United States Court of Appeals

for the

Eleventh Circuit

Case No. 07-15932-FF

FLORIDA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *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

BRIEF OF APPELLEES

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Florida State Conference of the NAACP, et al. v. Browning,

CASE NO. 07-15932-FF

CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Circuit Rule 26.1-1, Appellees furnish the following complete list of parties with an interest in the outcome of this appeal:

1. Advancement Project, attorneys for appellees
2. Peter Antonacci, attorney for appellant
3. Robert A. Atkins, attorney for appellees
4. Andy Bardos, attorney for appellant
5. Brennan Center for Justice, attorney for appellees
6. Kurt S. Browning, Secretary of State for the State of Florida, defendant/appellant
7. Glenn T. Burhans Jr., attorney for appellees
8. D. Mark Cave, attorney for appellees
9. Florida State Conference of the National Association for the Advancement of Colored People, plaintiff/appellee
10. GrayRobinson, P.A., attorneys for appellant
11. Greenberg Traurig, P.A., attorneys for appellees
12. Haitian American Grassroots Coalition, plaintiff/appellee

CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

13. Justin Levitt, attorney for appellees
14. Jennifer Maranzano, attorney for appellees
15. Brian W. Mellor, attorney for appellees
16. Honorable Stephan P. Mickle, presiding district court judge
17. Paul, Weiss, Rifkind, Wharton & Garrison, LLP, attorneys for appellees
18. Myrna Pérez, attorney for appellees
19. Project Vote, attorneys for appellees
20. Lauren Rothenberg, attorney for appellees
21. J. Adam Skaggs, attorney for appellees
22. Southwest Voter Registration Education Project, plaintiff/appellee
23. Elizabeth Westfall, attorney for appellees
24. Allen Winsor, attorney for appellant

Appellee Florida State Conference of the National Association for the Advancement of Colored People, pursuant to 11th Circuit Rule 26.1-1, states that it does not issue stock, does not have a parent corporation, and that there is no publicly traded corporation that owns 10% or more of its stock.

Florida State Conference of the NAACP, et al. v. Browning,

CASE NO. 07-15932-F

CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Appellee Haitian-American Grassroots Coalition, pursuant to 11th Circuit Rule 26.1-1, states that it does not issue stock, does not have a parent corporation, and that there is no publicly traded corporation that owns 10% or more of its stock.

Appellee Southwest Voter Registration Education Project, pursuant to 11th Circuit Rule 26.1-1, states that it does not issue stock, does not have a parent corporation, and that there is no publicly traded corporation that owns 10% or more of its stock.

GLENN T. BURHANS, JR.

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STATEMENT REGARDING ORAL ARGUMENT

The Court has scheduled oral argument for January 18, 2008.

STATEMENT OF THE ISSUES

(i) Did the District Court commit reversible error in finding that Appellees demonstrated a substantial likelihood of success of establishing that Section 97.053(6), Florida Statutes ("Subsection 6") violates and is preempted by the Help America Vote Act ("HAVA")?

(ii) Did the District Court commit reversible error in finding that Appellees demonstrated a substantial likelihood of success of establishing that Subsection 6 violates and is preempted by the materiality provision of the Voting Rights Act (the "VRA")?

(iii) Did the District Court commit reversible error in finding that Appellees have standing to assert HAVA and VRA claims?

STATEMENT OF THE CASE

By operation of Subsection 6 of Florida's election law, more than 14,000 voters were denied registration for the upcoming presidential primary. (R.105-25).[1] That is undisputed, as is the fact that the number of voters excluded by Subsection 6 will increase in 2008 as applications pour in ahead of the general election. (*Id.*). None of those 14,000-plus voters was found to be ineligible to vote, but they were kept off the registration rolls because of trivial typos, data-entry errors and meaningless spelling differences.

Subsection 6 is Florida's attempt to comply with the voter registration database requirements of HAVA, passed by Congress in the aftermath of the 2000 election to protect eligible voters from being turned away from the polls, and to prevent fraud by ineligible individuals, due to shoddy, outdated and unreliable registration lists.

The Florida Legislature adopted Subsection 6 to implement HAVA, but made verification of a recordkeeping number a precondition to registration. In a measure that HAVA neither requires nor permits, violates the VRA, and is contrary to virtually every other state, Subsection 6 forbids eligible voters from being registered if the driver's license or Social Security number on their application does not "match" other

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[1] Citations to the Record follow the following format: Docket Number - Subpart Number (if any) - Exhibit Number/Letter (if any) - Page/Paragraph Reference.

databases or is not otherwise verified -- even if that is due to a typographical error, computer glitch or clerical mistake and even if the voter has unimpeachable proof of identity.

The Legislature did not design Subsection 6 as a new voter identification program. It already did that when it mandated photo ID for all voters at the polls. *See* § 101.043, Fla. Stat. Florida tried to comply with HAVA, but ended up disenfranchising thousands of eligible voters through the error-prone matching process, without detecting any fraud.

Course of Proceedings

Appellees, the Florida State Conference of the NAACP, the Southwest Voter Registration Education Project ("Southwest Voter"), and the Haitian-American Grassroots Coalition ("HAGC"), filed their complaint (R.1) and moved for a preliminary injunction (R.4) on September 17, 2007 on the grounds that Subsection 6 violates and is preempted by HAVA, and violates the Voting Rights Act, the National Voter Registration Act and the U.S. Constitution. The District Court held a hearing on December 11, 2007 (R.96) and, based on the parties' written submissions, the substantial documentary record developed in expedited discovery and the expert and fact testimony submitted by Appellees, granted the preliminary injunction motion by order dated December 18, 2007. (R.105).

The Court held that, as organizations that conduct registration activities to

increase political participation among the minority communities disproportionately impacted by Subsection 6, Appellees had established irreparable harm and a likelihood of success on their HAVA and VRA materiality claims. Central to that ruling is this uncontested finding of fact: "As a result of natural and expected human errors in data entry and possible computer glitches in the matching process, [Subsection 6] has resulted in more than 14,000 otherwise eligible voters being kept off the voter rolls." (R.105-2).

With regard to HAVA, the District Court found that having "transformed the record-keeping function of the computer registration list requirement into a precondition to registration and, therefore, a precondition to voting," (R.105-12), Subsection 6 directly conflicts with, and thus is preempted by, three HAVA provisions: (1) 303(b)(2)(A), which permits first-time mail-in registrants to vote by *either* showing proof of identity *or* matching; (2) 303(b)(2)(B), which permits first-time mail-in registrants to vote a "fail-safe" provisional ballot, even without proof of identity or matching; and (3) 303(a), which requires the computerized voter registration list as a means to eliminate barriers to eligible voters, not to "prevent otherwise eligible voters from voting." (R.105-13).

With regard to the materiality provision of the VRA, 42 U.S.C. § 1971(a)(2)(B), the District Court found that due to data-entry mistakes and other administrative errors "immaterial to the voter's actual eligibility to vote," the record established that "many

have been denied the right to vote for reasons unrelated to their voter qualifications under the Florida Constitution." (R.105-14-15).

In finding irreparable injury, the District Court concluded that the 14,000 voters prevented from registering were "proof that Subsection Six is resulting in actual harm to real individuals" and that this "disenfranchisement, however unintentional, causes damage to the election system that cannot be repaired after the election has passed." (R.105-25). Appellant, the District Court noted, "provided no evidence that any of the 14,000 who have been denied registration were engaged in voter fraud." (R.105-26).[2]

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[2] The District Court also held that Appellees had stated valid claims under the First and Fourteenth Amendments, but found it unnecessary to reach the merits of the constitutional claims because Appellees demonstrated a likelihood of success on the merits of their statutory claims. (R.105-20).

STATEMENT OF THE FACTS

A. The Help America Vote Act and Florida Subsection 6

HAVA requires every state to create a "single, uniform, official, centralized, interactive computerized statewide voter registration list," which "assigns a unique identifier to each legally registered voter in the State." 42 U.S.C. § 15483(a)(1)(A). To identify a unique record for each voter, HAVA requires that new registrants provide a recordkeeping number if they already have one (a driver's license or their last four Social Security digits), or be assigned a number. *Id.* § 15483(a)(5)(A)(i). This "computerized list" was intended to replace the poorly maintained lists that historically caused many eligible voters to be turned away from the polls and permitted the potential for ineligible individuals to vote.

The Florida Legislature adopted Subsection 6 "to implement the statewide voter registration database required under the Federal Help America Vote Act." *See* Fl. Staff An., H.B. 1589 (Apr. 15, 2005), *at* http://tinyurl.com/3ae2rb. However, contrary to HAVA, for applicants who provide a driver's license or Social Security number, Subsection 6 makes matching and verification a precondition to registration: an application will not be accepted as "valid" unless the Secretary of State performs a successful database match or otherwise "has verified the authenticity" of the number as it appears on the application. § 97.053(6), Fla. Stat. Applicants who have no

driver's license or Social Security number, are registered without being subject to any verification process. *Id.*

If the Secretary fails to match the number, and the applicant does not "provide evidence to the [county] supervisor sufficient to verify the authenticity of the number provided on the application," the applicant will not be permitted to vote by regular ballot. *Id.* Instead, the un-matched voter will be given only a "provisional ballot" and that ballot will not count unless, within two days after the election, the voter presents evidence to verify *the number*. *Id.* Proof of *identity*, no matter how irrefutable, will not suffice. (*See, e.g.*, Bryant Tr. 70:25-74:3; Taff Tr. 61:19-63:18).[3]

Therefore, when an applicant happens to transpose on the application two digits of a 13-digit driver's license, or when the number otherwise contains a minor error, that number can never be verified and the un-matched voter's ballot will never be counted. § 97.053(6), Fla. Stat.; (R.66-5, R.73). Likewise, when an eligible voter's application is not successfully matched against other government databases, and the voter does not have -- or is not told to submit -- the precise document required to "verify the authenticity of the number," her provisional ballot will not be counted, even with a military ID, passport or other identification. (Taff Tr. 61:19-63:18;

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[3] Citations to deposition testimony are given with reference to the deponent; for Appellees' deposition designations, *see* R.78, R.91-4, and R. 97.

Bryant Tr. 70:25-74:3; Cowles Tr. 89:2-7; R.75-T). In contrast, an applicant with no verifiable identification number will be registered without any proof of identity.

That is because Subsection 6 is not Florida's *identity* verification law. Florida has such laws: under § 101.043, Fla. Stat., all voters at the polls must show photo ID. In addition, first-time voters who register by mail with no driver's license or Social Security number must present "current and valid identification" before voting. *See* § 97.0535, Fla. Stat. Subsection 6 is only about verifying *the number* on the form. (*See* Taff Tr. 70:20-71:9).

B. The Number of Voters Disenfranchised by Subsection 6

Appellant admits that Subsection 6 has excluded tens of thousands of voters from the Florida registration list. (R.84-3-15). As of the November 2006 general election, at least 12,804 voters who had submitted complete and timely applications were excluded. (*Id.*). As of October 10, 2007, at least 14,326 were excluded -- and that was before the last-minute spike in registrations leading to the "book closing" for the presidential preference primary (December 31, 2007) and before the quadrennial surge in registrations leading to the 2008 presidential election. (*Id.;* R.6-2-E; R.66-1-B).

The record evidence summarized below -- including the expert testimony, the individual registration records, and the sworn declarations from affected Florida applicants -- demonstrates that these voters were kept off the registration rolls because

of typos, data-entry errors, meaningless spelling differences and other trivial discrepancies that have nothing to do with their eligibility to vote under the Florida Constitution.[4] There is no proof that any one of these excluded voters is a fraud or otherwise ineligible. Appellant failed to proffer such evidence. Appellant's only witness on voter fraud conceded that he had no proof, and thus no opinion, that any of the 14,000-plus rejected applicants was a fake or fraud. (Hill Tr. 40:4-20; 73:21-74:1; 112:13-114:5). He also conceded that none of the historical instances of voter fraud he cited would have been prevented by Subsection 6. (R.97-1-2). As one of Appellant's representatives admitted, an unverifiable number on an application provides no useful information about a voter's eligibility. (Taff Tr. 63:19-64:23; 80:16-22).

C. Database "Matching" is Error-Prone and Unreliable

Under Subsection 6, election officials (primarily, the county supervisors) enter the information from registration applications into the State's voter database (the Florida Voter Registration System or "FVRS"). The data in the new registration records is then compared to data maintained by the Florida Department of Highway Safety and Motor Vehicles ("HSMV") or the Social Security Administration. If the

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[4] To be eligible to vote in Florida, an applicant must register and be a U.S. citizen, at least 18 years old, a permanent resident of Florida, and not convicted of a felony or

driver's license or Social Security number, first name and last name (plus birth date for voters providing Social Security numbers) do not match, the number on the application has not been verified and the voter is not registered. (Roberts Tr. 86:22-23; R.66-2-E-7).[5]

It is well-documented that database matching is error-prone and produces "false negatives" -- *i.e.*, data records that do not "match" but, in fact, relate to the same person, such as an application from Andy Jackson and a Social Security card from Andrew Jackson. (R.7-¶¶13, 20-44; R.7-1-B, H; R.7-2-I, J, K, L; R.8-¶14). As explained by data-matching expert Andrew Borthwick, confirmed by former Social Security Commissioner Kenneth Apfel (R.75-I-¶¶7, 13) and Los Angeles Registrar of Elections Connie McCormack (R.8-¶14), and proven by the actual Florida registration

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adjudicated mentally incapacitated without restoration of their voting rights. Art. VI, §§ 2, 4 Fla. Const.

[5] For forms with Social Security digits, the number, name, and birth date must match exactly. For forms with a driver's license number, the number and the first four letters of first and last name must match exactly: a "Joshua" who writes down "Josh" on his application will be verified, but a "Katherine" who writes down "Kate" will not.

A subset of un-matched applications with driver's license numbers, where the driver's license number matches exactly but the name does not, are sent to the State's Bureau of Voter Registration Services ("BVRS") for further review. (R.66-E-7, R.85-4-¶7, R.85-5-¶7). Since January 2006, 72,924 applications in total failed to match. Approximately half were sent back to the counties with no additional review; the other half were sent to the BVRS for "manual" review, and the thousands that could not be fixed were then sent back to the counties. (R.85-4-¶7).

records, there are numerous causes for these erroneous failed matches -- none having anything to do with the identity or eligibility of the voters:

- Typos or handwriting mistakes on the applications themselves.
- Data-entry mistakes made by elections officials, such as misspellings, dropped digits, and added letters.
- Inputting errors made by elections officials, such as inverting months and days, separating or reversing compound last names, and combining middle and last names.
- Name differences between databases due to the use of full names and nicknames, married and maiden names, and "Americanized" names.
- Trivial spelling differences between databases due to the use (or not) of hyphens, other punctuation marks, and alternative transliterations of foreign-language names.

(R.7-¶¶13, 20-44; R.7-1-B, H; R.7-2-I, J, K, L; R.8-¶14).

These meaningless ministerial mistakes are made not only in the creation of new voter registration records, but are embedded in the existing government databases. The Social Security Administration has reported that of 2.6 million voter registration records submitted for matching as of February 2007, *almost half* -- 46.2% -- resulted in "no match found." (R.7-1-E). As a former commissioner explained, failed matches to Social Security records occur due to name changes; transcription errors in names and numbers; incomplete, transposed or missing names or numbers; and discrepancies in multiple or compound names. (R.75-I-¶¶7, 13).

Before obtaining discovery here, Dr. Borthwick reviewed matching programs in other jurisdictions with an initial false negative rate of 20 to 30%. (R.7-¶¶46-51; R.7-1-D; R.7-2-I, M, N). The actual rate revealed by the data from Florida confirmed that: of the 1,088,964 applications from new voters submitted between January 2006 and October 2007, 363,341 were subject to matching,[6] and of those, 72,924 -- 20% -- were returned as not matched. (R.91-5, R.85-4-¶7).

D. Eligible Florida Voters Have Been Rejected From the Rolls

Copies of the applications submitted by un-matched voters prove that Florida voters are being kept off the registration rolls by Subsection 6 because of typographical mistakes and other data-entry errors by elections officials. Such errors include typos in names (A**leja**ndro entered as A**.ea**ndro; J**o**nes entered as J**0**nes); misspellings of names (M**i**llisa entered as M**e**llisa); Anglicization of non-English names (Concep**ció**n listed as Concep**tio**n); and entry of information in the wrong data field (Last name: Avellan McRea, First Name: Bunner entered as Last Name: Avellan,

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[6] Year-To-Date registration reports from December 2006 and October 2007 show 1,088,964 (650,742 + 438,222) applications from new voters; applications from existing voters are not subject to Subsection 6. (R.91-5-5,11; Roberts Tr. 81:22-25). Of those new applications, the 725,623 (424,865 + 300,758) applications submitted through the HSMV were also not subject to matching. (R.91-5-5,11, R.85-5-¶¶4-5).

First name: McRea Bunner; Gracieuse Jason entered as Gracieuse 06141949 Jason, with birth date field left blank). (R.66-1-C).[7]

Jose Lopez-Sandin, an eligible but un-matched voter from Pembroke Pines, testified that his first name was input mistakenly as "Joseph" and his last name is listed in Social Security records without a hyphen ("Lopez Sandin") even though his name is hyphenated. (R.67-2-Lopez-Sandin ¶¶4, 9-11). Eugene McKenna, an eligible 68-year old voter from Fort Lauderdale, testified that his application -- filled out by an elections official because he is blind in one eye -- failed to match because the official transposed two digits of his Social Security number. (R.67-2-McKenna ¶¶4,7).

Numerous similar slip-ups by data operators in entering names, numbers and birth dates are documented in the registration records submitted to the District Court. (R.67-3; R.91-1). Examples of errors in names are in Table 1 and errors in driver's license numbers are in Table 2. (*Id.*) The State failed to "match" these voters, and thus failed to register them, because their names and numbers were mis-typed when they were entered into the FVRS database:

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[7] In addition to these examples from Miami-Dade County applications, Appellees submitted applications produced by Hillsborough, Orange and Palm Beach counties demonstrating these types of errors. (R.67-3; R.91-1).

Table 1

Application	State Database
Sh**ir**ley	Sh**ri**ley
Dai**q**uiri	Dai**g**uiri
Aria**n**e	Aria**nn**e
L**iu**	L**ui**
Ann**e**	Ann
Rho**a**des	Rhodes
Bettis	**V**ettis
Clar**o**	Clar**a**
Gar**ci**a	Gar**y**a
Jos**ep**h	Jos**pe**h

Table 2

Application	State Database
P5307XXXXXXXX	**9**5307XXXXXXXX
A1406**32**XXXXXX	A1406**23**XXXXXX
XXXXXXX41**841**0	XXXXXXX41**41**0
XXXXXXXX99**4**30	XXXXXXX99**6**30
XXXXXXX64**6**840	XXXXXXX64840
XXXXXXX4**1**0670	XXXXXXX4**2**0670
B**2**0000XXXXXXX	B**3**0000XXXXXXX
C43**5**11XXXXXXX	C4311XXXXXXX
B55054XXXXXXX	**P614**54XXXXXXX
G**61**520XXXXXXX	G**16**520XXXXXXX

Further evidencing that failed matches are not material to the identity or eligibility of aspiring voters, Dr. Borthwick testified that "false negatives" are disproportionately common among minorities because of database differences due to hyphenated and compound naming conventions (in the Hispanic and Haitian-American communities), and the use of unique and derivative spellings of names (in the African-American community). (R.7-¶¶39, 40). And data from the Secretary confirmed it: although Hispanic Americans comprise 15% of the applicant population, they represent 39% of the voters un-matched and unregistered under Subsection 6 as of October 10, 2007. (R.91-3-3). Likewise, African Americans constitute 13% of the applicants, but 26% of the un-matched voters. (*Id.*). By contrast, Whites comprise 66% of all applicants, but account for only 17% of the un-matched voters. (*Id.*). The State and counties are well aware of the matching issues in these communities caused by hyphenated and compound names, as well as the matching issues caused by married names. (Taff Tr. 43:9-25; Roberts Tr. 87:2-12; Kelly Tr. 137:11-25, Bryant Tr. 51:10-52:12; R.66-1-D; R.66-2-E; R.75-J; R.76; R.77).

E. County Efforts to Fix Failed Matches Do Not Work

The Secretary returns the majority of un-matched applicants to the counties for follow-up.[8] Most of the time, the counties receive no explanation for why the matches failed -- *e.g.*, a spelling discrepancy, a compound last name, or nickname issue. (*See, e.g.*, Smith Tr. at 27:16-28:1). In the case of Social Security database searches, no one knows the reason for failed matches because 98% of the rejected applications are marked simply "no match found." (R.7-1-E-8, 9; *see also* Roberts Tr. 65:8-12, 66:6-20; R.85-4-¶10; R.85-5-¶9). The GAO found that given this lack of information, election officials "are not able to efficiently resolve the non-matching problems." (R.6-2-F-36).[9]

The counties try to contact the un-matched applicants to notify them "that the application is incomplete" and, in order to be registered, "the voter must provide evidence to the supervisor sufficient to verify the authenticity of the number provided on the application." § 97.053(6), Fla. Stat., as amended January 1, 2008. But the county notices are misleading and confusing, and too often are not received. (Smith

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[8] Approximately half of applications with driver's license numbers are reviewed by the BVRS but all the applications submitted to the Social Security database indicating "no match" proceed directly to the counties. (R.85-4-¶¶ 7, 10).

[9] Although the State and some counties have implemented proofreading procedures, such procedures are not required by the State, (*see* Taff Tr. 34:18-35:18), and do not catch all the errors in any event, (*see, e.g.*, Taff Tr. 45:7-11; Sola Tr. 33:9-12).

Tr. 31:14-22; Sola Tr. 48:20-23; R.75-M, R). Rather than being notified that their applications did not "match," un-matched voters who submit complete and correct applications are told that their applications are "incomplete" or "incorrect." (Sola Tr. 41:9-43:4; Smith Tr. 58:20-61:7; R. 75-P).

Alaina Fotiu-Wojtowicz, an eligible voter from Fort Lauderdale, testified that she received notice that her application was "incorrect," when she provided a correct Social Security number. (R.67-2-Fotiu-Wojtowicz ¶¶4-5). The notice received by declarant Oke Uwechue stated that his Social Security number was incorrect, though he confirmed that the number on his application was correct. Frustrated because re-submitting his number would not fix the error, he did not believe that he could register or vote. (R.67-2-Uwechue ¶¶6-9). Un-matched voters who resubmit the same, correct information are likely to be caught in a vicious cycle of rejection. (*See*, *e.g.*, Sola Tr. 59:14-61:21; 68:21-71:2; R.66-1-C; R.75-Q).

F. Provisional Ballots Create Further Barriers to Voting

Un-matched voters who try to vote are not permitted to cast a regular ballot. § 97.053(6), Fla. Stat. They only are allowed a provisional ballot, which comes with a presumption of invalidity and an extra heavy, if not insurmountable, evidentiary burden that is not imposed on any other voters. Their ballots will not be counted unless, within two days after the election, they present to the county supervisor's office evidence "sufficient to verify the authenticity of the [number] provided on the

application." § 97.053(6), Fla. Stat.[10]

The only evidence that will suffice is the driver's license or Social Security card: passports, military IDs and other forms of proof of identity are not acceptable. (Taff Tr. 61:19-63:18; Bryant Tr. 70:25-74:3; Cowles Tr. 89:2-7; R.75-T). And if the number on the application was mistranscribed -- *e.g.*, two digits in the 13-character driver's license were reversed -- the ballot cannot ever be counted because the voter can do nothing to "verify" that number. (*See* Taff Tr. 79:5-14; R.67-34-35; R.73).

This purported fix exists only in theory, not reality. Several supervisors testified that no un-matched voter ever has come in to present evidence. (Cowles Tr. 106:2-10; Snipes Tr. 99:23-100:2; Sola Tr. 107:4-15. *See also* R.75-U). Many do not have the means or ability to make a trip to the supervisor's office within two days of an election, especially the same week they took time away from jobs or other commitments to vote. (*See* Sola Tr. 103:10-104:8).[11]

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[10] Voters who cast provisional ballots for other reasons are counted if the voter is registered and the signature on the ballot envelope matches. § 101.048(2), Fla. Stat. *See also* (R.75-V).

[11] Appellant argues that a trip to the Supervisor of Elections office is not required, and that voters can scan and e-mail, fax, or mail copies of the required documentation to the Supervisor. The written notices, however, provide a physical address to which the voters are told to present the written evidence. No e-mail or fax number is provided. Voters are unlikely to think that the post office will deliver their documentation within 48 hours. (R.66-4-Y).

Even if un-matched voters are able to make the extra effort, they are affirmatively misled: by statute, the provisional ballot notice states that a voter has "*the right* to present written evidence supporting his or her *eligibility*," § 101.048, Fla. Stat. (emphasis added), creating the false impression that it is not necessary to provide any evidence relating to the number. (R.66-4-Y).

Further, poll workers are not trained to instruct these voters, nor told anything about how to handle individuals who failed to match. (Reed Tr. 29:20-32:15; Sola Tr. 82:9-83:19; Kelly Tr. 78:5-22; R.66-4-X). They are not equipped to advise voters regarding any requirements under Florida election law or Subsection 6 since counties "don't want them interpreting or saying too much to the voter." (Reed Tr. 32:2-12; *see also* Cowles Tr. 80:25-81:6; Reed Tr. 31:20-32:2; Snipes Tr. 63:21-64:1). Un-matched voters Ms. Hansra and Mr. Leinen testified that they were given provisional ballots, but were never informed they had to do anything further and, therefore, their votes were never counted. (R.67-2-Hansra ¶7; R.67-2-Leinen ¶5).

STANDARD OF REVIEW

A preliminary injunction order is reviewed under a mixed standard: (1) the decision to grant the injunction is reviewed for abuse of discretion; (2) findings of fact are reviewed for clear error; and (3) questions of law supporting the injunction are reviewed de novo. *See Johnston* v. *Tampa Sports Authority*, 490 F.3d 820, 824 (11th Cir. 2007). It will be reversed "only if the district court applies an incorrect legal

standard, or applies improper procedures, or relies on clearly erroneous factfinding, or if it reaches a conclusion that is clearly unreasonable or incorrect." *Schiavo ex rel. Schindler* v. *Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005) (citing *Klay* v. *United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004)).

SUMMARY OF ARGUMENT

The preliminary injunction order should be affirmed. In an ill-conceived attempt to comply with the voter registration database requirements of HAVA, Florida has frustrated the very purpose of that statute -- to prevent both disenfranchisement and fraud due to unreliable and antiquated registration lists -- and violated the VRA by denying registration to thousands of eligible voters because of immaterial administrative errors and database discrepancies. The District Court correctly held that Appellees demonstrated that Subsection 6 likely violates and is preempted by HAVA and the VRA, and that the more than 14,000 eligible voters already excluded demonstrated real and irreparable harm.

Subsection 6 was not adopted, as Appellant now contends, as a "common-sense" voter identification measure. It is neither. Common-sense would not deny registration based on computer operator typos. And a voter identification program would not deny the vote to citizens with irrefutable proof of identity. None of the 14,000-plus voters excluded from the rolls by Subsection 6 was found to be a fraud or a fake.

That is because Subsection 6 is about verifying *the number on a form*, not verifying voter identity. It does not even work as the "anti-fraud" measure Appellant purports it to be: an individual intent on fraudulently registering can submit a fictional name with no number and he will be registered, but a real and eligible voter who submits her number with two digits flipped will be prevented from registering and voting despite undeniable proof of her identity.

Appellant admits that HAVA does not require matching as a precondition to registration, but argues that HAVA "authorizes" it. To the contrary, Subsection 6 conflicts with, obstructs and is preempted by the Computerized List Requirements of HAVA 303(a) and the Requirements for Voters Who Register By Mail in HAVA 303(b). Congress required matching as part of the state's list-making function in an effort to *eliminate* barriers to voting. Florida has, instead, erected a new one. The digital disenfranchisement indisputably caused by Subsection 6 subverts the intent of Congress.

Subsection 6 also violates the VRA by denying the right to register and vote because of errors on a "record or paper relating to any application [or] registration" which are "not material in determining" whether the applicants are qualified to vote. No one, including Appellant, maintains that a "failed match" caused by a typo, data-entry error or trivial spelling difference is "material" to determining eligibility to vote.

Florida stands virtually alone in making matching and number verification a precondition to registration. Washington was enjoined from a implementing a similar "no match/no vote" law, and that state consented to judgment abolishing its misreading of HAVA. *See Washington Ass'n of Churches* v. *Reed*, 492 F. Supp.2d 1264 (W.D. Wash. 2006). Other outlier states that initially misinterpreted HAVA also have changed their laws.[12]

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT SUBSECTION 6 CONFLICTS WITH AND VIOLATES HAVA

Congress passed the Help America Vote Act of 2002 in response to the problems exposed during the 2000 elections, including administrative barriers to

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[12] Because the District Court avoided unnecessary constitutional rulings on the merits, *see Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988), only the statutory claims are briefed here. Nevertheless, the constitutional arguments amply supported in the record below are relevant in two respects. *First*, because the unjustified disenfranchisement of voters is a violation of the First and Fourteenth Amendments, *see Burdick* v. *Takushi*, 504 U.S. 428 (1992), neither HAVA nor the VRA should be construed to permit such disenfranchisement. *See Johnson* v. *Bush*, 405 F.3d 1214, 1229 (11th Cir. 2005) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems. . . ."). *Second*, the preliminary injunction may be affirmed on any legal grounds supported by the record, including the constitutional violations. *See Jaffke* v. *Dunham*, 352 U.S. 280, 281 (1957). If this Court were inclined to reverse the District Court on the statutory claims, it should not vacate the injunction, but instead remand to the district court to determine whether the injunction should be sustained on constitutional grounds.

registration and voting.[13] HAVA seeks to ensure that no eligible voter will be disenfranchised, and that fraud will not dilute those eligible votes. HAVA established in Section 303 two companion regulations of the registration and voting process: it requires (a) that every state create a reliable, computerized registration list to track applicants, and (b) that first-time voters who register by mail establish their identity in one of several ways before voting. 42 U.S.C. §§ 15483(a), (b).

Neither of these provisions authorizes any state to disenfranchise otherwise eligible applicants simply because the driver's license number or Social Security digits on their application forms have not been "matched" or verified. Indeed, they forbid the errant approach of Subsection 6, which deprives thousands of voters of the right to register and vote because of bureaucratic slip-ups -- the very problem HAVA seeks to eradicate.

"[S]tate laws that 'interfere with, or are contrary to the laws of congress, made in pursuance of the constitution' are invalid." *Wis. Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 604 (1991) (quoting *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat) 1 (1824)). Under

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[13] *See, e.g.*, 148 Cong. Rec. S2527 (daily ed. Apr. 11, 2002) (statement of Sen. Daschle) ("We all know why this bill is necessary. . . . In all, it is estimated that between 4 million and 6 million Americans were unable to cast a vote, or did not have their vote counted, in the 2000 elections. Between 4 and 6 million Americans, disenfranchised. In this day and age, that is simply unacceptable. . . . It is time for this Congress to step in and enact basic standards, to ensure that every American who is eligible to vote can vote. That is what this bill does.").

the doctrine of implied conflict preemption, a state statute must yield to federal law "where compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pharm. Research and Mfrs. of America* v. *Meadows*, 304 F.3d 1197, 1205 (11th Cir. 2002) (quotation marks and citation omitted). Congressional intent is to be gleaned from "the text of the statute, which is the result of innumerable compromises between competing interests reflecting many competing purposes and goals," *CBS Inc.* v. *PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1228 (11th Cir. 2001) (quotation marks and citation omitted).[14]

Based on the purposes and goals evinced in the text of Section 303, the District Court correctly held that Subsection 6 likely conflicts with, obstructs and is preempted by HAVA.[15]

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[14] The statutory text better reflects the appropriate balance of those competing Congressional considerations than the statements of individual members, which may provide individuals "both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). *See also Pharm. Research and Mfrs. of America*, 304 F.3d at 1205 (determining that statutory analysis "must begin, and often should end as well, with the language of the statute itself.") (quotations marks and citation omitted.)

[15] "Under the Supremacy Clause of the Federal Constitution, [t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for any state law, however clearly within a State's

A. Subsection 6 Conflicts With and is Preempted by HAVA Section 303(a), the "Computerized Statewide Voter Registration List"

The voter registration provision of HAVA that Florida tried (but failed) to comply with is Section 303(a), the "Computerized Statewide Voter Registration List Requirements." 42 U.S.C. § 15483(a). Unable to reconcile Subsection 6 with HAVA -- which he admits does not make number matching a precondition to registration -- Appellant now insists that the state law "establishes a registration requirement separate and apart from the [voter registration] database." Appellant's Br. at 8. But when the Florida Legislature adopted Subsection 6 in 2005, it stated the very opposite: its intent was "to implement the statewide voter registration database required under the Federal Help America Vote Act" and conform to the "election standards that must be followed by every state." *See* Fl. Staff An., H.B. 1589 (Apr. 15, 2005), *at* http://tinyurl.com/3ae2rb.

Thus, the use of unique identification numbers for new registrants has everything to do with the creation and maintenance of the voter registration database -

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acknowledged power, which interferes with or is contrary to federal law, must yield." *Felder* v. *Casey*, 487 U.S. 131, 138 (1988) (internal quotation marks and citation omitted); *Irving* v. *Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998) (same). Accordingly, Appellant's unsupported assertion, Appellant's Br. at 9, that there exists a presumption against preemption of state election laws -- or, indeed, any other laws under the state's police powers -- has been squarely rejected by this Court. *Irving*, 136 F.3d at 769 ("When considering implied preemption, no presumption exists against preemption.").

- and not some kind of new voter registration requirement or identity verification program. Section 303(a) sought to put an end to the poorly maintained and haphazardly updated registration lists that caused so much trouble in 2000. It requires each state to implement a "single, uniform, official, centralized, interactive computerized statewide voter registration list" that must be "the single system for storing and managing the official list of registered voters throughout the State." *Id.* § 15483(a)(1)(A), (i).

These "computerized lists" must be maintained in orderly fashion. *Id.* § 15483(a)(2), (4). With 14% of Americans moving (and potentially re-registering) each year, Congress sought to protect the new systems from bloat, requiring states to identify and eliminate duplicate and outdated registrations. *Id.* Having each voter represented on the list only once prevents confusion leading to disenfranchisement at the polls, and prevents the potential for fraud in the name of "deadwood" entries.[16]

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[16] 148 Cong. Rec. S10491-92 (daily ed. Oct. 16, 2002) (statement of Sen. Bond) ("It is well documented that registration lists around the country are in disarray; they are bloated and contain the names of thousands of people that no longer belong on the list . . . . The requirement for a state-wide registration system will enhance the integrity of our election process, making it easier for citizens to vote and have their ballots counted, while clearing ineligible and false registrations from the voter rolls."); *id.* at S10496 (statement of Sen. Durbin) ("This list is intended to help keep voter rolls current and accurate and to reduce, if not eliminate, confusion about a voter's registration and identification when a voter arrives at the polling

The solution: assign each voter a unique identifying number, *id*. § 15483(a)(1)(A)(iii), ensuring that as voters move and re-register, states will be able to make sure that their registration records "move" with them.

Thus, in Section 303(a)(5), Congress required voters on each new application to provide a unique identifier that the voter already uses: her driver's license number or, if she has none, the last four digits of her Social Security number. *Id.* § 15483(a)(5)(A)(i).[17] Critically, those voters who do not have such a number already will be assigned one, without any further hassle. *Id.* § 15483(a)(5)(A)(ii). These identifiers, alone or in combination with other registration information, distinguish a new John Doe from a duplicate or moving John Doe, maintaining the lists cleanly.

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place."); *id.* at S2536 (daily ed. Apr. 11, 2002) (statement of Sen. Dodd) ("If there is no statewide system for sharing such information, voters can easily remain on lists long after they have moved. If the State or jurisdiction is not vigilant about conducting list maintenance, the number of so-called duplicate names can easily grow.").

[17] *See, e.g.*, 148 Cong. Rec. S10490 (daily ed. Oct. 16, 2002) (statement of Sen. Bond) ("The conferees agree that a unique identification number attributed to each registered voter will be an extremely useful tool for State and local election officials in managing and maintaining clean and accurate voter lists. It is the agreement of the conferees that election officials must have such a tool. The conferees want the number to be truly unique and something election officials can use to determine on a periodic basis if a voter is still eligible to vote in that jurisdiction. The social security number and driver's license number are issued by government entities and are truly unique to the voter. They are the most unique numbers available, that is why the conferees require the voter to give the number.").

HAVA also requires states to attempt to "match" the information on applications against records maintained by the motor vehicle authorities or the Social Security Administration, *id.* § 15483(a)(5)(B), to confirm that one voter's registration record is not, for example, accidentally associated with another voter's driver's license number.[18] This matching exercise is not a voter identification test or a new voter eligibility requirement, but a recordkeeping and list maintenance responsibility of the state. No matching is required for applicants without a driver's license number or Social Security digits, *id.*, or for applicants in states which require voters to provide their full (and more reliably unique) Social Security number, *id.* § 15483(a)(5)(D). Rather, Section 303(a)(5)(B) was intended, as two courts have now held, to be an administrative safeguard for accurately "storing and maintaining the official list of registered voters," (R.105-12-13); *see also Washington Ass'n of Churches*, 492 F. Supp.2d at 1268.

Though enacted by the Florida Legislature to try to comply with HAVA, Subsection 6 conflicts with and undermines the purpose of Section 303(a) by turning this administrative process into a new bureaucratic barrier. Under Subsection 6, immaterial clerical and computer errors prevent citizens from registering, no matter

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[18] *See, e.g.*, H.R. Rep. 107-329(I), at 36 (2001) (discussing the importance of an accurate unique identifier, "to assure that list maintenance functions are attributed to the correct voter").

how reliable the voters' proof of identity or eligibility. By making the voter the victim of administrative mistakes, Subsection 6 creates anew one of the primary problems that the statewide lists were created to remedy. As the District Court correctly held, Congress never intended its administrative matching process to become yet another barrier to the vote. (R.105-13).

Like only a handful of other states -- most of which have since abandoned their misinterpretation[19] -- Florida misread HAVA to require matching or number verification as a predicate to registration. Washington made the same misstep and was enjoined for the same reason. *See Washington Ass'n of Churches* v. *Reed*, 492 F. Supp.2d 1264, 1271 (W.D. Wash. 2006). Because Subsection 6 "has transformed the record-keeping function of the computerized registration list requirement into a precondition to registration and therefore, a precondition to voting," (R.105-8), thus frustrating the purposes and objectives of Congress in creating the list requirements, the District Court properly found it preempted. *See Pharm. Research and Mfrs. of America*, 304 F.3d at 1205.

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[19] *See* Cal. Code Regs., tit. 2, §§ 20108.38(c), 20108.65(e), 20108.71; Md. Regs. Code tit. 33, §§ 33.05.04.04(A)(3), (B)(3)-(4), 33.05.04.05(C)(5); N.C. Gen. Stat. § 163-166.12(b2); Alert Re: Driver's License and Social Security Data Comparison Processes Required by the Help America Vote Act (HAVA), *at* http://tinyurl.com/36o2lt (Pennsylvania); Election Advisory No. 2006-19, *at* http://tinyurl.com/2stlcp (Texas); Washington Ass'n of Churches, No. CV06-0726 (W.D. Wash. 2006) (stipulated final order and judgment); (R.6-2-G).

B. Subsection 6 Conflicts With and is Preempted by HAVA Section 303(b), the "Requirements for Voters Who Register By Mail"

HAVA Section 303(b), 42 U.S.C. § 15483(b), proves that matching or verifying the number on a form is not a precondition to registration, and that the states *cannot* make it a precondition to registration or voting. Ironically, while Section 303(b) is an identification verification requirement intended to prevent the potential for voter fraud, Appellant urged the District Court to disregard it as a "meaningless" nullity. (R.23-15). That is because Subsection 6 is at war and cannot be squared with Section 303(b). The District Court correctly rejected that argument and held that Subsection 6 is preempted by 303(b). (R.105-8).

Section 303(b) requires that a first-time voter who registers by mail must verify her identity before voting. Voters may satisfy this requirement by presenting documentary identification at some point before voting, either at the time of registration or at the polls. *Id.* § 15483(b)(2)(A), (3)(A). However, in order to avoid disenfranchising minority and other voters lacking the necessary documentary ID, Congress also provided an alternative: voters may instead verify their identity by presenting a driver's license number or Social Security digits that the state is able to match. *Id.* § 15483(b)(3)(B). In addition, those who neither present a matched number nor documentary ID may vote a "fail-safe" provisional ballot, which will be

counted as long as the voter is otherwise eligible under state law. *Id.* § 15483(b)(2)(B).

Thus, matching cannot be a precondition to registering because, under Section 303(b), the matching or verification process "serves as a substitute for voter ID." *Washington Ass'n of Churches*, 492 F. Supp.2d at 1269.[20] Congress clearly intended that un-matched voters would be registered. Though the identifying numbers of some valid registrants would be verified, *id.* § 15483(b)(3)(B), some would not be verified, *id.* § 15483(b)(3)(2). As the District Court found, the fact that Congress mandated a provisional ballot for those un-matched voters who do *not* show documentary proof of identity, *id.* § 15483(b)(2)(B), proves that Congress intended a *regular* ballot for un-matched voters who *do* show documentary proof of identity. (R.105-8).

The District Court therefore correctly held that Subsection 6 directly conflicts with Section 303(b). It does so in at least four ways:

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[20] As Senator Bond explained, "*[i]n lieu of* the individual providing proof of identity, States may also electronically verify an individual's identity against existing State databases." 148 Cong. Rec. S10489 (daily ed. Oct. 16, 2002) (emphasis added). *See also id.* at S10490 (statement of Sen. Bond) ("[Section 303(b), t]he identification requirement[,] gives the voter choices as to where and at what point in the process to produce identification. The ability of the states to apply this provision in an arbitrary or discriminatory manner is limited by giving the choice to the voter.").

First, Subsection 6 renders meaningless the text of Section 303(b)(3)(B). If every voter with a driver's license number or Social Security digits is forced to satisfy the matching or verification process before registering, Section 303(b)(3)(B) would become superfluous. That violates the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *United States* v. *Ballinger*, 395 F.3d 1218, 1236 (11th Cir. 2005) (*en banc*) (quotation marks and citation omitted); *see also United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section, as the Government's interpretation requires.") (quotation marks and citations omitted).[21]

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[21] Appellant asserts that Section 303(b)(3)(B) is still meaningful in Florida for three classes of voters: (i) mail-in applicants who have authenticated their numbers other than by matching; (ii) applicants who have no identifying number; and (iii) applicants who registered to vote between the effective date of Section 303(b) and the effective date of Subsection 6. Appellant's Br. at 25. None of these categories gives meaning to Section 303(b)(3)(B), which exempts individuals whose numbers have been matched from the voters who must prove their identity through a broad documentary requirement. Appellant's category (i) comprises voters who have not been matched, so 303(b)(3)(B) does not apply; under the remainder of 303(b), they should be permitted to prove identity with a range of documentary proof, but Florida instead prohibits them from using any document except the card that verifies the number on their form. Category (ii) comprises voters who have no numbers, and so cannot take advantage of Section 303(b)(3)(B). Category (iii) simply expresses the tautology that Subsection 6 only began to conflict with

Second, though Congress intended to avoid disenfranchisement by giving these first-time voters multiple means to prove their identity, Subsection 6 blocks each and every one of these alternatives if it cannot match or verify the recordkeeping number on the application. As the District Court found, "identification sufficient under HAVA is not sufficient under Subsection Six unless it also verifies or matches the identification number that was provided on the voter registration application." (R.105-8). This is why eligible Floridians who have presented valid U.S. passports to election officials have nevertheless been denied registration under Subsection 6. (*See* R.90-10 n.9; R.91-3).

Third, Section 303(b) makes clear that Congress' *full* objective was to combat fraud through voter identification *while* preventing undue disenfranchisement. Congress originally provided no alternative to documentary identification for first-time mail-in registrants, but added the matching option to mitigate the harsh effects of the rule, "thereby avoiding the potential disenfranchisement of minority voters." 148 Cong. Rec. S10504 (daily ed. Oct. 16, 2002) (statement of Sen. Dodd).[22] Subsection 6

Section 303(b)(3)(B) as of the date it took effect. Appellant has still failed to give any meaningful content to the text of the statute.

[22] Although HAVA undoubtedly reflects a "compromise," *see, e.g.*, 148 Cong. Rec. at S10488 (Sen. Bond), S10505 (Sen. Dodd), the myriad exceptions and exemptions from section 303(b)'s general identification requirement reflects with particular clarity Congressional concern *both* with preventing fraud and with ensuring that those prevention mechanisms did not also cause undue

destroys that deliberate balance and defeats Congress's intent by elevating number verification to an absolute requirement, thereby disenfranchising thousands without any commensurate protection against fraud.[23]

Finally, Subsection 6 frustrates Section 303(b)'s "fail-safe" provisional ballot requirement for first-time mail-in registrants with neither a matched number nor documentary ID. Congress created this as a safety net to further minimize the number of eligible voters denied the right to vote because of administrative errors. *Id.* § 15483(b)(2)(B). Under Subsection 6, the ballots provided by 303(b)(2)(B) are a sham: they are presumptively invalid and will not be counted unless the voter somehow learns that she has to make a special effort, within two days after the election, to present particular evidence to the county supervisor to "verify" the number on her application form. Appellant has cited no evidence that anyone has been able to

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disenfranchisement. *See, e.g.*, 148 Cong. Rec. S1186 (statement of Sen. Wyden) ("I think at the end of the day we have to figure out ways to make it easier to vote, easier to participate in the political process, as we deter fraud."); *id.* at H3679 (statement of Rep. Hoyer) ("No one wants fraud in the election system; no one, on either side of the aisle. So we must address that issue, but we must address that issue in what the purpose of the bill is, to facilitate the exercising of the democratic franchise; to facilitate people being recognized as eligible voters . . . .").

[23] Subsection 6 creates the potential for disenfranchisement without any evidence that it has stymied the potential for fraud. There is no evidence that even one of the 72,924 applications delayed or denied by Subsection 6 were submitted fraudulently. Moreover, Subsection 6 does not prevent the fraudulent registration of fictitious voters: such a voter need only assert that he has no driver's license or Social Security number, and he will be registered without question.

do so successfully. And that onerous and often insurmountable burden is imposed even when there is no doubt about the voter's identity or eligibility -- age, citizenship, residence, lack of conviction, and timely submission of a registration form -- under Florida law. *See* Art. VI, §§ 2, 4, Fla. Const.

In reality, there is no "fail-safe" voting under Subsection 6. That obstruction of HAVA is alone sufficient to affirm the District Court.

C. HAVA Section 303(a)(5)(A)(iii) Does Not Authorize Subsection 6

Appellant concedes that HAVA does not require matching as a registration precondition, Appellant's Br. at 12-13 & n.4, but asserts that HAVA authorizes it. This is wrong.

Appellant relies on one provision (303(a)(5)(A)(iii)) within the subparagraph pertaining to the information to be provided by applicants. Section 303(a)(5)(A) first provides that an application "may not be accepted or processed" unless the applicant provides her driver's license number or Social Security digits. 42 U.S.C. § 15483(a)(5)(A)(i). With regard to this disclosure requirement, 303(a)(5)(A)(iii) then provides that, "[t]he State shall determine whether the information provided [on the application] by an individual is sufficient to meet the requirements of this subparagraph." *Id*. § 15483(a)(5)(A)(iii). Nothing in this subparagraph "authorizes" the states to require matching (or another external number verification process) in order to determine whether the number has been included on the application.

Appellant nevertheless interprets 303(a)(5)(A)(iii) as empowering states to refuse to register eligible voters who *have* provided driver's license numbers or Social Security digits on their forms -- precisely as required by 303(a)(5)(A)(i) -- but who have not been matched. Appellant's Br. at 11-12. That reading is inconsistent with section 303(b), which demonstrates Congress' clear intent to allow un-matched applicants to register and vote. *See supra* Part B. That also contravenes the obligation to construe provisions of the same statute consistently, with an eye to the whole statute's object and policy. *See In re Welzel*, 275 F.3d 1308, 1317 (11th Cir. 2001). "To do otherwise would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Clark* v. *Übersee Finanz-Korporation, A.G.*, 332 U.S. 480, 489 (1947). Congress did not "authorize" in 303(a) what it foreclosed in 303(b).

Read consistently with Congressional intent, 303(a)(5)(A)(iii) grants authority to the states to ensure compliance with the disclosure requirement of 303(a)(5)(A)(i) -- *i.e.*, that an application contain a unique recordkeeping number. It allows states the flexibility to rely on the face of the application itself. If no number is listed, the state may determine that a voter has failed to comply with 303(a)(5)(A)(i), or it may decide that the voter has no such number and assign one under 303(a)(5)(A)(ii). In this way, it is up to the state to determine whether the information on the application satisfies the subparagraph's objective of associating each new application with a unique

number.[24] This reading of Section 303(a)(5)(A)(iii) comports with the intent of 303(a) as a whole, rather than permitting the use of an error-prone administrative tool to disenfranchise eligible voters, contrary to the whole purpose of 303(a).

D. Section 304 Does Not "Authorize" Subsection 6

Appellant also tries to avoid the preemptive effect of Section 303(b). He argues that it does not apply where states choose to follow procedures more likely to cause disenfranchisement -- *i.e.*, that 303(b) is merely a default rule which states can elect to override. Appellant's Br. at 21. Appellant claims that Section 304 of HAVA permits states to adopt "stricter anti-fraud measures" than the supposedly "minimum standards" in 303(b). That misconstrues both HAVA provisions.

Section 304 is a blanket provision referring to all of HAVA Title III, including requirements for voting system design, disability access, and technological security safeguards. It provides that these various requirements should not be construed to

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[24] Section 303(a)(5)(A)(iii) also allows states to accept registration forms of voters with a driver's license, but no number on the face of the form, if the state can determine the appropriate driver's license number from information submitted on the form itself. The information provided by a voter would thereby be sufficient, under state law, to meet the requirements that the application "include" a driver's license number. *See, e.g.*, 2 Cal. Code Regs. § 20108.70 (implementing such a provision); Legislative Counsel of Cal., Help America Vote Act of 2002 (P.L. 107-252): Voter Registration Requirements #0609610, at 3 (Apr. 18, 2006) (construing Section 303(a)(5)(A)(iii) to provide the appropriate authority; *see also* Neb. Rev. Stat. § 32-312.03 (also implementing such a provision); 32-000-023 R.I. Code R. § 7 (Weil 2004) (same).

"prevent a State from establishing election technology and administration requirements that are more strict than the requirements established under this subchapter *so long as such State requirements are not inconsistent with the Federal requirements under this subchapter or any law* described in section 15545 of this title," including the Voting Rights Act of 1965. 42 U.S.C. §§ 15484, 15545 (emphasis added).

Section 304 thus merely reflects that HAVA does not preempt the entire field of election technology and administration where Congress has not specifically spoken. For example, a state may require its voting systems to have lower tolerance for error than HAVA's minimum standards, *see id.* § 15481(a)(5), because a unilateral state decision to prevent more error in the voting process actually *furthers* Congressional intent. Or a state may require voters to identify themselves in one of several ways before voting a regular ballot, even when they have registered *other* than by mail or even when they are not first-time registrants, because neither HAVA nor any other law described in 42 U.S.C. § 15545 identifies a different procedure to apply to such voters. Such a rule would not be "inconsistent" with 303(b).[25]

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[25] In this way, the vast majority of states seem to comport with Section 304, either by following section 303(b) precisely, or applying the range of options in section 303(b) to all first-time voters or all voters. *See* electionline.org, Voter ID Laws, at http://www.electionline.org/Default.aspx?tabid=364 (Sept. 18, 2007).

Subsection 6, however, *is* inconsistent with 303(b) (as it is with the Voting Rights Act). Section 303(b) *does* identify a specific procedure to apply to first-time mail-in registrants: such voters must either be matched *or* show the ID established by HAVA. This is not a menu or an option package for the states to pick and choose from. As discussed above, Congress added matching to 303(b) as an alternative to documentary ID to reduce the risk of disenfranchisement and, thus, carefully struck a balance between preventing fraud and disenfranchisement. That is not a "minimum standard," like a federal speed limit or pollution level, that states are free to make "tougher." That is a consciously calibrated balance of Congressional concerns which Subsection 6 throws out of whack by causing undue disenfranchisement without actually preventing any fraud.

In *Geier* v. *American Honda Motor Co., Inc.*, 529 U.S. 861 (2000), the Supreme Court found a state law preempted where it similarly undid a considered federal attempt to balance various purposes. *Geier* concerned a federal requirement governing passive safety restraints in automobiles; the standard was constructed to balance multiple objectives, ensuring that the restraints produced were effective,

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In contrast, Florida is an outlier: Appellants have shown no evidence that any other state has adopted Florida's rule, and only three other states are otherwise known to require verification of the number on a registration form before an otherwise eligible citizen can register and vote a ballot that will be counted. *See* Iowa Code § 48A.25A; La. Rev. Stat. § 18:101.1; S.D. Codified Laws § 12-4-5.5.

affordable and accepted by consumers. *Id.* at 877-80. It specifically allowed private-party automobile manufacturers to choose among a variety of means to achieve vehicular safety, because the relevant objectives would best be achieved if the regulated private parties could use a variety of "*alternative* protection systems in their fleets rather than one particular system in every car." *Id*. at 881. The District of Columbia, instead, required one particular restraint in every vehicle (airbags) no matter what other safety mechanisms the manufacturers produced. And in so doing, the court found that it was preempted because it destroyed the federal compromise, obstructing the accomplishment and execution of the full federal objectives. *Id*. at 881-82.

So too, here, where Congress carefully considered the balance between preventing fraud and preventing undue disenfranchisement, and thereby provided particular voters with alternatives to prove their identity before voting. The only evidence concerning the effect of Subsection 6 shows that it disenfranchises eligible individuals *without* preventing fraud.

II. THE DISTRICT COURT CORRECTLY HELD THAT SUBSECTION 6 CONFLICTS WITH AND VIOLATES THE MATERIALITY PROVISION OF THE VRA

The District Court correctly held, as the uncontroverted evidence established, that under Subsection 6, thousands of eligible voters "have been denied the right to vote for reasons unrelated to their voter qualifications under the Florida Constitution."

Order at 14. Subsection 6 therefore violates and is preempted by the VRA's "materiality" provision:

> No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

42 U.S.C. § 1971(a)(2)(B). That provision "was designed to eliminate practices that could encumber an individual's ability to *register* to vote." *Friedman* v. *Snipes*, 345 F. Supp.2d 1356, 1370-71 (S.D. Fla. 2004) (citation omitted).

Subsection 6 is just such an unlawful practice. It turns clerical mistakes that prevent verification *of a number* on a form into a bureaucratic barrier to registration. It denies registration to eligible voters based on immaterial errors that have no bearing on an applicant's eligibility to vote, including meaningless typos, data-entry errors and misspellings. Even when eligible voters have timely filled out complete and perfectly accurate applications, mistakes made by elections officials or mistakes already residing in government databases result in "failed matches." Appellant has conceded that errors rendering a number unverifiable give no useful information concerning whether a voter is over the age of 18, a United States citizen or resident of Florida, or whether she has been convicted of a felony or adjudicated mentally incompetent without restoration of her voting rights. *See* Art. VI, §§ 2, 4, Fla. Const. (*See also*

Taff Tr. 63:19-64:23; 80:16-22).

Appellant offers no response to this record evidence, or the District Court's finding that thousands of eligible Florida voters have been disenfranchised because of errors unrelated to their qualifications. Appellant focuses only on errors made by applicants (which, as discussed below, are not material to voters' qualifications), ignoring the myriad typos, data-entry errors and database inconsistencies that cause failed matches even when voters submit accurate numbers. There are a multitude of meaningless data-entry errors and spelling differences in the FVRS database that have caused matches to fail, and deny registration to qualified voters who complete their applications accurately. These mistakes made in the FVRS -- the State's official registration record -- are quintessentially errors on a "record or paper relating to any application, registration, or other act requisite to voting." Appellant's reading would render the "registration, or other act requisite to voting" language superfluous and, tellingly, Appellant omits that language when he quotes the VRA. *See* Appellant's Br. at 34.

Appellant cites *Friedman* v. *Snipes*, 345 F. Supp.2d 1356 (S.D. Fla. 2004) for the proposition that the VRA does not apply to the "treatment" or "handling" of an application, but that is not what the case holds. At issue in *Friedman* was whether the materiality provision applied to the *counting* of absentee ballots cast by already-registered voters. In concluding that it did not, the court emphasized that the

materiality provision is aimed at errors affecting prerequisites to voting like *registration*, not to "the counting of ballots by individuals *already deemed qualified to vote*." *Id.* at 1371 (emphasis in original). It also emphasized that the counting of ballots involved no error in any *record* requisite to voting. *Id.* at 1372. In contrast, the errors disenfranchising voters under Subsection 6 are in the official registration records of the state and other government records used for registration purposes, which are precisely the sources of errors that the materiality provision was designed to address.[26] *See Schwier* v. *Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003).

Diaz v. *Cobb*, 435 F. Supp.2d 1206 (S.D. Fla. 2006), also is not on point. There, the court held that the VRA was not violated by requiring applicants to check a box on the application affirming their citizenship. As Appellant notes, the court found it significant that HAVA required the citizenship checkbox. *See id*. at 1213-14. But the court did not find that the checkbox was material to an individual's *qualifications* merely because it was required by HAVA. Rather, the checkbox inquired into citizenship status, one of Florida's constitutional qualifications for the franchise, and was therefore material to determining whether the voter was qualified. The fact that HAVA required the checkbox merely put a Congressional stamp of approval on the

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[26] For the same reasons, Appellant's position finds no support in cases holding that the materiality provision does not apply to the requirement that registered voters

"determination that the question is material." *Id.* at 1213.

Here, unlike the citizenship requirement in *Diaz*, the recordkeeping number required by HAVA relates to list making and maintenance, not a voter's qualifications. The issue here is whether an applicant who satisfies HAVA by providing a number on the form can be denied the right to register based on meaningless errors in the administrative verification process. Appellant argues that HAVA requires applicants to provide the number. But that does not make a typo in that number by a county computer operator material to that applicant's eligibility. Similarly, an applicant who mistakenly reverses two digits in her 13-character driver's license number has not made an error material to her eligibility. The fact that a piece of information is required, by another statute *for another purpose*, does not make every error associated with that information material to the individual's qualifications to vote.

Appellant responds that "Subsection Six enables election officials to know -- not on faith alone, but with verifiable certainty -- that applicants are real people." Appellant's Br. at 35. The record establishes, however, that Subsection 6 *prevents* the registration of eligible voters who establish their identities with "verifiable certainty" -- such as by presenting a passport or military ID. *See supra* at 32-33. Indeed

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present photo identification -- which involves no error or omission on a record requisite to voting. *See* Appellant's Br. at 37 n.16.

Appellant's representative testified that the fact that a voter has transposed two digits of a driver's license number gives the State no material information about whether the individual is a citizen, whether she is over 18, whether she is a resident, or whether she has been rendered ineligible by conviction. (*See* Taff Tr. 63:19-64:23). Precluding registration based on such an error is "in direct conflict with the 'materiality' provision of Section 1971 of the Voting Rights Act." *Washington Assoc. of Churches*, 492 F. Supp.2d at 1270-71.

Finally, Appellant resorts to arguing that because registration is required under Florida law, every ministerial element of the registration process -- not just the state's *substantive* conditions of eligibility -- is necessarily material. If that were the case, the VRA materiality provision would have no meaning: if states could require that registration be completed without *any* errors or omissions, then no error or omission, no matter how miniscule, would be immaterial, and Section 1971(a)(2)(B) would serve no purpose. Congress did not intend such a pointless result when it included the materiality provision in the 1964 Civil Rights Act. *See, e.g., Ballinger*, 395 F.3d at 1236.

III. THE DISTRICT COURT PROPERLY FOUND THAT PLAINTIFFS WOULD BE IRREPARABLY HARMED ABSENT AN INJUNCTION AND THAT THE EQUITIES FAVORED INJUNCTIVE RELIEF

The District Court found that Appellees and thousands of eligible voters would be irreparably injured if an injunction did not issue, and that this inevitable

disenfranchisement clearly outweighed any harm that an injunction could cause Appellant. Based on the extensive evidence of arbitrary disenfranchisement, and the total absence of any evidence of voting fraud among those kept off the registration rolls by Subsection 6, the District Court found that the equities compelled enjoining Subsection 6. (R.105-25, 26).

The District Court did not err in finding that Appellees -- and thousands of Florida voters -- would inevitably be injured if Subsection 6 were not enjoined. Irreparable harm is "'the *sine qua non* of injunctive relief,'" and to be "irreparable," a plaintiff's injury must be "actual and imminent." *Siegel* v. *LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (citation omitted). Here, the record clearly established -- and Appellant did not dispute -- that absent an injunction, more than 14,000 voters would be prevented from casting a regular ballot in Florida's presidential primary -- and that many thousands more would be disenfranchised in the general election. The scale of disenfranchisement -- disproportionate among the very communities served by Appellees, all of whom will conduct voter registration activity in 2008 -- created the imminent threat of actual harm to Appellees, their members, and their constituents. As the District Court recognized, such harm to the franchise would be impossible to repair. (R.105-25).

Unable to dispute that such harm to the franchise constitutes a grave and irreparable injury, Appellant argues instead that "Appellees' delay in bringing this

action militates powerfully against a finding of irreparable harm." Appellant's Br. at 38. In other words, Appellant contends, the District Court clearly erred in finding that the credible threat of thousands of disenfranchised voters is irreparable harm because Appellees took too long to sue. That does not even make sense: regardless of the time it took Appellees to bring their case, the disenfranchisement of thousands of voters is real and cannot be remedied absent an injunction.

Thus, notwithstanding Appellees' supposed delay, there was no error in the District Court's finding of irreparable harm. In *Chabad of Southern Ohio & Congregation Lubavitch* v. *Cincinnati,* 363 F.3d 427, 436 (6th Cir. 2004), the Sixth Circuit concluded that notwithstanding appellee's purported delays, it was not an abuse of discretion to grant a preliminary injunction, because the district court *did* conclude that appellee had a strong likelihood of success on the merits and that the potential harm to the appellee was serious. *See also Advanced Communication Design, Inc.* v. *Premier Retail Networks, Inc.*, 46 Fed. Appx. 964, 984 (Fed. Cir. 2002) (affirming district court's preliminary injunction order on the grounds that delay "constitutes but a single factor in the irreparable-harm balancing inquiry" and that delay is excused where the movant offers a "good explanation" for that delay); *800 Adept, Inc.* v. *Murex Securities, Ltd.*, 505 F. Supp.2d 1327, 1337 (M.D. Fla. 2007) (even where plaintiffs delay in suing, it "does not preclude a determination of

irreparable harm" and is "only one factor that the Court may consider within the totality of the circumstance"). Just so here.

Moreover, where a party acts in good faith to investigate its potential claim, or attempts to resolve the dispute without resorting to litigation, the time involved before filing a request for injunctive relief has no bearing on a court's irreparable harm analysis. *See Fisher-Price, Inc.* v. *Well-Made Toy Mfg. Corp.*, 25 F.3d 119, 124 (2d Cir. 1994) ("delay" irrelevant to irreparable harm analysis where plaintiff engaged in good faith efforts to investigate its claim); *AT&T Mobility LLC* v. *Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 487 F. Supp.2d 1370, 1380 (N.D. Ga. 2007) (no "delay" offsetting irreparable harm where plaintiff waited for its claim to ripen and attempted to settle the dispute without litigation), *rev'd on other grounds*, 494 F.3d 1356 (11th Cir. 2007). Because Appellees diligently investigated their claims -- in the face of Appellant's persistent resistance -- the District Court did not err in finding that any concerns about the timing of this action were outweighed by clear and irreparable harm to the franchise.

Appellant, as the keeper of the statewide registration list, is the only entity with definitive information about the impact of Subsection 6. On September 18, 2006, Appellees' counsel first submitted a public records request to Appellant for data showing the number of un-matched applicants under Subsection 6. Almost three months later, Appellant apologized for *its own delay* in providing Appellees with

some data, but failed to provide Appellees' counsel with meaningful data until July 3, 2007, ten months after requested. And even that data was incomplete. (*See* R.100-12; R.106-4). Appellees repeatedly asked Appellant to clarify the contents of the data, and on September 7, 2007, Appellant advised Appellees, through his counsel, that he would not respond to Appellees' questions about the data. Accordingly, ten days later, Appellees filed this action, together with a motion for a preliminary injunction. Appellees first received data allowing them to evaluate the quantity and identity of the individuals affected by Subsection 6 on October 31, 2007. In short, for more than a year Appellees diligently sought information to substantiate or allay their concerns about Subsection 6, while Appellant balked at disclosure. This is not "delay."

The District Court also properly found that the irreparable harm of preventing thousands of voters from registering outweighed any abstract concerns about the integrity of Florida's elections -- especially because Appellant "provided no evidence that any of the 14,000 who have been denied registration were engaged in voter fraud." (R.105-26). Indeed, despite Appellant's protestations that the integrity of voting in Florida cannot be safeguarded if Subsection 6 is not enforced, the truth is that electoral integrity is *advanced* by the injunction. Nothing could damage the integrity of elections more than preventing eligible voters from voting because of trivial errors like typos by government clerks. Moreover, allowing eligible voters to vote promotes, not undermines, the soundness of Florida's elections.

IV. THE DISTRICT COURT CORRECTLY HELD THAT INJUNCTIVE RELIEF IS IN THE PUBLIC INTEREST

As the elections approach, and more and more Florida residents submit registration applications, the preliminary injunction is increasingly essential to the public interest, and to the public's trust in the integrity of the electoral process. Congress has explicitly stated that "the right of citizens of the United States to vote is a fundamental right," 42 U.S.C. § 1973gg(a)(1), and protection of this fundamental right unquestionably serves the public interest. (*See* R. 105-26). As recognized by the District Court, "[c]onfidence in the integrity of our electoral process is essential to the functioning of our participatory democracy." (*Id.*, quoting *Purcell* v. *Gonzalez,* 127 S. Ct. 5, 7 (2006)). Discriminatory and unfair registration laws undermine that confidence, and as a result, the "public interest is strongly in favor of ensuring that every eligible person in Florida is guaranteed the right to vote." (R. 105-26,27); *see also Charles H. Wesley Educ. Found., Inc.* v. *Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005); *Washington Ass'n of Churches*, 492 F. Supp.2d at 1271 ("public interest weighs strongly in favor of letting every eligible resident . . . register and cast a vote").

The Court of Appeals reviews "for abuse of discretion the grant of a preliminary injunction" and "'begin[s its] review by noting how deferential it is.'" *BellSouth Telecomms., Inc.* v. *MCIMetro Access Transmission Services, LLC,* 425 F.3d 964, 968 (11th Cir. 2005). Judgments about "the balancing of equities and the

public interest . . . are the district court's to make and [the Court of Appeals] will not set them aside unless the district court has abused its discretion in making them." *Id.*

Appellant does not contend that the District Court abused its discretion in finding harm to the franchise. Rather, Appellant argues that preventing voter fraud *also* serves the public interest. *See* Appellant's Br. at 40-44. Even if Subsection 6 actually prevented fraud, Appellant's protest shows no reversible error. The District Court weighed the competing public interests at issue in this matter and determined, after a careful review of the law and facts, that the public interest was best served by protecting the integrity of the registration process. Among other reasons, Subsection 6 is not a voter identification measure, and therefore it is false to suggest that the demonstrated danger of disenfranchising voters needs to be balanced against the prevention of fraud -- especially when there is zero evidence that any of the thousands of disenfranchised voters is a fraud. Subsection 6 does not require proof of identity and does not accept proof of identity. Rather, it requires that a recordkeeping number on a registration form be matched or verified, regardless of the voter's proof of identity.

The District Court did not abuse its discretion by finding that the integrity of the electoral process in Florida served a paramount public interest given that more than 14,000 Florida voters will be irreparably harmed by the operation of Subsection 6. *See* Appellant's Br. at 40-44. Nor did the District Court abuse its discretion when it

weighed the competing public interests, and found that the public interest in preventing a real, present and irreversible harm to more than 14,000 eligible voters outweighed the hypothetical risks asserted by Appellant. (*See* R.105-26 ("Defendant has provided no evidence that any of the 14,000 who have been denied registration were engaged in voter fraud.")).

V. THE DISTRICT COURT CORRECTLY HELD THAT APPELLEES HAVE STANDING TO CHALLENGE SUBSECTION 6

The District Court properly held that Appellees have standing on behalf of themselves, their members,[27] and the members of their constituent communities whom they will register.

An organization has standing to seek injunctive relief on its own behalf if it will suffer an imminent injury in fact that is "concrete and particularized"; a causal connection exists between the injury and the challenged conduct; and it is "likely" as opposed to "speculative" that the injury will be redressed by a favorable decision. *See Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An organization may establish an imminent and concrete injury in fact sufficient for organizational standing by demonstrating that a challenged practice will either frustrate its mission or cause it to divert resources to counteract the unlawful practice. *See*, *e.g.*, *Havens Realty Corp.*

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[27] Appellee Southwest Voter is not a membership organization. It has standing in its own right and on behalf of the individuals it will register.

v. *Coleman*, 455 U.S. 363, 379 (1982); *Crawford* v. *Marion County Election Bd*., 472 F.3d 949, 951 (7th Cir. 2007) (applying *Havens* in voting context), *Fla. Democratic Party* v. *Hood*, 342 F. Supp.2d 1073, 1079 (N.D. Fla. 2004) (same).

The District Court correctly held that each Appellee has standing on its own behalf. (R.106-5). In particular, the Court found that because failed matches interfere with Appellees' ability to assist their members and non-members with registering to vote, Subsection 6 will frustrate Appellees' organizational missions and force Appellees to divert resources to ensure that their voter registration drives are successful. (R.106-3-5, 7). Factual findings such as these are reviewed for clear error, and should not be disturbed where, as here, they are supported by substantial evidence. *See Grupo Televisa, S.A.* v. *Telemundo Commc'ns Group, Inc.*, 485 F.3d 1233, 1239 (11th Cir. 2007).

The District Court found that these injuries are neither voluntary nor indeterminate. (R.106-4 (Appellees' "injur[ies are] not merely conjectural or hypothetical given the relationship between voting and civic engagement, which plaintiff organizations seek to develop within their constituent communities.")). In 2004 and previous elections, Appellees devoted significant resources to increasing civic engagement among their constituent communities through voter registration, education, and mobilization, and protection of voters' rights. (*See*, *e.g.*, Fernandez Tr. 8:9-9:4; Lafortune Tr. 9:20-10:17; Neal Tr. 11:22-12:23). Appellees did not conduct

substantial registration activity in 2006, largely because of restrictions on third-party registration in Florida that have since been removed. However, Appellees have specific plans to conduct activities similar to 2004 and before in the 2008 voter registration cycle. (R.106-5; *see also* Fernandez Tr. 20:16-21:3; Lafortune Tr. 50:6-51:18; Neal Tr. 47:9-49:24). Thus, as the District Court correctly found, by preventing eligible applicants from becoming registered to vote, Subsection 6 will force Appellees to divert resources from their other activities during the 2008 election cycle to ensure that individuals whom they assist in registering become registered voters.[28] (R.106-5; *see also* Fernandez Tr. 28:7-30:1; Lafortune Tr. 26:7-28:14; Neal Tr. 42:21-45:23).

Where, as here, Appellees seek only injunctive and declaratory relief, they need only show that Subsection 6 will force them to divert resources and frustrate their missions going forward, not that it caused them to divert resources in previous elections. *See e.g.*, *Ocean Advocates* v. *U.S. Army Corps of Eng'rs*, 402 F.3d 846, 859-60 (9th Cir. 2005) (increased risk of future harm without past harm is sufficient

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[28] Appellant cites *Common Cause/Georgia* v. *Billups*, 504 F. Supp.2d 1333 (N.D. Ga. 2007), in arguing that Appellees lack standing, but the analogy is unpersuasive. The organizational plaintiff in *Billups* alleged substantially less concrete harm than that alleged here. *See Billups*, 504 F. Supp.2d at 1372. Moreover, the standing analysis in *Billups* rests upon a case that was reversed on appeal on the standing point. *See id.* (citing *Ind. Democratic Party* v. *Rokita*, 458 F. Supp.2d 775, 815-16

for standing); *Friends of the Earth, Inc.*, v. *Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) ("threatened rather than actual injury can satisfy Article III standing requirements"); *ACLU* v. *Santillanes*, 506 F. Supp.2d 598, 621 (D.N.M. 2007) ("The 'injury in fact' required to establish standing to seek prospective relief may include a 'credible threat' to Plaintiffs' or their members' right to vote"). As the District Court found, Appellees plainly made this showing.

The District Court also correctly held that the Florida NAACP and HAGC have standing on behalf of their members who will be injured by Subsection 6. (R.106-6). An organization has standing to seek injunctive relief on behalf of its members when its members would otherwise have standing to sue on their own behalf; the interests at issue are germane to the organization's purpose; and the participation of individual members is unnecessary to the resolution of the claim or the relief requested. *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000); *Hunt* v. *Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Appellees amply satisfy this standard.

Appellant argues that Appellees lack associational standing because they did not identify members harmed in the past, but this does not defeat standing here, where

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(D. Ind. 2006), *standing analysis reversed by Crawford* v. *Marion County Election Board*, 472 F.3d 949, 951 (7th Cir. 2007)).

only prospective relief is sought.[29] That Appellees have not identified a specific member who has been or will be harmed by Subsection 6 does not prevent them from asserting claims on behalf of their members. As the Supreme Court recently reaffirmed, an organization seeking prospective relief need only demonstrate that its members face an increased probability of harm to establish associational standing. *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2751 (2007) ("The fact that it is possible that children of group members will not be denied admission to a school based on race . . . does not eliminate the injury claimed.").[30]

This doctrine applies with particular force to voting rights cases. Courts have consistently recognized that, in the context of a compressed election cycle where many individuals are injured just before or on election day, "mistakes cannot be

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[29] Moreover, because Appellees conducted little registration activity, among their members or otherwise, in 2006 and 2007, few members of the two membership-based plaintiff organizations were at risk from Subsection 6 during this period. Far more members will be at risk in 2008, given Appellees' substantially increased registration activity.

[30] Appellant cites *National Alliance for the Mentally Ill* v. *Bd. Of County Commissioners*, 376 F.3d 1292 (11th Cir. 2004), and *Anderson* v. *Alpharetta*, 770 F.2d 1575 (11th Cir. 1985), but these cases are inapposite: they both involved challenges to *past* conduct, rather than claims for prospective relief. *See Nat'l Alliance*, 376 F.3d at 1293-94; *Anderson*, 770 F.2d at 1576-77. Moreover, *Anderson* involved a geographically confined injury, with no evidence that members of the plaintiff organization were of the particular community affected. 770 F.2d at 1581-82. In contrast, Appellees' members face specific future injury

specifically identified in advance" and thus, organizational plaintiffs have standing to assert claims on behalf of unknown members who will inevitably lose their voting rights. *Sandusky County Democratic Party* v. *Blackwell*, 387 F.3d 565, 573-74 (6th Cir. 2004); *see also Santillanes*, 506 F. Supp.2d at 621; *Fla. Democratic Party* v. *Hood*, 342 F. Supp.2d 1073, 1079 (N.D. Fla. 2004) ("[A] voter cannot know in advance that his or her name will be dropped from the rolls . . . or listed correctly but subject to a human error by an election worker . . . . It is inevitable, however, that there will be such mistakes."). Given the impossibility of determining in advance who will be harmed by an election regulation, if deprivations are to be prevented before a voter loses her right to vote, organizational plaintiffs must be permitted to assert standing on behalf of as yet unidentified members who will inevitably be harmed.

The District Court correctly concluded that the current and prospective members of HAGC and the Florida NAACP will face a significant and immediate risk that Subsection 6 will prevent them from registering and voting in the upcoming elections -- and thus HAGC and the Florida NAACP have associational standing. (R.106-6). The record is clear that throughout 2008, Appellees will conduct voter registration drives and engage in member recruitment. Some of these members will be eligible voters who will attempt to register to vote and be prevented from

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and are members of precisely the communities disproportionately impacted by Subsection 6.

registering due to Subsection 6. Accordingly, the District Court did not err in finding associational standing.

Finally, the District Court correctly held that Appellees have standing on behalf of third parties they will assist in registering to vote. (R.106-6). A litigant may bring an action on behalf of third parties if the litigant has suffered an injury in fact and thus has a "sufficiently concrete interest" in the outcome of the case, and the litigant has "a close relation" to a third party for whom there is "some hindrance" in protecting her own interests. *Powers* v. *Ohio*, 499 U.S. 400, 410-11 (1991).

The District Court correctly found that Appellees suffer an injury in fact because Subsection 6 frustrates their mission of registering voters and will force them to divert resources to counteract its illegal effects. (R.106-7). Appellees and those they will register have a close relationship based on a common interest -- vital to the organizations' success -- in the applicants successfully registering and voting. (R.106-7). Moreover, Appellees' extensive civic engagement work in particular minority communities enables them to understand the ways that Subsection 6 burdens their constituents, especially given Subsection 6's disproportionate effect precisely in the communities Appellees serve. (R.106-7; Fernandez Tr. 40:23-41:8; Lafortune Tr. 14:9-17:24; Neal Tr. 25:4-25:19).

Finally, the District Court found -- and the record is uncontested -- that "unmatched" applicants, particularly those whom Appellees seek to register, face

substantial barriers to protecting their own interests, including inadequate notice, insufficient time to take remedial steps, language barriers, non-comprehension of the registration process, and voter suspicion and embarrassment at being disenfranchised. (R.106-7-8; Lafortune Tr. 16:4-17:24; 35:6-37:11; Neal Tr. 44:1-45:1). Notably, the election clock frustrates the ability of many applicants injured by Subsection 6 to assert their rights in time to ensure that those rights may be adequately addressed. (R.106-7-8). An applicant who applies on the eve of the book closing deadline, as many applicants do, will have little opportunity to vindicate her rights in court prior to the impending election, even if she receives timely and comprehensible notice. *Cf. Singleton* v. *Wulff*, 428 U.S. 106, 117 (1976). Thus, were Appellees not permitted to assert the prospective third-party claims of the applicants they serve, those applicants will be utterly without recourse to vindicate their disenfranchisement.

CONCLUSION

For the foregoing reasons, the District Court's Order should be affirmed.

Dated: January 9, 2008.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses Times New Roman 14-point typeface and contains 13,951 words.

GLENN T. BURHANS, JR.

CERTIFICATE OF SERVICE

I, David S. Weeden, having been retained by Counsel for Plaintiffs-Appellees in this matter, hereby certify that on January 9, 2008, I caused to be served by Federal Express a true and correct hard copy, and by e-mail an electronic copy in PDF format, the Brief for Plaintiffs-Appellees on the following:

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I further certify that on January 9, 2008, I caused the original and six copies of the Brief for Plaintiffs-Appellees to be delivered to Federal Express for delivery to the U.S. Court of Appeals for the Eleventh Circuit.

Dated: January 9, 2008

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David S. Weeden