No. 07-15932-FF

In the United States Court of Appeals for the Eleventh Circuit

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FLORIDA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ETC., ET AL.,

Plaintiffs-Appellees,

v.

KURT S. BROWNING, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF FLORIDA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

INITIAL BRIEF OF KURT S. BROWNING SECRETARY OF STATE OF THE STATE OF FLORIDA

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CERTIFICATE OF INTERESTED PARTIES

NAACP et al. v. Secretary of the State of Florida, Case No. 07-15932-F

Pursuant to 11th Circuit Rule 26.1-1, Appellant furnishes a complete list of the following:

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2. Peter Antonacci, attorney for appellant
3. Robert A. Atkins, attorney for appellees
4. Andy Bardos, attorney for appellant
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22. Wendy R. Weiser, attorney for appellees

23. Elizabeth Westfall, attorney for appellees

24. Allen Winsor, attorney for appellant

STATEMENT REGARDING ORAL ARGUMENT

The Court has scheduled oral argument to take place on January 18, 2008. Appellant, the Florida Secretary of State, believes that oral argument will assist the Court's determination of the issues presented by this case—issues that affect Florida's ability to secure the integrity of its elections and protect the right to vote of all lawful voters.

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STATEMENT OF JURISDICTION

The District Court had jurisdiction of this action, which arises under the laws of the United States, pursuant to 28 U.S.C. § 1331. The District Court entered an order preliminarily enjoining the Secretary from enforcing a provision of Florida law. Pursuant to 28 U.S.C. § 1292(a)(1), this Court has jurisdiction to consider an interlocutory appeal of that preliminary injunction order. The District Court entered its preliminary injunction order on December 18, 2007, and the Secretary filed a timely notice of appeal.

STATEMENT OF THE ISSUES

This appeal presents three distinct questions:

(i) Does Section 303 of the Help America Vote Act of 2002 ("HAVA") preempt Section 97.053(6), Florida Statutes ("Subsection Six")?

(ii) Does the materiality provision of the Voting Rights Act (the "VRA") preempt Subsection Six?

(iii) Do Appellees have standing to pursue this challenge to the validity of Subsection Six?

STATEMENT OF THE CASE

In 2002, Congress established a new voter registration requirement. It provided that a voter registration application "may not be accepted or processed" unless it contains the applicant's driver's license number or the last four digits of the applicant's Social Security number. 42 U.S.C. § 15483(a)(5)(A)(i). Congress also expressly authorized each state to determine, according to its own laws, whether the number so provided is valid and sufficient such that the application may be accepted and processed and the applicant registered to vote. *Id.* § 15483(a)(5)(A)(iii). During its 2005 session, the Florida Legislature responded, enacting legislation that determines whether the number provided by an applicant is valid and sufficient, and consequently whether the application may be accepted and processed. § 97.053(6), Fla. Stat. In this case, Appellees assert that federal law preempts Florida's authority to do so.

Procedural History

On September 17, 2007, Appellees filed a nine-count complaint alleging that Subsection Six is inconsistent with HAVA, the VRA, the National Voter Registration Act (the "NVRA"), and the United States Constitution. (R. 1). Appellees also moved for a preliminary injunction. (R. 4). On December 11, 2007, the District Court held a hearing on the preliminary injunction motion. (R. 96). The Court granted the motion on December 18, 2007, concluding as a matter of law that HAVA and the VRA

preempt Subsection Six. (RE. 105). The Secretary appeals from this interlocutory order. (R. 107).

Statement of Facts

Before the adoption of Subsection Six, Florida law provided no means for determining whether voter registration applicants are who they claim to be. (R. 23-2–1). In 2005, the Florida Legislature adopted Subsection Six, which verifies an applicant's driver's license number or the last four digits of the applicant's Social Security number in order to verify the applicant's identity. Ch. 2005-278, § 6, Laws of Fla. Subsection Six became effective on January 1, 2006. *Id.* § 56.

Between the effective date of Subsection Six and the last day of September, 2007, state and local election officials received voter registration applications from 1,529,465 distinct applicants. (R. 85-3, Att. 15). Of these, as of the same date, 14,326 remained unregistered as a result of non-verification under Subsection Six. (*Id.*) Appellees have not identified any of these applicants as members of their organizations and have not otherwise identified members who assert that they have been or will be injured by Subsection Six. (R. 93–3, 5, Exh. A; RE. 106–6).

Standard of Review

A district court's decision to grant or deny a preliminary injunction is reviewed for an abuse of discretion. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004). A district court abuses its discretion, though, when it

misapplies the law, and this Court reviews a district court's legal determinations *de novo*. *Id*. at 1096-97. Because the issue of federal preemption is a purely legal issue to be considered without regard to factual circumstances, *Bartholomew v. AGL Resources, Inc*., 361 F.3d 1333, 1337 (11th Cir. 2004); *Moore v. Liberty Nat'l Life Ins. Co*., 267 F.3d 1209, 1220 (11th Cir. 2001), review here is *de novo*.

SUMMARY OF ARGUMENT

This case presents a simple question: may Florida, to ensure that voter registration applicants are real people and that they are who they claim to be, verify their driver's license or Social Security data before registering them to vote? The challenged regulation exists for the benefit of all lawful voters, and, by ensuring the integrity of the registration process, it promotes fair elections and confidence in the electoral process. Appellees seek to dismantle this specific, common-sense anti-fraud measure embodied in federal and state law.

Pivotal to this case is whether the words of federal law have meaning, or whether they can be ignored and wished away. Appellees reach their desired result only by averting their eyes from the plain text of HAVA. They silently pass over HAVA's most critical and relevant provisions and read them out of existence. They make no attempt to explain the words of Congress—words that directly authorize (if federal authorization were even needed) the verification process established by Subsection Six. Appellees cannot explain what Congress could have meant if it did not mean precisely what it has said.

HAVA prohibits states from accepting or processing applications that do not include an applicant's identifying number, and it expressly authorizes each state to determine, according to its own laws, whether the number provided is valid and sufficient to meet this predicate requirement. This is exactly what Subsection Six

does. It establishes a process to determine whether an applicant has satisfied HAVA's requirement that applicants provide their identifying numbers. Where, under Subsection Six, an applicant is determined not to have provided the required number, HAVA expressly prohibits the state from processing the application.

Ignoring HAVA's plain words, Appellees rely on subtle inferences drawn from anti-fraud provisions in HAVA that have no relation to voter registration. Arguing that these provisions limit the ability of states to enact stricter fraud-prevention measures, Appellees again ignore the plain text of HAVA. They give no meaning to HAVA's clear pronouncement that its requirements are minimum requirements that do not prohibit stricter state laws. Instead, they ask the Court to construe federal anti-fraud measures that expressly authorize stricter state laws as imposing a broad prohibition against state efforts to combat election fraud.

Appellees infer preemption from two other sources. First, recognizing that HAVA requires states to count provisional ballots cast by mail-in registrants who do not provide identification but who satisfy state-law eligibility requirements, they contend that Subsection Six is not an eligibility requirement. Once again, Appellees ignore black-letter law. Florida law expressly provides that registration pursuant to law is an eligibility requirement. An applicant who does not provide a verified identifying number—and is therefore unregistered—is not eligible to vote.

Next, Appellees argue that Subsection Six obstructs the goals of HAVA's

requirement that states establish a statewide voter registration database. Subsection Six in no way defeats the functions of the voter registration database. It establishes a registration requirement separate and apart from the database. Indeed, Subsection Six does not use the database for any purpose, much less to prevent eligible voters from voting. The database is simply a storehouse of information.

Finally, Appellees contend that Subsection Six violates the VRA's mandate that states not deny the right to vote on account of immaterial errors or omissions on any record or paper. Again ignoring HAVA, Appellees fail to note that HAVA expressly prohibits states from processing applications that omit the identifying number, and they fail to explain why an error is immaterial when its omission is not only material but fatal. They also ask the Court, contrary to precedent, to ignore the VRA's text and expand its scope to errors or omissions in the handling and processing of applications. The Court should decline this invitation.

In all, Appellees' position that federal law bars Florida from verifying the identifying numbers of voter registration applicants requires the Court to ignore:

- HAVA's command that applications may not be accepted or processed unless they contain the applicant's identifying number, 42 U.S.C. § 15483(a)(5)(A)(i);

- HAVA's authorization to states to determine by their own laws whether the number provided is sufficient and valid for acceptance and processing, *id.* § 15483(a)(5)(A)(iii);

- HAVA's pronouncement that its requirements are minimum requirements that may not be construed to prohibit stricter state laws, *id.* § 15484;

- HAVA's direction that the choice of means to implement its new registration requirement shall be left to the discretion of the states, *id.* § 15485;

- HAVA's recognition that state law must determine whether a provisional ballot should be counted, *id.* § 15482(a)(4);

- The Florida Constitution and Florida Statutes' specification that registration pursuant to state law is a condition of eligibility to vote, Art. VI, § 2, Fla. Const.; § 97.041(1)(a), Fla. Stat.; and

- The VRA's limitation on the scope of its materiality provision to errors and omissions on a record or paper, 42 U.S.C. § 1971(a)(2)(B).

The Court should give meaning to these provisions and reverse the District Court's entry of a preliminary injunction.

The regulation of elections lies at the heart of each state's constitutionally derived police powers. Thus, a presumption against preemption applies that cannot be overcome absent a "clear and manifest" congressional purpose to supersede the challenged law. No such purpose exists here. Indeed, HAVA's text clearly affirms the continued vitality of state authority in the province of election regulation. As the Sixth Circuit recently recognized, "[n]owhere in the language or structure of HAVA as a whole is there any indication that the Congress intended to strip from the States their traditional responsibility to administer elections." *Sandusky County Dem. Party v. Blackwell*, 387 F.3d 565, 576 (6th Cir. 2004).

ARGUMENT

Dissatisfied with congressional and state legislative policy, Appellees ask the Court to strike down a centerpiece of Florida's efforts to respond to election irregularities, protect the right to vote of lawful voters, and maintain public confidence in the integrity of the electoral process. In doing so, Appellees seek to roll back the clock on reforms that replace an unacceptable no-questions-asked "honor system" of voter registration with a process that verifies the identities of voter registration applicants. The question presented on this appeal is whether HAVA and the VRA preempt that process. They do not.

I. THE HELP AMERICA VOTE ACT OF 2002.

Congress enacted HAVA in response to election deficiencies and voter fraud during the 2000 elections. Its adoption served a dual purpose: to "make it easier to vote and tougher to cheat." 148 Cong. Rec. S10488 (statement of Sen. Bond).[1] In combating voter fraud, Congress was not contending with imaginary evils.[2]

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[1] The Congressional Record is replete with affirmations of this dual purpose. *See*, *e.g*., 148 Cong. Rec. S2523 (statement of Sen. Feinstein) ("[T]he new standards . . . are meant to 'make it easer to vote, and harder to vote fraudulently.' What a laudable goal."); *id*. at S2521 (statement of Sen. Cantwell) ("[W]e all agree that any election reform . . . should be about two things: deterring voter fraud and promoting voter participation."); *id*. at S2517 (statement of Sen. Wyden) ("From the beginning of this debate, I have said that this legislation should be about deterring voter fraud and promoting voter participation.").

[2] Congress recognized that voter registration fraud "can occur in many ways." *Id*. at S10492 (statement of Sen. Bond). Senator Dodd explained that

Rather, it was responding to concrete and verifiable examples of wrongdoing, including duplicate registrations.[3] Congress clearly understood "that illegal votes dilute the value of legally cast votes—a kind of disenfranchisement no less serious than not being able to cast a ballot." *Id*. at S10488 (statement of Sen. Bond).

To this end, HAVA established a new federal registration requirement. It provides that a voter registration application "may not be accepted or processed" unless it contains the applicant's driver's license number or the last four digits of the applicant's Social Security number. 42 U.S.C. § 15483(a)(5)(A)(i). After prohibiting states from processing applications that do not supply an identifying number, Congress provided:

> *The State shall determine* whether the information provided by an individual is sufficient to meet [this requirement], *in accordance with State law*.

"anecdotal evidence of dogs and deceased persons registering, and perhaps even voting, and registration lists with duplicate names in several different jurisdictions illustrate the frailties of current registration procedures." *Id*. at S10503 (statement of Sen. Dodd). And "even an insignificant potential for fraud can undermine the confidence of voters, election officials, political parties, etc., in the results of a close election." *Id*. at S2535 (statement of Sen. Dodd).

[3] More than 720,000 people were registered in more than one state, including 60,000 who were registered in Florida and another state. *Id*. at S10490, S10492 (statement of Sen. Bond). In fact, 3,000 people were known to have double-voted in the 2000 election. *Id*. at 10488. Congress concluded that "[d]uplicate registrations provide the opportunity for unscrupulous people to commit fraud and undermine honest elections by, in effect, invalidating legally cast ballots." *Id*. at S10492. As Senator Bond concluded, "there can be no doubt that voter fraud is a serious problem in Federal elections." *Id*. at S10492.

Id. § 15483(a)(5)(A)(iii) (emphases added). Thus, Congress expressly authorized each state to determine by its own laws whether an applicant had in fact provided the identifying number and satisfied the new federal registration prerequisite. To reinforce HAVA's deference to state law, Congress provided that the "specific choices on the methods of complying with [this requirement] *shall be left to the discretion of the State*." *Id.* § 15485 (emphasis added).

HAVA, therefore, explicitly authorizes each state to choose the methods of determining whether the number provided by an applicant satisfies HAVA's registration requirement. Senator Dodd, HAVA's chief Senate sponsor, explained:

> Section 303(a)(5)(A)(iii) specifically reserves to the States the determination as to whether the information supplied by the voter is sufficient to meet the disclosure requirements of this provision. . . . Consequently, a state may establish what information is sufficient for verification, preserving the sole authority of the State to determine eligibility requirements for voters . . . .
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> * * *
>
> The provision requires only that a verification process be established but it does not define when an applicant is a duly registered voter. Again, this conference report does not establish Federal registration eligibility requirements . . . . Section 303(a)(5)(A)(iii) makes it clear that State law is the ultimate determinant of whether the information supplied under this section is sufficient for determining if an applicant is duly registered under State law.

148 Cong. Rec. S10505. As the plain words of HAVA import, "nothing in [HAVA] establishes a Federal definition, or standard, for when a voter is duly registered. That authority continues to reside solely with the State and local

election officials pursuant to state law." *Id*. at S10504.[4]

In addition, HAVA established a mechanism for the verification of identifying numbers.[5] It requires each state, in order to "verify the accuracy of the

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[4] Pursuant to Sections 303(a)(5)(A)(iii) and 305, a state might elect to accept the number as valid and sufficient on the applicant's word alone. A state might also choose to verify the number by a database verification process or by requiring applicants to provide written verification of the number provided. Subsection Six makes each of the two latter means available to applicants.

[5] Congress crafted HAVA's registration requirement in response to concerns about voter registration fraud. Responding to "many reported cases and incidents of registration and vote fraud revealed in testimony," Congress "made a statement that vote fraud exists in this country." *Id*. at S10489 (statement of Sen. Bond). Senator McConnell echoed this view:

> This bill makes significant changes in the voter registration process for Federal elections. These changes are designed to clean up our Nation's voter registration lists and reduce fraudulent registrations and voting. Congress has a compelling interest in protecting the integrity of the Federal election process.

Id. at S10492. Congress, moreover, was determined to "make sure we do our best to see to it that people who register to vote are who they say they are, so we don't have people registering fictitious people and casting ballots for them." *Id*. at S10501 (statement of Sen. Dodd). Congress decided to discourage fraud:

> at the right time and in the right way, which is essentially at the front end when people come to sign up for the electoral process. But then, after we can ascertain they are who they say they are, they are not going to face innumerable hassles and barriers when they actually show up to vote.

Id. at S10421 (statement of Sen. Wyden) (emphasis added). The intent of Congress, therefore, was to establish a mechanism that allows states to verify the identity of voter registration applicants *before* those applicants are registered. Senator Bond explained that the "verification of an existing social security number is required before a person can qualify for Federal temporary assistance. . . . Surely clean elections, accurate results and faith in the election process is as important of an objective as preventing welfare fraud." *Id*. at S10490. He

information provided," to "match" a driver's license number provided by an applicant to information in the database of the motor vehicle authority. 42 U.S.C. § 15483(a)(5)(B)(i). It also requires the Commissioner of Social Security to enter into an agreement with each state "for the purpose of verifying" the last four digits of an applicant's Social Security number. *Id.* § 15483(a)(5)(C). While Congress expressly authorized each state to determine for itself whether the identifying number provided is valid and sufficient to satisfy the federal registration requirement, it simultaneously created a vehicle that particularly lends itself to that function.[6] It is this vehicle which Appellees assert Florida may not use.

II. HAVA EXPRESSLY AUTHORIZES SUBSECTION SIX.

Before the adoption of Subsection Six, Florida law made no provision for

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continued: "The use of driver's license numbers and full or partial social security numbers will help election officials to verify the identity and eligibility of individuals and reduce fraudulent voter registrations from being added to our voter rolls." *Id.* at S10492.

[6] The U.S. Election Assistance Commission ("EAC"), which HAVA created to assist states with compliance issues, *see* 42 U.S.C. § 15322, is in accord. In its Voluntary Guidelines, the EAC clearly acknowledged the authority of states to use matching to determine whether HAVA's registration requirement has been satisfied. While it recommended that states should afford applicants an opportunity—as Florida law does—to authenticate their identifying number, it noted that "[t]his does not mean that States should accept or add unverified registration applications to the statewide list. Rather, it means only that election officials should make certain efforts before an application is determined to be unverifiable and finally rejected." (R. 23-4–13). Thus, the EAC has read HAVA to permit the rejection of unverified applications and merely counseled states to "make certain efforts" to validate the information provided. (*Id.*)

verifying the identities of voter registration applicants. In 1998, the Florida Department of Law Enforcement ("FDLE") noted that Florida's "[m]inimal identification . . . requirements provide ample opportunity for voter registration fraud." (R. 23-2–1). It explained that Florida's standard "is in essence little more than 'trust me at my word alone' in registering to vote." (R. 23-2–7). Florida law "eliminated virtually any ability [to] verify whether the information provided on a registration form is in fact, accurate," resulting in "'no questions asked' voter registration." (R. 23-2–1, 6-7). FDLE concluded that unless Florida establishes "a way to truly verify a registrant's eligibility," officials "can do little to stop the potential registration (and subsequent voting) fraud." (R. 23-2–8).

In 2005, against this background, Florida adopted Subsection Six. It provides in part that an application:

> [M]ay be accepted as valid only after the [Department of State] has verified the authenticity or nonexistence of the driver's license number, the Florida identification card number, or the last four digits of the social security number provided by the applicant.

Consistent with HAVA, it recognizes that an application may not be processed if it does not provide an identifying number. 42 U.S.C. § 15483(a)(5)(A)(i). And, by enacting Subsection Six, Florida determined that the number provided is sufficient to meet HAVA's registration requirement *if* it is actually verified. This is precisely what HAVA's plain language permits Florida to do. *Id.* § 15483(a)(5)(A)(iii).

Under Subsection Six, an applicant's identifying number can be verified in

two alternative ways. First, it can be matched to information in official databases pursuant to the matching process established by HAVA itself. If no match is found, Subsection Six requires the Supervisors of Elections to notify applicants "that [they] must provide evidence . . . to verify the authenticity of the number" (*e.g.*, by providing a copy of the driver's license or Social Security card).[7] If an applicant does not do so before Election Day, he may nevertheless cast a provisional ballot, and the ballot will be counted (assuming the applicant is otherwise eligible) if the applicant verifies the number by 5 p.m. on the second day after the election.

Subsection Six thus determines that the number provided is sufficient—and that the application may therefore be accepted and processed—if it can be matched to information in an official database or authenticated by the applicant. It rests squarely on HAVA's express terms, *id.* §§ 15483(a)(5)(A)(iii), 15485, and it makes use of the very database verification process established by HAVA, *id.* § 15483(a)(5)(B). Far from prohibiting Florida's chosen means of implementation, HAVA underscores the right of states to elect a database verification process.

Even in the absence of specific federal authorization, Subsection Six would be valid. The Supreme Court has recognized the traditional authority of states to

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[7] During its 2007 regular session, the Florida Legislature amended Subsection Six to include this specific notice requirement and to codify the administrative practice that allows unmatched applicants to verify the authenticity of their numbers. *See* Ch. 2007-30, § 13, Laws of Fla. The amendment became effective on January 1, 2008. *See id.* § 57.

prescribe election regulations:

> The Constitution provides that States may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," Art. I, 4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections.

Burdick v. Takushi, 504 U.S. 428, 433 (1992); *accord Sandusky*, 387 F.3d at 568 ("The States have been primarily responsible for regulating federal, state, and local elections. These regulations have covered a range of issues, from registration requirements to eligibility requirements . . . ."); *Duke v. Massey*, 87 F.3d 1226, 1233 (11th Cir. 1996) ("Undoubtedly, in performing its obligation to regulate elections a state will impose some burdens . . . ."). Thus, Florida could have adopted Subsection Six even without the enactment of HAVA. Rather than diminish Florida's authority to do so, HAVA expressly confirms it.

III. APPELLEES ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION ENJOINING THE ENFORCEMENT OF SUBSECTION SIX.

The grant of a preliminary injunction is "the exception rather than the rule." *Siegel v. LePore*, 234 F.3d 1163, 1175 (11th Cir. 2000) (quoting *Texas v. Seatrain Int'l, S.A.*, 518 F.2d 175, 179 (5th Cir. 1975)). A preliminary injunction may be entered only if the movant establishes that "(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction

would not be adverse to the public interest." *Id*. A "preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the burden of persuasion as to each of the four prerequisites." *Id*. (quoting *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998)) (internal marks omitted). Because Appellees failed to make the necessary showing, the District Court's entry of a preliminary injunction was in error.

A. Appellees Have Failed to Establish a Substantial Likelihood of Success on the Merits.

Unable to explain away the clear language of HAVA, and contrary to the historic authority of states over elections, Appellees resort to contrived inferences to support their preemption claim. Specifically, they allege that Subsection Six is preempted by (i) HAVA's minimum identification requirements for mail-in registrants; (ii) HAVA's fail-safe provision, which allows mail-in registrants who fail to provide identification to cast a provision ballot; (iii) HAVA's requirement of a statewide voter registration database; and (iv) the VRA's prohibition against denying the right to vote on account of an immaterial error or omission on a record or paper. The Court should reject Appellees' invitation, on the strength of invented and illogical inferences, to nullify HAVA's express language and strike down one of Florida's most reliable barriers against election misconduct.

1. HAVA Does Not Preempt Subsection Six.

Conflict preemption occurs when it is impossible to comply with federal and

state law at the same time or when state law provides an obstacle to achieving the federal law's objectives. *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1122 (11th Cir. 2004). The "historic police powers of the states are not superseded by federal law unless preemption is the *clear and manifest purpose* of Congress." *Id.* (emphasis added). Courts apply a presumption against preemption and assume that "Congress does not cavalierly pre-empt" state law. *Nat'l Ass'n of State Utility Consumer Advocates v. F.C.C.*, 457 F.3d 1238, 1252 (11th Cir. 2006).

"[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic Inc., v. Lohr*, 518 U.S. 470, 485 (1996) (internal marks omitted). Congressional intent "primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it." *Id.* (internal marks omitted). "Also relevant . . . is the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect . . . the law." *Id.* (citation and internal marks omitted).

As an area traditionally within the province of state regulation, a weighty presumption opposes Appellees' claim that Congress intended to supersede Subsection Six. *See Cliff*, 363 F.3d at 1122. HAVA does not manifest a clear and unambiguous intent to impair the traditional authority of states to prescribe election regulations. It manifests the opposite.

a. HAVA Section 303(b) Does Not Preempt Subsection Six.

Appellees first infer preemption from Section 303(b), which imposes a minimum anti-fraud requirement on certain applicants who register by mail. Congress enacted Section 303(b) to address the specific evil of election fraud in connection with mail-in registration forms created by Section 6 of the NVRA:

> A principal concern of Congress addressed in this bill is the abuse of mail registration cards . . . for the purpose of committing vote fraud. The creation . . . of the mail registration cards opened a new avenue for vote fraud in many States. . . . [M]ail-in registration cards have become a means of unscrupulous individuals to register the names of deceased, ineligible or simply non-existent people to vote.
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> To address this, we created [in Section 303(b)] an identification requirement for first-time voters who register by mail. The security of the registration . . . process is of paramount concern to Congress and . . . the fraud provisions in this bill are necessary to guarantee the integrity of our public elections and to protect the vote of individual citizens from being devalued by fraud.

148 Cong. Rec. S10489 (statement of Sen. Bond). To this end, Section 303(b) requires an applicant who registers by mail, when first casting a ballot, to produce a "current and valid photo identification" or a copy of a "current utility bill, bank statement, government check, paycheck, or other government document." 42 U.S.C. § 15483(b)(1)-(2). It excepts from this identification requirement any mail-in applicant whose identifying number is successfully matched to information in official databases. *Id.* § 15483(b)(3)(B).

Appellees contend that, because it recognizes the possible existence of registered but unmatched voters, Section 303(b) evinces congressional hostility to a state's choice of matching to determine whether an applicant has provided the required number. This reading is not reasonable. HAVA prohibits states from processing applications that omit the identifying number, grants states discretion to determine whether the number has been provided, and, in the same subsection, creates the database verification process. Congress knew that registered but unmatched voters might exist—some states might use matching, while others might not—and it adopted an identification rule that applies wherever and whenever matching does not. Far from requiring states to register unmatched applicants, Section 303(b) simply recognizes that some states might choose to do so.

HAVA, moreover, expressly declares that the requirements of Section 303(b) are "minimum requirements" that may not be construed to prevent states from establishing requirements that are "more strict." *Id.* § 15484. The House Report explains that:

> While [HAVA's requirements] impose minimum requirements, they allow the states to develop their own laws and procedures to fulfill the requirements. The goal of the minimum standards is to improve our election system without issuing dictates that would rob states of the ability to craft their own solutions.

H.R. Rep. No. 107-329, at 35 (2001). HAVA thus "provides for basic requirements that States shall meet, but leaves to the discretion of the States how

they meet those requirements in order to tailor solutions to their own unique problems." 148 Cong. Rec. S10504 (statement of Sen. Dodd). It "requires that States and localities meet basic requirements in . . . the verification of identification for new registrants," but leaves to states "the sole determination . . . as to . . . whether an individual registrant is determined under State law to be duly registered and entered into the centralized registration list." *Id.* at S10506.

HAVA requires mail-in applicants to produce identification when they cast their first ballot, but only if they have not been matched. Subsection Six, which requires applicants to be matched, is consistent with the clear language HAVA. Stricter requirements are not preempted. They are expressly permitted. It is only lesser requirements that Section 303(b) preempts. Florida's decision to require more than the bare minimum is expressly authorized by HAVA.

Appellees seek to convert HAVA's *minimum* requirement into a *maximum* requirement. They argue that Section 303(b) mandates a rigid alternative that impliedly prohibits states from requiring any applicant to be matched *and* provide polling-place identification. Such "either/or" logic would bar not only a generally applicable matching requirement, but also a generally applicable identification requirement.[8] If unmatched mail-in applicants have a statutory right to vote a

[8] Florida is among the many states that require photo identification at the polls. *See* § 101.043, Fla. Stat. Nor is a state, as Appellees would have it, limited to *one* fraud-prevention measure.

regular ballot upon presentation of identification, then matched mail-in applicants have an equal right to vote a regular ballot without identification.

This cannot be. It cannot be that HAVA—with its anti-fraud objectives and provisions—silently preempts polling-place identification requirements.[9] Nor can it be that the "either/or" logic works only in one direction.[10] "[N]othing is better settled than that statutes should receive a sensible construction . . . so as to avoid an unjust or an absurd conclusion." *Johnson v. United States*, 529 U.S. 694, 706 n.9 (2000). No interpretation could be more unsound—or more destructive to the electoral process and settled principles of federalism—than that which transforms a narrow anti-fraud provision expressly authorizing stricter state laws into an implied

[9] The fallacy of such logic is illustrated by the spate of recent cases that have upheld generally applicable photo identification laws. *See*, *e.g.*, *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir.), *cert. granted*, 128 S. Ct. 33 (2007); *Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333 (N.D. Ga. 2007); *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006); *Gonzalez v. State of Arizona*, No. CV 06-1268-PHX, 2006 WL 3627297 (D. Ariz. 2006); *In re Request for an Adv. Op. Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1 (2007); *cf. Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006).

[10] Appellees' misinterpretation of Section 303(b) leads to other illogical conclusions as well. It would ban state laws that require voters to produce identification from a more restrictive list than that set forth in Section 303(b)—for example, a list that does not include utility bills or paychecks. It would also ban state laws that require mail-in registrants to provide a copy of their identification when they register, *see* 42 U.S.C. § 15483(b)(3)(A), or registrants to present more than one form of identification when they present themselves to vote.

ban on all generally applicable matching and photo-identification laws.[11] HAVA no more prevents a state from requiring that *all* voters be matched or verified than it prevents a state from requiring that *all* voters present identification at the polls.

Rather than recognize Section 303(b) as imposing a minimum requirement, Appellees contend that it creates a right to vote a regular ballot, to the exclusion of

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[11] The Supreme Court has granted certiorari in *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 953 (7th Cir.), *cert. granted* 128 S. Ct. 33 (2007), in which the petitioners challenge a state law that requires voters to present photo identification at the polls. Oral argument is scheduled to take place on January 9, 2008. Though they cite Section 303(b), the *Crawford* petitioners do not contend, as Appellees would, that it preempts generally applicable photo-identification laws. Moreover, in its amicus brief in support of Respondents, the United States rejected this same argument:

> Petitioners' amici (Sen. Feinstein Br. 2-3, 19) argue that HAVA's identification requirements preempt Indiana's stricter requirements. That argument—which was neither raised nor decided below—is without merit. By its terms, HAVA establishes mandatory "minimum" voter identification requirements and explicitly provides that "nothing in [it] shall be construed to prevent a State from establishing * * * requirements that are more strict." 42 U.S.C. 15484. See 148 Cong. Rec. at 20,834 ("this bill in no way limits the ability of the states from taking steps beyond those required") (statement of Sen. Bond); U.S. Election Assistance Commission, *EAC Advisory 2005-006: Provisional Voting and Identification Requirements* 1 (2005).
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> Amici's argument would convert HAVA into both a floor *and a ceiling*, thereby divesting States of the flexibility that Congress intended them to retain. See 42 U.S.C. 15485.

Brief of United States as Amicus Curiae Supporting Respondents, Nos. 07-21 & 07-25, at 31-32, available at http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-21_RespondentAmCuUSA.pdf (emphasis in original).

state-law anti-fraud requirements. The text of HAVA does not support this leap of logic. It provides that "a State shall . . . require an individual to meet the requirements" of Section 303(b), without any hint that its requirement is *exclusive* and *sufficient* to entitle a voter to a regular ballot. 42 U.S.C. § 15483(b)(1). By contrast to Section 302(a), which provides that an "individual shall be permitted to cast a provisional ballot," and which contains "rights-creating language," *see Sandusky*, 387 F.3d at 572-73, Section 303(b) does not create a right, but imposes a limited anti-fraud requirement on a narrow class of duly registered voters.

Finally, Appellees argue that Subsection Six is invalid because it would render Section 303(b) meaningless in Florida. This argument not only ignores the fact that stricter state laws are expressly permitted, it ignores the operation of Section 303(b) on several classes of Florida voters: (i) mail-in applicants who were not matched but who authenticated their numbers and became registered; (ii) applicants who do not have an identifying number; and (iii) applicants who registered to vote between the effective date of Section 303(b) on January 1, 2003, *see* 42 U.S.C. § 15483(d)(2)(B), and the effective date of Subsection Six on January 1, 2006, *see* Ch. 2005-278, §§ 6, 56, Laws of Fla. Therefore, even if Florida were prohibited from enacting stricter requirements, Subsection Six does not render Section 303(b) meaningless.

b. HAVA's Fail-Safe Provision Does Not Preempt Subsection Six.

Like the general provisions of Section 303(b), the fail-safe provision of Section 303(b)(2)(B) does not mandate a one-size-fits-all voter registration regimen on the states. Fail-safe voting provides that the ballot of a mail-in applicant who, when casting his first vote, fails to satisfy Section 303(b)'s identification requirements, will be treated as a provisional ballot in accordance with Section 302(a). 42 U.S.C. § 15483(b)(2)(B). Section 302(a), in turn, provides that:

> If the appropriate State or local election official . . . determines that the individual is *eligible under State law to vote*, the individual's provisional ballot shall be counted as a vote . . . in accordance with State law.

Id. § 15482(a)(4) (emphasis added). The obvious intent of fail-safe voting is to ensure that duly registered voters who are subject to the identification requirement of Section 303(b) are not left in the cold if they are unable to produce identification. It does not guarantee that the provisional ballot will be counted unless the voter is "eligible under State law to vote." As Senator Dodd explained:

> [A] first-time mail registrant voter without proper identification . . . is entitled to vote by provisional ballot, and that ballot is counted according to State law. . . . Whether a provisional ballot is counted or not depends solely on State law, and the conferees clarified this by adding language in section 302(a)(4) stating that a voter's eligibility to vote is determined under State law.

148 Cong. Rec. S10504; *accord id.* at S10489 (statement of Sen. Bond) ("[N]o provisional ballot will be counted until it is properly verified as a legal vote under

state law.”). Whether a provisional ballot will be counted, is, under HAVA’s express terms, strictly a question of state law.

Subsection Six is exactly so. Any person, including a mail-in applicant, may cast a provisional ballot, even if the person was not matched and does not present identification. *See* §§ 97.053(6), 101.043(2), Fla. Stat. The provisional ballot will be counted “under State law” if (i) by the end of the canvassing period, the identifying number is matched; or (ii) no later than 5 p.m. on the second day after the election, the applicant presents evidence verifying the authenticity of that number. Fail-safe voting requires nothing more. It permits an unmatched applicant without identification to cast a provisional ballot and requires states to determine the conditions on which the voter is deemed eligible.

Courts have recognized that HAVA makes state law the determinant of whether a provisional ballot will be counted. In *League of Women Voters v. Blackwell*, 340 F. Supp. 2d 823 (N.D. Ohio 2004), the Court affirmed the validity of a state requirement that voters who cast provisional ballots under HAVA’s fail-safe provision supply their identifying number, orally or otherwise, before polls close on Election Day. *Id.* at 827. The Court explained that:

> Nothing in HAVA says . . . that first-time voters unable to show that they are the same person as the person who registered by mail are absolutely entitled to [have] their ballots counted. All that HAVA provides is that a first-time voter who registered by mail who cannot provide [identification] at the polling place may vote provisionally.

Id. at 831; *accord Florida Dem. Party v. Hood*, 342 F. Supp. 2d 1073, 1081 (N.D. Fla. 2004) ("It is entirely reasonable to attribute to Congress a determination to make it easy to submit a provisional ballot to safeguard whatever right the voter had, but to leave to preexisting state law the question of whether the ballot should count . . . . That is what Congress did.").

Affirming a state's determination that provisional ballots cast in the wrong precinct may not be counted, the Sixth Circuit held that HAVA "explicitly defers determination of whether [provisional] ballots are to be counted to the States":

> HAVA is quintessentially about being able to *cast* a provisional ballot. No one should be "turned away" from the polls, but the ultimate legality of the vote cast provisionally is generally a matter of state law. . . . [T]he voter casts a provisional ballot at the peril of not being eligible to vote under state law; if the voter is not eligible, the vote will then not be counted.

Sandusky, 387 F.3d at 576 (6th Cir. 2004) (emphasis in original). HAVA's provisional ballot provision, the Court explained, does not "overturn state laws regarding registration," *id*. at 578 (quoting 148 Cong. Rec. S10491 (statement of Sen. Bond)), or establish "a Federal definition of when a voter is registered or how a vote is counted," *id*. (quoting 148 Cong. Rec. S10504 (statement of Sen. Dodd)). As a result, "HAVA does not require that any particular ballot, whether provisional or 'regular,' must be counted as valid." *Id*.[12]

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[12] By definition, a provisional ballot is *provisional*, or "accepted or adopted tentatively; conditional." *See* http://dictionary.com. Either federal or state law

Appellees nevertheless contend that unverified applicants are "eligible voters" whose provisional ballots must count, whether or not they comply with Subsection Six. They essentially assert that a provisional voter who *does not comply* with state law *complies* with state law. And, once again, Appellees avert their eyes from the express words of controlling law, which makes registration a condition of eligibility. The Florida Constitution provides that "[e]very citizen . . . who is at least eighteen years of age and who is a permanent resident of the state, *if registered as provided by law*, shall be an elector of the county where registered." Art. VI, § 2, Fla. Const. (emphasis added). Section 97.041(1)(a), Florida Statutes, reiterates these conditions, providing that, to be eligible to vote, a person must, *inter alia*, "register[] pursuant to the Florida Election Code." A person who is not registered is not eligible to vote,[13] and an applicant whose identifying number was neither matched nor timely authenticated is not registered.

Like their creative interpretation of Section 303(b)'s anti-fraud provisions, Appellees' reading of the fail-safe provision leads to illogical results. Critically, if a

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must prescribe the terms on which provisional ballots will be counted. Federal law not only forbears to do so, it expressly defers to state law.

[13] Indeed, Appellees initially recognized this, (RE. 12–11 ("An individual is eligible to vote if he or she registers . . . .")), but have since distanced themselves from this obvious truth. They now contend either that applicants need not be registered to be eligible to vote in Florida, or that applicants are registered pursuant to Florida law whether or not they comply with Subsection Six. Thus, reasoning circularly, they assume Subsection Six's invalidity in order to prove it.

provisional ballot must be counted despite the voter's failure to satisfy state-law registration requirements, the registration process itself would be entirely subverted. Individuals would be able to appear on Election Day, affirm that they are citizens, residents, and of proper age, and cast a provisional ballot which Florida would be compelled to count. The registration process, including the book-closing deadline,[14] which Appellees' counsel have challenged in related litigation, *see Diaz v. Browning*, 04-22572 (S.D. Fla.) (King, J.), would be a nullity.

Similarly, if unmatched mail-in applicants who present no identification have an absolute right to cast a valid vote that the state must count, Section 303(b)'s minimum identification requirement would accomplish nothing more than subject certain voters to the empty ceremony of casting a provisional rather than a regular ballot—a result Congress could not have intended. Nor does HAVA confer preferred status on provisional ballots, mandating that states count them where a regular ballot would not be counted. "After all, the whole point of provisional ballots is to allow a ballot to be cast by a voter who claims to be eligible to cast a regular ballot, pending determination of that eligibility." *Sandusky*, 387 F.3d at 576.

The fail-safe provision does not evince a clear and manifest congressional purpose to ban states from using database verification. Appellees have not

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[14] The book-closing deadline is the last day to register in order to be eligible to vote at a given election. *See* § 97.055, Fla. Stat. In Florida, registration books close on the 29th day prior to each election. *Id.*

established a substantial likelihood of success on their claim that the fail-safe provision preempts Subsection Six.

c. HAVA's Requirement of a Statewide Voter Registration Database Does Not Preempt Subsection Six.

Next, Appellees contend that Subsection Six obstructs the goals of HAVA Section 303(a)(1), which requires each state to implement "a single, uniform, official, centralized, interactive computerized statewide voter registration list . . . that contains the name and registration information of every legally registered voter." Subsection Six, however, in no way defeats any of the stated functions of the voter registration database. Florida's voter registration database is fully functional and fully compliant with the requirements of HAVA, notwithstanding Subsection Six.

Appellees are unable to identify a single requirement in the text of HAVA relative to the voter registration database that Subsection Six defeats. Instead, they turn away from HAVA's text and assert a revisionist theory of legislative history to create imaginary conflict. They claim, for example, that the database was designed to facilitate voter registration and that Subsection Six, as a registration requirement, obstructs that function. Not only would such reasoning invalidate any voter registration requirement, its premise is factually wrong. Congress designed the database to perform several functions, including the prevention of election fraud:

> The new computerized statewide registration systems that we require States to implement will also help safeguard voter registration lists

> against fraud. *A State's use of a statewide voter registration list will not, however, override State registration requirements*. . . . The intent of the conferees is to provide a centralized list of registered voters to help guard against fraud.

148 Cong. Rec. S10492 (statement of Sen. McConnell) (emphasis added).

> Section 303 . . . includes the provisions . . . requiring that all states establish a centralized computerized registration list of all eligible voters. This requirement is the single greatest deterrent to election fraud, whether by unscrupulous poll workers or officials, voters, or outside individuals or organizations.

Id. at S10509 (statement of Sen. Dodd); *accord id*. at S2526 (statement of Sen. McCain) ("[T]he bill establishes an interactive, computerized, statewide voter registration system that will prevent future incidents of election fraud."). If anything, Subsection Six furthers the goals of the computerized database. Indeed, it is simply implausible that a federal requirement that states establish a central database of registered voters supersedes fraud-prevention measures such as Subsection Six. This is especially true when the prevention of fraud was a leading congressional policy, and where the federal law expressly states that its requirements are minimum requirements that do not prohibit stricter state laws.

The District Court, overlooking ample legislative history that supports the anti-fraud purpose of the database requirement, explained that the list was intended to:

> keep voter rolls current and accurate and to reduce, if not eliminate, confusion about a voter's registration and identification when a voter arrives at the polling place. This section also provides safeguards to preserve the confidentiality of voter identification information and to protect against improper purging of names from the list.

(RE. 105–12-13 (quoting 148 Cong. Reg. S10488 (statement of Sen. Durbin))). It did not explain how Subsection Six, which establishes a registration requirement separate and apart from the voter registration database, obstructs these purposes. Subsection Six does not impair the accuracy of the list, render it less current, jeopardize the confidentiality of voter information, or result in list purges. Indeed, Subsection Six does not "use the list" for any purpose, much less to prevent eligible voters from voting. The database is simply a storehouse of information.

Subsection Six in no way contravenes the purposes of the computerized voter registration database, as they appear in HAVA's text. And, even if it were appropriate in the preemption analysis to seek extra-textual purposes in legislative history, there is no indication—much less a clear and manifest purpose—that Congress intended the database requirement to preempt Subsection Six.

2. The Materiality Provision of the VRA Does Not Preempt Subsection Six.

Appellees' claim that the materiality provision of the VRA preempts Subsection Six amounts to this: though HAVA prohibits states from accepting or processing voter registration applications that omit identifying numbers, the provision of such numbers is nevertheless so immaterial that the VRA requires states to process applications containing erroneous or untrue identifying numbers. This position is unsound and contravenes HAVA's specific authorization to the

states to determine, according to their own laws, whether the number provided is valid and sufficient so that the application may be accepted and processed—an authorization that would be meaningless if Congress intended only the total omission of the number to justify non-acceptance.

The VRA provides that the right to vote may not be denied "because of an error or omission on any record or paper . . . if such error or omission is not material in determining whether [the] individual is qualified under State law to vote." 42 U.S.C. § 1971(a)(2)(B). HAVA unequivocally refutes the position that an error in or omission of an identifying number from an application is "not material." In fact, it expressly prohibits states from processing applications that do not contain the applicant's identifying number. *Id.* § 15483(a)(5)(A)(i). It follows that an error in the number provided—which is no better than an omission—is, at the very least, not so immaterial that federal law obligates states to process applications that contain such errors. HAVA confirms this conclusion by expressly authorizing states to determine whether the number provided is valid and sufficient for acceptance and processing. *Id.* § 15483(a)(5)(A)(iii).

In *Diaz v. Cobb*, 435 F. Supp. 2d 1206 (S.D. Fla. 2006), the Court held that a state may deny an application if the applicant fails to check a box affirming that he meets specific eligibility requirements, even if the applicant signed an oath stating generally that he is qualified. HAVA, the Court explained, required the

checkboxes. *Id.* at 1213. "This reflects a Congressional determination that the question is material to a determination of eligibility, and constitutes a specific Congressional direction to reject an application as incomplete for failure to check one of the boxes." *Id.* at 1213-14. HAVA likewise requires the provision of an identifying number, and it explicitly directs that an application without that number "may not be accepted or processed." The same result must follow.

Even without HAVA, an error or omission of an identifying number would be material. Subsection Six enables election officials to know—not on faith alone, but with verifiable certainty—that applicants are real people. Without verification, officials cannot know whether the information provided by an applicant is true or false. Federal law does not require states to determine eligibility on an honor system. Thus, in *Howlette v. City of Richmond*, 485 F. Supp. 17, 22-23 (E.D. Va.), *aff'd* 580 F.2d 704 (4th Cir. 1978), the Court held that the materiality provision does not prohibit a state from rejecting petition signatures unaccompanied by a notarization. The notarization, like the verification process here, provided a reliable confirmation that the purported signer of the petition was a real person.[15]

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[15] Even if an error or omission of the identifying number were immaterial, the VRA would not preempt Subsection Six. It is a basic "canon of statutory construction that the more specific takes precedence over the more general," *Medberry v. Crosby*, 351 F.3d 1049, 1060 (11th Cir. 2003), and that, "when two statutes irreconcilably conflict, the more recent statute controls," *Borsage v. U.S. Dep't of Educ.*, 5 F.3d 1414, 1418 (11th Cir. 1993). As the more recent and more

Indeed, the District Court did not hold that an error or omission of the number is immaterial under the VRA. Rather, it concluded that "matching mistakes" resulting from "data entry errors, complications in the retrieval of information from outside the state, technical malfunctions in the matching process, or even the failure of the applicants to take the time to contact the Supervisor of Elections to verify their identification number" are immaterial. (RE. 105–14). Such errors do not, however, implicate the VRA. The VRA embraces only errors or omissions "on any record or paper"—not errors or omissions in the processing or handling of registrations. 42 U.S.C. § 1971(a)(2)(B).

Multiple courts have held that the words "on any record or paper" mean something. In *Friedman v. Snipes*, 345 F. Supp. 2d 1356 (S.D. Fla. 2004), the plaintiffs contended that the rejection of absentee ballots as untimely violated the materiality provision. The Court explained that the rejection of the ballots was not based on an error or omission "on any record or paper," and it rejected the position that the VRA extends to "any error or omission in the treatment, handling, or counting of any record or paper." *Id.* at 1372 (internal marks omitted). Likewise, in the present case, errors in the treatment, handling, or processing of voter

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specific statute, HAVA—and its prohibition against processing applications determined by a state not to provide an identifying number—controls.

registration applications do not implicate the materiality provision.[16]

The materiality provision, moreover, was never intended to eradicate legitimate anti-fraud measures. As this Court explained, it was:

> intended to address the practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions *on the application forms*, thus providing an excuse to disqualify potential voters.

Schwier v. Cox, 340 F.3d 1284, 1294 (11th Cir. 2003) (emphasis added). "[O]ne such tactic was to disqualify an applicant who failed to list the exact number of months and days in his age." *Id.* (internal marks omitted). This policy is clearly not implicated here. There is no evidence—and no allegation—that the Florida Legislature designed Subsection Six to disqualify potential voters.

HAVA provides that a state "may not accept or process" an application that does not include the applicant's identifying number, and it authorizes states to determine whether the applicant has provided that number. The position that federal law requires states to accept and process applications that omit the identifying number, or which contain an incorrect number, is directly contrary to HAVA. The VRA does not exhibit a clear and manifest purpose to compel states

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[16] *See also Rokita v. Indiana Democratic Party*, 458 F. Supp. 2d 775, 841 (S.D. Ind. 2006) (holding that "the act of presenting photo identification in order to prove one's identity is by definition not an 'error or omission on any record or paper' and, therefore, § 1971(a)(2)(B) does not apply to this case"); *Common Cause/Georgia League of Women Voters of Georgia, Inc. v. Billups*, 439 F. Supp. 2d 1294, 1357-58 (N.D. Ga. 2006) (same).

to accept and process such applications.

B. ***Appellees Have Failed to Establish Irreparable Harm.***

Under Subsection Six, election officials are required to notify any applicant whose identifying number could not be matched, and applicants may provide evidence to verify the authenticity of that number. This evidence can be communicated in person, by mail, by facsimile, or by e-mail (R. 85–42-43), and does not require applicants to drive long distances—or any distance at all—to complete their registrations. Nothing prevents applicants from consummating their registrations without the aid of a preliminary injunction.

Appellees' delay in bringing this action militates powerfully against a finding of irreparable harm. A "long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985); *accord Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (When an "application for preliminary injunction is based upon an urgent need for the protection of [a plaintiff's] rights, a long delay in seeking relief indicates that speedy action is not required."); *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) ("[Delay] may . . . indicate an absence of the kind of irreparable harm required to support a preliminary injunction.").

In *Gonzalez v. Arizona*, CV 06-1268-PHX, 2006 WL 3627297 (D. Ariz. Sep. 11, 2006), *aff'd*, 485 F.3d 1041 (9th Cir. 2007), the Court denied a motion for a preliminary injunction that would have prohibited enforcement of a proof-of-citizenship requirement for voter registration. The Court noted that the plaintiffs "filed suit approximately eighteen months after [the law] became effective and only four months before the primary election and six months before the general election." *Id.* at *3. Such delay, the Court explained, "raise[s] serious questions regarding Plaintiffs' need and desire for immediate injunctive relief." *Id.*

The present case involved still more egregious delay. It was filed nearly 27 months after the Governor signed the challenged law, more than 20 months after it took effect, and barely more than four months before the presidential preference primary. Throughout this period, Appellees' counsel demonstrated their full awareness of and opposition to Subsection Six. (R. 11–3-5). Twenty months ago they even initiated an action challenging Washington state's matching law, presenting the identical preemption claims asserted here. *See Washington Ass'n of Churches v. Reed*, No. CV06-0726 (W.D. Wash.). Appellees nevertheless neglected to bring this action until mere months remained before the close of registration for the presidential preference primary. As in *Gonzalez*, Appellees' long and unexplained delay undermines their assertions of exigent need.

Finally, the harm asserted by Appellees is undermined by the fact that they have not identified a single member of their organizations who has been or will be precluded from voting by the operation of Subsection Six, a fact dismissed by the District Court's Order on Standing. (RE. 106–6).

C. __The Preliminary Injunction, By Dismantling an Essential Safeguard Against Voter Registration Fraud, Is Adverse to the Public Interest__.

Appellees acknowledge that "the Secretary, and all Florida citizens, have a vested interest in a fair, orderly, and legitimate election." (R. 5–24-25). The injunction prohibiting the enforcement of Subsection Six imperils these interests.

Subsection Six is an essential preventative of election fraud. Indeed, it is the only reliable barrier to several corrosive electoral practices. While Appellees suggest that the public interest in the prevention of voter registration fraud "is considerably less important than the interest in preventing fraudulent votes," (R. 38–33), this position fails to appreciate the interrelatedness of registration and the exercise of the rights to which registration gives admittance. Under Florida law, any person able to register fraudulently can complete the fraud and cast a fraudulent vote with a near perfect assurance of impunity.[17]

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[17] Appellees' suggestion that the Secretary was required to present evidence of electoral fraud to justify Subsection Six is wrong. It is well established that, in the election context, there is no need for an "elaborate, empirical verification of the weightiness of the State's asserted justifications." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997); *accord Munro v. Socialist Workers*, 479

Once a fraudulent application is admitted, it becomes virtually impossible to prevent or detect the consequent unlawful act. Any fictitious registrant can request an absentee ballot[18] in person, in writing, or even telephonically, *see* § 101.62(1), Fla. Stat., and the fraudulent vote will be counted as long as the signature on the absentee ballot certificate matches that on the fraudulent application, *see id.* § 101.68(1), (2).[19] Likewise, a provisional ballot cast in person without photo identification would be counted as long as the fictitious person voted at the proper precinct and the signature on the fraudulent provisional ballot certificate matched that on the fraudulent application. *See id.* § 101.048(2)(b)1. Subsection Six also secures the ballot and the Florida Constitution from constitutional amendments that

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U.S. 189, 195-96 (1986) ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively . . . .").

[18] Florida is no stranger to absentee ballot fraud. In *In Re The Matter of the Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election for the City of Miami, Florida*, 707 So. 2d 1170 (Fla. 3d DCA 1998), the Court found that "substantial competent evidence existed to support the trial court's findings of massive fraud in . . . absentee ballots." *Id.* at 1171. Among other evidence, an FBI agent testified that 113 absentee ballots were cast under false voter addresses. *Id.* at 1172. The Court ordered the invalidation of all absentee ballots cast in the election. *Id.* at 1173. The impossibility of distinguishing legitimate from fraudulent absentee ballots thus negated thousands of lawful votes. *Accord Bolden v. Potter*, 452 So. 2d 564 (Fla. 1984) (invalidating all absentee ballots where vote fraud scheme was "conspicuously corrupt and pervasive").

[19] Appellees' contention that Section 303(b) would prevent such fraud is incorrect. If the applications were delivered in person, which third-party voter registration organizations do regularly and in mass quantities, Section 303(b), which applies only to mailed applications, would not apply.

rely on fraud in the initiative petition process.[20]

The invalidation of Subsection Six—the gatekeeper of Florida's electoral process—would clear a convenient path to election fraud with no security for detection. The Seventh Circuit recently noted the difficulty of detecting fraud in the electoral process and the consequent necessity of preventive measures:

> [T]he absence of prosecutions is explained by . . . the extreme difficulty of apprehending a voter impersonator. He enters the polling place, gives a name that is not his own, votes, and leaves. If later it is discovered that the name he gave is that of a dead person, no one at the polling place will remember the face of the person . . . . One response . . . would be to impose a very severe criminal penalty for voting fraud. Another, however, is to take preventive action . . . .

Crawford v. Marion County Election Bd., 472 F.3d 949, 953 (7th Cir.), *cert. granted* 128 S. Ct. 33 (2007); *accord Burson v. Freeman*, 504 U.S. 191, 208

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[20] The Florida Constitution grants citizens the right to propose constitutional amendments by obtaining a prescribed number of signatures of registered voters. *See* Art. XI, § 3, Fla. Const. A signature is counted toward the required number if the name and signature on the petition match the name and signature of a registered voter. *See* §§ 99.097(1), (3), Fla. Stat. By registering fictitious names and affixing these names to initiative petitions, supporters of an initiative can easily cheat the proposal onto the ballot. The Florida Supreme Court has noted that "the ability of citizens to amend the state constitution through the initiative process without fraud is extremely important." *Floridians for a Level Playing Field v. Floridians Against Expanded Gambling*, 967 So. 2d 832, 835 (Fla. 2007). This danger, like the threat of absentee and provisional ballot fraud, is not imaginary. In a pending case, the sponsor of a petition initiative is alleged to have presented petitions containing fictitious names to create the illusion of compliance with the constitutional signature requirement. *See Floridians Against Expanded Gambling v. Floridians for a Level Playing Field*, 945 So. 2d 553, 561 (Fla. 1st DCA 2006).

(1992) ("[E]lection fraud [is] successful precisely because [it is] difficult to detect."). For this reason, Congress recognized that the "right time" and the "right way" to "discourage fraud . . . is essentially at the front end when people come to sign up for the electoral process." 148 Cong. Rec. S10421 (statement of Sen. Wyden). The challenged law performs this function by ensuring that only lawful voters are admitted to the civic prerogatives reserved to them by the laws.

As Congress recognized, the purity of the voter registration process is indispensable to the purity of the entire electoral system. The evils incident to voter registration fraud are far-reaching and pervade and poison the whole sphere of citizen participation in a representative democracy. Once registered, an otherwise ineligible person can find means to exercise the full panoply of rights which the laws reserve to eligible voters. A "trust and don't verify" system of voter registration suspends the integrity of the entire electoral process—and public confidence and participation in it—on the tenuous honesty of individuals and interest groups.

Subsection Six seals Florida's voter registration rolls against unlawful applications and secures to lawful voters the exclusive enjoyment of their political privileges. The invalidation of the challenged law would deprive Florida of the surest means of combating election fraud and reinstate the substandard and discredited system of voter registration that leaves an unguarded door open to

dishonest practices. The public interest is deeply concerned in the maintenance of a verification system that closes the door on this species of election fraud and justifies public confidence in the democratic process.

IV. **APPELLEES LACK STANDING TO PURSUE THIS ACTION.**

An organization has standing to assert the injuries of its members only if its members would otherwise have standing to sue on their own behalves, the interests at issue are germane to the organization's purpose, and the participation of the members is unnecessary. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000). An organization's "failure to identify an injured constituent prevents [it] from asserting associational standing." *Nat'l Alliance for the Mentally Ill v. Bd. of County Comm'rs*, 376 F.3d 1292, 1296 (11th Cir. 2004); *accord Anderson v. City of Alpharetta*, 770 F.2d 1575, 1579-83 (11th Cir. 1985) (dismissing organization for failure "to identify injury to particular members"); *Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333, 1372 (N.D. Ga. 2007) (holding that the NAACP failed to "satisfy [its] burden to identify a member who otherwise would have standing to sue").

Appellees have been unable to identify a single injured member of their membership organizations. (RE. 106–6). In discovery, the Secretary requested that Appellees identify the members of their organizations who were substantially burdened or prevented from voting by the challenged law. Appellees objected, and

the Secretary moved to compel. (R. 45). The Court granted the Secretary's Motion and, echoing the assurances of Appellees' counsel, noted in his Order that "Plaintiff does not yet have such information, but hopes to have such information through discovery." (R. 52–2). The Secretary then provided Appellees a CD-ROM containing a data file of all applicants affected by Subsection Six. Appellees were provided with ample materials to identify injured members but have not done so. Because Appellees have not identified even one member that has suffered or will suffer injury in fact, they lack standing to sue on their members' behalves.

Appellees also lack organizational standing. "To satisfy the injury prong of Article III standing, a plaintiff must present specific, concrete facts showing that the challenged conduct will result in a demonstrable, particularized injury to the plaintiff." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 984 (11th Cir. 2005), *cert. denied*, 126 S.Ct. 377 (2005) (internal marks omitted). Appellees' bare assertion that the challenged law will frustrate their mission to promote voter registration and induce them voluntarily to devote indeterminate resources to resolving registration problems at an indeterminate time is insufficient to establish injury in fact.

In *Billups*, the Court held that the NAACP did not have direct standing to challenge a requirement that voters present photo identification at the polls. 504 F. Supp. 2d at 1372-73. The NAACP "failed to show that it already expended

resources" and "simply presented testimony indicating that at some undetermined time in the future, it may have to divert unspecified resources to various outreach efforts." *Id.* (internal marks omitted). Such "imprecise and speculative claims concerning potential future actions," the Court explained, "are a far cry from the kind of organizational expenditures" sufficient to confer standing. *Id.* at 1373. In addition, this alleged harm would be:

> [E]ntirely of [the plaintiffs'] own making since any future reallocation of resources would be initiated at [their] sole and voluntary discretion. Such an optional programming decision does not confer Article III standing on a plaintiff. . . . The diversion of resources . . . might well harm the [plaintiff's] other programs, for money spent on [one thing] is money that is not spent on other things. But this particular harm is self-inflicted; it results not from any actions taken by [defendant], but rather from the [plaintiff's] own budgetary choices.

Id. A contrary interpretation, the Court noted "would completely eviscerate the standing doctrine. If an organization obtains standing merely by expending resources in response to a statute, then Article III standing could be obtained through nothing more than filing a lawsuit." *Id.* at 1373.

The generalized expectation of a voluntary reallocation of resources is equally insufficient to establish injury in the present case. There is no showing that Appellees have already reallocated resources in response to the challenged law, despite the fact that the law has been in effect for over two years. (R. 93–8, 9, Exh. A). In fact, as in *Billups*, Appellees merely predict that they might at some future time divert unspecified resources to particular election activities in preference to

others. (*Id*.) Such loose and indeterminate predictions are not the sort of concrete, demonstrable, imminent harm that courts require to establish organizational standing. Moreover, any reallocation of resources in response to the challenged law would be entirely voluntary. The standing doctrine repels the conclusion that an organization may confer standing on itself by its own discretionary decisions.

CONCLUSION

Subsection Six is well within the traditional authority of a state to enact election regulations. It is also within HAVA's express authorization to the states to select the means to determine whether the number provided by an applicant is sufficient to permit the application to be accepted and processed. Appellees' position that federal law preempts Florida from verifying applicants' identifying numbers requires the Court to ignore multiple unambiguous provisions of controlling law. Appellees have not shown that the clear and manifest purpose of Congress was to bar fraud-prevention measures such as Subsection Six and have failed clearly to establish any entitlement to the extraordinary relief they seek.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with Federal Rule of Appellate Procedure 32(a)(7). This brief is submitted in 14-point Times New Roman font, and it contains 11,589 words.

/s/ ____________________
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CERTIFICATE OF SERVICE

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