, the Complaint alleges that plaintiffs, and thousands of eligible voters in Broward, Duval, Miami-Dade, Orange and Palm Beach counties, did not affirm their mental competency on the form, because of the confusing language of the required affirmation. (TAC ¶¶ 12-13, 89-90, 95, 146.) The Complaint also alleges that the majority of the applicants excluded as a result of the mental incapacity affirmation must, necessarily, be eligible, given the facts uncovered to date. The Complaint alleges, on information and belief, that between 1400 and 1650 individuals are adjudicated mentally incompetent with regard to voting each

year in all of Florida. But in the year 2004, 3721 applicants did not check the mental incapacity box in Miami-Dade alone, and many of them were rejected as mentally incompetent for that reason. In Orange County, 1329 individuals did not check the mental incapacity box during a six month period from April 4, 2004 to October 2005. (*Id.* at ¶¶ 88, 92.) Thus, at least 5000 voters did not respond to the mental capacity affirmation in these two counties alone, far exceeding the number of individuals adjudicated mentally incompetent “with regard to voting” each year in all 67 Florida counties. In other words, far more *eligible* than ineligible voters were excluded by the confusing affirmation.

Based on these facts, and construing all such facts in favor of the Plaintiffs, the Complaint clearly alleges that the regulation severely burdens eligible voters – i.e. those voters who are *not* mentally incompetent but who are excluded as mentally incompetent because of this regulation. The required affirmation burdened not only the applicants who were ultimately denied the right to vote, but also those who were given the opportunity to correct and who did correct. While one might judge this burden as less severe, because these applicants were ultimately permitted to vote, these applicants were nevertheless injured. Even if the burden is slight, the regulation at issue must be a “reasonable, nondiscriminatory restriction” that advances “important state interest” – which this regulation does not. *Anderson*, 460 U.S. at 788.

In this regard, Plaintiffs have alleged as follows:

- Defendants’ rejection of applications on which the mental incapacity box is unchecked does not prevent applicants who are ineligible by reason of mental incompetence from registering and voting. (TAC at ¶14).
- 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. (*Id.* at ¶ 84.)
- The mental incapacity affirmation excludes far more eligible voters than persons adjudicated mentally incompetent each year in each County’s Circuit Court. (*Id.* at ¶¶ 91-92.)

Thus, rejecting applications on which the mental incapacity box is not checked bears no relationship to Defendants' interest of preventing mentally incompetent persons from voting. As such, Plaintiffs have alleged that Defendants' practice impermissibly burdens the right to vote not only of the Individual Plaintiffs and the injured union members, but also of all prospective eligible applicants. (*Id.* at ¶¶ 6, 16, 20.)

These facts are more than sufficient to state a claim under the First and Fourteenth Amendments. “[E]ven when pursuing a legitimate interest, a state may not choose means that unnecessarily restrict constitutionally protected liberty.” *Anderson*, 460 U.S. at 806 (internal citations omitted). “Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.” *Id.* 460 (internal citations omitted). Accordingly, a district court in Georgia struck down Georgia’s Photo ID requirement, because the “Photo ID law thus [did] nothing to address the voter fraud issues that conceivably exist in Georgia.” *Common Cause of Georgia v. Billips*, 406 F.Supp.2d 1361, 1361 (N.D. Ga. 2005). Likewise, in this case, Plaintiffs have amply alleged that the mental incapacity affirmation does nothing to prevent voter fraud that could conceivably arise with regard to those barred from voting because they are mentally incompetent; at the same time, the regulation burdens all voter applicants and significantly burdens those who were denied the right to vote.⁶

Whatever level of scrutiny this Court applies, Plaintiffs’ allegations concerning Defendants’ refusal to process these voter registration applications thus state a claim that Plaintiffs’ right to vote has been burdened, in violation of the First and Fourteenth Amendments, that they have been denied the Equal Protection of the laws because Defendants practices are not “reasonable, nondiscriminatory restrictions” that advance an important state interest. *See Anderson*, 460 U.S. at 788 (“the state’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.”)

⁶ In *Fulani v. Krivanek*, 973 F.2d 1539, 1547 (11th Cir. 1992), the Eleventh Circuit applied *Anderson* in the same manner and held a verification fee requirement for third party candidates to be unconstitutional because “a party’s ability to pay a verification fee is *not rationally related* to whether that party has a modicum of support.” (emphasis supplied).

In addition to the allegations discussed above, Plaintiffs have adequately alleged that Defendants' use of the mental incapacity checkbox to disqualify eligible electors is discriminatory. The Complaint alleges that the mental incapacity affirmation burdens the right to vote by discriminating against those registrants with lower levels of literacy or education. (TAC at ¶ 95.) The mental incapacity affirmation, it is alleged, 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. (*Id.* at ¶¶ 83, 90.) 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. (*Id.* at ¶¶ 13, 90.) Plaintiffs have thus stated a *prima facie* case under *Anderson* and have satisfied the notice pleading requirements under Federal Rule 8(a). *United States v. Baxter Int'l, Inc.*, 345 F.3d 866, 880 (11th Cir. 2003).

Defendants argue that this Court should ignore all the factual allegations pled in the Complaint and dismiss Plaintiffs' claims based on 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). In support, they cite at length *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). (Cobb Reply at 9.) But *Munro* provides no support for such an argument. *Munro*, a case which concerns ballot access restrictions that are traditionally reviewed much more deferentially by the courts than the type of voter registration regulations alleged in this Complaint, holds that legislatures "should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, *provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.*" *Id.* at 195-196 (emphasis supplied). As set forth above, Plaintiffs have amply alleged that the regulation is unreasonable and significantly burdens Plaintiffs' constitutionally protected rights.

Defendants' purported defenses of their practices—that the required affirmation reduces fraud and prevents registration of ineligible voters, and that refusing to permit applicants an opportunity to correct the omission after book closing serves the important and legitimate state interest of administering a fair and orderly election process—lack

factual support. Apart from Plaintiffs' allegations to the contrary discussed above, Plaintiffs have further alleged in this regard that various counties have, in the past, made exceptions to the 29-day book closing rule and permitted amendments both in this respect and in others. (TAC at ¶¶ 5, 64, 67.)⁷

However, 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. Thus, Defendants' discussion of their rationales for the mental capacity box shall be entirely disregarded, and Defendants' motions to dismiss Count III for failure to state a claim are denied.

⁷ Defendants' reliance on *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 812 (1976) (Cobb Reply, at 8), for the proposition that the "State is not compelled to verify logical assumptions with statistical evidence" is similarly inapposite. *Hughes* is not a voting rights case, but deals with economic regulation. In any case, however, Plaintiffs have amply alleged –though it is not a burden that they must meet – that Defendants' articulated interests and assumptions are not logical.

A. **PLAINTIFFS HAVE ALLEGED FACTS THAT SUPPORT THEIR CLAIMS THAT DEFENDANTS' REFUSAL TO PROVIDE VOTER REGISTRATION APPLICANTS WITH NOTICE OR AN OPPORTUNITY TO CURE DEFICIENCIES IN THEIR APPLICATION SEVERELY BURDENS THEIR RIGHT TO VOTE UNDER THE U.S. CONSTITUTION.**

The facts alleged in the Third Amended Complaint more than adequately state claims, under the *Anderson* standard, that Defendants burdened or denied them the right to vote in violation of the U.S. Constitution to withstand a motion to dismiss. In particular, Defendants disenfranchised Plaintiffs by failing to provide Plaintiffs with meaningful notice of deficiencies in their voter registration application or permit applicants who timely submitted an application to correct deficiencies in their application after the registration deadline. (TAC at ¶¶ 4-10, 59-69.) Plaintiffs have alleged that in 2004, thousands of eligible applicants, including Plaintiffs and injured union members, submitted a voter registration application near or on the application deadline and in many instances, neglected to check the mental incapacity, felon and/or citizenship box. (*Id.* 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. (*Id.* at ¶¶ 5, 64-66.) As a result, these eligible applicants were denied their fundamental right to vote in the 2004 election. (*Id.* at ¶¶ 6, 8, 69.)

After the 2004 election, Florida amended its election code, in part, to prohibit applicants who timely submitted a voter registration application but whose application was incomplete to correct the application in time to be added to the rolls for the upcoming election. (*Id.* at ¶¶ 75-77.) Due to the same patterns of voter registration present in 2004, thousands of eligible electors, including members of the Union Plaintiffs, submitted an incomplete voter registration application during the 2006 registration cycle. Defendants unlawfully refused to process those applications and failed to provide applicants with timely notice of deficiencies in their applications. As a result, thousands of voters were unlawfully disenfranchised. (*See id.* at ¶¶ 20, 61, 77,

139.) Thus, Plaintiffs and their members alleged that Defendants would violate their constitutional right to vote in the 2006 general elections.⁸

These allegations, as a matter of law, state a *prima facie* claim for denial of the right to vote, or at a minimum, burden to the right to vote under *Anderson* and therefore, cannot be dismissed on a motion to dismiss. Courts have repeatedly held that registration periods and durational residency requirements may unconstitutionally burden an applicant's right to vote. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 358 (1982) (striking down Tennessee's durational residency requirement that voters have resided for one year in the state and three months in the county); *Beare v. Briscoe*, 498 F.2d 244, 245 (5th Cir.

⁸ Although the 2006 elections have been held, Plaintiffs' claims are not moot because they are capable of repetition yet evading review. The Eleventh Circuit has held that "In 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." *ACLU v. The Fla. Bar*, 999 F.2d 1486, 1496 (11th Cir. 1993). This doctrine applies where two conditions are met: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.*; *Florida Right to Life, Inc. v. Lamar*, 273 F.3d 1318 (11th Cir. 2001). Here, both conditions have been satisfied, particularly with regard to the Union Plaintiffs whose members will continue to be subjected to the same unlawful actions by Defendants in future elections.

Moreover, in this, the Eleventh Circuit implicitly held that the capable of repetition doctrine applies to the claims of the Individual Plaintiffs by declining to affirm the dismissal of the claims of Ebony Roberts, a Plaintiff in the original complaint, *Diaz v. Secretary of the State of Florida*, No. 04-15539 (11th Cir. Sept. 28, 2005) (per curiam opinion); *see also Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (although election was over and no relief could be provided to candidates or voters, case not moot since effects of issues on other independent candidates would persist in future elections); *Rosario v. Rockefeller*, 410 U.S. 752, 755 n.5 (1973) (challenge to voter registration requirements for primary elections not moot even though primary election had passed and petitioners would be eligible to vote in subsequent primary); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972) (sole named plaintiff met durational residency requirement and could vote but the problem to other voters posed by the requirement was capable of repetition yet evading review).

Defendants cannot show that the wrongful conduct that Plaintiffs have challenged cannot reasonably be expected to recur. To the contrary, state law now mandates the very conduct that Plaintiffs challenge; Defendants must now reject applications on which the applicant has not checked the mental incapacity box and are prohibited from permitting applicants who timely submit applications that are subsequently deemed incomplete, from correcting their applications after the registration deadline in order to be added to the rolls in time to vote in the upcoming elections. Thus, it is inevitable that voter registration applicants, including members of the Union Plaintiffs, will continue to be injured by Defendants in future elections.

1974) (invalidating portion of Texas constitution and statute requiring persons who wished to vote in any given year to register each year during a registration period beginning on October 1 and ending on January 31 of the following year). Plaintiffs have similarly alleged that Defendants' refusal to permit corrections to voter registration applications after the registration deadline in order for the applicant to vote in the following election unconstitutionally burdens or denies Plaintiffs' right to vote. Thus, the Court cannot grant Defendants' motion to dismiss these claims.

In addition to alleging burden or denial of their voting rights under the *Anderson* standard, Plaintiffs have also alleged facts that Defendants' purported interests in denying applicants adequate notice or an opportunity to cure deficiencies in their application after the registration deadline are not necessary. *See Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 789. In particular, Plaintiffs have alleged that in 2004, Supervisors of Elections for Duval County and other counties were capable of affording applicants who had timely submitted a voter registration application on which the applicant neglected to check the mental incapacity, citizenship, or felon status checkbox(es) an opportunity to correct the deficiency. Further, Duval County added those registrants to the rolls and permitted them to vote in the November 2, 2004 elections. (TAC at ¶¶ 63-68). Moreover, Plaintiffs have alleged that the implementation of the statewide voter registration database will increase the efficient processing of voter registration applications (*id.* at ¶¶ 18-19) thereby demonstrating that Defendants' refusal to afford applicants with an opportunity to amend their application after the voter registration deadline is unnecessary. *Cf. Anderson*, 60 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.").

Defendants have not shown that Plaintiffs' claims concerning Defendants' failure to provide meaningful notice or opportunity to correct incomplete voter registration applications after the registration deadline must be dismissed on the pleadings.

Defendants' argument that Florida's twenty-nine day voter registration deadline is constitutionally permissible both misconceives Plaintiffs' claim and lacks legal support. As case law concerning challenges to voter registration deadlines makes clear, the constitutionality of a voter registration deadline may not be presumed and any registration deadline is subject to heightened scrutiny, given that such deadlines place the most severe burden on the right to vote: absolute denial of the right to vote in a particular election.

Defendants' reliance upon several Supreme Court decisions in which registration deadlines of various amounts of time—some longer than Florida's registration deadline of 29 days—were upheld is unavailing. These cases neither require deference to the legislature's judgment as to voter registration deadlines nor dictate, as a matter of law, dismissal of Plaintiffs' claims. To the contrary, in each case, the Court insisted not only on determining whether the interests posited by the state made it necessary to burden plaintiffs' rights, *see Anderson*, 460 U.S. at 796-806, but appears to have employed strict scrutiny in evaluating the registration deadline. *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 based on "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"); *Marston v. Lewis*, 410 U.S. 679, 680-81 (1973) (upholding a 50-day registration deadline based on state's evidence related to the "realities of Arizona's registration and voting procedures," which relied upon a massive volunteer deputy registrar system making early registration cut off "necessary" to ensure accurate registration lists); *see also ACORN v. Bysiewicz*, 413 F. Supp. 2d 119 (D. Conn. 2005) (after trial in which the court conducted detailed examination of the interests put forward by the state, upholding Connecticut's 7-day registration requirement for non-presidential offices). In short, because Plaintiffs have alleged burden on, or denial of, their right to vote and no statutory or decisional law compels dismissal of their claims, Defendants' motions to dismiss Counts I and II of the Third Amended Complaints are denied.

B. DEFENDANTS' FAILURE TO PROVIDE VOTER REGISTRATION APPLICANTS WITH ACTUAL OR MEANINGFUL NOTICE THAT THEIR APPLICATION WAS INCOMPLETE 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, 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.”⁹ *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985). Such a standard is 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.) 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

⁹ 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 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.

2004. (*Id.* at ¶¶ 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 Third Amended Complaint 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. (*Id.* ¶¶ 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 because, with respect to the relevant notice and grace policies, the Supervisors clearly did 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.¹⁰ *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

¹⁰ At a bare minimum, the Supervisors remain necessary parties to this litigation. Under Florida law, the Supervisors are responsible for 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. (*Id.* at ¶¶ 72-74 (citing Fla. Stat. §§ 97.052(6), 97.053(7)).

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). Therefore, Plaintiffs' claims against Defendant Supervisors shall not be dismissed.

C. THE ELEVENTH AMENDMENT DOES NOT BAR CLAIMS AGAINST THE COUNTY SUPERVISORS OF ELECTION DEFENDANTS BECAUSE THE THIRD AMENDED COMPLAINT ALLEGES THAT THEY DO NOT FUNCTION AS ARMS OF THE STATE

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 Third Amended Complaint, however, dismissal is not warranted on this ground.

Although 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), the Eleventh Amendment does not provide any protection to counties or municipalities. *See id.* 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). County Supervisors are defined by the Florida Constitution 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. VIII, Sec. 1(d).

Defendants, nevertheless, argue, based on *Manders v. Lee*, that the County Supervisors function as “arms of the state” with regard to the registration procedures at issue and that Plaintiffs’ claims against them should, therefore, be dismissed. 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).

Application of the *Manders* factors makes clear that the Defendant Supervisors are agents of the county – 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. Article VIII of the Florida Constitution defines County Supervisors of Elections as “County Officials.” 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); *Abusaid v. Hillsborough County*, 405 F.3d 1298, 1305 (11th Cir. 2005) (affirming *Hufford* as applied to sheriff’s enforcement of county ordinance); *In re Polygraphex Sys., Inc.*, 275 B.R. 408, 413-14 (M.D. Fla. 2002) (same with respect to property appraiser). County Supervisors of Elections are listed along with the Board of County Commissioners, the Clerk of the Circuit Court, the Sheriff, and the Property Appraiser as “County Officials” in Ch. 145 of Title 11 of the Florida Statutes, which provides generally for the “Compensation of County Officials.” Fla. Stats. §§ 145.011 through 145.1 (2006). All of Title 11 concerns “County Organization.” Title 11 further provides for the budget of the County Supervisor of Elections and for the process of allocating County funds to the budget of the County Supervisor of Elections as part of Title 11, Chapter 129 on the “County Annual Budget.” *See* Fla. Stat. 129.201 (2006) (requiring proposal, review and approval

of the County Supervisor of Election's budget by the County Commission upon which the "proposed [County Supervisor of Elections] budget shall be submitted to the board of county commissioners or county budget commission pursuant to s. 129.03(2), and the budget shall be included by the board or commission in the general county budget")

The Defendant Supervisors completely misconstrue the meaning of the first *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 supplied). And, as stated above, state law defines the County Supervisors of Elections as agents of the counties. If Defendants' interpretation of *Manders* were to be followed, all counties and municipalities would tend to be viewed as arms of the state, because they are after all "creations of the state" and of state law.

Second, the State has granted the Supervisors of Elections broad authority in the electoral process. Defendant County Supervisors contend that they are agents of the state concerning the registration procedures, deadlines and application design at issue in this case. In support of this claim, the County Supervisors cite the 2006 statutes that might be viewed as having accorded greater control to the State in certain respects. (Snipes, Holland, Cowles & Anderson's Motion to Dismiss, at 11.) However, the Third Amended Complaint seeks nominal damages against the County Supervisors for violations of the 2004 statutes only. Eleventh Amendment immunity as to these claims, therefore, does not require the Court to reach the question as to whether the second *Manders* factor would tend to favor immunity under the 2006 laws.

Under Florida's election code in effect in 2004, there is no doubt that the County Supervisors of Elections maintained the voter registration records and made almost all of the relevant determinations concerning the registration of voters, including whether to disregard as immaterial omissions certain errors made by applicants on the Florida Voter Registration Application and whether to provide notice and an opportunity to correct even after the close of books, as alleged in the Third Amended Complaint. (TAC at ¶¶ 9, 63-68.) Fla. Stat. 97.015 (2004) provided that the "supervisor is the official custodian of

the registration books and has the exclusive control of matters pertaining to the registration of electors.” In 2004, Duval County thus permitted applicants a grace period to correct deficiencies in their application after the registration deadline (*id.* at ¶¶ 64-69) and Miami Dade County processed applications that were lacking the required checkmark in the Citizenship checkbox, despite a directive issued by the Secretary of State to all Supervisors of Elections insisting that such applications not be processed

These allegations were contained in the original complaint and in the First and Second Amended Complaints, and they were not disputed by any of the parties. On the contrary, the Defendant Secretary of State’s own Motion to Dismiss the original complaint took the position that “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 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; 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”); *Touchston v. McDermott*, 234 F.3d 1133, 1136 (11th Cir. 2000) (“the actual conducting of elections in each of the counties in Florida takes place under the auspices of the County Supervisors of Elections”); *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).

Third, as Defendants admit, each County 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 County 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 County 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 support a finding that the County Supervisors of Elections are agents of the state. *Cf. Abusaid*, 405 F.3d at 1313 (“[E]ven if the county ultimately may not be held liable for a judgment against the sheriff, the fact that the state is not liable either weighs heavily against extending the state’s Eleventh Amendment immunity to the challenged conduct.”).

Thus, under 2004 law, all the *Manders* factors favor the conclusion that the County Supervisors of Elections do not enjoy 11th Amendment immunity.

CONCLUSION

For the foregoing reasons this Court denies Defendants’ motions to dismiss the Third Amended Complaint.

Dated: West Palm Beach
Florida, December 18, 2006

RESPECTFULLY SUBMITTED,

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I hereby certify that a true and correct copy of the foregoing was sent electronically as an email attachment this 18th day of December, 2006 to counsel for the parties listed in Exhibit A, attached hereto.

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