

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA**

FLORIDA DEMOCRATIC PARTY, and
the DEMOCRATIC NATIONAL
COMMITTEE,

Plaintiffs,

v.

KEN DETZNER, in his official capacity as
Florida Secretary of State,

Defendant.

No. _____

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’
EMERGENCY MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to Federal Rule of Civil Procedure 65(a), Plaintiffs the Florida Democratic Party and the Democratic National Committee respectfully submit the following memorandum of law in support of their emergency motion for a preliminary injunction enjoining the State of Florida from rejecting vote-by-mail ballots where it has been determined that a voter’s ballot envelope signature does not match the voter’s signature on file with the county, without affording the voter an opportunity to “cure” the ballot by submitting an affidavit confirming that they cast the ballot in question and proof of their identity—as voters whose ballots are turned in without a signature are permitted to do. This law severely burdens the

fundamental right to vote and will disenfranchise thousands of Florida voters in the upcoming general election, unless the Court enters preliminary injunctive relief on an expedited basis.

NATURE OF THE MATTER

This is a case about the denial of the fundamental right to vote of thousands of Florida voters who vote-by-mail. Each election, thousands of vote-by-mail ballots are rejected because it is determined that the signature on their ballot envelope does not match their signature in the registration books. Despite the fact that Florida law recognizes procedures for curing other types of vote-by-mail ballots (namely, those with no signature), voters whose signatures do not match are not provided with an opportunity to cure their ballot in the same election cycle in which it is cast. As a result, their votes are not counted and these voters are wholly disenfranchised. The failure to extend the opportunity to cure to these signature-mismatch voters deprives these voters of the fundamental right to vote and runs afoul of the Equal Protection Clause.

This motion is filed as an emergency motion pursuant to Local Rule 7.1(L), as many voters have already received vote-by-mail ballots and canvassing of returned vote-by-mail ballots is slated to begin on October 24, 2016. It is essential that the motion be decided before the canvassing period begins for the relief plaintiffs request to be effective, such that voters whose ballots are rejected for

signature-mismatch are afforded an opportunity to cure their ballot and have their vote counted and voice heard in the 2016 general election.

STATEMENT OF FACTS

In the upcoming 2016 general election, millions of Florida voters will cast vote-by-mail ballots.¹ Voting-by-mail in Florida is on the rise. Florida voters cast more than 2.37 million vote-by-mail ballots in the 2012 general election, constituting more than 28 percent of all ballots cast—nearly six percentage points higher than in the 2008 general election, when voters cast 1.85 million vote-by-mail ballots. Ex. A at 3-4 (Michael C. Herron and Daniel A. Smith, *Florida's 2012 General Election under HB 1355: Early Voting, Provisional Ballots, and Absentee Ballots* (January 2013)).² This trend continued in 2016, with more than half a million vote-by-mail ballots returned in advance of Florida's March 15, 2016 primary election. Ex. B (Steve Bousquet, *With half-million absentee ballots turned in for Florida's primary, Miami-Dade a focal point for problems*, Miami Herald, (Feb. 25, 2016) (“Bousquet Article”)).

But not all voters who submit vote-by-mail ballots in the upcoming election will have their votes counted. That is because county canvassing boards and

¹ Vote-by-mail ballots were formerly called “absentee ballots” in Florida.

² Except where otherwise specified, exhibit numbers herein refer to exhibits to the Declaration of Mark Herron in Support of Plaintiffs' Emergency Motion for Preliminary Injunction.

Supervisors of Election will reject thousands of vote-by-mail ballots on the basis of a “signature mismatch” determination, and Florida election procedure offers these voters no opportunity to cure their ballots.

To be counted, the envelope of a vote-by-mail ballot must include the voter’s signature. Fla. Stat. § 101.65. Such signatures must survive a review process in which county canvassing boards or county Supervisors of Elections (“SOEs”) compare them to voters’ signatures submitted in the registration process. *See Id.* § 101.68(2)(c)(1) (establishing that, unless the SOE has already done so, the canvassing board “shall . . . compare the signature of the elector in the registration books or the precinct register to see that the elector is duly registered in the county and to determine the legality of that vote-by-mail ballot”). If the canvassing board determines that the signature on the ballot does not match the signatures on file for the voter, the ballot is rejected. *Id.* § 101.65. (stating that a vote-by-mail ballot “will be considered illegal and not be counted if the signature on the voter’s certificate does not match the signature on record” in the voter’s registration file). Ballots rejected because of signature-mismatch determinations are preserved in the ordinary course of Florida election procedure, just as other official ballots are preserved. *See Id.* § 101.68(2)(c)(1) (establishing that such ballots, their envelopes, and relevant affidavits “shall be preserved in the manner that official ballots voted are preserved”).

While ballots rejected because of signature mismatch are preserved, voters who submit them currently receive no opportunity to cure the mismatch. Instead, that voter's ballot simply does not count. This results, in part, from the timing of Florida's current election procedures. Currently, when a voter's ballot has been rejected due to a perceived difference between the signature on the ballot and the signature in the registration books or precinct register, the SOE will mail a voter registration application to the elector, which "indicat[es]" the elector's current signature. *Id.* § 101.68(4)(a). Voters then have an opportunity to update their registration signatures—but the opportunity comes too late to enable voters to have their votes counted in the same election cycle. That is because the State will only process voters' updates to their registration signatures *before* the start of canvassing of vote-by-mail ballots, which may begin as early as 15 days before an election. *Id.* § 98.077(4); *id.* § 101.68(2)(a).³ Thus, in any given election, voters only receive notification of a signature mismatch determination *after* the window to update their signatures has closed. Because rejections for signature-mismatch occur *during the canvass*, and signatures on file cannot be updated once canvassing has started, a vote-by-mail voter who casts a ballot rejected for signature-mismatch simply cannot correct the defect. Such voters are completely disenfranchised.

³ For the upcoming general election, the deadline is Monday October 24, 2016. *See* Ex. C at 18.

In contrast, Florida *does* provide an opportunity to cure to those voters whose ballots are rejected due to a complete lack of signature on the vote-by-mail ballot. *See* Fla. Stat. § 101.68(2)(c)(1). This class of voters—those who cast “no-signature” ballots— are afforded the ability to cast effective votes in the same election cycle: “[u]ntil 5 p.m. on the day before an election, the supervisor shall allow an elector who has returned a vote-by-mail ballot that does not include the elector’s signature to complete and submit an affidavit in order to cure the unsigned vote-by-mail ballot.” *Id.* § 101.68(4)(b). A voter must include a copy of one of several listed forms of identification with the affidavit. *Id.* § 101.68(4)(d). The affidavit and accompanying identification may be mailed, faxed, e-mailed, or delivered in person to the relevant county supervisor of elections. *Id.* § 101.68(4)(d)(4)-(5). The affidavit, instructions, and contact information for each county supervisor of elections are made available on their respective websites, pursuant to Florida Statute § 101.68(4)(d)(5)(e). Currently, this affidavit process is not afforded to voters whose ballots are rejected for signature mismatch.

Despite the weighty consequence of ballot rejection for signature mismatch (i.e., *total disenfranchisement*), Florida also has no statewide process for assessing whether a voter’s signature on the vote-by-mail ballot envelope matches the signature in the registration file. As the Florida Division of Elections has made clear, the Florida legislature:

did not incorporate in the Florida Election Code a scientific standard of handwriting comparison when charging canvassing boards with their duty to compare signatures . . . Instead, the Legislature in essence created a standard of reasonableness and left it to the canvassing boards to make such determinations using their collective best judgment as to what constitutes a signature match.

Ex. K (*Div. of Election Op.* 13-07, at 3 n.1⁴ (April 23, 2013) (quoting *Div. of Elections O.* 06-11 (Aug. 25, 2006))). As a consequence of this discretion, some counties use signature verification technology and others do not. For those counties that do employ such technology, the Division of Elections lacks the authority to certify or test it. *Id.* at 3-4. And even if a county elects to use such signature verification technology, “the ultimate decision regarding the authenticity of a signature must be made by the canvassing board using their collective best judgment.” *Id.* at 3-4.

Whether making the signature matching determination in the first instance, or reviewing the output of signature verification technology, county canvassing boards face a challenging task given the difficulty inherent in analyzing voter handwriting. At a 2015 annual conference for the Florida State Association of Supervisors of Elections, a professional Forensic Document Examiner gave a presentation where he instructed that handwriting is affected by (a) physical factors such as age, illness, injury, medicine, eyesight, alcohol, and drugs; (b) mechanical

⁴This opinion is available at: <http://opinions.dos.state.fl.us/searchable/pdf/2013/de1307.pdf>.

factors such as pen type, ink, surface, position, and paper quality, and (c) psychological factors such as distress, anger, depression, happiness, and nervousness. Ex. D at 6 (Richard Orisini, *Signature Evaluation*, Fla. State Ass'n of Supervisors of Elections 2015 Annual Summer Conference (June 7-10, 2016) ("Orsini Presentation")); *see also* Ex. E ¶¶ 14, 17-18 (Expert Decl. of Dr. Linton Mohammed ("Mohammed Decl.")). Consistent with the Forensic Document Examiner's observations, it is well-established that unremarkable characteristics such as a person's body position when signing, writing surface and material, the physical and psychological state of the person, and environmental factors, such as noise and luminance, affect a person's signature. *See* Ex. F at 145 (Tomislav Fotak, et al., *Handwritten Signature Identification Using Basic Concepts of Graph Theory*, 7 WSEAS Transactions on Signal Processing 145 (2011) ("Tomslav Article")); Ex. E. ¶¶ 15, 17 (Mohammed Decl.). Signatures also change with age for both healthy individuals and people who suffer from physical ailments as they get older. *See, e.g.*, Ex. E. ¶¶ 14, 17-18 ** (Mohammed Decl.); Ex. G (Michael P. Caligiuri, et al., *Kinematics of Signature Writing in Healthy Aging*, 59 J. Forensic Sci. 1020 (2014) ("Caligiuri Article")); Ex. H (Judie Walton, *Handwriting Changes Due to Aging and Parkinson's*, 88 Forensic Sci. Int. 197 (1997) ("Walton Article")).

In attempting to control for the above factors, county canvassing boards make the tough determination about whether a particular signature is authentic without any expertise or statewide standard to employ. In light of the lack of statewide standards, the number of vote-by-mail ballots that are rejected due to a perceived signature mismatch unsurprisingly varies considerably and significantly across counties—and even more problematic, across race and party. *See* Ex. E ¶¶ 17-20 (Mohammed Decl.). For example, in the 2012 general election, Seminole and Alachua counties were ten times more likely than Sarasota, Hillsborough, and Leon counties to reject a vote-by-mail ballot as illegal for signature mismatch. Ex. I at 10 (Expert Report of Dr. Daniel A Smith (“Smith Rpt.”)). The former counties rejected over 1% of all vote-by-mail ballots for signature mismatch while the comparable figure in latter counties was less than one-tenth of 1 percent. *Id.* Such disparity suggests “tremendous variation in how SOEs and canvassing boards interpret valid vote-by-mail ballot signatures.” *Id.* at 14; *see also* Ex. E ¶¶ 3-4, 18, 22 (Mohammed Decl.). Moreover, across 11 counties studied, Democratic voters were more likely than Republican voters to have their vote-by-mail ballots rejected for signature mismatch. Ex. I at 14 (Smith Report).

More generally, in the 2012 general election, 2,608 vote-by-mail ballots were rejected for signature mismatch in 11 Florida counties that received nearly half of all [vote-by-mail] ballots in that election cycle. *Id.* at 7-8. It is accordingly

likely that more than 5,000 ballots were rejected statewide for signature mismatch. *See id.* This number is only expected to increase in the upcoming general election given the rise in the number of vote-by-mail ballots cast.

ARGUMENT

I. Preliminary Injunction Standard

“A party seeking a preliminary injunction bears the burden of establishing its entitlement to relief.” *Scott v. Roberts*, 612 F.3d 1279, 1289-90 (11th Cir. 2010). (citation omitted.) “To obtain such relief, the moving party must show (1) a substantial likelihood of success on the merits; (2) that it will suffer irreparable injury unless the injunction is issued; (3) that the threatened injury outweighs possible harm that the injunction may cause the opposing party; and (4) that the injunction would not disserve the public interest.” *GeorgiaCarry.org v. U.S. Army Corps of Eng’rs*, 788 F.3d 1318, 1322 (11th Cir. 2015). (citation omitted.)

II. Plaintiffs Are Likely To Succeed On Their *Anderson-Burdick* Claim.

Based on past elections, it is all but certain that thousands of Florida vote-by-mail ballots will be improperly rejected because a voter’s signature on her ballot envelope does not match the signature on file for the voter. Fla. Stat. § 101.68(4)(a). In contrast, voters who do not sign the ballot envelope *at all* have an opportunity to cure and have their vote counted by signing an affidavit and submitting a copy of a form of identification by the night before Election Day. *See*

Fla. Stat. § 101.68(4)(a)-(d); Ex. I at 7 (Smith Rpt.); Ex. B (Bousquet Article) (In Miami-Dade County, an “unsigned ballot envelope is not fatal because the law allows those voters to ‘cure’ the problem by going to an elections office and signing the envelope” by 5 p.m. on Elections Day Eve). But voters whose ballots are deemed to have non-matching signatures have no recourse. Their votes are not counted.

The failure to count signature-mismatch votes unquestionably burdens the right to vote, *see Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009) (“a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction”) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)), as “[o]bviously included” within the right to vote “is the right of qualified voters within a state to cast their ballots and have them counted.” *United States v. Classic*, 313 U.S. 299, 315 (1941); *Stewart v. Blackwell*, 444 F.3d 843, 856-57 (6th Cir. 2006) (same); *see also* 52 U.S.C. § 10310(c)(1) (defining right to vote as including “casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast”). And of course the right to cast an effective vote “is of the most fundamental significance under our constitutional structure.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citation omitted).

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992), the Supreme Court laid out a “flexible standard” to resolve constitutional challenges to state election laws. *Anderson*, 460 U.S. at 789. “A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights . . . 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*, 504 U.S. at 433-34 (citation and internal quotations omitted). Under this sliding scale, when a regulation subjects the right to vote to a “severe” restriction, the restriction “must be narrowly drawn to advance a state interest of compelling importance” to pass constitutional muster. *Norman v. Reed*, 502 U.S. 279, 280 (1992). Less severe burdens remain subject to balancing, but “[h]owever slight” the burden on the right to vote “may appear,” “it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” *Crawford v. Marion Cty. Election Bd.*, 128 S. Ct. 1610, 1616 (2008) (plurality) (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

A. The Categorical Disqualification Of Signature-Mismatch Ballots Imposes A Severe Burden on Florida Citizens’ Right To Vote.

The fact that canvassing boards are going to reject thousands of vote-by-mail voters' ballots for signature-mismatch in the 2016 General Election with no opportunity to cure presents a severe or, at the very least, significant, burden on Florida voters' right to vote.

First, it is all but certain that thousands of voters will be disenfranchised because their ballots are rejected due to a determination that the signature on their ballot envelope does not "match" the signature on file. In the 2012 General Election, in just 11 Florida counties, at least 2,608 vote-by-mail ballots were rejected because of signature-mismatch. *See* Ex. I at 8 (Smith Rpt.). Those counties account for "nearly half of all absentee ballots cast" in that election, *id.* at 7-8, indicating that it is likely that well over 5,000 ballots were rejected across Florida for signature mismatch in the 2012 General Election. With vote-by-mail voting on the rise, *see discussion supra*, that number is only likely to increase in the 2016 General Election.

Disenfranchisement of such a high number of voters constitutes a severe burden. In *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006), the Sixth Circuit found a "severe" burden where unreliable punch card ballots and optical scan systems resulted in thousands of votes not being counted. *Id.* at 661-62. And, in *Ne. Ohio Coal. for the Homeless v. Husted* ("NEOCH"), 696 F.3d 580 (6th Cir. 2012), the court held that disqualification of thousands of Ohio provisional ballots

because they were cast in the right polling location but wrong precinct in multiple precinct polling locations constituted a “substantial” burden on provisional voters. *Id.* at 597. The court reached this conclusion even though such ballots historically constituted less than 0.248% of all votes cast. *Id.* at 593. Most recently, in *One Wisconsin Inst., Inc. v. Thomsen*, 2016 U.S. Dist. LEXIS 100178 (W.D. Wis. July 29, 2016), the court found a severe burden where about 100 otherwise qualified voters were disenfranchised because of Wisconsin’s voter ID law. *Id.* at *137-38. In the context of voting rights cases, “the basic truth [is] that even one disenfranchised voter—let alone several thousand—is too many[.]” *League of Women Voters of N.C. v. N. Carolina (“LOWV”)*, 769 F.3d 224, 244 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015).

Second, because signature-mismatch voters have *no* opportunity to cure, the canvassing board’s determination that there is a signature-mismatch results in their automatic and total disenfranchisement. Unsurprisingly, courts hold this sort of categorical denial of the right to cast an effective vote with no recourse amplifies the severity of the burden on the right. *See NEOCH*, 696 F.3d at 585-587 (“summary” and “automatic” nature of disqualification of right-place, wrong-precinct ballots suggests burden on right to vote is “substantial”); *cf. Crawford*, 553 U.S. at 199-200 (finding severity of burden mitigated by fact that “voters

without photo identification may cast provisional ballots that will ultimately be counted”).

Third, canvassing boards reject vote-by-mail ballots on the basis of signature-mismatch even though it is virtually certain that nearly all such ballots were properly cast. It borders on the absurd to suggest that over 5000 Floridians attempt to cast fraudulent ballots in each election. As Dr. Linton Mohammed explained, laypersons with little to minimal training are highly likely to mistakenly classify a valid signature as invalid (i.e., a mismatch). Ex. E ¶¶ 10-12, 18, 21(Mohammed Decl.) (studies found laypersons find false mismatch 26% of the time, even when they have more samples than elections administrators have in determining whether a Florida voter’s signature “matches” the signature on file). Courts find the burden on the right to vote more severe when burden is due to government error or is otherwise out of the voter’s control. *See NEOCH*, 696 F.3d at 593-94 (relying on fact that majority of provisional ballot right-place/wrong precinct votes—which are not counted—are attributable to poll-worker error to establish that burden on voters is substantial); *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 238 (6th Cir. 2011) (granting preliminary injunction on equal protection grounds where “voters who may bear no responsibility for the rejection of their ballots”); *Stewart*, 444 F.3d at 860-61 (fact that technological burden exacted by voting machines “not within the control of the voters” makes

burden more substantial). And, as discussed *infra*, there are ample reasons a canvassing board might conclude no signature match, even though the person signing the ballot envelope is the same as the person who originally signed the registration. In other words, there are numerous factors outside a voter's control that may cause their ballot to be rejected for signature-mismatch.

For example, a person's signature varies each time she signs based on unremarkable factors such as the person's body position when signing, writing surface and material, physical and psychological state of the person, and environmental factors, such as noise and luminance. *See* Ex. E ¶¶ 15, 17 (Mohammed Decl.); Ex. F at 145 (Tomislav Article). Indeed, a presentation given by a Forensic Document Examiner at the 2015 annual conference for the Florida State Association of Supervisors of Elections noted that eyesight, illness, pen type, surface, paper quality, distress, depression, and nervousness are among the many factors that affect handwriting. Ex. D at 6 (Orsini Presentation); *see also* Ex. E ¶¶ 14, 17-18 (Mohammed Decl.).

For another thing, signatures systematically change with age for even healthy individuals. *See, e.g.*, Ex. E ¶¶ 14, 17-18 (Mohammed Decl.); Ex. G (Caligiuri Article); *see also* Ex. D at 6 (Orsini Presentation) (noting "age" is a factor that affects handwriting). Given that voters need not regularly update their registrations once registered to vote, it is likely that many vote-by-mail voters'

signatures are being compared to their signatures from many years earlier, further increasing the likelihood of an erroneous finding of mismatch. Ex. E ¶¶ 18 (Mohammed Decl.).

Additionally, maintaining a consistent signature can be a struggle for “voters who suffer from arthritis, strokes and other ailments that affect their handwriting.” Ex. J (*Anti-Voter Bill*, Sarasota Herald-Tribune (May 9, 2011)); *see, e.g.*, Ex. H (Walton Article). Troublingly, it is likely that these are just the sorts of voters who would need to cast a vote-by-mail ballot because of the physical difficulties presented by voting in person.

Lastly, and most importantly, in light of the lack of standards provided to canvassing boards for assessing signatures’ authenticity, the risk of canvassing board error—deeming authentic signature inauthentic or non-matching—is incredibly high. Ex. E ¶¶ 3-4, 18, 21-22 (Mohammed Decl.). As demonstrated by the studies cited above, detecting forgery is a challenging task since a person’s signature can vary over time due to a number of factors, many outside the person’s control. Ex. E ¶ 17-19 (Mohammed Decl.). Yet amateurs without expertise in handwriting analysis—canvassing board members—are statutorily obligated to take up the task without any guiding standards, making it all-but-certain that they will conduct such signature comparison using inconsistent metrics and disparate

guesswork. Ex. E ¶¶ 3-4, 18, 21-22 (Mohammed Decl.). As the Florida Division of Elections has explained, the Florida legislature:

did not incorporate in the Florida Election Code a scientific standard of handwriting comparison when charging canvassing boards with their duty to compare signatures . . . Instead, the Legislature in essence created a standard of reasonableness and left it to the canvassing boards to make such determinations using their collective best judgment as to what constitutes a signature match.

Ex. K (*Div. of Election Op.* 13-07, at 3 n.1 (quoting *Div. of Elections Op.* 06-11 (Aug. 25, 2006))). In other words, the statutory scheme affords canvassing boards complete discretion over signature comparison with no statewide oversight or standards. Even if a Supervisor of Elections for a particular county were to elect to use signature verification technology to aid in the signature matching decision process, the Florida Division of Elections has made clear both that (a) even if such technology is used, “the ultimate decision regarding the authenticity of a signature must be made by the canvassing board using their collective best judgment” and (b) the Division of Elections lacks the statutory test to certify the use of signature verification technology. *Id.* at 3-4. The statutory scheme accordingly *ensures* that the metrics used for comparing signatures will not and cannot be standardized across county canvassing boards. Nor can the Division of Elections ameliorate the problem by ensuring that the particular standard or scheme used by each canvassing board is sufficiently reliable—it lacks the statutory authority to do so.

It should come as no surprise, then, that the rejection rates for signature-mismatch vary “considerabl[y]” across counties. Ex. I at 10 (Smith Rpt.). In the 2012 General Election, for example, Seminole and Alachua counties rejected over 1 percent of all absentee ballots for signature mismatch; Sarasota, Hillsborough, and Leon counties, meanwhile, rejected less than one-tenth of 1 percent of all absentee ballots for signature mismatch. *Id.* Put differently, the rate of rejection for signature-mismatch varied *tenfold* across counties.⁵ This suggests “tremendous variation in how [Supervisors of Election] and canvassing boards interpret valid absentee ballot signatures.” *Id.* at 14.

Such variance further amplifies the severity of the burden—and the Equal Protection Clause violation—because vote-by-mail voters in some counties are “less likely to cast effective votes” than vote-by-mail voters in others. *Wexler v. Anderson*, 452 F.3d 1226, 1232 (11th Cir. 2006). The facts here are very much akin to those in *Stewart*, cited favorably by the Eleventh Circuit in *Wexler*, where the Sixth Circuit applied strict scrutiny to particular counties’ use of voting technologies where use of them “result[ed] in a greater likelihood that one’s vote w[ould] not be counted on the same terms as the vote of someone in” another county that employed a different, more reliable technology. *Stewart*, 444 F.3d at 871; *Wexler*, 452 F.3d at 1233 n.10. Similarly, here, through no fault of the voter,

⁵ For the reasons discussed herein, it is virtually certain that the Counties with the lower rejection rates that are doing a more accurate job of signature matching.

vote-by-mail voters in some counties face a significantly greater likelihood their votes will not be counted than voters in other counties.

B. There Is No Government Interest Sufficiently Weighty To Justify The Rejection of Ballots For Signature-Mismatch While Affording No Opportunity To Cure.

The burden on Florida voters' fundamental right to vote is severe; the government accordingly must advance a corresponding interest that is "sufficiently weighty" to justify the burden, and show that the scheme producing the burden is narrowly drawn to further that interest. *Normand*, 502 U.S. at 288-89.

As an initial matter, to the extent that the State asserts that its interest in this policy is preventing voter fraud, that interest is not furthered by categorically disqualifying signature-mismatch ballots without providing a voter an opportunity to cure the defects in his or her ballot. Specifically, where a person is provided an opportunity to cure and can in fact demonstrate the authenticity of the ballot then, quite plainly, there is no fraud. Thus, providing an option to cure would both work to prevent fraud—the asserted interest—and would minimize the severe burden of disenfranchisement that the law places on lawful, eligible voters. *See id.* at 289 (discussing the need for interests to be narrowly tailored). The current State statutory scheme for signature-mismatch is not narrowly tailored and does not overcome the severe burden that the law places on voters.

Further, the justification of administrative burden also is insufficient. Florida gives voters who submit no-signature vote-by-mail ballots an opportunity to cure, permitting no-signature voters to complete and sign an affidavit until 5 p.m. on Election Day Eve, and submit a copy of a form of identification to verify the voter's identity. Fla. Stat. § 101.68(4)(a)-(d). Thus, the system for curing is already in place and is applied across Florida. Accordingly, it should pose no burden on Florida to extend the same opportunity to voters who submit signature-mismatch ballots. Indeed, other states do just this, offering signature-mismatch voters an opportunity to cure just as they do for no-signature voters. *See, e.g.*, Wash. Admin. Code § 434-261-050.

Because of how variable any individual's signature is, *see discussion supra*, the signature-match requirement does little to further the government's interest in preventing voter fraud because a vote is much more likely to be rejected due to canvassing board error rather than due to attempted forgery. This is particularly so where, as here, there is no opportunity to cure to guard against disenfranchisement of lawful voters, whose votes are rejected due to no fault of their own.

III. Plaintiffs Satisfy The Other Preliminary Injunction Factors.

A. An Injunction Is Necessary to Avoid Irreparable Harm.

Because Florida voters whose vote-by-mail ballots are rejected due to mismatched signatures are unable to cure their ballot rejections, thousands of

eligible Florida voters—including Plaintiffs’ members and constituents—will be prevented from casting effective votes in the upcoming election, through no fault of their own, even though they will have submitted timely and complete vote-by-mail ballots. “[O]nce the election occurs, there can be no do-over and no redress.” *LOWV*, 769 F.3d at 247. Thus, courts have long recognized that an “abridgment to the voters’ constitutional right to vote” is imminent, “irreparable harm is presumed and no further showing of injury need be made.” *Touchston v. McDermott*, 234 F.3d 1133, 1158-59 (11th Cir. 2000); *see also Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (“*OFA*”) (abridgement of right to vote constitutes irreparable harm); *Council of Alt. Political Parties v. Hooks*, 121 F.3d 876 (3d Cir. 1997) (same); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (same).

B. The Balance of Hardships Weighs in Favor of an Injunction.

The threatened injury of voter disenfranchisement outweighs any damage that an injunction might cause Defendants. The State already permits ballots without a signature to be cured under a process that is simple, effective, and can be rapidly implemented for curing vote-by-mail ballots with mismatched signatures. There is simply no reason why it cannot apply that process to ballots with mismatched signatures. Any hardship created by an injunction would thus be minimal. Such administrative inconveniences are, at any rate, far outweighed by the hardship imposed by the unconstitutional deprivation of the equal right to vote.

See Taylor v. Louisiana, 419 U.S. 522, 535 (1975) (stating “administrative convenience” cannot justify the deprivation of a constitutional right).

C. An Injunction Is in the Public Interest.

The public has a paramount interest in elections where every eligible resident may cast an effective vote. *See Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005); *see also LOWV*, 769 F.3d at 248 (“[t]he public has a ‘strong interest in exercising the fundamental political right to vote.’” (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006))); *OFA*, 697 F.3d at 437 (“The public interest . . . favors permitting as many qualified voters to vote as possible.”). Fla. Stat. § 101.68(2)(c)(1) subjects Florida voters to an unjustified risk that their ballots will be rejected without an opportunity to cure. It serves no public purpose to deprive voters of the opportunity to cure, given that a system for granting it is readily available. Under the circumstances, an injunction prompting the State to extend such an opportunity to cure to voters whose ballots are rejected due to a signature mismatch would only promote the public interest.

IV. *Purcell* Does Not Preclude The Relief Plaintiffs Seek.

This Court can order preliminary injunctive relief in time for this election and *Purcell v. Gonzalez*, 549 U.S. 1 (2006), is no bar to such relief. In *Purcell*, the Supreme Court vacated an injunction granted shortly before an election, barring Arizona from enforcing its law requiring that voters provide identification under

certain circumstances. *Id.* at 5-6. In reaching this holding, the Court expressed concern that changing the voter identification law immediately before the election could potentially lead to “voter confusion and consequent incentive to remain away from the polls.” *Id.* at 4-5.

Here, by contrast, there is neither any risk of voter confusion nor any risk of inhibiting individuals from voting. Rather, the only voters who will be affected by the injunction sought here are those who otherwise would be completely disenfranchised. Specifically, an injunction would extend the opportunity to cure to voters whose ballots definitely would not have been counted because they would have been categorically rejected for signature mismatch; it gives these voters a chance to cast their votes *and have them count*. At worst, then, these signature-mismatch voters would not take advantage of the opportunity, leading to no change in the number of votes from the status quo; but it is implausible that the opportunity to cure would cause *fewer* voters to submit vote-by-mail ballots in the first place. Further, there is an administrative procedure for curing that is already in place and already utilized by the State and counties. Thus, there is no need to develop any new procedures and minimal changes to the status quo. *Purcell* accordingly should not preclude this court from affording plaintiffs the relief they seek.

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that the Court enter a preliminary injunction enjoining Defendant, his officers, employees, and agents; all persons acting in active concert or participation with the Defendant, or under any Defendant's supervision, direction, or control; and all other persons within the scope of Federal Rule of Civil Procedure 65, from enforcing Fla. Stat. § 101.68(2)(c)(1) without first providing voters whose ballots are rejected for signature-mismatch an opportunity to cure their ballots in the same election cycle.

Dated: October 3, 2016

Respectfully submitted,

/s/ Mark Herron

Mark Herron

Florida Bar No. 199737

mherron@lawfla.com

Robert J. Telfer III

Florida Bar No. 0128694

rtelfer@lawfla.com

MESSER CAPARELLO, P.A.

2618 Centennial Place

Tallahassee, FL 32308

Telephone: (850) 222-0720

Facsimile: (850) 558-0659

and

Marc E. Elias

MElias@perkinscoie.com

Bruce V. Spiva

BSpiva@perkinscoie.com

Elisabeth C. Frost

EFrost@perkinscoie.com

Amanda R. Callais
ACallais@perkinscoie.com

PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211

Counsel for Plaintiffs