No. 07-15932-FF

In the United States Court of Appeals for the Eleventh Circuit

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

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

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ARGUMENT

The Help A□erica Vote Act of 2002 ("HAVA") prohibits states fro□ processing voter registration applications that do not contain an applicant's identifying nu□ber, 42 U.S.C. § 15483(a)(5)(A)(i), and it expressly authorizes states, by □ethods of their own choice, to deter□ine whether the required nu□ber has been provided, *id*. §§ 15483(a)(5)(A)(iii), 15485. Subsection Six, which deter□ines that the nu□ber has been provided if it □atches data in official records or is verified by the applicant, does precisely this.

Appellees nevertheless assert that HAVA i□plicitly bars states fro□ selecting the surest and □ost effective □eans of □aking this deter□ination: a co□parison to official records. In fact, they go so far as to assert that states □ust blindly accept without verification whatever nu□ber the applicant chooses to provide. (Ans. Br. at 35.) To reach this conclusion, Appellees avoid HAVA's plain words, wishfully rewrite its legislative purpose, disparage the i□portance of its new registration require□ent, assail the wisdo□ of Florida's chosen □eans of i□ple□entation, □isinterpret critical provisions of law, and reduce the □andate of HAVA to a hollow cere□ony that serves no useful function.

I. APPELLEES CANNOT EXPLAIN SECTION 303(a)(5)(A)(iii).

HAVA establishes a new voter registration require□ent. It provides that a state "□ay not accept or process" an application that does not contain the

applicant's driver's license nu□ber or the last four digits of the applicant's Social Security nu□ber. 42 U.S.C. § 15483(a)(5)(A)(i). It then authorizes each state, according to its own laws, to deter□ine whether the required infor□ation has been provided and, consequently, whether the application □ay be processed. *Id*. § 15483(a)(5)(A)(iii). For still greater clarity, it expressly e□powers each state to choose the □eans of i□ple□enting the new registration require□ent. *Id*. § 15485. Subsection Six is Florida's chosen □eans to deter□ine whether an applicant has provided the required nu□ber and whether the application □ay be processed.[1]

"Where the language Congress chose to express its intent is clear and una□biguous, that is as far as we go to ascertain its intent because we □ust presu□e that Congress said what it □eant and □eant what it said." *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc). Undaunted, Appellees □ake one atte□pt to explain what Congress □ight have □eant if it did not □ean what it said. They assert that Section 303(a)(5)(A)(iii) grants states the "flexibility" to "rely on the face of the application itself." (Ans. Br. at 36). According to Appellees, where an applicant has provided a nu□ber—any nu□ber—Section 303(a)(5)(A)(iii) leaves states only one option: to accept the

[1] Throughout their Brief, Appellees refer to unregistered applicants as "eligible voters." Under Florida law, a person is not eligible to vote unless registered pursuant to law, including Subsection Six. Art. VI, § 2, Fla. Const.; § 97.041(1)(a), Fla. Stat.; Ans. Br. at 9 n.4.

nu□ber at face value. No verification is acceptable. (*Id*. at 35).

Thus, according to Appellees, what Congress *really* □eant when it said that the "State shall deter□ine whether the infor□ation provided . . . is sufficient . . . , in accordance with State law" is that the state shall not do so. And, when it entitled Section 303(a)(5)(A)(iii) "DETERMINATION OF VALIDITY OF NUMBERS PROVIDED," and followed those words with authorizing language, Congress intended to prohibit—not per□it—a deter□ination of the validity of nu□bers provided. This interpretation turns statutory language on its head.[2] It transfor□s words that create authority into a strict □andate that states □inisterially accept the nu□ber provided—accurate or inaccurate—no questions asked. Notably, Appellees □ake no atte□pt to construe Section 305, which operates in tande□ with Section 303(a)(5)(A)(iii) and expressly grants states "discretion" to i□ple□ent HAVA's new registration require□ent by □ethods of their own choice. Indeed, their brief does not even □ention Section 305.

According to Appellees, only where an applicant who has an identifying nu□ber totally o□its it would Section 303(a)(5)(A)(iii) leave the state any option.

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[2] Appellees' interpretation calls to □ind the infor□al holiday long celebrated by schoolchildren—Opposite Day—on which state□ents □ean the *opposite* of what they ordinarily □ean. *See* http://en.wikipedia.org/wiki/Opposite_Day. For exa□ple, on Opposite Day, the state□ent that a state has discretion to deter□ine, according to its own laws, whether an applicant has provided the infor□ation required by law, would □ean that a state *does not* have that discretion and □ust accept the infor□ation provided without a peep. Today is not Opposite Day.

(Ans. Br. at 36). In such cases, Appellees say, a state □ay either accept or deny the application. Appellees' atte□pt to confine Section 303(a)(5)(A)(iii) to cases of total o□issions is refuted by that provision's own words. The title of Section 303(a)(5)(A)(iii) refers to a deter□ination of the validity of nu□bers *provided*—not to nu□bers *omitted*, which are not susceptible to a deter□ination of validity. Its substance likewise refers to "infor□ation provided" and conte□plates a deter□ination with respect to such infor□ation. A nu□ber that is o□itted is not "provided," and no deter□ination of sufficiency can be □ade with respect to an o□itted nu□ber. Appellees' characterization of Section 303(a)(5)(A)(iii) as referring only to o□itted nu□bers is utterly at odds with its plain text.

II. THE PURPOSE OF HAVA'S NEW REGISTRATION REQUIREMENT IS NOT ADMINISTRATIVE CONVENIENCE BUT THE PREVENTION OF ELECTION IRREGULARITY AND FRAUD.

Finding no succor in the text of HAVA, Appellees turn to its legislative history in search of a congressional "purpose" contrary to its express language. Selectively fusing their own hypotheses with pieces of state□ents □ade in Congress, Appellees seek to recast HAVA's new registration require□ent as a tool of ad□inistrative convenience, serving no real purpose beyond bureaucratic list □aintenance. Ignoring its intended function as a security against election irregularity and fraud, Appellees trivialize its i□portance and invite the Court to eviscerate it. The Court should decline to look behind the clear text of HAVA in

search of a reason to invalidate Subsection Six.

Even if recourse to legislative history were necessary, it would support Subsection Six. Though Appellees disparage HAVA's new registration require□ent—and Florida's i□ple□entation of it—as "ad□inistrative" (Ans. Br. at 4, 20, 22, 28, 29, 34, 37, 44) and "bureaucratic" (*id*. at 28, 41) "recordkeeping" (*id*. at 2, 4, 6, 28, 29, 33, 36, 44, 51), and pejoratively label errors and inaccuracies as "trivial" (*id*. at 2, 9, 11, 21, 49), "clerical" (*id*. at 3, 28, 41), "□eaningless" (*id*. at 2, 9, 11, 41, 42, 44), and "□inisterial" (*id*. at 13, 45), Congress did not share Appellees' dis□issive regard for an accurate and secure registration process. Far fro□ serving an uni□portant bureaucratic function, HAVA's new registration require□ent was the focus of Congress's efforts to co□bat election irregularity and fraud.

Two basic concerns infor□ed Congress's enact□ent of HAVA's new registration require□ent. First, Congress recognized the reality and potential for fraud in the registration process by the deliberate creation of registration records that do not relate to real, living people. Such registrations □ight be sub□itted, for exa□ple, in the na□e of a pet, a deceased person, or a fictitious person. *See*, *e.g.*, 148 Cong. Rec. S10501 (state□ent of Sen. Dodd) ("We are going to . . . do our best to see to it that people who register are who they say they are, so we don't have people registering fictitious people and casting ballots for the□."); *id*. at

S10419 (state□ent of Sen. McConnell) ("These . . . provisions will ensure that [the] stars of □Ani□al Planet' will no longer be able to register and vote. These provisions will ensure that our dearly departed will finally achieve everlasting peace and will not be troubled with exercising their franchise every 2 years.").

Second, Congress recognized the reality and potential for fraud in connection with the intentional or unintentional sub□ission of duplicate registrations in the na□e of a single person—registrations that can be exploited to fraudulent ends. *See*, *e.g.*, *id*. at S10492 (state□ent of Sen. Bond) ("Duplicate registrations provide the opportunity for unscrupulous people to co□□it fraud and under□ine honest elections by, in effect, invalidating legally cast ballots."); *id*. at S10413 (state□ent of Sen. Dodd) ("[I]t is our hope and expectation that the risk that individuals □ay be voting □ultiple ti□es in □ultiple jurisdictions will be □ini□ized if not eli□inated altogether.").

HAVA's new registration require□ent addresses both concerns. First, by requiring applicants to provide their identifying nu□bers, and by authorizing states to deter□ine whether the nu□bers provided are valid and sufficient, HAVA enables states to ascertain whether applicants are real, living people. Second, by authorizing states to validate applicants' identifying nu□bers, it prevents duplicate registrations and ensures that each applicant is registered only once. Thus, it secures the accuracy of voter registration records—not as an end in itself, for the

ease and convenience of ad□inistrative list-□akers—but as a □eans of securing the integrity of the entire electoral process fro□ dishonest practices. *See*, *e.g.*, *id*. at S10492 (state□ent of Sen. Bond) ("These provisions were designed to create □ore accurate voter lists and help ensure the integrity of elections."); *id*. at S10419 (state□ent of Sen. McConnell) ("The accuracy of the voter registration list is para□ount to a fair and accurate election.").[3]

Appellees' interpretation, by prohibiting states fro□ deter□ining the validity of nu□bers provided by applicants, would frustrate both purposes. The co□pelled acceptance of whatever nu□ber an applicant chooses to provide—accurate or inaccurate—would disable election officials fro□ ensuring that an applicant is a real, living person. It would also prevent election officials fro□ detecting duplicate registrations. If an applicant provides an inaccurate nu□ber and later sub□its a second application with the correct nu□ber or a different inaccurate nu□ber, the duplication would be undetectable. HAVA's require□ent would then be the pointless ad□inistrative charade that Appellees represent it to be.[4]

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[3] Appellees' assertion that Congress could not possibly have intended HAVA to present a "barrier" to registration turns away not only fro□ HAVA's legislative history but its text, which provides that applications which do not contain the applicant's identifying nu□ber "□ay not be accepted or processed." *See* 42 U.S.C. § 15483(a)(5)(A)(i). This restrictive language is designedly a "barrier" to the processing of applications in specific circu□stances.

[4] As Appellees the□selves recognize, the last four digits of an applicant's Social Security nu□ber are anything but "unique," (R. 1, ¶ 45) ("[E]very □last four'

Appellees' argu□ent, □oreover, that Subsection Six is invalid because it is "only about verifying the nu□ber" □isses the point. First, the clear words of HAVA are concerned only with the nu□ber. They require applicants to provide their identifying nu□bers and authorize states to deter□ine the sufficiency of the nu□ber. Second, and □ore funda□entally to Congress's concerns, the provision of an accurate nu□ber ensures that an applicant is unique and that a single person is not registered □ore than once. If applicants could co□plete their registrations without verifying their nu□bers (*e.g.*, by providing identification that does not contain the nu□ber), election officials' efforts to deter□ine whether the new applicant is the sa□e person as one with the sa□e na□e already in the registration database would be frustrated.

The words of HAVA are clear. Appellees' atte□pt to repeal these words by a trivializing and revisionist characterization of legislative history □ust fail.

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digit co□bination returns approxi□ately 40,000 Social Security nu□bers."). Florida assigns a truly unique nu□ber. *See* 42 U.S.C. § 15483(a)(1)(A)(iii). An applicant's identifying nu□ber re□ains on record, though, and, if accurate, enables election officials to know whether duplicate entries relate to the sa□e person.

III. HAVA DOES NOT PREEMPT SUBSECTION SIX.[5]

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

Section 303(b) i□poses a li□ited identification require□ent on applicants who apply by □ail. It requires the□, when first casting a ballot, to produce identification. 42 U.S.C. § 15483(b)(1)-(2). It provides an exception to this identification require□ent for applicants whose identifying nu□bers are successfully □atched to infor□ation in official databases. *Id*. § 15483(b)(3)(B).

Appellees □isread Section 303(b) to "clearly" require that "un-□atched voters . . . be registered." (Ans. Br. at 31). First, because Appellees refuse to attribute any □eaning to Sections 303(a)(5)(A)(iii) and 305, they do not read Section 303(b) *in pari materia* with these provisions. Sections 303(a)(5)(A)(iii) and 305 authorize states to deter□ine, by □ethods of their own choice, whether an

[5] Appellees contend that the presu□ption against pree□ption does not apply to allegations of i□plied conflict pree□ption. (Ans. Br. at 24-25 n.15). In *California v. ARC America Corp*., 490 U.S. 93 (1989), however, the Supre□e Court applied a presu□ption against pree□ption in just such a case. In *ARC America*, there was no clai□ of express or field pree□ption. *Id*. at 101. The "only contention" was that the challenged state laws presented an "obstacle to the acco□plish□ent of the purposes and objectives of Congress." *Id*. at 102. The Court nevertheless held that "appellees □ust overco□e the pre-su□ption against finding pre-e□ption of state law in areas traditionally regulated by the States." *Id*. at 101; *accord Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1122 (11th Cir. 2004) ("When we consider issues that arise under the Supre□acy Clause (i.e., pree□ption issues), we start with the assu□ption that the historic police powers of the states are not superseded by federal law unless pree□ption is the clear and □anifest purpose of Congress.").

applicant's identifying nu□ber is valid and sufficient. Thus, so□e states □ight use the database verification process created by Section 303(a)(5)(B) to □ake this deter□ination, while others □ight not. Congress granted states this discretion, and it knew that not all states would exercise this discretion in the sa□e way.[6] It accordingly fra□ed an identification require□ent that would apply wherever and whenever, in the discretion of states, database verification does not.

Appellees' failure to recognize the discretion which HAVA affords prevents the□ fro□ appreciating the function of Section 303(b) in HAVA's larger sche□e.[7] While Appellees read Sections 303(a)(5)(A)(iii) and 305 out of HAVA, the Secretary's interpretation construes these provisions and Section 303(b) *in pari materia*, giving scope and operation to each, □indful of the structure and purpose of HAVA. And, even if Section 303(b) is considered alone, nothing about it co□pels states to register applicants whose identifying nu□bers are un□atched. It si□ply provides a require□ent for such applicants if they *are* registered.

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[6] It is well recognized that different states have experienced different kinds and degrees of election irregularity and fraud. *See*, *e.g.*, *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 953 (7th Cir.), *cert. granted* 128 S. Ct. 33 (2007) (citing Florida and Illinois as "notorious exa□ples" of states afflicted by election fraud). It is no surprise that the exercise of discretion by each would be influenced by these considerations and tailored to local circu□stances.

[7] The pree□ption analysis takes into consideration "the language of the pre-e□ption statute," the "statutory fra□ework surrounding it," and the "structure and purpose of the statute as a whole." *Medtronic Inc., v. Lohr*, 518 U.S. 470, 485 (1996). It requires, therefore, consistent with established canons of statutory

Second, Appellees □isread Section 303(b) as presenting two alternative require□ents. They hypothesize that Section 303(b) represents a "consciously calibrated balance" of the applicant's interest in registration and the state's interest in co□bating fraud, and that Subsection Six throws this balance "out of whack." (Ans. Br. at 39). If, however, Section 303(b) represents the perfect balance between ease of registration and security against fraud, *any* additional state-law require□ent would throw the balance "out of whack." Even the □easures which Appellees suggest a state □ight pursue—such as a require□ent that voters "identify the□selves in one of several ways before voting," (Ans. Br. at 38)—would throw the balance "out of whack." A "consciously calibrated balance," to serve its intended objective, □ust be final. This is not what Congress did. Section 303(b)'s require□ent is a □ini□u□ require□ent that □ay not be construed to prohibit stricter state laws. Congress set a fraud-prevention floor—it did not strike a balance that i□poses a floor and a ceiling. This could hardly be clearer. 42 U.S.C. § 15484 ("The require□ents established by this title are □ini□u□ require□ents . . . .").

Second, the structure of Section 303(b) de□onstrates that identification and □atching are not alternative require□ents. They are not separated by the disjunctive word "or" or juxtaposed as parallel provisions. Rather, Section 303(b)

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interpretation, that provisions be construed with proper reference to each other.

i□poses one require□ent—an identification require□ent—and, by three exceptions, *see* 42 U.S.C. § 15483(b)(3)(A-C), li□its the scope of that require□ent to the specific dangers Congress perceived. Unlike *Geier v. American Honda Motor Co.*, *Inc.*, 529 U.S. 861 (2000), the question here is not whether a state □ay narrow a set of alternatives prescribed by federal law.[8]

Third, Appellees' interpretation leads to illogical results Congress could not have intended. If a state □ay not subject all applicants to □atching because □atching is one of two alternatives, it □ay not, for the sa□e reason, subject all voters to an identification require□ent. Appellees □ake no effort to distance the□selves fro□ this conclusion.[9] Such a holding would *invert* the intent of Congress by precluding states fro□ i□posing a photo-identification require□ent on

[8] The distinction can be illustrated as follows: if Congress required all hospitals to provide e□ergency care to residents of the state in which they were located, but excepted patients with health insurance, Appellees' reasoning would prohibit states fro□ requiring all residents to purchase health insurance, because the state law would steer everybody into the exception and leave nobody upon which the general rule could operate. It would be illogical to assert that, because Congress conte□plated the existence of people without health insurance, it i□pliedly prohibited states fro□ requiring its residents to be insured.

[9] Appellees' counsel has twice intervened as *amicus curiae* in litigation pursuing the policy objective of invalidating state law photo-identification require□ents, *see Crawford*, 472 F.3d 949; *In re Request for an Advisory Opinion*, 479 Mich. 1 (2007), and have filed an *amicus* brief to the sa□e effect in the Supre□e Court's pending review of *Crawford*. The argu□ent that Section 303(b) presents a rigid alternative has been rejected in *amicus* briefs by the United States, *see* http://tinyurl.co□/yrxgz5, and by forty-one current □e□bers of Congress who were active in the passage of HAVA, *see* http://tinyurl.co□/2d2ll8.

□atched □ail-in applicants while leaving the□ free to i□pose a photo-identification require□ent on in-person applicants. As explained in the Secretary's Initial Brief, Congress found that □ail-in applications are highly susceptible to fraud, and it enacted Section 303(b) to address this specific evil. Appellees' position would reverse congressional intent by allowing □ore stringent identification require□ents with respect to in-person than □ail-in applicants.

Finally, this Court need not decide whether HAVA creates an "alternative" that precludes generally applicable □atching require□ents, because that is not this case. Under Subsection Six, the absence of a □atch does not result in the denial of an application and is not deter□inative against the applicant. Its effect is to trigger the require□ent that applicants docu□ent the authenticity of their nu□bers. Thus, Florida *does* register un□atched applicants; it si□ply i□poses on the□ one additional require□ent not applicable to □atched applicants. Far fro□ supplanting and rendering "□eaningless" Section 303(b)'s identification require□ent, Subsection Six does not eli□inate *or even limit* the class of voters to who□ Section 303(b)'s identification require□ent applies, but supple□ents that require□ent with a docu□entation require□ent. And the docu□entation require□ent is a quintessential exa□ple of a stricter state law that Section 304 expressly per□its. In fact, Appellees appear to recognize this, noting that Section 304 allows states to "require voters to identify the□selves in one of several ways before voting a

regular ballot." (Ans. Br. at 38).

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

The fail-safe provision allows un□atched □ail-in applicants who failed to present identification under Section 303(b) to cast provisional ballots, and it defers to state law to deter□ine whether those ballots will be counted. 42 U.S.C. § 15482(a)(4), 15483(b)(2)(B). Florida law allows exactly this, *see* §§ 97.053(6), 101.043(2), Fla. Stat., and provides that the provisional ballot will be counted if (i) by the end of the canvassing period, the identifying nu□ber is □atched; or (ii) no later than 5 p.□. on the second day after the election, the applicant docu□ents the authenticity of that nu□ber. Subsection Six, therefore, is plainly in co□pliance with the fail-safe provision.

The District Court concluded that HAVA requires Florida to count all provisional ballots cast pursuant to the fail-safe provision, whether or not provisional voters co□ply with Subsection Six. This conclusion is plainly wrong, since HAVA expressly leaves that deter□ination to state law. If all provisional ballots □ust count, they are hardly "provisional." Appellees do not contend otherwise, but clai□ that the conditions Subsection Six prescribes are "insur□ountable" and render the fail-safe provision a "sha□." (Ans. Br. at 34, 35).

This position is wrong. First, it would contravene the text of HAVA, which expressly defers the deter□ination of eligibility to state law. Second, it is contrary

to precedent. In *League of Women Voters v. Blackwell*, 340 F. Supp. 2d 823 (N.D. Ohio 2004), the Court affir□ed the validity of a state require□ent that provisional voters under HAVA's fail-safe provision supply their identifying nu□ber before polls close on Election Day. The Court did not invalidate the require□ent on the ground that it was too difficult. It si□ply applied the clear words of HAVA.

Finally, Subsection Six does not i□pose insur□ountable conditions. It requires election officials to notify un□atched applicants that they □ust "provide evidence to the [Supervisor of Elections] sufficient to verify the authenticity of the nu□ber provided on the application."[10] Such docu□entation □ay be provided in person, by □ail, by facsi□ile, or by e-□ail (R. 85–42-43), at any ti□e before 5 p.□. on the second day after the election. Thus, Subsection Six provides for notice, allows nu□erous □eans of co□□unication, and affords □ore ti□e than the require□ent upheld in *League of Women Voters*. Appellees' assertion that Subsection Six presents "insur□ountable" obstacles does not wash.

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

Appellees fail to clarify precisely how Subsection Six obstructs the ai□s of HAVA's database require□ent. They point to no deficiency—real or perceived—

[10] Even before the Florida Legislature created this specific notice require□ent, effective January 1, 2008, *see* Ch. 2007-30, § 13, Laws of Fla., Florida law required that applicants be notified of the disposition of their applications. *See* § 97.073(1), Fla. Stat.

in Florida's database that results fro Subsection Six. The purpose of the database, Appellees assert, was to protect the voter rolls fro duplicate registrations by assigning each voter a unique identifier based on the nu ber provided by the applicant. (Ans. Br. at 26). If so, it defies logic to assert that Subsection Six, which ensures that the nu ber provided by the applicant is *accurate*, defeats the purpose of securing lists fro duplicate registrations. The provision of an *inaccurate* nu ber defeats this purpose by rendering duplicate entries undetectable. Subsection Six only pro otes this purpose.

Ulti ately, Appellees' position appears to be that the database was generally designed to facilitate voter registration, while Subsection Six akes registration ore difficult. (Ans. Br. at 28, 29). Even if Congress designed the database with no fraud-prevention purpose, it would not follow that Subsection Six is pree pted. Such reasoning would invalidate *all* state voter registration require ents, because *all* state voter registration require ents tend to li it registration. This was not the intent of Congress. HAVA "preserved the traditional authority of State and local election officials to be the sole deter inants of whether an applicant is duly registered." 148 Cong. Rec. S10506 (state ent of Sen. Dodd). In its first foray into the regulation of voter registration applicants, Congress acted with deliberate caution and with no intent to overturn state-law require ents. 42 U.S.C. § 15484; *accord Sandusky County Dem. Party v. Blackwell*, 387 F.3d 565, 576 (6th Cir.

2004) ("Nowhere in the language or structure of HAVA as a whole is there any indication that the Congress intended to strip fro the States their traditional responsibility to ad inister elections.").[11]

IV. THE MATERIALITY PROVISION OF THE VOTING RIGHTS ACT DOES NOT PREEMPT SUBSECTION SIX.

Errors and o issions on any record or paper that preclude a deter ination that applicants are real people are not i aterial. The fact that HAVA expressly prohibits states fro processing applications which, as deter ined by state law, do not contain identifying nu bers, de onstrates a congressional deter ination that the accuracy of applicants' identifying nu bers, and the steps taken to ensure their accuracy, are aterial. Because Subsection Six enables election officials to verify that applicants are real people, it is funda ental to the deter ination of eligibility. A person who is not real is not eligible to vote.

Appellees respond that, because applicants ight hypothetically wish to verify their reality by other eans, such as a passport, Subsection Six is invalid. (Ans. Br. at 44). The ateriality provision does not deny states the choice of

[11] Appellees suggest that the Florida Legislature could not have intended Subsection Six as a voter identification easure because Section 101.043, Florida Statutes, already acco plishes this by requiring photo identification at the polls. (Ans. Br. at 3). Besides being irrelevant to the pree ption analysis, this suggestion overlooks the fact that the photo-identification require ent is not absolute, and that valid absentee and provisional ballots can be cast without any identification. *See* §§ 101.68, 101.043(2), 101.048(2), Fla. Stat. It also overlooks the fact that nothing li its states to *one* fraud-prevention easure.

□eans to □ake deter□inations of eligibility. Indeed, such a draconian reading would prevent the establish□ent of any definite rules.[12] Thus, in *Diaz v. Cobb*, 435 F. Supp. 2d 1206 (S.D. Fla. 2006), the Court upheld a require□ent that applicants check a box to affir□ their citizenship. It did not invalidate the provision si□ply because so□e applicants □ight prefer to present naturalization papers.[13] Si□ilarly, 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 affir□ed a require□ent that petition signatures be notarized to ensure that their signers were real people. It did not strike the require□ent si□ply because a hypothetical signer □ight wish to produce a passport. Appellees' assertion that a state-law require□ent is invalid if a litigant can hypothesize a different □eans of establishing eligibility than that which the law affords is contrary to precedent.

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[12] Under Appellees' interpretation, an applicant's total refusal to co□plete an application for□ would itself be i□□aterial if he nevertheless produced a birth certificate, naturalization papers, a passport, a utility bill, or so□e co□bination of such docu□ents sufficient to show co□pliance with all conditions of eligibility.

[13] To distinguish *Diaz*, Appellees assert that the Court deter□ined the checkboxes to be □aterial not because Congress required the□, but because they related to the deter□ination that the applicant is a citizen. (Ans. Br. at 43). Likewise, in the present case, the required infor□ation and its verification relate to the deter□ination that the applicant is a real person, an equally i□portant attribute of an eligible voter. The Appellees' characterization of *Diaz*, however, is not accurate. The Court's conclusion that the checkboxes were □aterial was based in part on the "Congressional deter□ination that the question is □aterial," and the Court explained that, even if the checkbox require□ent were not □aterial, it would be affir□ed because "HAVA, as the later and also □ore specific provision,

The □ateriality provision, □oreover, does not pree□pt legiti□ate fraud-prevention □easures. Appellees' interpretation, for exa□ple, would prohibit states fro□ denying an application on the ground that the applicant failed to sign it. *See* § 97.053(5)(a)8., Fla. Stat. (requiring applicants sign their applications). An applicant's signature—indeed, the applicant's *name*—is not relevant to his age, citizenship, or residence. Like the verification of an identifying nu□ber, however, it is a critical anti-fraud require□ent.[14] Infor□ation that enables election officials to verify the correctness of an applicant's representations of eligibility is □aterial.[15]

Even if errors and o□issions that preclude verification were i□ □aterial (which they are not), Subsection Six would not be pree□pted. HAVA prohibits states fro□ processing applications that do not include the applicant's identifying nu□ber, and it expressly authorizes states to deter□ine whether the nu□ber provided is valid. 42 U.S.C. § 15483(a)(5)(A)(i), (iii). It is a basic "canon of

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controls." 435 F. Supp. 2d at 1213.

[14] Florida relies al□ost exclusively on a co□parison of signatures to verify the legiti□acy of absentee ballots, *see* § 101.68(1), (2)(c)1., Fla. Stat., provisional ballots, *see id*. § 101.048(2)(b)1., Fla. Stat., and signatures on petition initiatives, *see id*. § 99.097(1), (3), Fla. Stat.

[15] The National Voter Registration Act confir□s this reasoning. *See* 42 U.S.C. § 1973gg-7(b)(1) (providing that □ail-in applications "□ay require only such identifying infor□ation . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to ad□inister voter registration and other parts of the election process"). Thus, it allows states, even on federally developed □ail-in applications, to require "identifying infor□ation" that enables officials to evaluate an applicant's eligibility, including whether the

statutory construction that the □ore specific takes precedence over the □ore general," *Medberry v. Crosby*, 351 F.3d 1049, 1060 (11th Cir. 2003), and that, "when two statutes irreconcilably conflict, the □ore recent statute controls," *Borsage v. U.S. Dep't of Educ.*, 5 F.3d 1414, 1418 (11th Cir. 1993). The earlier and □ore general □ateriality provision cannot nullify the later and □ore specific provisions of HAVA.[16] And HAVA itself incorporates this principle, providing that the require□ent of an identifying nu□ber applies "notwithstanding any other provision of law." 42 U.S.C. § 15483(a)(5)(A)(i).

V. APPELLEES HAVE FAILED TO ESTABLISH IRREPARABLE HARM.

Preferring the illusions of rhetoric, Appellees insist that Subsection Six categorically "disenfranchises" un□atched applicants. The actual effect of Subsection Six is to require un□atched applicants to docu□ent the authenticity of their identifying nu□bers (*e.g.*, by providing a copy of their driver's license or

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applicant is a real person.

[16] Appellees' repeated suggestion that Subsection Six results in the "rejection" of applicants (Ans. Br. at 9, 12, 16, 17), besides ignoring the federal prohibition against processing applications deter□ined not to contain the applicant's identifying nu□ber, □istakes the legal effect of Subsection Six. Subsection Six does not "reject" applicants. Rather, the absence of a □atch triggers a require□ent that applicants docu□ent their identifying nu□bers. Once an applicant □eets this require□ent, the pending application is processed, or, if the applicant sub□its a new application with the correct nu□ber, the new application is accepted and processed. Applicants have a□ple opportunity year-round to provide the necessary docu□entation or correct any errors and beco□e registered.

Social Security card). Appellees □ake no atte□pt to explain why an applicant who wishes to vote cannot □eet the docu□entation require□ent—just as applicants are required to □eet all other registration require□ents—without the aid of a preli□inary injunction. Indeed, had Appellees identified even one □e□ber of their organizations who alleges injury fro□ Subsection Six, the fallacy of irreparable har□ would be evidenced by the ease with which that individual could contact local election officials and beco□e registered.

To bolster their clai□ of irreparable har□, Appellees present a narrative of facts containing nu□erous □isstate□ents, critical o□issions, and unsupported characterizations.[17] Indeed, the actual state of facts is very different. When local election officials receive applications, data-entry clerks enter the infor□ation into the statewide co□puterized database. Proofreading, though not required by Florida law, is co□□onplace. (R. 85-2, Att. 1 at 19:21-20:3; Att. 3 at 32:15-21). In addition, clerks electronically scan original applications into the database to create a per□anent i□age and enable further proofreading. (R. 85-2, Att. 1 at 18:25-19:4, Att. 2 at 10:7-21, Att. 3 at 33:11-13). Though Appellees, after extensive discovery and nu□erous public record requests, clai□ to have identified so□e data-entry

[17] Appellees' efforts to couch this appeal as a factual one undoubtedly result fro□ their desire to avoid addressing the District Court's □isapplication of the law. A court's conclusions of law en route to a preli□inary injunction deter□ination are reviewed *de novo*. *Teper v. Miller*, 82 F.3d 989, 993 (11th Cir. 1996).

errors—unavoidable in any syste that relies on hu an agency—there is no evidence whatsoever that such errors are "yriad." (Ans. Br. at 42).

Once an applicant's infor ation is entered into FVRS, it is trans itted to the Depart ent of Highway Safety and Motor Vehicles ("DHSMV") for verification. Within about forty-eight hours after data entry, local election officials receive an electronic notification of applications that could not be validated by DHSMV, the Social Security Ad inistration, or, after individual review, by the Depart ent of State's Bureau of Voter Registration Services. (R. 85-2, Att. 1 at 35:14-36:4, Att. 2. at 28:22-29:3; Att. 4 at 108:25-109:5). Local staff co only researches returned records to co plete the registration without any action by the applicant. (R. 85-2, Att. 2 at 26:14-27:5, Att. 7 at 13:23-14:7, 14:22-15:5). They ail statutorily required notices to applicants whose applications cannot be resolved and, if possible, atte pt to reach the by phone. (R. 85-2, Att. 1 at 42:25-43:11, Att. 4 at 125:13-25; 85-3, Att. 10 at 45:18-46:6).

These efforts have been successful. Of 1,529,465 applicants since the effective date of Subsection Six, 31,506 have been returned to the Supervisors as un atched, and 14,326 re ain pending (as of Septe ber 30, 2007). (R. 85-3, Att. 15). These facts establish that applicants are able to effect their registrations without the aid of a preli inary injunction.[18]

[18] Appellees bla e the Secretary for their 27- onth delay in seeking

VI. APPELLEES LACK STANDING TO PURSUE THIS ACTION.

A. Appellees Do Not Have Associational Standing.

An organization has standing to assert the injuries of its □e□bers only if its □e□bers would otherwise have standing to sue on their own behalves, the interests at issue are ger□ane to the organization's purpose, and the participation of the □e□bers is unnecessary. *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1170 (11th Cir. 2006). Unable or unwilling to identify a single organizational □e□ber who has been or will i□□inently be injured by Subsection Six, Appellees ask the Court to *assume* that the first require□ent—that one or □ore of their □e□bers will suffer actual or i□□inent injury—has been satisfied. As explained in the Secretary's Initial Brief, the law of this Circuit does not support this application of the relevant standard.[19]

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e□ergency relief. (Ans. Br. at 48-49). Their clai□ that the Secretary refused to provide necessary facts rings hollow, given their clai□ that Subsection Six is pree□pted as a □atter of law. And, even if the alleged 10-□onth delay in responding to the public record request sub□itted by Appellees' counsel was entirely attributable to the Secretary (which it is not), with no obligation on Appellees' part to co□□ence suit and seek the infor□ation through discovery, the re□aining 17 □onths of Appellees' 27-□onth delay re□ain unexplained.

[19] Instead of identifying even a single □e□ber, Appellees continue to refer to the 14,000 individuals whose applications re□ained pending because of the challenged statute. But those individuals do not help Appellees unless they can clai□ the□ a□ong their □e□bers—which they do not. Appellees also suggest that only 363,341 applications have been subject to the □atching process. (Ans. Br. at 12). That suggestion is not based on evidence (they cite only their counsel's declaration relating to reports on the Internet, despite record evidence to the

Appellees cite *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007). In *Parents*, an association of the parents of schoolchildren challenged a school district's policy of using race in □aking ad□issions decisions. The standing question was not whether the association was able to identify an injured □e□ber—all of its □e□bers had children whose ad□issions decisions were subject to the challenged policy—but whether the injury too speculative because a child □ight, despite the policy, be enrolled in a preferred school. *Id*. at 2750-51. In addition, the Court noted a standing doctrine not applicable here, explaining that "one for□ of injury under the Equal Protection Clause is being forced to co□pete in a race-based syste□ that □ay prejudice the plaintiff." *Id*. at 2751. Appellees' reliance on *Parents* is □isplaced.

B. Appellees Do Not Have Organizational Standing.

In support of their position that a voluntary reallocation of resources[20] constitutes injury in fact, Appellees rely on a line of cases that originates with

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contrary), and the actual nu□ber of applications that went through the □atching process in the relevant period, even exclusive of applications sub□itted to DHSMV in conjunction with driver's license transactions, is □ore than 765,000. But of all the nu□bers involved in this case, the □ost critical is the nu□ber of har□ed □e□bers identified by Appellees: Zero.

[20] The tendency of a law to counteract an organization's stated □ission is inadequate to establish injury in fact. *ACORN v. Fowler*, 178 F.3d 350, 361 n.7 (5th Cir. 1999) (A showing "that an organization's □ission is in direct conflict with a defendant's conduct is insufficient, in and of itself, to confer standing on the organization to sue on its own behalf.").

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982). *Havens* is distinguishable both as it relates to the nature of the injury and the specificity of the allegation. In *Havens*, the plaintiff provided counseling and referral services to ho□eseekers to pro□ote racially integrated housing. *Id*. at 368, 379. The defendants operated apart□ent co□plexes that allegedly engaged in racial steering. *Id*. at 368. The Court held that, if the defendants' racial-steering practices "perceptibly i□paired [the plaintiff's] ability to provide counseling and referral services," the plaintiff had suffered injury. *Id*. at 379. The "drain on the organization's resources" was a "concrete and de□onstrable injury." *Id*.[21]

Thus, in *Havens*, standing was predicated on a "drain" of the plaintiff's resources resulting fro□ the *negation* of its efforts to pro□ote integrated housing. It was *not* predicated on a co□pletely voluntary "diversion" of resources to assist the plaintiff's □e□bers' efforts to co□ply with legal require□ents—the basis of the injury alleged here.

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[21] *Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333 (N.D. Ga. 2007), also rejected the applicability of *Havens*. In *Billups*, the NAACP contended that it had standing to challenge a photo-identification require□ent because "it □ay have to re-allocate resources to educate its □e□bers concerning the Photo ID require□ent and to ensure that its □e□bers who lack Photo ID cards obtain [the□]." *Id*. at 1372. The Court explained that *Havens* and its progeny "are Fair Housing Act cases, which involve special sets of circu□stances." *Id*. The NAACP "has not de□onstrated that the United States Court of Appeals for the Eleventh Circuit would extend the standing analysis applied in those Fair Housing Act cases outside the context of housing discri□ination." *Id*.

Even if *Havens* applies, Appellees have failed to allege the supposed diversion of resources with the necessary specificity. In *Louisiana ACORN Fair Housing v. LeBlanc*, 211 F.3d 298 (5th Cir. 2000), an organization lacked standing where the alleged diversion of resources was not established with particularity. The organization's executive director testified that the assistance it provided to the injured tenant consu□ed "an inordinate a□ount of . . . ti□e" and detracted fro□ "activities in other areas." *Id*. at 305. The Court, however, found the asserted injury "conjectural, hypothetical, and speculative"—not "concrete and particularized." *Id*. at 306. The testi□ony "neither □entioned any specific projects . . . put on hold . . . nor . . . describe[d] in any detail how [the organization] had to re-double efforts . . . to co□bat discri□ination." *Id*. at 305.

In *Elend v. Basham*, 471 F.3d 1199 (11th Cir. 2006), protestors challenged the alleged policy of the U.S. Secret Service to constrain protestors to "Protest Zones." *Id*. at 1206. The protestors sought to establish injury by asserting that they "fully intend" to engage in peaceful protest "in the future." *Id*. The Court noted that, "[g]iven . . . the unspecified details of where, at what type of event, with what nu□ber of people, and posing what kind of security risk, we are being asked to perfor□ the judicial equivalent of shooting blanks in the night." *Id*. at 1206-07. The protestor's indefinite allegation of future injury "fail[ed] to provide any li□itation on the universe of possibilities of when or where or how such a

protest □ight occur." *Id*. at 1209. The Court concluded that the alleged injury was not "i□□inent and concrete enough for judicial consideration." *Id*. at 1206.

The record here is equally devoid of specific, concrete facts establishing injury. Alleging no past injury (Ans. Br. at 54), Appellees ask the Court to credit their soothing, generalized assurance that they will conduct voter registration activities in the future, without any concrete plans or particularized facts to support the assertion. As in *Elend*, Appellees offer no details of their asserted plans or any "li□itation on the universe of possibilities of when or where or how." 471 F.3d at 1209. As in *Louisiana ACORN*, Appellees fail to identify "any specific projects [they] had to [or will] put on hold." 211 F.3d at 305. Thus, while Appellees clai□—and □erely clai□—that they will respond to Subsection Six by assisting applicants, they do not identify activities *from which* resources □ight be diverted, or the □anner in which the anticipated injury will be sustained. Because Appellees' plans are inchoate, the injuries they assert, unsupported by past or ongoing injury, are purely speculative.[22] Appellees have failed to de□onstrate that their injury would "proceed with a high degree of i□□ediacy, so as to reduce the

[22] When asked whether the NAACP will increase its voter registration activities in 2008, its executive director answered: "We're hoping to." (R. 93-1—47:12-15). "Such □so□e day' intentions—without any description of concrete plans, or indeed even any specification of *when* the so□e day will be—do not support a finding of the □actual or i□□inent' injury that our cases require." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (e□phasis in original).

possibility of deciding a case in which no injury would have occurred at all." *31 Foster Children v. Bush*, 329 F.3d 1255, 1266 (11th Cir. 2003).

CONCLUSION

At its core, Appellees' opposition to Subsection Six is an objection to its wisdo□ and policy better addressed to Congress or the Florida Legislature. Because Subsection Six co□ports with the una□biguous text of federal law, this Court should reverse the District Court's entry of a preli□inary injunction.

Respectfully sub□itted,

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CERTIFICATE OF COMPLIANCE

This is to certify that this brief co□plies with Federal Rule of Appellate Procedure 32(a)(7). This brief is sub□itted in 14-point Ti□es New Ro□an font, and it contains 7,000 words.

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CERTIFICATE OF SERVICE

This is to certify that on January 14, 2008, a copy of the foregoing was served on the following individuals as indicated below:

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