

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 America Vote Act of 2002 (“HAVA”) prohibits states from processing voter registration applications that do not contain an applicant’s identifying number, 42 U.S.C. § 15483(a)(5)(A)(i), and it expressly authorizes states, by methods of their own choice, to determine whether the required number has been provided, *id.* §§ 15483(a)(5)(A)(iii), 15485. Subsection Six, which determines that the number has been provided if it matches data in official records or is verified by the applicant, does precisely this.

Appellees nevertheless assert that HAVA implicitly bars states from selecting the surest and most effective means of making this determination: a comparison to official records. In fact, they go so far as to assert that states must blindly accept without verification whatever number 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 importance of its new registration requirement, assail the wisdom of Florida’s chosen means of implementation, misinterpret critical provisions of law, and reduce the mandate of HAVA to a hollow ceremony that serves no useful function.

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

HAVA establishes a new voter registration requirement. It provides that a state “may not accept or process” an application that does not contain 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). It then authorizes each state, according to its own laws, to determine whether the required information has been provided and, consequently, whether the application may be processed. *Id.* § 15483(a)(5)(A)(iii). For still greater clarity, it expressly empowers each state to choose the means of implementing the new registration requirement. *Id.* § 15485. Subsection Six is Florida’s chosen means to determine whether an applicant has provided the required number and whether the application may be processed.¹

“Where the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said.” *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc). Undaunted, Appellees make one attempt to explain what Congress might have meant if it did not mean 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 number—any number—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.

number at face value. No verification is acceptable. (*Id.* at 35).

Thus, according to Appellees, what Congress *really* meant when it said that the “State shall determine whether the information 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 permit—a determination of the validity of numbers provided. This interpretation turns statutory language on its head.² It transforms words that create authority into a strict mandate that states ministerially accept the number provided—accurate or inaccurate—no questions asked. Notably, Appellees make no attempt to construe Section 305, which operates in tandem with Section 303(a)(5)(A)(iii) and expressly grants states “discretion” to implement HAVA’s new registration requirement by methods of their own choice. Indeed, their brief does not even mention Section 305.

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

² Appellees’ interpretation calls to mind the informal holiday long celebrated by schoolchildren—Opposite Day—on which statements mean the *opposite* of what they ordinarily mean. See http://en.wikipedia.org/wiki/Opposite_Day. For example, on Opposite Day, the statement that a state has discretion to determine, according to its own laws, whether an applicant has provided the information required by law, would mean that a state *does not* have that discretion and must accept the information provided without a peep. Today is not Opposite Day.

(Ans. Br. at 36). In such cases, Appellees say, a state may either accept or deny the application. Appellees' attempt to confine Section 303(a)(5)(A)(iii) to cases of total omissions is refuted by that provision's own words. The title of Section 303(a)(5)(A)(iii) refers to a determination of the validity of numbers *provided*—not to numbers *omitted*, which are not susceptible to a determination of validity. Its substance likewise refers to “information provided” and contemplates a determination with respect to such information. A number that is omitted is not “provided,” and no determination of sufficiency can be made with respect to an omitted number. Appellees' characterization of Section 303(a)(5)(A)(iii) as referring only to omitted numbers 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 statements made in Congress, Appellees seek to recast HAVA's new registration requirement as a tool of administrative convenience, serving no real purpose beyond bureaucratic list maintenance. Ignoring its intended function as a security against election irregularity and fraud, Appellees trivialize its importance 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 requirement—and Florida's implementation of it—as “administrative” (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), “meaningless” (*id.* at 2, 9, 11, 41, 42, 44), and “ministerial” (*id.* at 13, 45), Congress did not share Appellees' dismissive regard for an accurate and secure registration process. Far from serving an unimportant bureaucratic function, HAVA's new registration requirement was the focus of Congress's efforts to combat election irregularity and fraud.

Two basic concerns informed Congress's enactment of HAVA's new registration requirement. 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 might be submitted, for example, in the name of a pet, a deceased person, or a fictitious person. *See, e.g.*, 148 Cong. Rec. S10501 (statement 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 them.”); *id.* at

S10419 (statement of Sen. McConnell) (“These . . . provisions will ensure that [the] stars of ‘Animal 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 submission of duplicate registrations in the name of a single person—registrations that can be exploited to fraudulent ends. *See, e.g., id.* at S10492 (statement of Sen. Bond) (“Duplicate registrations provide the opportunity for unscrupulous people to commit fraud and undermine honest elections by, in effect, invalidating legally cast ballots.”); *id.* at S10413 (statement of Sen. Dodd) (“[I]t is our hope and expectation that the risk that individuals may be voting multiple times in multiple jurisdictions will be minimized if not eliminated altogether.”).

HAVA’s new registration requirement addresses both concerns. First, by requiring applicants to provide their identifying numbers, and by authorizing states to determine whether the numbers provided are valid and sufficient, HAVA enables states to ascertain whether applicants are real, living people. Second, by authorizing states to validate applicants’ identifying numbers, 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 administrative list-makers—but as a means of securing the integrity of the entire electoral process from dishonest practices. *See, e.g., id.* at S10492 (statement of Sen. Bond) (“These provisions were designed to create more accurate voter lists and help ensure the integrity of elections.”); *id.* at S10419 (statement of Sen. McConnell) (“The accuracy of the voter registration list is paramount to a fair and accurate election.”).³

Appellees’ interpretation, by prohibiting states from determining the validity of numbers provided by applicants, would frustrate both purposes. The compelled acceptance of whatever number an applicant chooses to provide—accurate or inaccurate—would disable election officials from ensuring that an applicant is a real, living person. It would also prevent election officials from detecting duplicate registrations. If an applicant provides an inaccurate number and later submits a second application with the correct number or a different inaccurate number, the duplication would be undetectable. HAVA’s requirement would then be the pointless administrative charade that Appellees represent it to be.⁴

³ Appellees’ assertion that Congress could not possibly have intended HAVA to present a “barrier” to registration turns away not only from HAVA’s legislative history but its text, which provides that applications which do not contain the applicant’s identifying number “may 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 circumstances.

⁴ As Appellees themselves recognize, the last four digits of an applicant’s Social Security number are anything but “unique,” (R. 1, ¶ 45) (“[E]very ‘last four’

Appellees’ argument, moreover, that Subsection Six is invalid because it is “only about verifying the number” misses the point. First, the clear words of HAVA are concerned only with the number. They require applicants to provide their identifying numbers and authorize states to determine the sufficiency of the number. Second, and more fundamentally to Congress’s concerns, the provision of an accurate number ensures that an applicant is unique and that a single person is not registered more than once. If applicants could complete their registrations without verifying their numbers (*e.g.*, by providing identification that does not contain the number), election officials’ efforts to determine whether the new applicant is the same person as one with the same name already in the registration database would be frustrated.

The words of HAVA are clear. Appellees’ attempt to repeal these words by a trivializing and revisionist characterization of legislative history must fail.

digit combination returns approximately 40,000 Social Security numbers.”). Florida assigns a truly unique number. *See* 42 U.S.C. § 15483(a)(1)(A)(iii). An applicant’s identifying number remains on record, though, and, if accurate, enables election officials to know whether duplicate entries relate to the same person.

III. HAVA DOES NOT PREEMPT SUBSECTION SIX.⁵

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

Section 303(b) imposes a limited identification requirement on applicants who apply by mail. It requires them, when first casting a ballot, to produce identification. 42 U.S.C. § 15483(b)(1)-(2). It provides an exception to this identification requirement for applicants whose identifying numbers are successfully matched to information in official databases. *Id.* § 15483(b)(3)(B).

Appellees misread Section 303(b) to “clearly” require that “un-matched voters . . . be registered.” (Ans. Br. at 31). First, because Appellees refuse to attribute any meaning 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 determine, by methods of their own choice, whether an

⁵ Appellees contend that the presumption against preemption does not apply to allegations of implied conflict preemption. (Ans. Br. at 24-25 n.15). In *California v. ARC America Corp.*, 490 U.S. 93 (1989), however, the Supreme Court applied a presumption against preemption in just such a case. In *ARC America*, there was no claim of express or field preemption. *Id.* at 101. The “only contention” was that the challenged state laws presented an “obstacle to the accomplishment of the purposes and objectives of Congress.” *Id.* at 102. The Court nevertheless held that “appellees must overcome the pre-sumption against finding pre-emption 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 Supremacy Clause (i.e., preemption issues), we start with the assumption that the historic police powers of the states are not superseded by federal law unless preemption is the clear and manifest purpose of Congress.”).

applicant's identifying number is valid and sufficient. Thus, some states might use the database verification process created by Section 303(a)(5)(B) to make this determination, while others might not. Congress granted states this discretion, and it knew that not all states would exercise this discretion in the same way.⁶ It accordingly framed an identification requirement 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 them from appreciating the function of Section 303(b) in HAVA's larger scheme.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, mindful of the structure and purpose of HAVA. And, even if Section 303(b) is considered alone, nothing about it compels states to register applicants whose identifying numbers are unmatched. It simply provides a requirement for such applicants if they *are* registered.

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 examples" 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 circumstances.

⁷ The preemption analysis takes into consideration "the language of the preemption statute," the "statutory framework 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 misread Section 303(b) as presenting two alternative requirements. They hypothesize that Section 303(b) represents a “consciously calibrated balance” of the applicant’s interest in registration and the state’s interest in combating 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 requirement would throw the balance “out of whack.” Even the measures which Appellees suggest a state might pursue—such as a requirement that voters “identify themselves 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, must be final. This is not what Congress did. Section 303(b)’s requirement is a minimum requirement that may not be construed to prohibit stricter state laws. Congress set a fraud-prevention floor—it did not strike a balance that imposes a floor and a ceiling. This could hardly be clearer. 42 U.S.C. § 15484 (“The requirements established by this title are minimum requirements . . .”).

Second, the structure of Section 303(b) demonstrates that identification and matching are not alternative requirements. They are not separated by the disjunctive word “or” or juxtaposed as parallel provisions. Rather, Section 303(b)

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

imposes one requirement—an identification requirement—and, by three exceptions, *see* 42 U.S.C. § 15483(b)(3)(A-C), limits the scope of that requirement 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 may 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 may not subject all applicants to matching because matching is one of two alternatives, it may not, for the same reason, subject all voters to an identification requirement. Appellees make no effort to distance themselves from this conclusion.⁹ Such a holding would *invert* the intent of Congress by precluding states from imposing a photo-identification requirement on

⁸ The distinction can be illustrated as follows: if Congress required all hospitals to provide emergency care to residents of the state in which they were located, but excepted patients with health insurance, Appellees' reasoning would prohibit states from 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 contemplated the existence of people without health insurance, it impliedly prohibited states from 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 requirements, *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 same effect in the Supreme Court's pending review of *Crawford*. The argument that Section 303(b) presents a rigid alternative has been rejected in *amicus* briefs by the United States, *see* <http://tinyurl.com/yrxgz5>, and by forty-one current members of Congress who were active in the passage of HAVA, *see* <http://tinyurl.com/2d2l18>.

matched mail-in applicants while leaving them free to impose a photo-identification requirement on in-person applicants. As explained in the Secretary’s Initial Brief, Congress found that mail-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 more stringent identification requirements with respect to in-person than mail-in applicants.

Finally, this Court need not decide whether HAVA creates an “alternative” that precludes generally applicable matching requirements, because that is not this case. Under Subsection Six, the absence of a match does not result in the denial of an application and is not determinative against the applicant. Its effect is to trigger the requirement that applicants document the authenticity of their numbers. Thus, Florida *does* register unmatched applicants; it simply imposes on them one additional requirement not applicable to matched applicants. Far from supplanting and rendering “meaningless” Section 303(b)’s identification requirement, Subsection Six does not eliminate *or even limit* the class of voters to whom Section 303(b)’s identification requirement applies, but supplements that requirement with a documentation requirement. And the documentation requirement is a quintessential example of a stricter state law that Section 304 expressly permits. In fact, Appellees appear to recognize this, noting that Section 304 allows states to “require voters to identify themselves 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 unmatched mail-in applicants who failed to present identification under Section 303(b) to cast provisional ballots, and it defers to state law to determine 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 number is matched; or (ii) no later than 5 p.m. on the second day after the election, the applicant documents the authenticity of that number. Subsection Six, therefore, is plainly in compliance 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 comply with Subsection Six. This conclusion is plainly wrong, since HAVA expressly leaves that determination to state law. If all provisional ballots must count, they are hardly “provisional.” Appellees do not contend otherwise, but claim that the conditions Subsection Six prescribes are “insurmountable” and render the fail-safe provision a “sham.” (Ans. Br. at 34, 35).

This position is wrong. First, it would contravene the text of HAVA, which expressly defers the determination 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 affirmed the validity of a state requirement that provisional voters under HAVA’s fail-safe provision supply their identifying number before polls close on Election Day. The Court did not invalidate the requirement on the ground that it was too difficult. It simply applied the clear words of HAVA.

Finally, Subsection Six does not impose insurmountable conditions. It requires election officials to notify unmatched applicants that they must “provide evidence to the [Supervisor of Elections] sufficient to verify the authenticity of the number provided on the application.”¹⁰ Such documentation may be provided in person, by mail, by facsimile, or by e-mail (R. 85–42-43), at any time before 5 p.m. on the second day after the election. Thus, Subsection Six provides for notice, allows numerous means of communication, and affords more time than the requirement upheld in *League of Women Voters*. Appellees’ assertion that Subsection Six presents “insurmountable” 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 aims of HAVA’s database requirement. They point to no deficiency—real or perceived—

¹⁰ Even before the Florida Legislature created this specific notice requirement, 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 from Subsection Six. The purpose of the database, Appellees assert, was to protect the voter rolls from duplicate registrations by assigning each voter a unique identifier based on the number provided by the applicant. (Ans. Br. at 26). If so, it defies logic to assert that Subsection Six, which ensures that the number provided by the applicant is *accurate*, defeats the purpose of securing lists from duplicate registrations. The provision of an *inaccurate* number defeats this purpose by rendering duplicate entries undetectable. Subsection Six only promotes this purpose.

Ultimately, Appellees' position appears to be that the database was generally designed to facilitate voter registration, while Subsection Six makes registration more 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 preempted. Such reasoning would invalidate *all* state voter registration requirements, because *all* state voter registration requirements tend to limit registration. This was not the intent of Congress. HAVA "preserved the traditional authority of State and local election officials to be the sole determinants of whether an applicant is duly registered." 148 Cong. Rec. S10506 (statement 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 requirements. 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 from the States their traditional responsibility to administer elections.”).¹¹

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

Errors and omissions on any record or paper that preclude a determination that applicants are real people are not immaterial. The fact that HAVA expressly prohibits states from processing applications which, as determined by state law, do not contain identifying numbers, demonstrates a congressional determination that the accuracy of applicants’ identifying numbers, and the steps taken to ensure their accuracy, are material. Because Subsection Six enables election officials to verify that applicants are real people, it is fundamental to the determination of eligibility. A person who is not real is not eligible to vote.

Appellees respond that, because applicants might hypothetically wish to verify their reality by other means, such as a passport, Subsection Six is invalid.

(Ans. Br. at 44). The materiality 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 measure because Section 101.043, Florida Statutes, already accomplishes this by requiring photo identification at the polls. (Ans. Br. at 3). Besides being irrelevant to the preemption analysis, this suggestion overlooks the fact that the photo-identification requirement 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 limits states to *one* fraud-prevention measure.

means to make determinations of eligibility. Indeed, such a draconian reading would prevent the establishment of any definite rules.¹² Thus, in *Diaz v. Cobb*, 435 F. Supp. 2d 1206 (S.D. Fla. 2006), the Court upheld a requirement that applicants check a box to affirm their citizenship. It did not invalidate the provision simply because some applicants might prefer to present naturalization papers.¹³ Similarly, 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 affirmed a requirement that petition signatures be notarized to ensure that their signers were real people. It did not strike the requirement simply because a hypothetical signer might wish to produce a passport. Appellees' assertion that a state-law requirement is invalid if a litigant can hypothesize a different means of establishing eligibility than that which the law affords is contrary to precedent.

¹² Under Appellees' interpretation, an applicant's total refusal to complete an application form would itself be immaterial if he nevertheless produced a birth certificate, naturalization papers, a passport, a utility bill, or some combination of such documents sufficient to show compliance with all conditions of eligibility.

¹³ To distinguish *Diaz*, Appellees assert that the Court determined the checkboxes to be material not because Congress required them, but because they related to the determination that the applicant is a citizen. (Ans. Br. at 43). Likewise, in the present case, the required information and its verification relate to the determination that the applicant is a real person, an equally important attribute of an eligible voter. The Appellees' characterization of *Diaz*, however, is not accurate. The Court's conclusion that the checkboxes were material was based in part on the "Congressional determination that the question is material," and the Court explained that, even if the checkbox requirement were not material, it would be affirmed because "HAVA, as the later and also more specific provision,

The materiality provision, moreover, does not preempt legitimate fraud-prevention measures. Appellees’ interpretation, for example, would prohibit states from 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 number, however, it is a critical anti-fraud requirement.¹⁴ Information that enables election officials to verify the correctness of an applicant’s representations of eligibility is material.¹⁵

Even if errors and omissions that preclude verification were immaterial (which they are not), Subsection Six would not be preempted. HAVA prohibits states from processing applications that do not include the applicant’s identifying number, and it expressly authorizes states to determine whether the number provided is valid. 42 U.S.C. § 15483(a)(5)(A)(i), (iii). It is a basic “canon of

controls.” 435 F. Supp. 2d at 1213.

¹⁴ Florida relies almost exclusively on a comparison of signatures to verify the legitimacy 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 confirms this reasoning. *See* 42 U.S.C. § 1973gg-7(b)(1) (providing that mail-in applications “may require only such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process”). Thus, it allows states, even on federally developed mail-in applications, to require “identifying information” that enables officials to evaluate an applicant’s eligibility, including whether the

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). The earlier and more general materiality provision cannot nullify the later and more specific provisions of HAVA.¹⁶ And HAVA itself incorporates this principle, providing that the requirement of an identifying number 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” unmatched applicants. The actual effect of Subsection Six is to require unmatched applicants to document the authenticity of their identifying numbers (*e.g.*, by providing a copy of their driver’s license or

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 determined not to contain the applicant’s identifying number, mistakes the legal effect of Subsection Six. Subsection Six does not “reject” applicants. Rather, the absence of a match triggers a requirement that applicants document their identifying numbers. Once an applicant meets this requirement, the pending application is processed, or, if the applicant submits a new application with the correct number, the new application is accepted and processed. Applicants have ample opportunity year-round to provide the necessary documentation or correct any errors and become registered.

Social Security card). Appellees make no attempt to explain why an applicant who wishes to vote cannot meet the documentation requirement—just as applicants are required to meet all other registration requirements—without the aid of a preliminary injunction. Indeed, had Appellees identified even one member of their organizations who alleges injury from Subsection Six, the fallacy of irreparable harm would be evidenced by the ease with which that individual could contact local election officials and become registered.

To bolster their claim of irreparable harm, Appellees present a narrative of facts containing numerous misstatements, critical omissions, and unsupported characterizations.¹⁷ Indeed, the actual state of facts is very different. When local election officials receive applications, data-entry clerks enter the information into the statewide computerized database. Proofreading, though not required by Florida law, is commonplace. (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 permanent image 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 numerous public record requests, claim to have identified some data-entry

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

errors—unavoidable in any system that relies on human agency—there is no evidence whatsoever that such errors are “myriad.” (Ans. Br. at 42).

Once an applicant’s information is entered into FVRS, it is transmitted to the Department 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 Administration, or, after individual review, by the Department 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 commonly researches returned records to complete 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 mail statutorily required notices to applicants whose applications cannot be resolved and, if possible, attempt to reach them 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 unmatched, and 14,326 remain pending (as of September 30, 2007). (R. 85-3, Att. 15). These facts establish that applicants are able to effect their registrations without the aid of a preliminary injunction.¹⁸

¹⁸ Appellees blame the Secretary for their 27-month 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 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. *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1170 (11th Cir. 2006). Unable or unwilling to identify a single organizational member who has been or will imminently be injured by Subsection Six, Appellees ask the Court to *assume* that the first requirement—that one or more of their members will suffer actual or imminent 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

emergency relief. (Ans. Br. at 48-49). Their claim that the Secretary refused to provide necessary facts rings hollow, given their claim that Subsection Six is preempted as a matter of law. And, even if the alleged 10-month delay in responding to the public record request submitted by Appellees' counsel was entirely attributable to the Secretary (which it is not), with no obligation on Appellees' part to commence suit and seek the information through discovery, the remaining 17 months of Appellees' 27-month delay remain unexplained.

¹⁹ Instead of identifying even a single member, Appellees continue to refer to the 14,000 individuals whose applications remained pending because of the challenged statute. But those individuals do not help Appellees unless they can claim them among their members—which they do not. Appellees also suggest that only 363,341 applications have been subject to the matching 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 making admissions decisions. The standing question was not whether the association was able to identify an injured member—all of its members had children whose admissions decisions were subject to the challenged policy—but whether the injury too speculative because a child might, 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 form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff.” *Id.* at 2751. Appellees’ reliance on *Parents* is misplaced.

B. Appellees Do Not Have Organizational Standing.

In support of their position that a voluntary reallocation of resources²⁰ constitutes injury in fact, Appellees rely on a line of cases that originates with

contrary), and the actual number of applications that went through the matching process in the relevant period, even exclusive of applications submitted to DHSMV in conjunction with driver’s license transactions, is more than 765,000. But of all the numbers involved in this case, the most critical is the number of harmed members identified by Appellees: Zero.

²⁰ The tendency of a law to counteract an organization’s stated mission 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 mission 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 homeseekers to promote racially integrated housing. *Id.* at 368, 379. The defendants operated apartment complexes that allegedly engaged in racial steering. *Id.* at 368. The Court held that, if the defendants’ racial-steering practices “perceptibly impaired [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 demonstrable injury.” *Id.*²¹

Thus, in *Havens*, standing was predicated on a “drain” of the plaintiff’s resources resulting from the *negation* of its efforts to promote integrated housing. It was *not* predicated on a completely voluntary “diversion” of resources to assist the plaintiff’s members’ efforts to comply with legal requirements—the basis of the injury alleged here.

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 requirement because “it may have to re-allocate resources to educate its members concerning the Photo ID requirement and to ensure that its members who lack Photo ID cards obtain [them].” *Id.* at 1372. The Court explained that *Havens* and its progeny “are Fair Housing Act cases, which involve special sets of circumstances.” *Id.* The NAACP “has not demonstrated 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 discrimination.” *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 consumed “an inordinate amount of . . . time” and detracted from “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 testimony “neither mentioned any specific projects . . . put on hold . . . nor . . . describe[d] in any detail how [the organization] had to re-double efforts . . . to combat discrimination.” *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 number of people, and posing what kind of security risk, we are being asked to perform 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 limitation on the universe of possibilities of when or where or how such a

protest might occur.” *Id.* at 1209. The Court concluded that the alleged injury was not “imminent 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 “limitation 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 claim—and merely claim—that they will respond to Subsection Six by assisting applicants, they do not identify activities *from which* resources might be diverted, or the manner 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 demonstrate that their injury would “proceed with a high degree of immediacy, 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 ‘some day’ intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (emphasis 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 wisdom and policy better addressed to Congress or the Florida Legislature. Because Subsection Six comports with the unambiguous text of federal law, this Court should reverse the District Court's entry of a preliminary injunction.

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 7,000 words.

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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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