

BACKGROUND

This action seeks to resolve, through a declaratory judgment, an urgent and important dispute regarding the legal standards that govern the acceptance or rejection of State absentee ballots and federal write-in absentee ballots cast by members of the Armed Forces of the United States (“Overseas Military Ballots”) for the November 7, 2000 presidential election. As alleged in the Complaint, the Defendant Canvassing Boards (and other County Canvassing Boards in Florida) wrongfully rejected hundreds, if not thousands, of Overseas Military Ballots, apparently because of misinterpretations and misapplications of Federal and Florida law.²

Although national leaders of both political parties, as well as Florida’s Attorney General, Robert Butterworth, have urged County Canvassing Boards to count wrongfully invalidated military ballots, many of those

demand further recounts of the certified vote totals, the declaratory relief requested in Counts I and II of the Complaint is still essential. In the event that any counting of any ballots is ordered in the context of a contest proceeding, this Court’s declaration of the legal principles governing Overseas Military Ballots will be applied to the counting of those ballots in connection with the contest proceedings. Because complete relief can be accorded among those identified as parties in the absence of any other entities, and this action relates to the interpretation of federal law to which all entities are legally bound, the court has jurisdiction to grant a just adjudication without the joinder of any other persons.

² Those misinterpretations of the governing law were exacerbated by the strenuous arguments of Democratic attorneys who attended Canvassing Board meetings in every county and attempted to exclude as many military ballots as possible. Those arguments were based on inaccurate statements of the law set forth in a five-page memorandum circulated statewide by attorneys representing the Gore campaign. A copy of that memorandum is attached as Ex. 4.

Boards, including those named as Defendants herein, have taken little or no action in response. See Exhibits 5 and 6. In fact, directly contrary to the media statements by Democratic Party leadership, lawyers representing the Democratic Party at County Canvassing Board meetings objected to, and filed written protests regarding the eligibility of, virtually every Overseas Military Ballot considered by the Boards. *See, e.g.*, Protest to Overseas Military Ballots in Duval County, received November 24, 2000, attached as Ex. 7 (protesting 76 military ballots based on alleged postmark defects). Remarkably, press reports indicate that the some national Democratic leaders who previously professed support for counting Overseas Military Ballots recently have insulted the legitimate efforts of some County Canvassing Boards to count those wrongfully invalidated votes by characterizing them as “Thanksgiving Stuffing.” If immediate action is not taken to declare the correct legal standards governing Overseas Military Ballots, the illegal disenfranchisement of hundreds, if not thousands, of military voters will remain unremedied.

CONTROLLING LEGAL PRINCIPLES

The United States Constitution protects the right to vote and the right to have one’s vote counted. *Ex parte Yarbrough*, 110 U.S. 651 (1884) (right to vote); *United States v. Mosley*, 238 U.S. 383 (1935) (right to have vote

counted).³ “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Greidinger v. Davis*, 988 F.2d 1344, 1348 (4th Cir. 1993) quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1976)). Thus, Federal courts strictly scrutinize state restrictions that burden voting rights. See *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 625-26 (1969); see also *Carrington v. Rash*, 380 U.S. 89 (1965) (striking down on equal protection grounds statute that prevented resident military personnel from voting where stationed).

In 1986, Congress sought to ensure the franchise for military voters stationed overseas (or at sea) when it enhanced the legal protections for those voters by passing the Uniformed and Overseas Citizens Absentee Voting Act. Congress enacted these protections to preserve the constitutionally enshrined right to vote for American citizens serving their country in foreign locations. In particular, the Act provides that “the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections . . . (1) denies or abridges the inherent constitutional right of citizens

³ Likewise, the right to vote is protected by the Declaration of Rights of the Florida Constitution. Fla. Const. Art. 1 § 1 (“All political power is inherent in the people”).

to vote for their President and Vice President.” 42 U.S.C. § 1973aa *et seq.* See Exh. 9. Similarly, Congress has prohibited anyone acting under color of state law from “deny[ing] the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under state law to vote in such election.” *See* 42 U.S.C. § 1971(B)(The Voting Rights Act of 1965). See Exh. 8. Further, states may not invalidate absentee ballots when, “in using such ballots, voters were doing no more than following the instructions of the officials charged with running the election.” *See Griffin v. Burns*, 570 F.2d 1065, 1075 (1st Cir. 1978).

Florida law reflects these same principles. The Florida Supreme Court has held that the technical requirements of state law cannot supersede an absentee voter’s fundamental right to vote, as long as the voter substantially complied with Florida’s election laws. *See Boardman v. Esteve*, 323 So.2d 259 (Fla. 1975). In *Boardman*, the Court observed that “[b]y refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.” *Id.* At 263. The Court further stated that “substantial compliance with the absentee voting laws is all that is required to give legality

to the ballot.... Election laws relating to absentee ballots are to be liberally construed in favor of the absentee voter.” *Id.* at 264, 265.

The Florida Supreme Court has identified three specific factors to consider in determining whether a purported ballot irregularity voids an absentee ballot:

- (a) the presence or absence of fraud, gross negligence, or intentional wrongdoing;
- (b) whether there has been substantial compliance with the essential requirements of the absentee voting laws; and
- (c) whether the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the election.

Boardman, 323 So.2d at 269; *Beckstrom v. Volusia County Canvassing Bd*, 707 So.2d 720, 725 (Fla. 1998).

The overarching and complementary principles of both Federal and Florida law aid in clarifying and applying the correct legal standards pertinent to Overseas Military Ballots. Plaintiffs ask this Court for a prompt declaration of the controlling federal standard of review relevant to the Overseas Military Ballots in light of the possibility that the wrongfully invalidated Ballots may become subject to further inspection in the proceedings presently in progress in *Gore, et al. v. Harris, et al.*, Case No. 00-2808 (2d Judicial Cir., Leon County).

ARGUMENT

I. Canvassing Boards May Not Reject Overseas Military Ballots Solely Because They Lack A Postmark.

Defendant Canvassing Boards relied on § 101.62(7)(c) of the Florida Election Code as the legal basis for rejecting Overseas Military Ballots transmitted in envelopes that lack a legible APO, FPO or foreign postmark. However, since at least 1984, the Division of Elections of the Florida Department of State has interpreted this section as requiring only that the envelope transmitting the ballot be “postmarked *or* signed and dated no later than the date of the Federal election.” Fla. Admin. Code § 1S-2.013(7) (emphasis added), attached as Exh. 26. Thus, under Florida’s interpretive regulation, which, as explained below, was adopted as part of a Plan of Compliance developed pursuant to a Federal Consent Decree, the presence of a postmark on an overseas ballot envelope is optional.

Rule 1S-2.013 was enacted as part of a Plan of Compliance approved by the United States District Court for the Northern District of Florida in 1984. The compliance plan was an agreed remedy, developed pursuant to a Consent Decree, by which the State of Florida settled a suit brought by the

United States Department of Justice to correct Florida's chronic violations of the Overseas Citizens Voting Rights Act, 42 U.S.C. § 1973dd *et seq.*, and the Federal Voting Assistance Act, 42 U.S.C. § 1973cc *et seq.*

In the Consent Decree, a copy of which is attached as Ex. 3, the State of Florida stipulated that the widespread failure of numerous Florida counties to mail absentee ballots to overseas voters in a timely manner “threatened to deprive a substantial number of these voters of the opportunity and right to vote in the November 1980 election.” Consent Decree, Exh. 3 at ¶ 9. Florida also stipulated that the “late mailing of absentee ballots to overseas citizens . . . violated the Overseas Citizens Voting Rights Act and the Federal Voting Assistance Act.” *Id.*, Exh. 3, at ¶ 10. Finally, as part of the Consent Decree, the Court “Ordered, Adjudged and Decreed” that the “State of Florida does not grant American citizens located abroad a reasonable opportunity in federal elections to exercise their right to vote absentee in violation of the Overseas Citizens Voting Rights Act and the Federal Voting Assistance Act.” *Id.*, Ex. 3, at Ordering ¶ 1.

The Consent Decree required that Florida submit a Plan of Compliance that would govern future elections. In 1984, Chief Judge Stafford of the United States District Court for the Northern District of Florida, Tallahassee Division, entered an Order (attached hereto as Exh. 1),

approving a remedial plan that relied in part on Fla. Admin. Code § 1C-7.13, which is the same Rule that is now codified as Fla. Admin. Code § 1S-2.013. A copy of Rule 1S-2.013, showing its historical derivation from Rule 1C-7.13, is attached as Exh. 26. Because Rule 1S-2.013 was adopted and approved by the U.S. District Court expressly as part of a Plan of Compliance with Federal law, the Rule takes precedence over any inconsistent provision of Florida law. The refusal of Florida's governmental units, including County Canvassing Boards, to comply with the Rule constitutes a violation of the Federal Consent Decree.

Congress enacted the Uniformed and Overseas Citizens Voting Act to ensure the availability of absentee ballots for overseas citizens and thereby prevent an unconstitutional deprivation of the right to vote. 42 U.S.C. § 1973ff.⁴ See Exh. 10. In particular, the Federal write-in ballot provisions of the Act are intended “to facilitate [voting by] those who themselves had the desire to vote, did everything right to be able to get that right, and then were denied the piece of paper on which to do it.” Uniformed and Overseas Citizens Absentee Voting Act, H.R. Rep. No. 99-765, at 6 (1986), *reprinted in* 1986 USCCAN 2009, 2010. To that end, Congress described the Federal

write-in ballot provisions as the “most important part” of the Act. *Id.* The legislative history of the Act confirms the long-standing federal concern with ensuring the enfranchisement of armed services members serving abroad. *Id.* (“Congress has twice enacted legislation to protect the voting rights of all eligible citizens living, working or serving their country in uniform and overseas.”). Congress reauthorized the most recent version of the Act once again to secure military members’ voting rights in federal elections, notwithstanding “restrictive and confusing” state laws. *Id.* Therefore, it is contrary to the specific purpose and history of the Act for states to impose undisclosed additional restrictions on the right to vote that lead to the disenfranchisement of overseas armed forces members.

Invalidating Overseas Military Ballots because the envelope carrying the ballot bears no postmark or an “incorrect” postmark contravenes the clear congressional purpose to ensure the enfranchisement of military members. At 39 U.S.C. § 3406(a)(1), Congress provided that Overseas Military Ballots “shall be carried expeditiously and free of postage.” Since they are to be carried “free of postage,” there will be no postage to cancel

⁴ The U.S. Congress has comprehensive authority to regulate elections, including the power to specify safeguards necessary to enforce the fundamental right to vote. *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

with a postmark.⁵ Congress passed this statute to secure the voting rights of overseas military voters. Thus, this statute supersedes any Florida law that presumes to require the postmarking of envelopes carrying overseas military ballots.

Any provision of Florida law whose application would invalidate Overseas Military Ballots for lack of a postmark presents “as an obstacle to the accomplishment and execution of the full purposes of Congress” in the Overseas and Military Voters Act. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Such a law, whose application would lead to the disenfranchisement of an overseas military voter, is thus preempted and inoperative as applied to Overseas Military Ballots. *See Foster v. Love*, 522 U.S. 67, 69 (1997) (“The regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative.”). Therefore, Defendant Canvassing Boards acted contrary to law by invalidating overseas military ballots that arrived in envelopes without a postmark or bearing an “incorrect” postmark.

Federal law provides, in 39 U.S.C §3406(a)(1), that Overseas Military Ballots “shall be carried expeditiously” and “free of postage.” The Florida

⁵ As an apparent result of 39 U.S.C. sec. 3406(a)(1), a large percentage of the overseas absentee ballots for the 2000 presidential election arrived without a postmark.

Secretary of State adopted Rule 1S-2013(7) of the Florida Administrative Code pursuant to the Federal Consent Decree and Plan of Compliance approved in 1984 by the United States District Court for the Northern District Florida. By virtue of its federal provenance, Rule 1S-2013 takes precedence any inconsistent provision of Florida Law. Consistent with the Federal law exempting Military Ballots from the requirements of postage, Rule 1S-2.013 also provides that County Canvassing Boards can accept Military Ballots in unpostmarked envelopes. Accordingly, under Federal law and the Florida Rule adopted to comply with Federal law, Overseas Military Ballots need not bear *any* postmark at all. Rejecting such ballots based on the absence of a postmark, or the presence of a domestic postmark, imposes an impermissible restriction on the fundamental right to vote that is inconsistent with controlling federal law.

The “shall be carried expeditiously” requirement of 39 U.S.C. § 3406(a)(1) permits special handling by the military of overseas absentee ballots and thus gives military commanders the authority to bypass APO or FPO processing by directing that the ballots be carried by military airlift to the United States. Many of these ballots, mailed by election officials to overseas locations, were returned with postmarks from cities that are the sites of military bases, such as Norfolk, Virginia, or San Diego and Oxnard,

California. Ballots that began their journey on or before November 7th, 2000 from an overseas (or at sea) location could (and often did) arrive in Florida with “domestic” postmarks and with dates after November 7th. Nonetheless, they arrived at election offices on or before November 17th, and thus the Canvassing Boards should have accepted them.

II. Canvassing Boards Cannot Reject Overseas Military Ballots Solely Because The Transmittal Envelope Has an Illegible, Smudged, Domestic, or “Late” Postmark.

Overseas Military Voters have no control over the circumstances in which their absentee ballots may have been postmarked or delivered. This Court may take judicial notice of the varied processes of mail delivery used by the United States Armed Forces. As the Court is well aware, the movement of military mail can depend on shifting weather conditions, availability of aircraft, or operational constraints. These exigencies apply particularly to United States Navy personnel serving on ships at sea, whose Fleet Post Office system entails numerous procedures to move mail from ships to post offices within the United States. The fluid nature of military operations at sea potentially can alter the procedures by which a Navy member’s mail is delivered.

These exigencies, and the resulting variety of methods by which military mail is delivered, render it perfectly plausible for the envelopes

transmitting military mail to bear domestic postmarks. Under 39 U.S.C. § 3406(a)(1), military mail is to be “carried expeditiously” to the United States from overseas or at sea military locations or vessels, and it is not at all uncommon for that mail to be posted from APO or FPO locations in Queens, New York, or San Francisco, California. Thus, a domestic postmark would reflect only one of the many procedures that form the normal APO/FPO system of mail delivery; and it does not provide any evidence as to the physical location of the military voter.

The circumstances under which military mail is collected at the local level, transported to more central collection points, carried to APO or FPO post offices that serve as entry points into the United States, and finally delivered to the addressee through the domestic postal system, are unique. It is no fault of individual military voters if their Overseas Military Ballots finally arrive in Florida with smudged, illegible, domestic or “late” postmarks. Under Federal law, as explained in Part I above, Military Overseas Ballots require *no* postmark *at all*. Therefore, it follows that *no* alleged postmark defect can serve as the sole legal basis for disqualifying an Overseas Military Ballot.

III. Canvassing Boards May Not Reject Overseas Military Ballots For Lack Of A Handwritten Date On The Transmittal Envelope.

A. Background.

In numerous instances where the transmittal envelope lacks a postmark, Defendant Canvassing Boards and other County Canvassing Boards rejected Overseas Military Ballots that did not bear a handwritten date on the transmittal envelope, citing Florida Administrative Code § 1S-2.013(7) as authority. However, this code provision, which requires the voter to provide a handwritten date, cannot be applied to Overseas Military Ballots because the military members' home counties in Florida utterly failed to give any notice of the hand-dating requirement.

B. Failure of Elections Officials to Give Notice of Any Requirement that the Envelope Be Dated.

The absentee ballot materials and detailed instructions provided to overseas military personnel by most counties in Florida *contain no instructions* informing the voter that he or she should date the envelope, and the pre-printed envelope enclosed for the return of the absentee ballot provides *no space* for a hand-written date. The envelope provides only a space for signature. The word "date" *does not appear anywhere in those instructions or on the envelope*. For the convenience of the Court, sample copies of the absentee ballot materials provided by nine Florida counties are

attached hereto as Ex. 17 through 25. Because Florida's election officials failed to give notice of a date requirement, overseas military voters had no way of knowing that an obscure Florida Administrative Code provision says that the ballot's mailing envelope needs a date as well as a signature.

As explained above, federal law is crystal clear that, where the voter complies with the instructions provided by election officials, Canvassing Boards cannot reject the ballot for failure to comply with other requirements about which no notice was given. *Griffin v. Burns*, 570 F.2d 1065, 1078 (1st Cir. 1978).⁶ Further, as a matter of Florida law, the State cannot implement a regulation that could deprive a person of the right to vote without adequate notice that complies with the fundamental right of due process. *State v. Barancik*, 134 So.2d 497, 499 (1961).

Griffin v. Burns addressed whether absentee ballots could be invalidated as improperly issued after the voters had returned the ballots. As in the present case, *Griffin* involved voters who had followed all of the directions included with their absentee ballots; but the Rhode Island Supreme Court later determined that no statute authorized the issuance of absentee ballots for primary elections, disallowed the ballots, and thus disenfranchised

⁶ The principle of substantial compliance similarly applies in other statutory contexts. See *Brehmer v. Inland Steel Industries Pension Plan*, 114 F.3d 656, 662 (7th Cir. 1997).

those voters. 570 F.2d at 1068. Relying on United States Supreme Court precedent, the First Circuit Court of Appeals struck down the Rhode Island court's decision and held that State authorities had violated the voters' Constitutional guarantee of due process by invalidating the votes of persons who relied on the State-issued absentee ballots and accompanying instructions. See 570 F.2d at 1078 (citing *Reynolds v. Sims*, 377 U.S. 533, 561 (1968)).

The First Circuit noted the “unreasonableness of expecting a voter to have questioned the State Secretary’s and other state officials’ issuance of

Id. at 1076. In this case, it is likewise unreasonable to expect military voters to question the accuracy of the official, written instructions provided by county election officials with the state absentee ballots. Like the absentee voters in Rhode Island, overseas military voters have a right to rely on the instructions provided by Florida’s election officials and to receive notice of any and all requirements, which could invalidate their votes. The rejection by County Canvassing Boards of Overseas Military Ballots completed in compliance with all of the official instructions received constitutes a violation of the voters’ due process right to adequate notice.

C. Technical Omission of Handwritten Date is Immaterial as a Matter of Law.

Congress has enacted statutes that expressly preclude the States from invalidating Overseas Military Ballots based on technical omissions, where the voter has otherwise substantially complied with the ballot requirements. *See* 42 U.S.C. §1971 (B) (prohibiting anyone acting under color of state law from “deny[ing] the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election”). *See* Exh. 8. Where the military voter completes an Overseas Military Ballot in time to be delivered to County election officials by the legal deadline of ten days after the date of the election pursuant to Florida Administrative Code § 1S-2.013(7), a failure to include a handwritten date on the transmittal envelope of an otherwise correctly completed ballot is clearly immaterial and cannot legally invalidate the ballot under federal law. This is especially true when, as here, the omission of a date is the fault of state election officials and not of the voter.

D. Federal Statutes Do Not Permit States to Adopt More Restrictive Requirements Than Those Established By Federal Law.

As discussed above, Congress has clearly expressed in the Voting Rights Act and the Overseas Military Ballot Act the overriding federal interest in safeguarding the Constitutional right of members of the armed services to vote. Congress specifically enacted the federal voting statutes to correct constitutional violations amounting to a denial of the right to vote. *See* 42 §1973aa-1(a). *See* Exh. 9. Congress found that unduly restrictive absentee registration and balloting procedures denied the constitutional right to vote. *See id.* at (a)(4). Based on those findings of constitutional violations, Congress found it necessary to “establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.” *Id.* at (b)(2).

As the foregoing argument clearly establishes, States may not restrict the ability of military voters to cast absentee ballots in ways that conflict with Federal law. *See, e.g.,* 42 §1973aa-1 (g) (only permitting states to adopt *less* restrictive voting practices). *See* Exh. 9. To the contrary, States *are specifically required* to permit military voters to submit absentee ballots and to permit them to use Federal write-in absentee ballots. *See* 42 U.S.C.

§1973ff-1 (1-3). See Exh. 10. That clear statutory directive preempts an arbitrary decision by state election officials to exclude ballots that do not include a date, where no date requirement was included in the absentee ballot instructions.

E. Florida Courts Have Held that Federal and State Law Does Not Permit Technical Requirements to Disenfranchise Voters Without Notice.

It is well established that Canvassing Boards cannot apply technical requirements of law to disenfranchise voters without notice. In *State v. Barancik*, the Florida Supreme Court reviewed the appeal of a voter whose name was stricken from the voting rolls, and thus was denied the right to vote, pursuant to a Florida statute authorizing the striking of certain categories of names from the rolls without notice. As the court held, “[t]he right to vote is a right which transcends property rights. It is the keystone in the arch of liberty.” *Id.* at 499-500. The court then rejected the argument that the due process clause did not extend to protecting the right to vote, and went on to say that the government’s obligation to notify a citizen that it had withdrawn the right to vote implicated “a far more sacred concept” even than the right to be free from a criminal judgment without notice and an opportunity to be heard. *Id.* at 500. The court then struck down the act as

“unconstitutional and void for failure to comply with the essential elements of due process under the Federal and [Florida] Constitutions.” *Id.*

F. No Federal or State Statute Requires that a Date Appear on the Military Ballot or Envelope.

There exists no Florida or federal *statute* requiring the dating of Overseas Military Ballots. Section 101.64 of the Florida Election Code specifies in detail what information that must appear on the voter’s certification appearing on the outside of the absentee ballot’s mailing envelope. Nowhere in the text of section 101.64, and nowhere in the “form” certificate contained therein, is there any directive that the mailing envelope be dated. Instead, the statute requires only three things: (1) that the voter sign the “Voter’s Signature” line on the mailing envelope; (2) that the voter place the last four digits of the voter’s social security number in the space provided; and (3) that the voter have the ballot witnessed. Fla. Stat. Ann. § 101.65. For all of the reasons set out above, the County Canvassing Boards cannot reject Overseas Military Ballots on ground that the envelopes bearing the ballots are not dated.

IV. Canvassing Boards May Not Reject Federal Military Absentee Write-In Ballots Where Clerks Are Unable To Locate A Request For A State Absentee Ballot.

Federal law provides that service members may use a Federal write-in absentee ballot “in general elections for Federal office” if the voter “make[s] timely application for, and do[es] not receive, [a] State absentee ballot[.]” 42 U.S.C. § 1973ff-2. See Exh. 2. The form prescribed by Federal law for the Federal write-in absentee ballot concludes with a signed certification, in which the military voter must “*swear or affirm, under the penalty for perjury,*” that he or she has met certain requirements. See Federal Write-In Absentee Ballot, attached as Ex. F (emphasis added). Among other things, the voter must swear that “[m]y application for a regular state absentee ballot was mailed in time to be received 30 days prior to this election.” *Id.* at ¶ 4.d. In addition, the voter must swear that “I have not received the requested

Id. at ¶ 4.e.

Where a military voter has *sworn*, under penalty of *perjury*, that an absentee ballot was requested, Canvassing Boards should presume that such a request was made. If the county clerk is unable to locate a record of the request for a state absentee ballot, it is entirely possible that delivery of the request was delayed or lost in the military postal system, or that the clerk’s office inadvertently misplaced or misfiled the request. In addition,

Canvassing Boards should not reject otherwise valid Federal write-in absentee ballot due to clerical errors or delays in delivery that are completely beyond the control of the military voter. Rather, where the military voter *swears* under penalty of perjury that he or she requested an absentee ballot, the Canvassing Board bears the legal burden to prove that the voter failed to make a request (and disprove that the request was not simply lost or mis-filed), before ruling that the ballot may be rejected.⁷

Further, the “President’s designee” designed the Federal write-in ballot, in cooperation with state elections officials, to include a legally binding oath that requires the military voter to swear that he or she has requested a state absentee ballot. This evidence of this oath on the face of the ballot is the best evidence of the fact that the service member applied for, but failed to receive, a state absentee ballot; and it outweighs any argument against this proposition in light of the inconsistent record-keeping practices of Florida’s election offices.

Finally, no provision of either Federal or Florida law permits the rejection of Federal Military Absentee Write-In Ballots merely because county elections official cannot find a record of the request for a state absentee

⁷ State law allows requests for such ballots to be made by telephone.

ballot. Section 101.68(c)(1) of the Florida statutes, which sets out the grounds on which a ballot may be declared illegal, does not state that Canvassing Boards can reject federal military write-in absentee ballots due to failure to locate a record of a request for an absentee ballot. As the Florida Supreme Court has held, “unless the absentee voting laws . . . expressly declare[] that [a] particular act is essential to the validity of the ballot, or that its omission will cause the ballot not to be counted, the statute should be treated as directory, not mandatory provided such irregularity is not calculated to affect the integrity of the ballot or election.” *Boardman*, 323 So.2d at 264. Because state law contains no mandatory prohibition *against* counting federal military write-in absentee ballots where the clerk cannot find a record of a request for a state ballot, Canvassing Boards must count Federal military write-in absentee ballots bearing the properly sworn oath.

V. Canvassing Boards May Not Reject Federal Military Absentee Write-In Ballots On The Basis Of Minor Differences In Voter Signature.

Some County Canvassing Boards have rejected Overseas Military Ballots on the ground that the voter’s signature on the transmittal envelope appeared to be slightly different from the voter’s signature on file in the county clerk’s office. It has been reported that, in at least one instance, a County Canvassing Board rejected an Overseas Military Ballot on the ground

that one letter in the signature appeared different from the signature on file. In another case, a Canvassing Board rejected a ballot because the voter had used initials for his first and middle names. The signature was otherwise correct. Obviously, if there are *major* differences between the two signatures, the ballot should be investigated further or rejected. However, if it is clear that the signature is *substantially* the same, the vote should be counted. County Canvassing Boards, who are not trained handwriting experts, should not make subjective judgments about minor inconsistencies in signatures, particularly where military voters may be completing their ballot materials in less than ideal conditions. At a minimum, County Canvassing Commissions must apply the *same* handwriting standards to *all* voters, and may not apply standards that are different in any respect as to military voters. *See* 42 U.S.C. § 1971(a)(2)(A); 42 U.S.C. 1973ff-1(2) (requiring states to permit uniformed service voters and overseas voters to vote by absentee ballot, to accept otherwise valid registration applications and to permit overseas voters to use federal write-in absentee ballot).

VI. Canvassing Boards Should Count Overseas Military Ballots In The Foregoing Categories Under Florida’s “Substantial Compliance” Standard.

Under the three-factor test set forth by the Florida Supreme Court in *Boardman*, Canvassing Boards should count all of the categories of rejected

Id. 262.

The trial court described the failure to affix cancellation stamps as something “not of vital consequence” that was “attribut[able] more logically to human misunderstanding of minute technicalities than to lack of diligence to comply with essential requirements.” *Id.* Citing the “substantial compliance” test, the Florida Supreme Court agreed with the trial court and

refused to invalidate any beyond the 88 ballots stricken by the trial judge. Ballots lacking postmark cancellation stamps were counted. *Id.* at 269-70.

CONCLUSION

“The uniform of our country . . . must not be the badge of disenfranchisement for the man or woman who wears it.” *Carrington v. Rash*, 380 U.S. 89, 97 (1965) (internal quotations omitted). To protect against the disenfranchisement of military voters on technical grounds beyond their control, Plaintiffs respectfully request that this Court declare that County Canvassing Boards may not reject Overseas Military Ballots for any of the grounds described above.

Respectfully submitted,

OF COUNSEL:

Jason L. Unger, No. 991562
George Meros, No. 263321
GRAY, HARRIS & ROBINSON.
301 South Bronough St.
Tallahassee, Florida 32301
Telephone: (850) 577-9090
Facsimile: (850) 577-3311

Edward P. Fleming
MCDONALD, FLEMING, MOORHEAD,
FERGUSON, GREEN & SMITH, L.L.P.
4300 Bayou Boulevard, Suite 13
Pensacola, Florida 32503
Telephone: (850) 477-0660
Facsimile: (850) 477-4510
Florida Bar No. 615927

Kirk K. Van Tine
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., N.W.
Washington, DC 20004-2400
Telephone: (202) 639-7740
Facsimile: (202) 585-1068

J. Nixon Daniel, III
BEGGS & LANE
Blount Building, Suite 700
Post Office Box 12950
Pensacola, Florida 32576
Telephone: (850) 469-3306
Facsimile: (850) 469-3330

Stuart Bowen
1100 San Jacinto Center
Austin, Texas 78701-4039
Telephone: (512) 750-2009

Kenneth W. Sukhia
FOWLER, WHITE, GILLEN,
BOGGS, VILLAREAL
AND BANKER P.A.
101 N. Monroe St.
Tallahassee, Florida 32301
Telephone: (850) 681-0411
Facsimile: (850) 469-3330
Florida Bar No. 266256

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing will be delivered by hand-delivery to all Defendants this 5th day of December, 2000.

Attorney for Plaintiffs