No. 04-15539

IN THE

United States Court of Appeals

FOR THE

Eleventh Circuit

EMMA YAIZA DIAZ, *et al.*,

Plaintiffs-Appellants.

v.

GLENDA HOOD, SECRETARY OF STATE OF FLORIDA, *et al.*,

Defendants-Appellees,

On Appeal from the United States District Court
for the Southern District of Florida Miami Division

AMENDED BRIEF OF APPELLEE GLENDA HOOD

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

The following is a list of persons or entities that have or may have an interest in the outcome of this case:

Plaintiffs:

Emma Yaiza Diaz; Ebony Roberts; Andre Neal Bembry; American Federation of Labor and Congress of Industrial Organizations; American Federation of State, County And Local Employees, AFL-CIO; Florida Public Employees Council 79, AFSCME, AFL-CIO; and Service Employees International Union, AFL-CIO.

Defendants:

Glenda Hood, Secretary of State of Florida; Brenda Snipies, Broward County Supervisor of Elections; John Stafford, Duval County Supervisor of Elections; Constance Kaplan, Miami-Dade Supervisor of Elections; Bill Cowles, Orange County Supervisor of Elections; and Theresa Lepore, Palm Beach County Supervisor of Elections.

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Erik S. Jaffe
Counsel for Appellee Hood

STATEMENT REGARDING ORAL ARGUMENT

Appellant Hood requests oral argument in this case. Given the multiple parties and claims, and the limited and partial standing claimed by the various plaintiffs, oral argument will be valuable in assisting the Court to sort out the various claims and their implications for standing.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

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JURISDICTION

The primary issue in this case – standing – goes to the issue of jurisdiction or the lack thereof. This Court, of course, has jurisdiction to resolve the jurisdictional issues.

STATEMENT OF ISSUES

1. Whether any of the plaintiffs have standing to bring their claims given their failure to plead some or all of the required elements of injury, causation, and redressibility?

2. In the alternative, whether the plaintiffs have failed to state claims for which relief may be granted in light of the express and implied federal authorization for the challenged conduct and given the absence of any allegations of intentional discrimination or intentional deprivation of property or liberty?

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

Plaintiffs brought suit in this case seeking declaratory and injunctive relief requiring defendants to permit persons to register to vote notwithstanding the fact that they did not submit completed registration applications. The district court took briefing and held a hearing on motions for a preliminary injunction and motions to dismiss for lack of standing and for failure to state a claim. During the proceedings, plaintiffs sought to file an amended complaint without leave of the Court, in violation of the Federal Rules of Civil Procedure. They subsequently withdrew their amended complaint and declined to re-file it properly, preferring instead to stand on their original complaint and receive a more expeditious resolution of their motion. The district court accepted their election and ruled exclu-

sively on the basis of the original Complaint and did not consider the amended complaint. The district court ultimately ordered the case dismissed based on lack of standing.

B. FACTS

In order to register to vote in Florida, a Florida resident must complete a voter registration application and provide various items of information related to that person's qualifications to vote and to the administration of the elections system. At issue in this case are the requirements on the Florida Voter Registration Application that an individual check a box responding to questions asking whether the person is a citizen, has been convicted of a felony, or has been declared mentally incompetent. Each of those questions corresponds to an express qualification for voting in Florida. In addition, an individual must provide the last four numbers of their social security number or one of several other numeric identifiers so that Florida will be able to uniquely identify the voter and avoid duplicate registrations and ensure that distinct persons with similar names are not erroneously rejected as duplicative registrants.

The individual plaintiffs in this case challenged the felon check-box requiremement, the mental incompetence check-box, and the numeric identifier check-box. The Union plaintiffs also challenged each of those three requirements and the citizenship check-box requirement as well. Plaintiffs Diaz and Bembry

submitted incomplete applications, received notice that their applications were incomplete after the established filing deadline for registration to be effective for the November 2004 elections, and made no attempt to cure their defective applications. Plaintiff Roberts filed an incomplete application, received notice of the deficiency after the filing deadline, but cured the deficiency and her corrected application was processed and she was registered to vote in time for the November 2004 election.

C. STANDARD OF REVIEW

An order dismissing a complaint is reviewed by this Court *de novo*. *London* v. *Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1250 (11th Cir. 2003).

SUMMARY OF ARGUMENT

The individual plaintiffs in this case lack standing because their alleged injuries – the inability to vote in the November 2004 election – were not causally related by the complained-of actions of the defendants. Rather, such injuries were caused by plaintiffs' own failures to complete their registration applications and their failures to correct such deficiencies. In addition, Plaintiff Roberts suffered no injury in fact whatsoever in that she successfully registered to vote when she completed her application in time for the election. Furthermore, none of the plaintiffs have alleged, as to defendant Secretary of State Hood, that their injuries could be redressed by any action ordered of Secretary Hood.

The Union plaintiffs lack standing as representatives of their members because the Complaint alleges not a single fact that would establish injury by any of their members. Beyond failing to state facts identifying such potentially injured members, the unions did not even allege generically that any member was precluded from voting by the challenged conduct of defendants. Furthermore, even if they had alleged such preclusion, that would still be insufficient to establish representational standing because any such union members would lack standing in their own rights for the same reasons that the individual plaintiffs lack standing. The Union plaintiffs also lack standing in their own right in that they have not suffered any cognizable injury. The expenditure of resources on issues of general interest to the unions is not the type of injury sufficient to create standing. Were it otherwise, every single advocacy group and advocate could create standing to challenge any law or conduct merely by first devoting some resources to education or advocacy and then bringing suit based on the alleged diversion of such resources caused by the offending law. Such an injury is no different from the generic injury to an organization's abstract goals or desires, and where the law does not itself directly imposed added operating costs or burdens beyond the normal educational and advocacy activities of the entity, standing is not established. Mere diversion of an organization's general advocacy and education activities from one topic to another simply is not sufficient.

Finally, plaintiffs fail to state a claim as to any of their challenges because the various check-box and numeric identifier requirements are either specifically provided for under federal law, or are functionally indistinguishable from federal requirements and fall within an area expressly left to the discretion of the States. Plaintiffs also fail to state claims for invidious racial discrimination or violation of due process in that they never allege any *intentional* discrimination or deprivation of liberty, they fail to alleged sufficient facts from which discrimination could even be inferred at all, and the acts of which they complain are more than supported as reasonable under existing law.

ARGUMENT

I. NONE OF THE INDIVIDUAL PLAINTIFFS HAVE STANDING TO CHALLENGE THE REQUIREMENTS OR IMPLEMENTATION OF FLORIDA'S VOTER REGISTRATION SYSTEM.

The requirements for standing are well-established. As the Supreme Court described in *Lujan* v. *Defenders of Wildlife*,

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, … and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" …. Second, there must be a causal connection between the injury and the conduct complained of-- the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." …. Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." ….

504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992) (citations and footnote omitted).

Each of the individual plaintiffs in this case failed multiple aspects of the constitutional requirements for standing.

A. PLAINTIFF DIAZ LACKS STANDING.

Plaintiff Diaz alleges standing by claiming that she was injured when her incomplete voter registration application (lacking a response to the mental incapacity questions) was not processed and when she failed to receive timely notice and an opportunity to cure the defect in her application. As the district court recognized, Order at 13-14 [Tab 3], Diaz fails both the second and third elements of the *Lujan* test in that there is no causal connection between her injury – her inability to vote in the November 2004 election – and the actions of defendants and, as to Secretary of State Hood, she failed to allege that the Secretary had any authority to order her to be registered and hence redress her injury.

Regarding the lack of causation, it is undisputed that had Ms. Diaz submitted a completed voter registration application she would have been registered to vote. There is likewise no allegation that Ms. Diaz was somehow incapable of completing the application or that her failure to respond to the check-box question on mental incapacity was somehow caused by the defendants. Whether purposefully or

inadvertently, Ms. Diaz's failure to complete the application was entirely her own doing, and hence she "created her own injury." Order at 14. [Tab 3] That intervening cause of her lack of registration breaks the causal chain between her injury and defendant's conduct and thus deprives her of standing.

Absent some inability to comply with the law or some unreasonable burden imposed by compliance (as with, for example, a poll tax), the failure or refusal to act as the law directs involves an intervening cause that precludes standing. The Supreme Court itself recently has recognized that such self-inflicted harm deprives plaintiffs of standing. Rejecting the challenge of a group of plaintiffs objecting to the "hard-money" limits in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), the Court held that the plaintiffs lacked standing:

> [Plaintiffs' alleged injury] stems not from the operation of [BCRA] § 307, but from their own personal "wish" not to solicit or accept large contributions, *i.e.,* their personal choice. Accordingly, the Adams plaintiffs fail here to allege an injury in fact that is "fairly traceable" to BCRA.

McConnell v. *FEC*, 540 US 93, 228, 124 S. Ct. 619, 709 (2003). Similarly, in *Rosario* v. *Rockefeller*, 410 U.S. 752, 757-58, 93 S. Ct. 1245, 1249-50 (1973), the Supreme Court found that plaintiffs' failure to register in a timely fashion and hence their inability to vote in a particular election did not even constitute disenfranchisement at all. The Court distinguished the case where a "State totally denied the electoral franchise to a particular class of residents, and there was no way

in which the members of that class could have made themselves eligible to vote," and held that where the plaintiffs simply failed to comply with the readily available procedures for registration they brought about their own injury: "[I]f their plight can be characterized as disenfranchisement at all, it was not caused by § 186, but by their own failure to take timely steps to effect their enrollment." *Id*. (footnote omitted).[1] Just as in *McConnell*, so too with the plaintiffs here. Plaintiffs were fully capable of completing the voter registration application and have never alleged that doing so would impose any material burden whatsoever. This is not the case of a complex literacy test, a burdensome poll tax, or some tricky math question such as converting your age into days; it is simply a requirement to check several boxes. Ms. Diaz's failure or refusal to complete the application is the intervening and overwhelming cause of her failure to be registered. Such a result is simply not fairly traceable to defendants' actions.

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[1] Though *Rosario* involved the merits, rather than standing, it demonstrates that there is no causal connection to a *legally cognizable injury*, and hence to that extent is relevant to standing as well. *See McConnell*, 540 U.S. at 227, 124 S. Ct. at 708 ("[T]o satisfy our standing requirements, a plaintiff's alleged injury must be an invasion of a concrete and particularized legally protected interest. … We have noted that '[a]lthough standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, ... it often turns on the nature and source of the claim asserted.'") (citations omitted).

As for Ms. Diaz's claim regarding the supposed lack of notice and opportunity to cure the defect in her application, once again, Ms. Diaz's own conduct breaks the causal connection necessary for standing. As the district court noted, Ms. Diaz in fact received notice of the deficiency in her application and that notice instructed her to correct the deficiency. Ms. Diaz, however, declined to correct or resubmit the application. While Ms. Diaz alleges that she did not receive the notice of deficiency until after the October 4th deadline for filing applications, having not submitted an amended application at all, she is incapable of alleging how such an amendment would have been handled.[2] In short, her allegations state merely the fact of injury, her failure to be registered in time for the November 2004 election, but fail to alleged facts sufficient to show such injury was fairly traceable to the timing of the notice she received. The allegations establish only that Ms. Diaz's inability to vote in the November 2004 election stemmed entirely from her own conduct in failing to complete the application when originally submitted and in failing to cure the deficiency when she was apprised of it. Any suggestion that a corrected application would have been rejected as untimely would be pure speculation as she made no attempt whatsoever at a cure. *Cf*. *McConnell*, 540 U.S. at 230,

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[2] Indeed, Plaintiff Roberts cured her defective application after the cutoff for the filing of applications generally, and she was registered in time for the election.

124 S. Ct. at 710 (rejecting standing where injury to plaintiffs is "purely conjectural").

Plaintiff's claim that the district court's finding of lack of causation improperly conflates standing and the merits, Appellants' Brief at 23-24, misconceives the standing inquiry. Standing independently requires allegations of facts demonstrating a causal connection between the alleged injury and the conduct of defendants. That such causation is *also* a prerequisite for success on the merits does not "conflate" standing and the merits any more than is necessary from the very nature of the standing inquiry itself. Rather, the standing inquiry looks to the minimum elements of bringing a claim while the merits inquiry requires all of that plus the further substantiation that the injury caused by defendants violated the law. It is that latter issue, whether the facts alleged establish a violation of the law that is the distinct merits inquiry. But the existence of an injury, a causal connection to the challenged conduct, and redressibility are prerequisites to *both* standing and success at the end of the day.

Finally, as to Secretary of State Hood, the district court further held that Ms. Diaz had failed to allege that Hood had the authority to redress her injury. While it is true that Secretary Hood has responsibility for various parts of the Florida elections apparatus, it is also undisputed that she lacks the authority to order County

Supervisors to take the particular actions requested. Absolutely nothing in the Complaint alleges such authority and even plaintiffs' brief to this Court makes no such claim. Indeed, the Complaint itself alleges just the opposite. While noting that the Secretary of State's office issued an interpretation of the mandatory nature check-box requirement, the Complaint, at 13 ¶ 37 [Tab 5], also notes that various Supervisors declined to follow that interpretation. Such is the nature of the Secretary's authority in Florida – she has the responsibility of providing uniform interpretations of the law, but no authority to impose such interpretations upon the county supervisors who are vested with their own responsibility and authority with regard to election matters.

Plaintiffs' responses to this element of standing are simply non-sequitors. Focusing on the general duties of the Secretary and the relief requested from the district court, they not once allege anything that would demonstrate that the requested relief would be capable of redressing the relevant injuries. That they sought a court order requiring the Secretary to adopt their legal interpretations and issue a directive to that effect to the county supervisors is a far cry from alleging any facts to suggest that such a directive would be binding or effective on the Supervisors. Just as with the initial directive regarding check boxes, any such court-ordered directive could be ignored by the Supervisors in their own discretion. Be-

cause there is no allegation in the Complaint that relief sought from the Secretary would redress her injuries, Ms. Diaz lacks standing.

B. PLAINTIFF BEMBRY LACKS STANDING.

For all of the reasons that Ms. Diaz lacks standing, Plaintiff Bembry likewise lacks standing to bring this claim. As with Ms. Diaz, Mr. Bembry failed to complete his voter registration application. As with Ms. Diaz, There is no allegation that Mr. Bembry attempted to cure the deficiency in his application when he received notice of such. Indeed, Mr. Bembry was in fact given precisely the same opportunity to cure the defect in his application but, unlike Ms. Roberts, refused to avail himself of that opportunity. Appellants' Brief at 29. Having been given and refused the opportunity to correct his application, Mr. Bembry cannot even allege a due process injury at all, and his subsequent injury of being unable to vote in the November 2004 election had absolutely nothing to do with the conduct of defendants – it was wholly a function of his intervening refusal even to *submit* a corrected application.[3] Thus, as with Ms. Diaz, Mr. Bembry has failed to satisfy the causation element of standing and the Complaint was properly dismissed.

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[3] Plaintiffs argue, Appellants' Brief at 30 n. 5, that Mr. Bembry's opportunity to cure his application was reflected only in an affidavit submitted to the Court and that such affidavit should not be the basis of a motion to dismiss. But at no point have defendants ever denied that such an opportunity for cure existed, nor could they given that Ms. Roberts successfully availed herself of that very same opportu-

Furthermore, as to Secretary Hood, the relief sought from her in the Complaint was identical to that sought by Ms. Diaz, such relief was not capable of redressing his alleged injuries, and hence he also fails the third element of the standing injury regarding redressibility.

C. Plaintiff Roberts Lacks Standing and Her Claims Are Moot in Any Event.

Ms. Roberts likewise failed to establish standing for the reasons given for Ms. Diaz and Mr. Bembry on the causation and redressibility elements. Indeed, the lack of a causal connection between her then-prospective injury and the conduct of the defendants is all the more apparent in that she successfully avoided any actual injury by correcting her application. In light of such events, she not only failed to suffer *any* injury-in-fact – she successfully registered to vote – she also illustrated her own independent role in the causal chain alleged for her prospective but unrealized injury by taking the available steps to avoid that injury herself.

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nity and successfully registered to vote. While allegations in a Complaint should be read in a favorable light for defendants, the actual facts on the ground simply highlight the deficiency of the allegations themselves. There is absolutely no allegation that Mr. Bembry attempted to correct his application but was nonetheless denied registration and the Court should be especially unwilling to assume such a denial would have occurred given that it had the evidence of Ms. Roberts herself that corrected applications would have been accepted in Duval County.

Plaintiffs nonetheless argue that Ms. Roberts's successful registration goes to mootness, not standing, and argue that she satisfies the voluntary-cessation and capable-or-repetition exceptions to mootness. As an initial matter, Ms. Roberts's successful registration for the November 2004 election, even if not independently a factor in the standing inquiry, amply illustrates the innate deficiencies in her Complaint both with regard to causation and with regard to injury-in-fact itself. At the point the complaint was filed Ms. Roberts had not suffered an actual injury, but rather was facing only a *prospective* injury. In deciding the cause of that injury and whether it was sufficiently imminent rather than conjectural or hypothetical, the Court need not ignore the undeniable fact that the injury *never happened* and was cured by Ms. Roberts's own correction of her application. Where an alleged injury is merely prospective rather than actual and existing, it seems misguided to ask a court to ignore the actual impossibility of the injury when deciding whether it is indeed "imminent."

Furthermore, even if the evaporation of Ms. Roberts's then-potential injury were addressed under the rubric of mootness rather than standing, the result would be identical. Both go to the issue of Article III authority and Ms. Roberts fairs no better in her attempt to avoid mootness.

As for the voluntary cessation doctrine, were there is no possibility that defendant will resume conduct injuring the plaintiff, the case nonetheless remains

moot. Ms. Roberts having provided the required information and been registered to vote, Supervisor Stafford cannot possibly cause her further injury on the grounds alleged in the Complaint. The complained-of action – the denial of Ms. Roberts's voter registration for failure to provide an identification number – has no possibility whatsoever of recurring, nor has she alleged any such possibility. The fact that defendant Stafford may enforce the numeric identifier requirement to others in the future in no way changes that fact that there is no prospect for a resumption of the challenged conduct *as to her*.[4] Ms. Roberts is certainly in no position to pursue this lawsuit on behalf of other persons as she no longer has any interest whatsoever in the outcome and has no personal interest in the future application of the rule. Unlike a party at risk of injury from a resumption of challenged conduct, and hence sufficiently interested to continue the litigation based on the mere prospect of such a resumption, Ms. Roberts faces no such risk and hence presents this Court with no genuine case or controversy.[5] It is that disconnect between the litigant and the

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[4] Voluntary cessation, like the capable of repetition exception to mootness, necessarily depends on the potential for a defendant to resume its challenged conduct as to the specific plaintiff bringing the claim. *See infra* at 17-19. The primary difference between the two doctrines is that where voluntary cessation is at issue, the burden regarding recurrence/non-recurrence rests with the defendant rather than with the plaintiff.

[5] This case is thus very different from the situation where a plaintiff will have repeated interactions with a government agency and hence could herself be subject to a resumption of the unlawful conduct.

prospect future injury that requires the voluntary cessation doctrine to be applied with respect to the individual plaintiff before the court, not with respect to some hypothetical persons having no connection to the plaintiff.

For the same reasons that the voluntary cessation exception does not apply, neither does the capable-of-repetition exception to mootness. In this case there is no prospect that the challenged conduct as to Ms. Roberts will be repeated. Unlike a case involving potentially recurring short-term conduct that would affect the same individual – pregnancy for example, in the context of challenges to abortion laws – Ms. Roberts dispute with Supervisor Stafford is not capable of repetition. Plaintiffs' cases are not to the contrary. In *Storer* v. *Brown*, 415 U.S. 724, 737 n. 8, 94 S. Ct. 1274, 1238 n. 8 (1974), independent candidates challenging a rule that required them to be disaffiliated from another party for eleven months prior to filing an independent candidacy was deemed not moot even though the election had long passed and the candidates could no longer be placed on the ballot. But the very same issue could recur in future elections even as to the same candidates themselves if they affiliated with another party in the interim or sought and failed to obtain a major-party nomination before launching an independent candidacy. Indeed, such waiting period rules are precisely designed to prevent "sore-losers from major party primaries from running as independents, and hence one could

readily anticipate recurrence even as to the original claimants.[6] Furthermore, at least in *Storer*, the plaintiffs had actually been *injured* in the previous election. Here Ms. Roberts was not injured *at all*, will not be injured in the future, and hence is a most peculiar plaintiff to assert the rights of others.

Cases since *Storer* and *Rosario* have confirmed the plaintiff-specific nature of the capable-of-repetition inquiry. *See Norman* v. *Reed*, 502 U.S. 279, 288, 112 S. Ct. 698, 705 (1992) (election case rejecting mootness because "[t]here would be every reason to expect the *same parties* to generate a similar, future controversy") (emphasis added); *Illinois State Bd. of Elections* v. *Socialist Workers Party,* 440 U.S. 173, 187-88, 99 S. Ct. 983 (1979) (citing rule requiring "a reasonable expectation that the *same complaining party* would be subjected to the same action again"

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[6] In *Rosario*, 410 U.S. 756 n. 5, 93 S. Ct. 1245, even though the plaintiffs had registered for a party in time for the upcoming primary, the challenged conduct – an early deadline for registering as a member of a party in order to participate in a later party primary – was indeed still capable of repetition as to the very same persons. The filing deadline would apply to any attempt to *change* party affiliation in order to vote in that party's primary, and such conduct once again is precisely what the law was targeted toward. (Such last minute party affiliations or changes in order to influence a primary come about either as a result of middle-of-the-road voters who have no particular party loyalty and hence choose party's on the basis of which primary they wish to vote in, or as a result of Machiavellian conduct designed to "raid" an opposing party's primary and try to cause the perceived weaker candidate to win.) And in *Dunn* v. *Blumstein*, 405 U.S. 330, 333 n. 2, 92 S. Ct. 995, 998 n. 2 (1972), plaintiff represented a class of persons that could still be affected by the law, even if he had met the relevant residency requirement for purposes of a subsequent election.

and finding mootness after election had passed because no reasonable expectation that the plaintiff would be injured in future) (emphasis added); *see also Van Wie* v. *Pataki*, 267 F.3d 109, 114-15 (2d Cir. 2001) (discussing *Storer*, *Rosario*, and *Dunn* and subsequent cases and concluding that, even in election context, case is moot where *same parties* could not demonstrate more than speculative possibility of recurrent injury).

As to other potential registrants who might seek to challenge the numeric identifier requirement, the issue is fully capable of review in other manners. For example, the Florida Voter Registration Form itself can be challenged on its face in administrative proceedings in Florida, and the alleged conflict with federal law raised there. Furthermore, other potential registrants filing throughout the year and well in advance of an election could challenge the numeric identifier if they chose not to provide it (assuming, *arguendo*, that such conduct did not undermine the causality requirement of standing, as it does here). In short, the legal system has ample means of hearing and addressing this issue without rendering an advisory opinion at the behest of a litigant that has no continuing interest in the matter. Ms. Roberts thus cannot satisfy the evading-review requirement for this narrow exception to mootness.

As for the due process claim regarding timely notice and opportunity to cure an incomplete application, once again there is absolutely no argument that any de-

ficiencies in notice that may have occurred in the past election will recur in the future. Plaintiffs do not, and have never, contended that the sporadic delays in mailing out notices regarding incomplete applications were the result of intentional acts on the part of any of the defendants or was a policy of the Counties or the State. Indeed, quite to the contrary, Florida law requires that notice be given to prospective registrants who file incomplete applications. *See* Fla. Stat. § 97.073 (2004). The County Supervisors endeavored to provide timely notice of incomplete applications, and while they may not have been 100% successful in that regard, the occasional delays were due to inadvertence and the crush of an unusually large voter registration drive that resulted in a flood of new voter applications being filed very close to the voter registration deadline. Indeed, in Ms. Roberts' case, the relevant County Supervisor took the unusual step of opening up an additional cure window precisely because of the unusual circumstances presented. The undisputed facts thus demonstrate that there was absolutely no policy of intentional delay in providing notice and opportunity to cure, there is a statute expressly providing for notice, there is absolutely no suggestion that County Supervisors have or will in the future intentionally ignore such a statute, and hence there is no basis whatsoever to suggest that there will be any intentional delays in the future.

II. NONE OF THE UNION PLAINTIFFS HAVE STANDING TO CHALLENGE THE REQUIREMENTS OR IMPLEMENTATION OF FLORIDA'S VOTER REGISTRATION SYSTEM.

The district court held that the union plaintiffs lacked representational standing because they "failed to allege sufficient facts to establish that one of their members could have brought this case in their own behalf. Order at 11. [Tab 3]

A. THE UNIONS HAVE NOT DEMONSTRATED REPRESENTATIONAL STANDING.

The district court correctly held that the Union plaintiffs had failed to allege that even a single union member was injured by the challenged conduct. First, a review of the Complaint demonstrates that the only allegations regarding union members is that many of them live in the relevant counties and are qualified to vote. There is not a single allegation that they tried but failed to register to vote, that any such hypothetical failure was due to the challenged requirements in this case, or that any of those fictional non-registered members was denied timely notice and opportunity to correct their application. Indeed, the only allegations are that union "members have applied to register to vote," without a single allegation that any of them have been denied registrations or the reasons for any theoretical denials. Complaint at 5-7, ¶¶ 11-15. [Tab 5]

The problem with the Complaint is not simply that it failed to personally identify a particular union member who could bring suit in his or her own right, it

failed to allege, even generically, that *any* union members whatsoever had suffered an injury sufficient to confer standing. Plaintiffs' claim before this Court, Appellants Brief at 37-38, that they have members who were denied registration based on the challenged requirements in this case is notable only for its conspicuous failure to identify such allegations in the complaint itself. Rather, plaintiffs rely on subsequently discovered "evidence" that was appended to an amended complaint that they chose to withdraw rather than have litigated before the district court. Regardless of whether the unions could ultimately find members who would have standing, the fact remains that in the Complaint currently under consideration, there are still no allegations to that effect. If the Unions later felt capable of pleading new allegations that would be sufficient for standing, then they certainly could have done so through an amended complaint given that the dismissal below was without prejudice. They chose not to for their own strategic reasons, but that strategy choice cannot be the basis for reading into the original Complaint allegations that might have been, but were not, actually pled.

Second, even if one were to read into the Complaint allegations that are not there – that union members were denied registration for the relevant reasons – that still would not establish that those members would have standing to sue on their own behalf. For the same reasons discussed with respect to the individual plaintiffs, any hypothetical union members would lack standing due to their inability to

establish the causation or redressibility elements of standing. Indeed, the very fact that such elements are a function of the individual behavior of voter registration applicants themselves demonstrates that the presence of the actual individuals would be necessary properly to litigate the case. Consequently, the unions' assertion of representations standing fails not merely the first requirement that its members would otherwise have standing, it also fails the third requirement in that he participation of individual members would be required to fairly evaluate such standing in the first place.

B. The Unions Have Not Demonstrated Standing Based on Any Direct Injury to Them.

Citing to *Havens Realty Corporation* v. *Coleman*, 455 U.S. 363, 102 S. Ct. 1114 (1982), the union plaintiffs claim that they have standing in their own right because they were injured by having to divert their own resources to investigate and educate their members about the allegedly illegal requirements on the voter registration application. Appellants' Brief at 41-42. But the mere diversion of resources to challenge or combat conduct deemed contrary to an organizations purposes is not sufficient to create organizational standing. As the D.C. Circuit observed in addressing an identical claim, an organization must allege that "discrete programmatic concerns are being directly and adversely affected" by the challenged activity itself. *National Taxpayers Union* v. *United States*, 68 F.3d 1428,

1433 (D.C. Cir. 1995) ("*NTU*") (internal citations and quotations omitted). As the D.C. Circuit explained:

> The impact of [the challenged law] upon NTU's programs, such as its educational and legislative initiatives, also does not constitute an injury in fact. "An organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit." *Spann* v. *Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir.), *cert. denied*, 498 U.S. 980, 111 S. Ct. 508, 509 (1990); *see also Association for Retarded Citizens* v. *Dallas County Mental Health & Mental Retardation Center Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994) ("The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization.").
>
> Similarly, NTU's self-serving observation that it has expended resources to educate its members and others regarding Section 13208 does not present an injury in fact. There is no evidence that Section 13208 has subjected NTU to operational costs beyond those normally expended to review, challenge, and educate the public about revenue-related legislation. Unlike the injury alleged in *Havens Realty*, where the defendant's practices "perceptibly impaired" the plaintiff's ability to provide counseling and referral services for low-and moderate-income homeseekers, 455 U.S. at 379, 102 S. Ct. at 1124, Section 13208 has not forced NTU to expend resources in a manner that keeps NTU from pursuing its true purpose of monitoring the government's revenue practices. *See also Spann*, 899 F.2d at 28-29 (Housing organizations established injury in fact where defendants' illegal acts necessitated "increased education and counseling ... to identify and inform minorities ... that defendants' housing is by law open to all."). NTU cannot convert its ordinary program costs into an injury in fact from Section 13208.

NTU, 68 F.3d 1434. Just as NTU could not manufacture standing simply by spending some money on education or advocacy, neither can the unions in this case.

Unlike the perceptible impairment of the specific statutory functions of the Fair Housing entity in *Havens Realty*, there is no allegation of perceptible impairment of the unions' primary function of representing their members or even of their secondary function of promoting political activity and citizenship by their members. Whatever resources the union used to address this issue, there is absolutely no allegation that they were beyond the realm of the normal operational costs that they had dedicated to the election. Indeed, there is no claim that the unions themselves are entitled to recover any resources devoted to their efforts, no request for such relief, and hence the narrow class of injury alleged to the unions themselves is not even redressible by any of the relief requested.[7]

Finally, unlike in *Havens Realty*, prudential concerns militate against allowing standing merely because an organization chooses, for its own abstract reasons, to become involved in advocacy or education regarding a particular topic. Were

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[7] Further, even assuming, arguendo, that he unions were injured in the colloquial sense, such "injury does not amount to an invasion of a legally protected interest. The laws being challenged here are designed to protect the interests of the voters themselves, not to protect the unions' interest in allocating their advocacy and education resources to other priorities that they would prefer. *See Center for Law and Education* v. *Department of Education*, -- F.3d --, 2005 WL 119831, at *5 (D.C. Cir. 2005) (legal rights at issue were not designed to protect the interests of the challenging organization rather than the interests of parents, students, and educators; organizations thus lacked their own standing). The organizational interests in *Havens*, by contrast, were indeed protected by the very law that authorized the or-

the mere expenditure of resources in opposition to a disfavored law sufficient to confer standing, then any organization could manufacture an injury, and standing, at will. Under such a theory, even the plaintiffs in *Lujan* should have had standing in their own right given that they undoubtedly spend money combating the threat to endangered species posed by the various projects they opposed. The D.C. Circuit recently recognized this distinction between advocacy organizations and service organizations such as that in havens. In *Center for Law and Education* v. *Department of Education*, -- F.3d --, 2005 WL 119831, at *9 (D.C. Cir. 2005), the court rejected organizational standing, noting that the "case before is easily distinguished from [*Havens Realty*] …. [In *Havens*] defendants' practice 'perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income home-seekers ....' [455 U.S.] at 379. Here, the only 'service' impaired is pure issue-advocacy-the very type of activity distinguished by *Havens*. *See id.* at 379 (distinguishing *Sierra Club* v. *Morton,* 405 U.S. 727, 739, 92 S. Ct. 1361 (1972))."[8] Given that the costs of such efforts are not *imposed* upon an or-

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ganization in the first place and than expressly conferred the maximum constitutional standing on the organizations to bring the type of suit it brought.

[8] Under such an over-reading of the diversion of resources theory, every lobbyist seeking to repeal a law, every business seeking advice regarding compliance with a law, every non-profit group seeking to educate or advocate against a law, and even individuals who simply choose to devote resources to their own abstract issues of

ganization, but merely chosen as part of the organization's ordinary efforts to promote its abstract ideas, they should be held insufficient for standing purposes. Otherwise, standing limitations would become meaningless.

III. IN THE ALTERNATIVE, PLAINTIFFS HAVE FAILED TO STATE A CLAIM.

Aside from the standing issue, this Court can affirm the judgment below on the ground that the Complaint fails to state a claim. While the Court below did not expressly rely on the various motions to dismiss on the merits, those issues present straightforward questions of law regarding the sufficiency of the complaint and the content of federal law. An examination of such law shows that Florida's voter registration form is not only fully consistent with the law, it in fact mirrors in all material respects the federal voter registration form and hence cannot be deemed to violate federal requirements.

Any consideration of whether Florida's voter registration form complies with federal law should begin first with the laws in question and second with the manner in which the federal government itself interprets the requirements of the law with regard to its own federal voter registration form. Insofar as Florida's requirements are explicitly required under federal law, or in pari material with such

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concern would suddenly have standing. That simply stretches *Havens Realty* too far.

requirements, they cannot, as a matter of law, be deemed immaterial or unnecessary.

The relevant law applicable to voter registration requirements is as follows:

The Voting Rights Act of 1965, 42 U.S.C. § 1971(a)(2)(A) and (B):

> (2) No person acting under color of state law shall - -
>
> > (A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote;
> >
> > (B) 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 . . .

The National Voting Rights Act of 1965, 42 U.S.C. § 1973:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . .

The National Voter Registration Act of 1993, 42 U.S.C. § 1973 et seq. Section 1973gg-4(a) states as follows:

(1) Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant to

section 9(a)(2) for the registration of voters in elections for Federal office.

(2) In addition to accepting and using the form described in paragraph (1), a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b) of this title for the registration of voters in elections for Federal office.

Section 1973gg-7(b)(1) states as follows:

[The form] may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.

The Help America Vote Act of 2002

Section 15483(a)(5) states as follows:

This prohibits states from accepting or processing an application unless it includes:

(I) in the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number; or (II) in the case of any other applicant (other than an applicant to whom clause (ii) applies), the last 4 digits of the applicant's social security number.

Section 15483(b)(4)(B) states as follows:

"If an applicant for voter registration fails to answer the question included on the mail voter registration form pursuant to subparagraph (A)(i) ["Are you a citizen of the United States of America?"], the registrar shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office (subject to State law)."

A. THE CHECK-BOX REQUIREMENTS ARE FULLY CONSISTENT WITH FEDERAL LAW.

Permissible Disuniformity with the Federal Form. As can be seen by the quoted provisions, the citizenship "checkbox" and "attestation" requirements are explicitly required by federal law. The application attached to the Complaint as Exhibit A [Tab 5] is the voter registration form developed by the State of Florida pursuant to section 1973gg-4(a)(2) of the National Voter Registration Act ("NVRA"). *See* 42 U.S.C. § 1973gg-4 ("a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b) of this title for the registration of voters in elections for federal office"). Section 1973gg-7(b)(1) of the NVRA, in turn, expressly permits voter registration forms developed by the State to require "other information" not required by the generic federal form, with the sole limitation that such information be "necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process."

Recognizing that state forms will necessarily vary according to state eligibility requirements, § 1973gg-7(b) requires that the application contain certain items. Specifically, it states that the voter registration application "*shall include* a statement that (A) specifies each eligibility requirement *(including citizenship)*, (B)

contains an attestation that the applicant meets each such requirement, and (C) requires the signature of the applicant, under penalty of perjury." *Id.* (emphasis added). Any disuniformity between the generic federal form and the specific state forms thus is fully contemplated by, addressed in, and authorized under the NVRA and cannot possibly be deemed to violate the Voting Rights Act.

There is no dispute that Section 1973gg-4 requires the State of Florida to accept the national form for mail-in registrations attached to Plaintiffs' Complaint at Exhibit E. [Tab 5] This form does not include "checkboxes" for felon status or mental capacity. Given that the form must be accepted by all fifty states, it is not surprising that each state's eligibility requirements are not specifically listed on the form itself. For example, Florida is amongst the few states that prohibit convicted felons from voting unless their civil rights have been restored. While many of the eligibility requirements are similar, they are by no means identical. *See* Compl., Exh. E, at pp. 3-27 (listing the eligibility requirements for each state). Instead, the nationwide form suggests that applicants review the particular state's instructions for eligibility information and then affirm that "*I meet the eligibility requirements of my state* and subscribe to any oath required." *Id.* at 2 & Application (emphasis added). The Florida instructions state that an applicant's felon status or mental incapacity renders them ineligible to vote. *Id.* at 8.

However, Plaintiffs' "uniformity" argument ignores Section 1973gg-4(a) of the NVRA. That section permits the State to develop its own form for use in federal elections, so long as the form complies with Section 1973gg-7(b) of the NVRA. Section 1973gg-4(a) states as follows:

> (1) Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant to section 9(a)(2) for the registration of voters in elections for Federal office.
> (2) *In addition to accepting and using the form described in paragraph (1)*, a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b) of this title for the registration of voters in elections for Federal office.

See 42 U.S.C. § 1973gg-4(a) (emphasis added). The State is given discretion to develop its own form, constrained only by the limitations set forth in Section 1973gg-7(b), which requires that the state application only request such identifying information and other information as is necessary to allow the state election official to:

(1) assess the eligibility of the applicant;

(2) administer voter registration; and

(3) administer other parts of the election process.

If the State were not permitted to vary from the federal form, Section 1973gg-4(a)(2) and Section 1973gg-7(b) would have no purpose. If Congress intended only one standard form, then Congress would not have provided for a state discre-

tionary form and certainly would not have provided for general guidelines as to the contents of such form. Once again, the lack of "uniformity" charged by Plaintiffs is expressly authorized by Congress.[9]

Validity of the Citizenship Checkbox. The indisputable legality of the citizenship checkbox is confirmed by § 15483(b) of HAVA, which *added* to the questions that were required to be asked on the federal and state voter registration applications. The statute provides:

> The mail voter registration form developed under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. § 1973gg-4) shall include the following:
>
> (i) The question "*Are you a citizen of the United States of America?*" and *boxes for the applicant to check* to indicate whether the applicant is or is not a citizen of the United States.

42 U.S.C. § 15483(b)(4)(A); *see also* 42 U.S.C. § 15545(a) (noting that HAVA § 15483(b) supercedes the NVRA).

The additions in § 15483(b) are consistent with the Congressional intent to make it "tougher to cheat" in elections. 148 Cong. Rec. S10488 (daily ed. Oct. 16, 2002) (Senator Bond succinctly summarizing the purpose of HAVA as to "make it easier to vote *but tougher to cheat*.") (emphasis added). Congress clearly enacted

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[9] Plaintiffs' attack on the "materiality"/"necessity" of these checkboxes is discussed in Part I.A.2.b., *infra*.

the "check the box" citizenship requirement as a "*new anti-vote fraud provision*." H.R. Rep. 107-807, Report on the Activities of the Committee on the Judiciary, 2003 WL 131168, at *80 ("voter registration applicants must specifically affirm their American citizenship"). In fact, this provision is listed as one of seven anti-fraud provisions in the Report. *See id.* And Congress likewise fully understood and expected that the check-box requirement would be enforced and incomplete applications returned to the applicants and not processed until completed. See 148 Cong. Rec. S10488, S10493 (October 16, 2002) (Sen. McConnell: "This legislation requires that voter registration applications contain a question asking whether the applicant is a U.S. citizen and boxes for the applicant to answer the question by checking 'yes' or 'no.' If neither box is checked, the election official must return the application to the individual with instructions to complete the form. In effect, we have created a second-chance registration opportunity. The individual's registration application cannot be processed and the individual cannot be registered unless the citizenship question is answered-and answered affirmatively." Sen. Bond: "The Senator from Kentucky has accurately described the intent and effect of this provision."); Id. (Sen. Bond: "Some jurisdictions simply discard registration applications or do not process the application when an individual does not answer the citizenship question. Other jurisdictions register individuals even though

the individual did not answer the citizenship question. *Both of these scenarios threaten the integrity of Federal elections*.") (emphasis added).

The suggestion that the citizenship checkbox is redundant with the oath and hence immaterial and unnecessary simply ignores federal law, which explicitly requires both the checkbox and the oath and has incorporated those allegedly redundant requirements into the federal form itself. The nationwide voter registration form promulgated by the Election Assistance Commission ("EAC")[10] requires applicants to both (1) check a box affirming U.S. citizenship and (2) swear that "I am a United States citizen." *See* EAC Publication, entitled "Register To Vote In Your State By Using This Postcard Form and Guide," Revised 10/29/2003 (available at "www.eac.gov/register_vote_forms.asp"). Thus, the EAC also recognizes that both inquiries are necessary and material elements of voter registration applications.

Indeed, HAVA is not silent on this issue. Section 15483(b)(4)(B) – in a section appropriately entitled "Incomplete Forms" – states the following:

> If an applicant for voter registration fails to answer the question included on the mail voter registration form pursuant to subparagraph (A)(i) ["Are you a citizen of the United States of America?"], the registrar shall notify the applicant of the failure and provide the applicant

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[10] The Federal Election Commission "transferred to the Election Assistance Commission" the responsibility for creating the Nationwide Voter Registration Form. *See* www.fec.gov/votregis/vr.shtml.

> with an opportunity to complete the form in a timely manner **to allow for the *completion* of the registration** form prior to the next election for Federal office (subject to State law).

42 U.S.C. § 15483(b)(4)(B) (emphasis added). This provision is clear that the form is not deemed complete until the applicant checks the box in the affirmation next to the question, "Are you a citizen of the Unites States of America?" If, as Plaintiffs suggest, the Application must be deemed complete as a matter of law without the required response to the citizenship question, then the referenced language of the statute serves no purpose. Congress would not have intended for the registrar to be required to spend the time and money to send a notice to applicants with incomplete forms just to satisfy some idle curiosity and would not have inconvenienced the applicant with an utterly meaningless act. *See Ced's Inc.* v. *U.S. E.P.A.*, 745 F.2d 1092, 1100 (7th Cir. 1984) ("We will not interpret a statute to require a meaningless act . . . if a more plausible interpretation is available.").

Finally, Plaintiffs' argument that an applicant is excused from checking the box mandated by Congress would rob 42 U.S.C. § 15483(b)(4) of any purpose or legal effect. This Court "look[s] askance at interpretations that render statutory language devoid of purpose and effect." *Florida Right to Life, Inc.* v. *Lamar*, 273 F.3d 1318, 1327 (11th Cir. 2001). Furthermore, Congress is presumed to know existing law. *See Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32, 111 S. Ct. 317, 325 (1990) ("We assume that Congress is aware of existing law when it passes leg-

islation."). It cannot be inferred that Congress intended to enact a law that violated the Voting Rights Act or the general provisions of the NVRA.

Legality of Felon and Mental Capacity Checkboxes. Plaintiffs do not dispute the materiality and necessity of an applicant's felon status or mental incapacity. Indeed, these eligibility requirements are expressly required by Florida law. § 97.052(2)(s), (t), Fla. Stat. (felon and mental incapacity, respectively). Moreover, numerous other states have the same or similar eligibility requirements. *See, e.g.*, National Voter Registration Form, Pls.' Compl., Exh. E) (listing, *inter alia*, Arizona, Delaware, Iowa, Kentucky, and Maryland as having similar eligibility requirements).

Instead, Plaintiffs quibble over Florida's means of ascertaining such information. Specifically, they suggest that a generic affirmation by the applicant in the oath that they are "qualified" to vote should be sufficient. Specific affirmations, they argue, are "immaterial" under the Voting Rights Act and "unnecessary" under the NVRA. They also contend that the State should determine the applicants' eligibility itself without bothering to ask the applicants for such information. Each of these attempted intrusions into Florida's election process should be rejected by the Court.

Indeed, the fact that the State has made *precisely the same determination* regarding the need to affirm non-felon and mental capacity status as Congress has

made regarding separate affirmation of citizenship should end this dispute as a matter of federal law. If a separate checkbox is deemed so *material* for emphasizing and enforcing the citizenship requirement that it is *mandated* by federal law, then *a fortiori* the exact same requirement is *material* for the unchallenged substantive requirements regarding felons and mental competency.

Much like the citizenship checkboxes mandated by HAVA, the felon and mental capacity "checkboxes" require applicants to make an affirmative and volitional indication of their status. If such an independent volitional indication of qualification is deemed by Congress and the EAC to be material and valuable regarding the citizenship requirement, then there is no basis whatsoever for finding them immaterial regarding the other eligibility requirements in Florida.

Anti-fraud measures, such as those challenged here, are not inconsistent with the "materiality" provision of the Voting Rights Act or the "necessity" provision of the NVRA. For example, the court in *Howlette* v. *City of Richmond, Virginia*, 485 F. Supp. 17, 22-23 (E.D. Va.), *aff'd*, 580 F.2d 704, 705 (4th Cir. 1978) (affirming District Court's ruling for the reasons stated in the lower court's order) rejected a challenge brought under the Voting Rights Act's "materiality" provision in upholding a notarization requirement for petition signatures as an anti-fraud measure.[11]

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[11] The NVRA of 1993 specifically proscribed requiring notarizations for mail-in voter registrations. *See* 42 U.S.C. § 1973gg-7(b)(3). The checkboxes at issue im-

The court's reasoning in that case applies with equal (or greater) force here. It stated as follows:

> In the Court's view, the requirement of individual notarization of each signature on a petition seeking a referendum is material in several respects. ***First,*** *the individual notarization requirement impresses upon the signers of the petitions the seriousness of the act of signing a petition for a referendum.* ***Second,*** *the individual notarization requirement dissuades non-qualified persons from signing the names of qualified voters by subjecting those who take the oath to potential criminal liability for perjury.* ***Third,*** *the requirement that each person signing the petition appear and make oath before a notary will often provide an additional, neutral witness to the signing, further aiding the City in discouraging and prosecuting fraud and misrepresentation.*

Howlette, supra. See also Hoyle v. *Priest,* 265 F.3d 699, 704-05 (8th Cir. 2001) ("Requiring that petition signers be qualified electors simply protects the state and its citizens against both fraud and caprice, valid concerns considering the time and expense needed to undertake the initiative process. We conclude that the challenged practice is material, and thus outside the scope of" the materiality provision.).

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pose a much lighter burden on applicants than notarizations and are not specifically proscribed anywhere in federal law. Rather, the use of checkboxes are *expressly mandated* for affirming citizenship under HAVA. Certainly, if the notarization requirement is consistent with the Voting Rights Act and legal but for a specific prohibition subsequently adopted by the NVRA, a state's use of the checkboxes containing its specific eligibility requirements must be consistent with the Voting Rights Act.

The Secretary of State is given discretion regarding the time, place, and manner of administering elections. *See Storer* v. *Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 1279 (1974) ("[T]he States have evolved comprehensive . . . election codes regulating in most substantial ways . . .the time, place, and manner of holding primary and general elections [and] the registration and qualifications of voters."); *Burdick* v. *Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 2063 (1992) (a state may impose "reasonable, nondiscriminatory restrictions upon the . . . rights of voters"); *id.* at 2067 ("[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system.").

Federal law expressly provides states the authority to administer their respective eligibility requirements. Title III of HAVA governs states' election technology and administration requirements for federal elections. *See* 42 U.S.C. §§ 15481 to 15485. Specifically, Title III provides standards for voting systems, provisional voting, and voter registration requirements, among other items. *See id.* §§ 15481 to 15483. HAVA establishes minimum requirements, but does not prevent states from establishing requirements, "more strict," but not "inconsistent with," HAVA's requirements. *Id.* § 15484. The felon and mental capacity "checkboxes" emanate from the State's inherent right to administer the election process.

B. THE NUMERIC IDENTIFIER REQUIREMENT IS FULLY CONSISTENT WITH FEDERAL LAW.

HAVA also required that States ask applicants to provide unique identifying numbers from at least one of the following: a current driver's license, social security number (last four numbers), or state identification. *See* 42 U.S.C. § 15483(a)(5)(A). Under the Florida Voter Registration Act ("FVRA"), a voter registration application that does not contain an identification number is incomplete and cannot be accepted. The FVRA requires the applicant to provide "[t]he applicant's Florida driver's license number, the identification number from a Florida identification card under s. 322.051, or the last four digits of the applicant's social security number." *See* § 97.053(5)(a)(5), Fla. Stat. (2004). Plaintiffs claim that by requiring applicants to provide their Florida driver's license numbers, Florida identification card numbers, or partial social security numbers to register to vote, the Secretary of State has required immaterial information in violation of 42 U.S.C. § 1971(a)(2)(B). That claim, however, founders on the undeniable fact that Congress itself has required such numeric identifiers for all states beginning in either 2004 or 2006, and hence has made a legislative determination that such information is indeed material and will be valuable in the administration of the election system and in the prevention of fraud. HAVA requires each state and jurisdiction to implement a computerized statewide voter registration list. Florida's computerized statewide voter registration list will be operative by January 1, 2006. Section

15483(a)(5) of HAVA prohibits states from accepting or processing an application unless it includes:

> (I) in the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number; or (II) in the case of any other applicant (other than an applicant to whom clause (ii) applies), the last 4 digits of the applicant's social security number.[12]

Florida is preparing for the implementation of this computerized system, and it must collect identification numbers from all registrants in order to have a system that will prevent fraud and comply with federal law. HAVA's anti-fraud scheme makes identification numbers a critical and material aspect of determining the eligibility of voters. (While the federal mandate to use such numbers is not yet in effect in Florida, the materiality of such numbers collected on the State's own initiative and in anticipation of the upcoming obligation, is more than sufficiently established by the fact that they will be required and hence must currently be deemed permitted as a material element in either the current or future administration of the election system.)

The identification number requirement helps ensure that the voter rolls do not contain individuals registered under false identities. The identification number

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[12] If an applicant has never been issued a driver's license or social security number and brings this fact to the attention of elections officials, "the State shall assign the applicant a number which will serve to identify the applicant for voter registration

therefore is critical to determining whether the voter qualifications have been met. An identification number aids the State in ensuring that non-citizens, convicted felons, and others not entitled to vote are not permitted to register. It helps ensure that the voter is registering under his or her true identity, as previously verified by the Department of Motor Vehicles or the Social Security Administration. With only a name and birth date, election officials would have a difficult time discerning if an individual had registered to vote in Florida multiple times. If an individual changes his or her name, an identification number ensures that an individual is not registered to vote under multiple names. The identification number also helps to identify deceased individuals and remove them from the list of registered voters. For all these reasons, Plaintiffs' claim under 42 U.S.C. § 1971(a)(2)(B) fails because applicants' identification numbers are material both to assessing their qualifications, verifying their identity, and to preventing voter fraud.

C. PLAINTIFFS FAIL TO STATE A CLAIM FOR INVIDIOUS DISCRIMINATION ON THE BASIS OF RACE OR ETHNICITY.

Regarding the alleged discrimination based on a disparate racial impact from Florida's facially neutral voter registration requirements, plaintiffs have simply failed to state a claim of discrimination. Section 2 of the Voting Right Act provides, in part:

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purposes." None of the Plaintiffs alleges that he or she did not have a driver's li-

> No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any State or political subdivision in a manner which result in a denial or abridgment of the right of any citizen of the United States to vote *on account of race or color*…

42 U.S.C. § 1973 (emphasis added). In order to establish a violation of Section 2, Plaintiffs must prove invidious discrimination. Specifically, Plaintiffs must "[p]rove either: (1) discriminatory intent on the part of legislators or other official responsible for creating or maintaining the challenged system; or (2) objective factors that, under the totality of the circumstances, show the exclusion of the minority group form meaningful access to the political process due to the interaction of racial bias in the community with the challenged voting scheme." *Osburn* v. *Cox*, 369 F.3d 1283, 1289 (11th Cir. 2004). Plaintiffs do not allege discriminatory intent. Nor do they allege sufficient facts that, under the totality of the circumstances analysis, establish discriminatory effect. Consequently, they fail to state a claim.

There are a host of factors relevant to determining whether a voting practice results in the denial to vote on account of race. *See Thornburg v. Gingles*, 478 U.S. 30, 36-38 (1986); *Muhammad Shabazz Farrakhan, et al v. State of Washington*, 338 F.3d 1009, 1015-16 (9th Cir. 2003) (listing nine, non-exhaustive factors). Among other things, in examining the totality of the circumstances, the Court must consider how the challenged practice interacts with social and historical conditions

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cense or social security number.

to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representative. *See Muhammad*, 338 F.3d at 1015-16.

Plaintiffs ignore the totality of the circumstances, choosing instead to alleged mere disparate impact. Even proof of such impact alone would be insufficient to establish discrimination. *See, e.g.*, *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 591 595 (9th Cir. 1997) (noting that a "bare statistical showing of disproportionate impact on a racial minority does not satisfy the § 2 'results' inquiry" and approving the district court's observation that "the observed difference in rates of home ownership between non-Hispanic whites and Africa-Americans *is not substantially explained by race but is better explained by other factors independent of race* which adequately rebutted any inference of racial bias that the [disparate impact] statistics might suggest") (emphasis added) Indeed, Plaintiffs do not even allege facts sufficient to make a prima facie case that there *is* a disparate impact at all, much less that it is due to the registration requirements or invidious discrimination. The only data they cite are alleged statistics that African Americans submitted 36 percent of incomplete application in Miami-Dade County, 37 percent of incomplete applications in Broward County, and more incomplete applications than any other group in Duval County. (Pls.' Mem. of Law, at p. 14). Such numbers are meaningless, however, absent information about what percentage application in total were submitted by African Americans. Given the highly

active get-out-the-vote and registration efforts targeting African American voters, it seems quite likely that African Americans would form a disproportionate percentage of new registrants. Thus, if 40% of new applications were from African Americans, then the cited percentages of incomplete applications might be perfectly in line with their relevant numbers and in fact might represent a lower incompleteness *rate* than other groups. By citing only gross numbers, with no basis for comparison, Plaintiffs tell this Court absolutely nothing about whether a disparate impact even exists and hence have not satisfied their burden of stating a prima facie case of discrimination.[13] Given such deficiencies in their allegations, Plaintiffs' likelihood of success on their discrimination claim at this point is nil.

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[13] The statistics cited in the Diaz Complaint, paragraph 59, at page 18, are no better. Plaintiffs claim that while "Blacks comprise only 17% of the *registered* voters in Broward County," they constitute more than one-third of incomplete applications, in Broward. They give a ratio of 20% / 35% for Miami-Dade County. But the number of registered voters is plainly the wrong denominator for assessing the relative error rate of *new* applications given that previously registered voters have nothing to do with such error rates. At a minimum, the baseline should be the percentage of *submitted* applications, and must take into account the relative percentage of prospectively *eligible* voters within the population. (Given the low previous registration rate, there are far more unregistered but prospectively eligible voters in the African American community, and hence their application rate during this election cycle could be expected to be out of proportion to their prior registration rate. There is simply a bigger pool of new candidates for first time registration.) Furthermore, to assume that an incomplete application is simply a *mistake*, rather than reflective of *actual* ineligibility – *i.e.*, the unwillingness to check a box falsely – has absolutely no basis. Indeed, Plaintiffs do not even allege as much and hence the generic claim of disparate impact is empty.

D. PLAINTIFFS FAIL TO STATE ANY CONSTITUTIONAL DUE PROCESS VIOLATION CONCERNING THE ALLEGED LACK OF TIMELY OPPORTUNITY TO CURE INCOMPLETE REGISTRATION FORMS.

Plaintiffs allege a violation of procedural due process resulting from the application of two Florida statutes that were admittedly obeyed by the supervisors of elections. First, Florida law requires that twenty-nine days before the election, "the registration books must be closed . . . and must remain closed until after that election." *See* § 97.055, Fla. Stat. (emphasis added). Second, Florida law requires the supervisors to notify each applicant of the disposition of the applicant's voter registration application, and if the application was incomplete, "the supervisor must request that the applicant supply the missing information in writing and sign a statement that the additional information is true and correct." *See* Fla. Stat. § 97.073. Plaintiffs allege that they were unable to register to vote because the notification of their incomplete application arrived after the registration books were closed on October 4, 2004. These claims do not rise to the level of a deprivation of procedural due process.

The notification requirements and the book closing requirements are part of a complex statutory scheme that was enacted by the legislature to prevent voter fraud, keep registrants informed of the status of their applications, and ensure the orderly operation of the election. The book closing deadline is an important part of this scheme and its constitutionality has been consistently upheld. "The statutory

requirement that, as a qualification of voting in any election, one must be duly registered on the books of registration of a State at least thirty days before that election has been held perfectly valid and constitutional." *See Key* v. *Board of Voter Registration of Charleston County*, 622 F. 2d 88 (4th Cir. 1980); *see also Marston* v. *Lewis*, 410 U.S. 679, 681 (1973) ("[W]e are confronted with a recent and amply justifiable legislative judgment that 50 days rather than 30 is necessary to promote the State's important interest in accurate voter lists. The Constitution is not so rigid that the determination and others like it may not stand."); *Burns v. Fortson*, 410 U.S. 686 (1973) (holding that a 50 day cut-off for new voter registrations is Constitutional); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (holding that a 30 day cut-off for new voter registrations is Constitutional). As the Court said in *Marston*, ". . . a person does not have a federal constitutional right to walk up to a voting place on election day and demand a ballot. States have valid and sufficient interests in providing for some period of time prior to an election in order to prepare adequate voter records and protect its electoral processes from possible frauds." 410 U.S. at 680.

Plaintiffs do not deny that the supervisors provided them with notice of the disposition of their voter registration application. Plaintiffs concede that they each received letters from their respective supervisors of elections informing them that their application was incomplete and requesting that they supply the missing in-

formation. This is all that Florida law and Federal law require the supervisors to do, and they complied with their statutory obligation. *See* §97.073, Fla. Stat.; 42 U.S.C. § 1971gg-6(a)(2). Neither Florida nor Federal law imposes a specific time requirement on how quickly the supervisors must turn around voter registration applications. Neither the Secretary of State nor the supervisors of elections has violated any federal or state statute in the manner they provided the notice and in the manner in which they closed their books.

As a result of their failure to properly complete their applications, Plaintiffs are not permanently prevented from registering to vote. Even today, Plaintiffs are free to go to their supervisor of elections and provide the missing information. If the supervisor finds them eligible to vote after evaluating the missing information, they will be added to the voter registration rolls after November 2, 2004 to vote in the next election. *See* § 97.073, Fla. Stat. (2004). Plaintiffs do not allege that they have even attempted to complete their applications by supplying the missing information after receiving their notices from the supervisors of elections.

Plaintiffs claims are also deficient because they have failed to show that the time the supervisors of elections took to process their applications was so unrea-

sonable that it amounts to a Constitutional violation.[14] The greatest amount of time Plaintiffs allege passed between the submission of a registration application to the supervisor or elections and a determination of eligibility was about 40 days. Plaintiffs have not shown that taking 40 days to turn around a voter registration application is an unreasonably long amount of time, particularly when the supervisors of election were inundated with voter registration applications as the deadline for registering to vote approached. Indeed, one of the Plaintiffs alleges that the supervisor of elections took about 20 days to issue an eligibility determination. Plaintiffs have not shown that taking 20 days to process a voter registration application near the book closing time when the supervisors are receiving thousands of applications each day runs afoul of the Constitution.[15]

Plaintiffs have therefore failed to demonstrate that the Defendants' enforcement of Florida's statutory elections scheme resulted in any due process violations.

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[14] This argument assumes that Plaintiffs turned their applications directly in to the supervisors of elections. It appears that at least some of the Plaintiffs provided their incomplete registration applications to third party voter registration organizations, not affiliated with a state or county government. Plaintiffs have failed to demonstrate that these organizations turned their applications in on the day the plaintiffs filled them out.

[15] Plaintiffs do not allege that the alleged delays in processing their voter registrations were the result of an intentional act. Even if they were the result of some negligence, it still would not constitute a violation of procedural due process. *See Daniels* v. *Williams*, 474 U.S. 327 (1986) ("[T]he Due Process Clause is simply not implicated by a negligent act of an official....").

Plaintiffs admittedly submitted incomplete applications within weeks of the registration book closing deadline at a time when the county supervisors of elections were inundated with thousands of new applications each day. *See Rosario* v. *Rockefeller*, 410 U.S. 752, 757 (1973) (noting that if the plaintiffs' "plight can be characterized as disenfranchisement at all, it was not caused by [the challenged law], but by their own failure to take timely steps to effect their enrollment"). Nevertheless, Plaintiffs received the required notification and can complete their applications and register to vote for the next election when the registration books reopen. By doing so, Defendants provided Plaintiffs with all the due process that was due. Plaintiffs have failed to show that any of their procedural due process rights were violated.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the District Court.

Respectfully Submitted,

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February 15, 2005

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of Appellee Hood complies with the 14,000 word type-volume limitation of Fed. R. Civ. P. 32(a)(7)(B) in that it contains 12,311 words, excluding the captions, table of contents, table of authorities, and certificates of counsel. The number of words was determined through the word-count function of Microsoft Word XP. Counsel agrees to furnish to the Court an electronic version of the brief upon request.

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Erik S. Jaffe

CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of February, 2005, I caused a copy of the foregoing Brief of Appellee Hood to be served by U.S. Mail, postage pre-paid, on each of:

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