

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

FLORIDA STATE CONFERENCE OF THE  
NATIONAL ASSOCIATION FOR THE  
ADVANCEMENT OF COLORED PEOPLE  
(NAACP), as an organization and representative  
of its members; *et al.*;

Plaintiffs,

v.

CASE NO. 4:07CV-402-SPM/WCS

KURT S. BROWNING, in his official capacity as  
Secretary of State for the State of Florida,

Defendant.

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**SECRETARY OF STATE’S REPLY TO PLAINTIFFS’  
SUPPLEMENTAL BRIEF CONCERNING STANDING**

Defendant Kurt S. Browning, in his official capacity as Secretary of State for the State of Florida (the “Secretary”), files this reply to Plaintiffs’ Supplemental Brief Concerning Standing (doc. 100).

**I. Plaintiffs Do Not Have Standing on Behalf of Their Members.**

An organization has standing to assert the injuries of its members only if its members would otherwise have standing to sue on their own behalves, the interests at issue are germane to the organization’s purpose, and the participation of the members is unnecessary. *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1170 (11th Cir. 2006). Plaintiffs, unable or unwilling to identify a single organizational member who has actually been or will imminently be injured by the challenged law, propose a novel application of this standard. They simply ask the Court to *assume* that the first requirement—that one or more of their members will suffer actual or

imminent injury and therefore have standing to sue on their own behalves—has been satisfied. Neither the law of this Circuit nor the facts of this case warrant such a leap of logic.

To establish associational standing, an organization must show injury, actual or imminent, to an organizational member. *Nat'l Alliance for the Mentally Ill v. Bd. of County Comm'rs*, 376 F.3d 1292, 1296 (11th Cir. 2004). This requirement applies not only where the plaintiff organization seeks to redress past injuries, but also where prospective relief is sought. *See, e.g., Anderson v. City of Alpharetta*, 770 F.2d 1575, 1577, 1583 (11th Cir. 1985) (finding no associational standing where plaintiff sought an “injunction affirmatively to require [a municipality] to provide public housing” but was unable to identify an injured member). The authority cited by Plaintiffs for a contrary principle—*NYC C.L.A.S.H., Inc. v. City of New York*, 315 F. Supp. 2d 461 (S.D.N.Y. 2004)—is not the law in the Eleventh Circuit.

Plaintiffs also cite *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007). In *Parents*, an association of the parents of children enrolled in Seattle School District No. 1 challenged the district’s policy of using race as a deciding factor in making admissions decisions. The standing question was not whether the association was able to identify a specific, injured member—all of its members had children whose admissions decisions were subject to the challenged policy—but whether the possibility that, despite the policy, a child might be enrolled in a preferred school rendered the injury too speculative. *Id.* at 2750-51. In addition, the Court noted a specific standing doctrine not applicable here, explaining that “one form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff.” *Id.* at 2751. Plaintiffs’ reliance on *Parents*, therefore, is unavailing.

Here, Plaintiffs have not identified even one member of their organizations who has or

will imminently be injured by the challenged law.<sup>1</sup> They have not even identified a member who is not registered to vote but who will imminently register to vote. Plaintiffs' assertion, moreover, that, in the future, there would be an "increased risk of injury" to its members—even if it were legally relevant, which it is not—is baseless. *See* doc. 100 at 17. The challenged law has been in effect for nearly two years, and continual improvements, including the codification of the override and notice provisions effective January 1, 2008, will decrease—not increase—the likelihood that Plaintiffs' members will suffer future injury. Plaintiffs have had ample opportunity to identify an injured member, but have not done so.<sup>2</sup> Because Plaintiffs have failed to identify even one member that has suffered, is suffering, or will imminently suffer injury in fact, they lack standing to sue on their members' behalves.

## **II. Plaintiffs Do Not Have Standing on Their Own Behalves.**

Organizational standing exists where (1) the organization has suffered a concrete and particularized injury in fact that is actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the defendant's challenged action; and (3) it is "likely," as opposed to merely "speculative," that a favorable decision would redress the injury." *Lujan v. Defenders of Wildlife*, 504 U.S. at 560-61. The organization must present specific, concrete facts showing that

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<sup>1</sup> Instead of identifying even a single member, Plaintiffs continue to refer to the 14,000 individuals whose applications remain pending because of the challenged statute. But those individuals do not help the Plaintiffs unless they can claim them among their members—which they do not. Plaintiffs also suggested at the hearing—but not in their papers—that "only" 363,341 applications have been subject to the matching process. That suggestion is not based on evidence (they cite only their counsel's declaration relating to reports on the Internet), and the actual number of applications that went through the matching process between January 1, 2006, and October 1, 2007, is more than 765,000. But of all the numbers involved in this case, the most critical is the number of harmed members identified by Plaintiffs: Zero.

<sup>2</sup> They have not been bashful, though, about identifying others who might have been harmed. *See, e.g.*, doc. 90 at 10 n.9 (describing the plight of "83-year-old Gloria Barea," "70-year-old Raama Minguela," and two members of the military). Plaintiffs' reliance on these individuals' stories—instead of their own members'—is telling.

it “has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983).

***A. The Alleged Frustration of Plaintiffs’ Mission Is Insufficient to Establish Injury in Fact.***

The tendency of a law to counteract an organization’s stated mission is inadequate to establish injury in fact. *ACORN v. Fowler*, 178 F.3d 350, 361 n.7 (5th Cir. 1999) (A showing “that an organization’s mission is in direct conflict with a defendant’s conduct is insufficient, in and of itself, to confer standing on the organization to sue on its own behalf.”). Plaintiffs cite no case in which the frustration of an organization’s mission, without more, was held to confer standing. Such a theory of standing would undermine the vitality of the doctrine by permitting any organization to challenge any law, regardless of its effect on the organization itself, that might operate adversely to the ideals set forth in its mission statement. It would also facilitate the fabrication of standing by allowing any person to challenge any law simply by forming an organization and adopting a mission statement that conflicts with the challenged law. Indeed, Plaintiffs appear to acknowledge this limitation and contend that standing exists where the challenged law will “operate to make the organization’s ability to achieve its mission more difficult.” Doc. 100 at 3. This proposed analysis relates to the activities of the organization and merges into Plaintiffs’ allegation that the challenged law diverts their resources. Accordingly, the fact that the challenged law might militate against Plaintiffs’ organizational objectives neither establishes injury in fact nor confers standing.

***B. The Alleged Diversion of Plaintiffs’ Resources is Insufficient to Establish Injury in Fact.***

In support of their position that a voluntary allocation of resources in response to a challenged law constitutes injury in fact, Plaintiffs rely exclusively on the line of cases that

originates with *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). These cases are not applicable to the present facts. In *Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333 (N.D. Ga. 2007), the NAACP challenged a state law that required voters to present photo identification at the polls. To establish standing, the NAACP contended that “it may have to re-allocate resources to educate its members concerning the Photo ID requirement and to ensure that its members who lack Photo ID cards obtain [them].” *Id.* at 1372. The Court rejected the applicability of *Havens*, explaining that *Havens* and its progeny:

are Fair Housing Act cases, which involve special sets of circumstances. Plaintiff NAACP simply has not demonstrated that the United States Court of Appeals for the Eleventh Circuit would extend the standing analysis applied in those Fair Housing Act cases outside the context of housing discrimination, and the Court therefore declines to do so here.

*Id.* (citation omitted); accord *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698, 761 n.86 (D. Or. 1997) (indicating that *Havens* might “reflect a doctrine of necessity,” since the denial of standing to “testers” of discriminatory practices could render the Fair Housing Act’s anti-discrimination provisions unenforceable). Here, as in *Billups*, the *Havens* analysis is inapplicable and insufficient to confer standing.

Even if *Havens* applies (which it does not), Plaintiffs have failed to allege the supposed diversion of their resources with the necessary specificity. In *Louisiana ACORN Fair Housing v. LeBlanc*, 211 F.3d 298, 305-06 (5th Cir. 2000), the Court held that a fair housing organization was without standing to bring an action to redress violations of the Fair Housing Act where the alleged diversion of the organization’s resources was not established with particularity. The organization’s executive director testified that the assistance it provided to the prospective tenant “started to take over an inordinate amount of our work time and staff time” and that it detracted from the organization’s “activities in other areas, [including] outreach and education, research

and monitoring, intakes and investigations of complaints.” *Id.* at 305. In all, he estimated that the organization devoted at least 96 hours of staff time to combat the alleged violation. *Id.* The Court, however, found that “[n]one of [the] testimony at trial demonstrates a concrete and particularized injury.” *Id.* at 306. The testimony “neither mentioned any specific projects [the organization] had to put on hold . . . nor did [it] describe in any detail how [the organization] had to re-double efforts in the community to combat discrimination.” *Id.* at 305. Because the alleged injury was “conjectural, hypothetical, and speculative,” it did not establish standing. *Id.* at 306.

*Elend v. Basham*, 471 F.3d 1199 (11th Cir. 2006), similarly illustrates the degree of specificity necessary to establish a concrete injury. In *Elend*, protestors challenged the alleged policy of the U.S. Secret Service to constrain protestors to “Protest Zones.” *Id.* at 1206. Seeking an injunction prohibiting the contested practice, the protestors sought to establish injury by asserting that they “fully intend to peacefully express their viewpoints in the future in a manner similar to their activities . . . at other locations around the country.” *Id.* The Court held that the alleged injury was not “imminent and concrete enough for judicial consideration.” *Id.*

Assuming that a protest would take place, the Court noted that, “[g]iven . . . the unspecified details of where, at what type of event, with what number of people, and posing what kind of security risk, we are being asked to perform the judicial equivalent of shooting blanks in the night.” *Id.* at 1206-07. The protestor’s indefinite allegation of future injury “fail[ed] to provide any limitation on the universe of possibilities of when or where or how such a protest might occur.” *Id.* at 1209. Nor did the Court find past or ongoing injury from which to infer future injury, observing that the protestors had not protested the president in four years. *Id.* at 1208-09. Comparing the speculative promise of future action to the declared but general intent of the plaintiff in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), to return to Sri Lanka to observe

endangered species, the Court concluded the protestors failed to establish actual or imminent injury. *Id.* at 1209.

The record in this case is equally devoid of specific, concrete facts establishing injury in fact. Plaintiffs do not assert past injury, conceding that they conducted “little or no” voter registration activity in 2006 or 2007. Doc. 100 at 11. Though they attribute their inactivity to a state law regulating third-party voter registration organizations, *see id.*, the enforcement of that law was enjoined in August, 2006, *see League of Women Voters of Florida v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006), leaving ample opportunity for Plaintiffs to conduct voter registration activities in advance of the 2006 general election and throughout 2007. They did not do so. They nevertheless ask the Court to credit their generalized assurances that they will conduct voter registration activities in the future, without any concrete plans or particularized facts to support the assertion. As in *Elend*, Plaintiffs fail to specify the details of their asserted plans and offer no “limitation on the universe of possibilities of when or where or how” those activities might be conducted or the injuries sustained. 471 F.3d at 1209. As in *Louisiana ACORN*, Plaintiffs fail to mention “any specific projects [they] had to [or will] put on hold.” 211 F.3d at 305. Thus, while Plaintiffs claim—and merely claim—that they will respond to the challenged law by assisting voter registration applicants, they do not describe, either in detail or in general, the activities *from which* resources might be diverted, or, consequently, the manner in which the projected injury will be sustained. Because Plaintiffs’ future plans are inchoate, the injuries they assert, unsupported by past or ongoing injury or demonstrable and particularized imminent injury, are purely speculative. And, because they have not established concrete and imminent plans, Plaintiffs have failed to demonstrate that their injury would “proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury

would have occurred at all.” *31 Foster Children v. Bush*, 329 F.3d 1255, 1266 (11th Cir. 2003) (quoting *Lujan*, 504 U.S. at 559).

### **III. Plaintiffs Do Not Have Third-Party Standing.**

In general, “a litigant must assert his own legal rights and interests and may not ordinarily rely on the rights and interests of third parties.” *Harris v. Evans*, 20 F.3d 1118, 1121 (11th Cir. 1994). The “prohibition against third-party standing promotes the fundamental purpose of the standing requirement by ensuring that the courts hear only concrete disputes between interested litigants who will frame the issues properly.” *Id.* The U.S. Supreme Court, however, has framed a narrow exception to the prohibition of third-party standing. Specifically, it has:

[R]ecognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: the litigant must have suffered an “injury-in-fact,” thus giving him or her a “sufficiently concrete interest” in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party’s ability to protect his or her own interests.

*Powers v. Ohio*, 499 U.S. 400, 409-12 (1991). Plaintiffs allege that, under this standard, they may assert the claims of “the eligible members of their communities”—namely, members of the Latino, Haitian, and African-American communities. *See* doc. 100 at 20, 22-23. Because they have neither pled nor established the elements of third-party standing, Plaintiffs cannot assert the legal claims of others.

In *Kowalski v. Tesmer*, 543 U.S. 125 (2004), an association of criminal defense attorneys challenged a state law denying the appointment of appellate counsel to indigent criminal defendants following plea-based convictions. The attorneys alleged that, though they were unable to identify any specific clients or potential clients harmed by the challenged law, they could assert third-party standing on behalf of future indigent defendants. *Id.* at 130-31. The Court held that the attorneys did not have a “close relationship” with hypothetical, unknown

clients. “The attorneys,” the Court explained, “[did] not have a ‘close relationship’ with their ‘alleged clients’; indeed, they [had] no relationship at all.” *Id.* at 131. In addition, the Court concluded that no hindrance prevented indigent criminal defendants from protecting their interests by challenging the state law, despite the absence of counsel. *Id.* at 132.

Here, Plaintiffs claim a sweeping entitlement to assert the rights of broad classes of the population, including all Latino-, Haitian-, and African-Americans in Florida who might at any time apply for voter registration and suffer injury because of the challenged law. Their relationship with the individuals that comprise these classes, like the relationship between the attorneys and possible future clients in *Kowalski*, is hypothetical and nonexistent. The specific individuals that Plaintiffs might assist in the registration process, like the criminal defendants in *Kowalski* who might stand in need of appellate counsel, are unknown—an insufficient basis for third-party standing under recent Supreme Court precedent. And, like the criminal defendants in *Kowalski*, members of the Latino, Haitian, and African-American communities are able to protect their interests. The allegation that the override and notice procedures of the challenged law would baffle applicants’ attempts to vindicate their rights is not only insulting to Plaintiffs’ constituents, but is also belied by the fact that the majority of applicants whose applications have been returned to the Supervisors of Elections have in fact become registered. *See* doc. 85 at 2. Plaintiffs’ remarkable suggestion, moreover, that racial and ethnic minorities are obstructed from protecting their interests by “unfamiliarity with the election process” and “culturally specific barriers” must be rejected.

**WHEREFORE**, the Secretary respectfully requests that the Court enter an order dismissing this action for lack of subject matter jurisdiction.

*/s/ Andy Bardos*

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**CERTIFICATE OF SERVICE**

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