

VIA ELECTRONIC & FIRST-CLASS MAIL

November 25, 2009

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Florida Department of State
R.A. Gray Building
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*Re: Proposed New Rule, 1S-2.039:
FVRS Voter Registration Procedures*

Dear Ms. Matthews:

We write to submit comments to Proposed Rule 1S-2.039: FVRS Voter Registration Procedures. We request that our comments be considered prior to the public hearing concerning the proposed rule on November 30, 2009.

Summary of Comments

Proposed Rule 1S-2.039 establishes procedures and practices affecting voter registration, including those related to § 97.053(6), Fla. Stat., a law requiring verification of a voter applicant's Florida driver's license number, state identification number, or last four digits of the applicant's Social Security number.

In pertinent part, and in a striking change from a similar draft circulated in advance of the March 5, 2009, workshop, the Proposed Rule would require supervisors of elections to notify voter applicants whose "personal identifying number" above cannot be verified through the Department of Highway Safety and Motor Vehicles ("DHSMV"), Social Security Administration ("SSA"), or Bureau of Voter Registration Services ("BVRS") ("unmatched applicants" or "unmatched voters") that: (1) in order to vote by regular ballot in the upcoming election, they must provide their supervisor "beforehand" with a copy of their Florida driver's license, state identification card, or social security card; and (2) if the voter does not supply this "before going to the polls," the voter will only be able to vote a provisional ballot, which will not be counted unless the voter presents evidence of his or her driver's license, state ID card, or social security card to the supervisor within two days of the election. Proposed Rule 1S-2.039(5)(a)(2)(a) (emphasis supplied). That is, despite the fact that Florida law demands that voters at the polls provide a photo ID, despite the fact that most voters will bring a driver's license to the polls for this purpose, and despite the fact that showing a driver's license at the polls could easily clear up any lingering problem with verification, the Proposed Rule would demand that supervisors notify voters that they *cannot* resolve the verification problem at the very time when it is most straightforward to do so.

As explained below, we strongly oppose this provision of the Proposed Rule because it would needlessly restrict the rights of eligible voters to vote a valid ballot and impede the ability of county supervisors of elections to exercise one of their core responsibilities under Florida law: registering voters. The Rule would result in the loss of votes cast by eligible, unmatched voters and burden unmatched voters' right to vote by forcing such voters to take unnecessary and duplicative steps to ensure the counting of their ballot. The Rule would also have the undesirable effect of increasing the number of provisional ballots, which are complicated and costly to administer, and would increase the administrative burden on supervisors in the days after an election, precisely at one of the busiest points of the election cycle, when errors risk compromising the accuracy of the final tally. We further note that given the disproportionate impact of errors in the matching process on minority populations, to the extent that the Proposed Rule increases the burden of resolving verification errors, it could well run afoul of Section 5 of the federal Voting Rights Act.

For these reasons, we urge the Division of Elections to modify Proposed Rule 1S-2.039(5)(a)(2)(a) to require notice to unmatched voter applicants that they may verify their identity and vote by regular ballot, up to and on Election Day, by (1) providing their supervisor or a poll worker with a copy of their Florida driver's license, state identification card, or social security card or, (2) showing one of those documents to a poll worker and executing an affidavit reflecting the accurate identifying number, and attesting that the name and number as they appear on the card and affidavit are his or her name and number. We also urge the Division to amend 1S-2.034, the Polling Place Procedures Manual, to reflect this change in procedure.

Factual Background

Section 97.053(6) was not enforced for much of 2008 due to an ongoing legal challenge to the law, *Fla. State Conf. of NAACP, et al. v. Browning*, Case No. 07-402 (N.D. Fla.),¹ and while a request for preclearance of an amendment to the law was pending with the U.S. Department of Justice. Effective September 8, 2008, the Division resumed enforcement of § 97.053(6).

The Division implemented new procedures in the fall of 2008 purporting to eliminate errors in the verification process; however, though the new procedures improved the flawed procedure to some degree, an alarming number of errors remain. Between September 8, 2008 and October 6, 2008 — the registration deadline for the 2008 general election — more than 11,000 Florida citizens submitted complete and timely applications to participate in the 2008 general election but were not successfully registered to vote because the information on their voter registration application could not be matched with a record in the DHSMV or SSA databases. That is, in the span of just one month, at least 11,000 applicants with complete and timely registration applications were denied

¹ The Florida State Conference of the NAACP, Haitian-American Grassroots Coalition, and Southwest Voter Registration Education Project, on whose behalf these comments are submitted, are plaintiffs in the litigation.

registration and unable to resolve errors in the verification process in time to cast a valid ballot in the 2008 election.

These unmatched voter applicants were disproportionately Latino and African-American. While Latino applicants represented 17% of the total applicants who submitted applications from September 8, 2008 to the registration deadline of October 6, 2008, they accounted for 24% of the unmatched applicants from that period. Similarly, African-American applicants represented 23% of the total applicants during that period but 30% of the unmatched applicants.² In contrast, white applicants represented 42% of the total applicants, but only 19% of those who were unmatched.

As Election Day approached, state and county election officials expressed divergent views as to whether unmatched voter applicants should be permitted to verify their identifying number at the polls on Election Day — when they are required to bring identification anyway, under Florida law — and vote with a regular ballot. Per its memo of September 5 to the supervisors, the Division stated that unmatched applicants who had not presented evidence to resolve their verification before Election Day should only be permitted to vote by provisional ballot and required to present such evidence to their supervisor within two days of the election for their ballot to count.

Counsel for the Florida State Association of Supervisors of Elections reached a different conclusion, issuing a written memorandum concluding that supervisors are responsible for devising procedures to permit unmatched applicants to verify their information and that because § 97.053(6), Fla. Stat., does not prohibit unmatched applicants from verifying their identity at their polling place,³ supervisors could authorize that procedure.⁴ On Election Day, supervisors of elections in many counties, including supervisors for several of the most populous counties in the state, reportedly permitted unmatched voter applicants to present evidence to resolve their verification issue at their polling place and vote by regular ballot. There have been no reports that supervisors implementing these

² The law's disproportionate impact upon minority applicants is also evident from a demographic analysis of voter applicants who submitted their application between January 1, 2006 and October 10, 2007. During that period, Latinos comprised 15% of the applicant pool but 39% of applicants who were unmatched and unregistered as of October 10, 2007. Likewise, African-American applicants constituted 13% of applicants but 26% of unmatched applicants.

³ The relevant portion of the law, § 97.053(6), Fla. Stat., provides as follows:

If the applicant has not provided the necessary evidence or the number has not otherwise been verified prior to the applicant presenting himself or herself to vote, the applicant shall be provided a provisional ballot. The provisional ballot shall be counted only if the number is verified by the end of the canvassing period or if the applicant presents evidence to the supervisor of elections sufficient to verify the authenticity of the applicant's driver's license number, Florida identification card number or last four digits of the social security number no later than 5 p.m. of the second day following the election.

⁴ Memorandum from Ronald A. Labasky to the Florida State Association of Supervisors of Elections (Oct. 21, 2008) (attached hereto as Attachment A).

procedures encountered any substantial difficulty in doing so, or that the election process suffered in any way as a result.

Proposed Rule 1S-2.039(5)(a)(2)(a) Would Burden Eligible Voters and Interfere with Supervisors' Obligation to Register Eligible Voters

Proposed Rule 1S-2.039(a)(2)(a) would require supervisors of elections to notify voter applicants whose personal identifying number cannot be verified that: (1) in order to vote by regular ballot in the upcoming election, they must provide their supervisor “beforehand” with a copy of their Florida driver’s license, state identification card, or social security card and (2) if the voter does not supply this “before going to the polls,” the voter “will be allowed to vote a provisional ballot” which will not be counted unless the voter presents evidence of his or her identification within two days. *Id.* (emphasis supplied). In other words, unmatched voter applicants who remain unverified on Election Day would be notified that they are prohibited from verifying their identity at their polling place and would be required to vote by provisional ballot, which will be rejected unless the voter presents evidence to the supervisor to verify his or her identify within two days following the election.

We strongly oppose this provision of the Proposed Rule due to the wholly unnecessary burdens that it would place upon unmatched voters. Notifying unmatched voters that they are prohibited from correcting the state’s verification errors at the polls would be duplicative and needlessly burden the right to vote. Florida election law requires voters to produce identification at the polls to prove their identity prior to voting,⁵ and poll workers effectively administer this straightforward process, including documenting where necessary the fact that identification has been shown. There is no legitimate basis, as a legal or practical matter, for prohibiting unmatched voters from similarly verifying their identity for both voting and registration purposes at the polls on Election Day, precisely when they are already prepared to present their identification to an election official.

Notifying unmatched voters who appear at the poll with their Florida driver’s license, state identification card, or Social Security card that they are forbidden from presenting that identification to a poll worker, and instead requiring them to take the additional step of presenting the identification directly to their supervisor within two days of the election is unnecessary and would impose a severe burden on many voters, particularly low-income voters who lack immediate access to the internet or fax or photocopying machines. Moreover, given the large number of supervisors who apparently permitted unmatched voter applicants to prove their identity for purposes of § 97.053(6) at the polls during the 2008 general election, without adverse consequences, prohibiting this practice would be punitive while serving no useful purpose.

We also oppose the Proposed Rule because it would unnecessarily interfere and conflict with the legal obligations of supervisors of elections under state and federal law to ensure that eligible applicants who timely submit a complete voter registration application are

⁵ § 101.043, Fla. Stat.; *see also* § 97.0535, Fla. Stat.

registered to vote.⁶ Supervisors have the authority and responsibility to ensure eligible citizens are registered and that their votes are counted and to reduce duplicative and unnecessary bureaucratic burdens on voters. As noted by counsel for the Florida State Association of Supervisors of Elections, supervisors are required to establish procedures to enable unmatched voters to supply evidence to verify their identity prior to presenting themselves to vote. As nothing in the plain language of § 97.053(6) prohibits supervisors from accepting verification of an unmatched voter's identity at the polling place, supervisors are permitted under state law to establish these procedures and should be permitted to continue this practice in upcoming elections. Indeed, many supervisors will be able to save time and cost through such procedures, which avoid the need to issue and process provisional ballots, and reduce the number of voters attempting to submit extra evidence of eligibility to supervisors in the hectic days immediately after an election. By requiring notice that conflicts with supervisors' implementation of these procedures, the Proposed Rule would senselessly create, rather than relieve, administrative burdens.

Finally, notifying unmatched voters that they must vote by provisional ballot despite their ability to present their identification card would increase the risk that their ballot will not count due to poll worker error. Some unmatched voters, who voted in counties which required unmatched voters to vote by provisional ballot during the 2008 general election, reported that poll workers did not instruct them to supply a copy of their identification to their supervisor within two days of the election. As a result, these voters did not take this necessary step to ensure that their provisional ballot would be counted. Provisional ballots may also be rejected for other administrative reasons unrelated to a voter's eligibility, such as failure to cast the ballot in the correct precinct, or failure to sign the provisional ballot envelope—both of which often result from poll worker error.⁷ Consequently, the number of unmatched voters, who cast a provisional ballot and whose provisional ballot is rejected due to poll worker error in administering such ballots, would likely increase substantially.

The Proposed Rule Should be Modified to Permit Unmatched Voters to Verify Their Identity on Election Day

We recommend that the Proposed Rule be modified to permit unmatched voters to verify their identity during early voting or on Election Day through two means: (1) providing a copy of their Florida driver's license, state identification, or social security card to a poll worker; or (2) showing one of those documents to a poll worker and executing an affidavit reflecting the accurate identifying number, and attesting that the name and number as appear on the card and written on the affidavit are his or her name and

⁶ § 98.045(1), Fla. Stat. (supervisors "must ensure that any eligible applicant for voter registration is registered to vote . . ."); *see also* 42 U.S.C. § 1973gg-6(a) ("In the administration of voter registration for elections for Federal office, each State shall insure that any eligible applicant is registered to vote in an election. . .").

⁷ In the 2008 general election, 18,321 provisional ballots were rejected in Florida, of which 1,287 were rejected because the voter cast the ballot in the wrong precinct. U.S. Election Assistance Commission, *2008 Election Administration and Voting Survey* 50 (Nov. 2009) (Table 36A. Provisional Ballots: Reasons for Rejection, Part A).

number. Attached to this comment is a draft amendment to the Proposed Rule, with minimal changes to the proposed text (see Attachment B).

Our amendment of the Proposed Rule would reduce, within the confines of the statute, the burden to unmatched voters of verifying their identity and would enable supervisors to fulfill their obligation to register all eligible voters and permit such voters to vote by regular ballot. Allowing unmatched voters to prove their identity at the polling place on Election Day would in many instances obviate the need for additional contacts between unmatched voters and their supervisor's office within the two-day period following the election. The amendment would also minimize unmatched voters' use of provisional ballots, which are risky to voters and cumbersome to administer. The amendment would avoid any adverse incremental burden on minority populations. Finally, to the extent the state has an interest in maintaining records of voter verification for auditing purposes, our amendment would satisfy that interest.

* * *

In sum, we strongly oppose Proposed Rule 1S-2.039(5)(a)(2)(a) and urge the Division to amend the Rule to notify unmatched voters that they may verify their identity at the polling place on Election Day and vote by regular ballot. If the Proposed Rule as currently drafted is adopted and in effect for the 2010 elections, it will inevitably disenfranchise and unnecessary burden unmatched voters who seek to vote in those elections and impose unnecessary and unwarranted administrative cost on supervisors. Nothing in the text of § 97.053(6) or the facts surrounding the administration of § 97.053(6) during the 2008 general election warrant the imposition of these burdens on the right to vote.

Thank you in advance for considering our comments. If you have questions about these comments, please contact Elizabeth Westfall at Advancement Project at 202-728-9557.

Sincerely,

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Haitian-American Grassroots Coalition
Southwest Voter Registration Education Project

cc: Allen Winsor, Esquire

ATTACHMENT B

Draft Amendment of Proposed Rule 1S-2.039(5)(a)(2)(a)

1S-2.039(5)(a)(2)(a) FVRS Voter Registration Procedures.

(5) Identification verification. Any valid application for new registration that is submitted other than electronically through DHSMV shall be routed to DHSMV or SSA for verification of the authenticity or nonexistence of the personal identifying number provided on the application. However, no application shall be routed to DHSMV unless the Supervisor first determines that the applicant is eligible in accordance with Section 97.041, F.S.

(a) Personal identifying number provided.

1. If DHSMV or SSA is able to verify the personal identifying number, the applicant's completed application shall become the official registration record and the applicant's name shall be listed as an active voter in the FVRS.

2. If DHSMV or SSA is unable to verify the personal identifying number, the application record shall be routed to the BVRS to check for data entry errors using the scanned image of the application in the FVRS, and a comparison of information available from DHSMV. If a data entry error occurred, the BVRS shall correct the application record and resubmit the record to DHSMV OR SSA for verification. If no data entry error occurred, but the BVRS is able to confirm that the number belongs to the applicant, the BVRS shall override the FVRS to complete the registration process. The applicant's completed application shall become the official registration record and the applicant's name shall be listed as an active voter in the FVRS. If the BVRS is unable to resolve the verification issue, the BVRS shall flag the record as unverified and suspend the record through the FVRS to the Supervisor of the new applicant's county of residence resolutions as follows:

a. The Supervisor shall then send the applicant written notice stating that:

i. The applicant's personal identifying number as provided on the application could not be verified,

ii. In order to vote a regular ballot in the upcoming election, the applicant must:

a. provide beforehand to the Supervisor a copy of his or her Florida driver's license, Florida identification card or social security card in person or mail, fax or e-mail a copy of the card to the office [with the necessary Supervisor's contact information provided]; ~~or~~

b. provide to a poll worker on Election Day a copy of his or her Florida driver's license, Florida identification card or social security card; or

c. show to a poll worker on Election Day his or her original Florida driver's license, Florida identification card, or social security card, and execute an affidavit under penalty of perjury including the voter's name, date of birth, signature, date, poll worker's signature, and an attestation by the applicant that the name and number on the card and on the affidavit are his or her name and number; or

iii. If the applicant does not provide evidence of his or her Florida driver's license, Florida identification card or social security card, before ~~voting~~ ~~going to the polls~~, the applicant will be allowed to vote a provisional ballot and has the right to present the evidence until 5 p.m. of the second day after Election Day in order to ensure that the provisional ballot is counted.

iv. That Florida law exempts from public disclosure a person's driver's license number, identification card number and social security number.