

**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.*,

Case No. 4:07-cv-402-SPM-WCS

Plaintiffs,

vs.

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

Defendant.

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**PLAINTIFFS' SUPPLEMENTAL BRIEF CONCERNING STANDING**

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It is undisputed that thousands of eligible voters will be unregistered in 2008 due solely to § 97.053(6), Fla. Stat. (“Subsection 6”). At the request of the Court, Plaintiffs submit this supplemental brief in further support of their standing to contest this impending disenfranchisement. As explained below, Plaintiffs’ standing is secure under the applicable legal standards on the established factual record. First, Plaintiffs have standing to assert claims on their own behalf, because Subsection 6 has frustrated and will continue to frustrate their missions, and will cause them to divert resources to counteract the unlawful effects of Subsection 6 during the 2008 registration cycle. Second, Plaintiffs have standing to bring claims on behalf of their own members, whose rights to register and vote will be impaired by Subsection 6. Finally, Plaintiffs have standing to bring claims on behalf of third-party members of the communities that they serve, whose rights to register and vote will be impaired by Subsection 6.<sup>1</sup>

## **ARGUMENT**

### **I. Plaintiffs Have Standing to Bring Claims on Their Own Behalf Because Subsection 6 Frustrates Plaintiffs’ Missions and Forces Them to Divert Resources to Counteract its Unlawful Effects**

This case has been brought by three organizations: the Florida State Conference of the NAACP (“Florida NAACP”), Southwest Voter Registration and Education Project (“Southwest Voter”) and the Haitian American Grassroots Coalition (“HAGC”). An

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<sup>1</sup> Plaintiffs need show only that one plaintiff has standing. *See Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1003 n.10 (11th Cir. 2004). *See also Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) (holding that if a court finds that one of the named plaintiffs has standing to pursue the asserted claims, it need not find that the other plaintiffs also have standing for those plaintiffs to remain in the suit); *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1170 (11th Cir. 2006) (same).

organization has standing to seek injunctive relief on its own behalf if: (i) it will suffer an imminent injury in fact that is “concrete and particularized”; (ii) there is a causal connection between the injury and the conduct complained of; and (iii) it is “likely” as opposed to “speculative” that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

**A. Plaintiffs Have Shown Concrete and Imminent Injury in Fact**

An organization may establish an imminent and concrete injury in fact by proving that a challenged practice will either frustrate its mission or cause it to divert resources to counteract or compensate for the unlawful practices in question, interfering with its programmatic activities. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Crawford v. Marion County Election Bd.*, 462 F.3d 949, 951 (7th Cir. 2007) (citing *Havens*), *Fla. Democratic Party v. Hood*, 342 F. Supp.2d 1073, 1079 (D. Fla. 2004) (same). Though the injury must be concrete, “it need not measure more than an ‘identifiable trifle,’” *ACORN v. Fowler*, 178 F.3d 350, 358 (5th Cir. 1999) (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973)).

*1. Frustration of Mission*

In the submission styled a Supplemental Response to Plaintiffs’ Motion for Preliminary Injunction and Motion to Dismiss for Lack of Subject Matter Jurisdiction (“Standing Mot.”), Defendants cite *ACORN v. Fowler* for the unremarkable proposition that the fact that a challenged practice is in conflict with an organization’s mission is insufficient to confer standing. Standing Mot. at 6. Rather, an organization must show

both a conflict and an injury resulting from that conflict: a showing that the challenged practice will actually operate to make the organization's ability to achieve its mission more difficult. *Fowler*, 178 F.3d at 361-62 & n.7. Plaintiffs have done so, and more.

Each Plaintiff has testified that registering voters and civic engagement, and thereby empowerment of the minority community it primarily serves, are critical to its core mission. Subsection 6 prevents eligible voters from registering to vote and voting, with disproportionate disenfranchising effect among the very communities Plaintiff organizations serve. By preventing its constituents from registering to vote, Subsection 6 interferes with each Plaintiff's mission in a way that makes each Plaintiff's ability to register voters and empower its client community more difficult.

Imminent injury in this respect is clear on the existing record. Southwest Voter testified that Subsection 6 will frustrate its mission by preventing Latinos from registering to vote and decreasing their political power. *See, e.g.*, Fernandez Dep. 41:16–43:5 (Southwest Voter's mission is to politically empower minority communities through voter registration, voter education, voter mobilization, and cultivating community leaders); *id.* 8:9–9:4; 16:25–17:20; 18:9–18:23 (describing voter registration projects among Latino communities in Florida in past election cycles); Exh. A<sup>2</sup> (Southwest Voter Training Manual, Description of Southwest Voter's mission); Exh. B (Southwest Voter Training Manual, Description of the importance of the Latino vote); Fernandez Dep. 40:23–41:8 (Southwest Voter has serious concerns about its ability to

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<sup>2</sup> This exhibit, like each other exhibit attached to this brief, is a true and correct copy of an excerpt of a document produced in its entirety to Defendant during discovery in this case.

effectively register voters under the Subsection 6 regime); *id.* 42:4–42:9 (“There are so many people that need to be registered to vote. That is what [Southwest Voter] will be doing in '08 and [Subsection 6] will hold us back because it will keep us from getting people who should be on the rolls and want to be on the rolls from getting on the voter rolls.”); Reply Decl. of Glenn Burhans, Jr., exh. 2.

HAGC testified that Subsection 6 will harm its mission by decreasing the political participation of Haitian Americans, decreasing the opportunities of electoral success for candidates of Haitian-American background, and limiting the opportunities for the Haitian-American communities to elect candidates of choice. *See* Lafortune Dep. 7:2–7:5 (“The purpose of the coalition work is to work for the empowerment and representation of Haitian nationals in the U.S.”); *id.* 9:18–10:17 (HAGC conducts election day monitoring and voter education for the Haitian-American community); *id.* 50:6–50:18; 54:7–54:12; 22:6–22:18 (HAGC member groups conduct voter registration and some member groups will do so prior to the January elections); *id.* 31:4–32:18; 49:2–49:14; 14:9–17:24 (Subsection 6, by preventing eligible applicants from being registered, impacts the Haitian-American community’s ability to show its voting strength and to elect candidates of its choice.).

The Florida NAACP testified that Subsection 6 frustrates its mission by discouraging voter registration and voter participation within the African-American community. *See* Exh. C (Florida NAACP Strategic Plan, Strategic Initiative on Political Empowerment); Neal Dep. 7:9–7:15 (the mission of the Florida NAACP is to eradicate discrimination against minorities, particularly African-Americans); *id.* 42:24–45:23

(Subsection 6, through its impact on African-American applicants and voters, frustrates the Florida NAACP's ability to register and mobilize individuals in the African-American community and will consequently hurt their ability to raise funds for their work); *id.* 46:20–49:24 (Subsection 6 will impede the Florida NAACP's goal of registering eligible African-American individuals for the 2008 election and ensuring those individuals can meaningfully participate on election day); Reply Decl. of Glenn Burhans, Jr., exh. 2.

Additionally, although Plaintiffs need not show economic injury to show injury sufficient for standing, *Village of Arlington Heights v. Metro. Housing Development Corp.*, 429 U.S. 252, 263 (1977), Florida NAACP also testified that Subsection 6 will hurt its efforts to raise funds for the organization. Neal Dep. 45:8–45:20 (impact Subsection 6 will have on fundraising abilities). In all of these ways, Subsection 6 will frustrate Plaintiffs' missions in ways that cause tangible injury.

## 2. *Diversion of Resources*

Moreover, each Plaintiff has shown that Subsection 6 will interfere with its programmatic activities, causing it to divert resources to counteract the unlawful effects of the statute. The Supreme Court established that this interference and diversion of resources suffices to establish injury in fact for standing purposes in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

Defendant argues – without any rationale – that the *Havens* rule is confined to the Fair Housing Act. Standing Mot. at 7 n.5. This argument is illogical, and has been recognized as such. The *Havens Realty* Court found standing not because the challenged

practice concerned fair housing instead of voting rights, but because the practice caused injury to the organizational plaintiff's ability to serve its clients, and was not merely "a setback to the organization's abstract social interests." *Id.* The Eleventh Circuit applied the rule in the immigration context, well outside of the fair housing sphere, in *Haitian Refugee Center, Inc. v. Nelson*, 872 F.2d 1555, 1561 n.10 (11th Cir. 1989), *aff'd sub nom. McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 488 n.8 (1991). And indeed, the voting rights case cited by Defendant as evidence that *Havens Realty* has been confined to fair housing was *overturned* in this respect on appeal, with the Seventh Circuit citing *Havens Realty* as grounds for proper standing. *See Indiana Democratic Party v. Rokita*, 458 F. Supp.2d 775, 815-16 (S.D. Ind. 2006) (confining *Havens Realty* to fair housing claims); *Crawford v. Marion County Election Board*, 472 F.3d 949, 951 (7th Cir. 2007) (applying *Havens Realty*'s rule on diversion of resources to the voting rights claim at issue).<sup>3</sup>

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<sup>3</sup> *See also Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 611 & n.1 (1982) (Brennan, Marshall, Blackmun, and Stevens, JJ., concurring) (recognizing that, under *Havens*, standing is satisfied by an injury caused by interference with critical organizational activities); *Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990) (finding standing based on the "opportunity costs of discrimination").

Defendant relies heavily on *Common Cause/Georgia v. Billups*, 504 F. Supp.2d 1333 (N.D. Ga. 2007), which in turn relied exclusively in its analysis of organizational standing on *Indiana Democratic Party*. As explained above, however, the Seventh Circuit Court of Appeals squarely rejected the lower court's standing analysis in *Indiana Democratic Party*. Specifically, the Seventh Circuit — citing *Havens Realty* — held that the state law at issue "injures the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote." *Crawford*, 462 F.3d at 951.

Clearly, interference with an organization’s clear programmatic plans suffices to establish injury in fact. Here, while the specific nature of the diversion differs for each Plaintiff, the injuries are all consistent: by preventing the registration of eligible citizens, disproportionately from the communities that each Plaintiff serves, Subsection 6 will drain resources from each Plaintiff’s other worthwhile and important activities.

The record establishes that Subsection 6 will force Southwest Voter to divert resources to assist applicants whose applications have not been accepted as a result of this statute. Southwest Voter has specific and concrete plans to conduct significant voter registration and mobilization activities prior to the federal presidential election in 2008, much as it did in 2004 and before. Fernandez Dep. 20:16–21:3 (Southwest Voter’s plans to conduct voter registration drives in 25 to 30 communities in 2008, starting in early spring); *id.* 21:11–21:24 (Southwest Voter’s plans for Latino academies, voter registration, and “Get Out The Vote” activities in Florida in 2008); Exh. D (Southwest Voter planning document for 2008); Fernandez Dep. 16:25–17:20; 18:9–23 (describing voter registration and mobilization projects in 2004 and before).

Subsection 6 will prevent numerous eligible applicants from being registered, particularly eligible Latinos. Reply Decl. of Glenn Burhans, Jr., exh. 2; Decl. of Andrew Borthwick Supp. Pls. Mot. for Prelim. Inj. (“Borthwick Decl.”) ¶ 39. As a result, Subsection 6 will force Southwest Voter to allocate time and resources to verify whether the applicants whose applications they submitted to election officials became registered and, for unregistered applicants, assist them in remedying any deficiency with their application. Fernandez Dep. 26:8–27:5 (explaining that Subsection 6 will force

Southwest Voter to verify that the applicants it seeks to register are successfully added to the registration rolls); *id.* 28:7–30:1 (voter verification and subsequent follow up with applicants will force Southwest Voter to divert its resources that could otherwise be spent on voter registration); *id.* 41:16–43:5; 27:8–27:20; 32:21–33:12; 43:24–44:24 (Subsection 6 will require that Southwest Voter divert resources from other programs to ensuring that its applicants become registered and assisting those who did not get registered).

Subsection 6 will also force Southwest Voter to devote resources to training its volunteers and employees as to how to conduct activities in the face of Subsection 6. Fernandez Dep. 28:7–30:1. Thus, as a result of Subsection 6, Southwest Voter will have fewer resources for its core voter registration, education, and mobilization activities. *id.* 43:24–44:24 (“It’s going to take money away from the job that we need to do.”).

HAGC has also established that Subsection 6 will interfere with its programmatic activities, forcing it to divert resources from its advocacy on language access and voting machine issues to assisting individuals who have not been registered. Specifically, the HAGC engages in election day monitoring and voter education and its member organizations conduct voter registration drives in the Haitian American community. LaFortune Dep. 50:6–50:18 (member groups are conducting voter registration and will continue to do so aggressively as the January elections approach); *id.* 40:15–40:22 (describing HAGC’s role in election day monitoring). Subsection 6 will necessitate that the HAGC devote staff time and resources that it would otherwise devote to other activities to educating the community about the hurdles imposed by Subsection 6. *Id.*

26:7–28:14; 48:12–49:1 (HAGC will need to divert resources from other registration activities to educate the community about Subsection 6). Additionally, Subsection 6 will force HAGC to expend resources on election day assisting and educating voters who have not “matched” and thus do not appear on the registration rolls, rather than assisting voters with other obstacles or challenges that they may face on election day. Lafortune Dep. 26:7–28:14; *id.* 35:6–37:11 (HAGC will have to chose between assisting voters with the new machines or helping those who have not been “matched”). Additionally, HAGC testified that Subsection 6 may likely result in tangible expenses, like having to operate an additional telephone line to field questions and respond to the problems brought about by Subsection 6. *Id.* 26:7–28:14. Consequently, as a result of Subsection 6, Plaintiff will have fewer resources to devote to its core civic engagement, voter education, and voter assistance activities. *Id.* 26:7–28:14; 35:6–37:11; 48:12–49:1.

Finally, the Florida NAACP has established that Subsection 6 will interfere with its activities and divert its resources from other ends. The Florida NAACP conducts ongoing voter registration and hopes to increase its voter registration activities significantly in 2008 in anticipation of the presidential election. Neal Dep. at 11:22–12:23; 37:18–37:25; 14:2–14:19; 20:10–20:23; 21:19–22:1; 49:2–49:24 (describing the Florida NAACP’s voter registration program and activities); *id.* 15:4–16:19 (describing the Florida NAACP’s role in coordinating and directing registration drives). Subsection 6 will cause the Florida NAACP to divert its resources from these traditional registration activities to assist applicants that Subsection 6 has blocked from registering. As in the past, the Florida NAACP will follow up with individuals whom it seeks to register to

ensure that they have become registered. *See* Exh. E (2004 email from Miami Dade NAACP branch regarding verifying that voter registration applicants are registered); Neal Dep. 18:19–19:4; 30:3–31:4 (local NAACP branches are required to verify if applicants are registered). Because of Subsection 6, the Florida NAACP will need to expend resources on resolving matching issues and attempting to solve the difficulties of these “unmatched” applicants, and will have fewer resources available for its core voter registration activities. *Id.* 42:21–45:23; 23:20–24:22 (Subsection 6’s impact on African-American applicants will cause the Florida NAACP to devote more resources to ensuring its applicants are registered, particularly in the time before election day when they normally conduct get-out-the-vote operations); *id.* 26:25–27:7 (the Florida NAACP’s voter education includes informing the community about this statute). Further, the Florida NAACP monitors precincts on election day to ensure that eligible voters are able to meaningfully participate. *Id.* at 45: 21-45: 23 (explaining that the Florida NAACP conducted election day monitoring in 2006). To the extent that the Florida NAACP needs to assist individuals who have not been registered because of Subsection 6, it will have fewer resources to assist other individuals on election day. *Id.* 46:20–49:24. Therefore, as a result of Subsection 6, the Florida NAACP will have fewer resources to devote to its core voter registration, education, and election day monitoring activities.

Despite the ample evidence that Plaintiffs wish to expend their resources on registering eligible citizens and not on correcting problems with the state’s matching process, Defendant argues that to the extent that Subsection 6 will force Plaintiffs to divert resources in future elections, such diversion is “voluntary” and does not suffice to

establish organizational standing. Standing Mot. at 6-7. Its purported evidence for the “voluntary” nature of the interference is that Plaintiffs have not already reallocated substantial resources to confront Subsection 6’s disenfranchising effect in 2006 and 2007. *Id.* at 6.

First, as the case it cites makes clear, Defendant mistakes the nature of the “voluntary” inquiry. A plaintiff may not manufacture an injury solely by claiming the legal costs of filing suit, *National Taxpayers Union v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995), but it may claim injury when a challenged practice “perceptibly impair[s]” its normal activities and it must change those activities to respond to the unlawful practice, *id.* (citing, with approval, *Havens Realty*).<sup>4</sup> Here, Plaintiffs do not intend to divert resources because they wish to challenge Subsection 6; they challenge Subsection 6 because it will cause them to divert their resources.

In this prospective challenge, Defendant also ascribes altogether undue significance to the lack of clear evidence of 2006 and 2007 harm to Plaintiffs’ activities. Because of State limits on voter registration activity in 2006 and 2007 that have since been enjoined, *League of Women Voters of Florida v. Cobb*, 447 F. Supp.2d 1314 (S.D. Fla. 2006), Plaintiffs could conduct little to no structured voter registration activity in 2006 and 2007, including programs to assist applicants unregistered because of Subsection 6. Fernandez Dep. 13:9–13:21; 17:8–17:11; 24:15–24:17; 27:8–27:20; Neal Dep. 32:25–33:17; 34:13–34:25. Moreover, as Defendants have continually reminded this

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<sup>4</sup> Moreover, as the *National Taxpayers Union* court clearly stated “[i]t is well-recognized that the standing inquiry in tax cases is more restrictive than in other cases.” 68 F.3d at 1434.

Court, there was no state notice provision specific to Subsection 6 in 2006 and 2007; members of Plaintiffs' communities who were rejected by the rule rarely knew *why* they were rejected, and groups like Plaintiff organizations had no practical opportunity to identify the problem when it occurred, much less divert resources to address it. *See, e.g.*, Lafortune Dep. 39:4–39:20 (stating that HAGC first became aware of Subsection 6 in late 2006). Only after extensive research, and repeated demands for information that have – at last – produced meaningful information about the extent of the problem and the identity of affected registrants, are Plaintiff organizations able to assess how they would be forced to divert resources to combat Subsection 6 if it were allowed to remain in effect.

All of this evidence provides more than sufficient support that Plaintiffs' missions and programmatic activities will be frustrated by the operation of Subsection 6. Plaintiffs do not seek damages for injuries caused by Subsection 6's operation in previous elections. Complaint at 60-61. Accordingly, Plaintiffs need not demonstrate past injury.<sup>5</sup> With respect to the upcoming elections, the only elections relevant for the standing analysis, Plaintiffs have thoroughly demonstrated that injury in fact is imminent.

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<sup>5</sup> While a court may consider evidence of past harm when evaluating the likelihood of future injury, *see, e.g.*, *Covington v. Jefferson County*, 358 F.3d 626, 639 (9th Cir. 2004), a plaintiff can demonstrate that future injury is likely without proving past injury. *See e.g.*, *Ocean Advocates v. United States Army Corps of Eng'rs*, 402 F.3d 846, 859-60 (9th Cir. 2005) (finding standing for plaintiffs based upon the increased risk of an oil spill, even though the plaintiffs had never before been injured by an oil spill); *Friends of the Earth, Inc., v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000) (“The Supreme Court has consistently recognized that threatened rather than actual injury can satisfy Article III standing requirements. . . . Threats or increased risk thus constitutes cognizable harm.”) (citations omitted).

**B. Plaintiffs Have Shown a Causal Connection Between the Injury and Subsection 6**

Plaintiffs have also clearly shown a causal connection between the injuries above and the challenged law, Subsection 6. Thousands of voters in Plaintiffs' communities would be registered but for Subsection 6, and this disruption is the casual act frustrating Plaintiffs' plans to register and serve their constituents in this important election year. The causal connection is undisputed.

**C. Plaintiffs Have Shown that the Injury Would Likely Be Redressed by a Favorable Decision**

Because Subsection 6 is directly to blame for the imminent injuries described above, an injunction against Subsection 6 would prevent the injuries from occurring. A favorable decision in this case would in fact relieve Plaintiffs of their injuries. Thus, each Plaintiff has clearly established that it has standing to proceed in its own right.

**II. Plaintiffs Have Standing To Bring Claims on Behalf of Their Members Who Will Be Denied the Right To Register and Vote Because of Subsection 6**

The parties also agree on the basic standard for associational standing: an organization has standing to assert the injuries of its members if: (i) their members would otherwise have standing to sue on their own behalves, (ii) the interests at issue are germane to the organization's purpose, and (iii) the participation of the individual members is unnecessary to the resolution of the claim or the relief requested. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 181 (2000); *Hunt v. Wash. State*

*Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). At least one member who would otherwise have standing will suffice. *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1171 (11th Cir. 2006); *Sierra Club v. Tenn. Valley Auth.*, 430 F.3d 1337, 1344 (11th Cir. 2005). The Plaintiff organizations with members have met this standard as well.

**A. Plaintiffs' Members Would Have Standing to Sue on Their Own Behalf**

Two Plaintiff organizations – the Florida NAACP and HAGC – have members. The test to determine whether any individual member of these organizations would have standing is the same as the general test above for the organizations directly: imminent injury in fact, a causal connection, and redressability. *Lujan*, 504 U.S. at 560-61. It is clear that those individual members to be impacted by Subsection 6 in 2008 would be injured in fact by the burden that the statute places on registration, whether theoretically surmountable or not; it is clear that Subsection 6 would be to blame; and it is clear that an injunction against Subsection 6 would redress the injury.

Plaintiffs need not have the “oracular vision,” *Elend v. Basham*, 471 F.3d 1199, 1207 (11th Cir. 2006), to demonstrate the particular member to be injured in 2008 in order to demonstrate standing, as long as the threat of future harm is real and immediate. *See NYC C.L.A.S.H., Inc. v. City of New York*, 315 F. Supp.2d 461, 468 (S.D.N.Y. 2004) (“There is[ ] no absolute requirement that individual members be identified in order to confer organizational standing.”). Courts have repeatedly found that a demonstrated increased risk of injury to members – and therefore to each given member – due to a challenged act suffices to establish this real threat of immediate future harm.

Indeed, this past Term, in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007), the Supreme Court found associational standing for a plaintiff organization seeking prospective relief, notwithstanding the organization’s inability to specify an injured member. *Id.* at 2750-51. Rejecting the argument that the plaintiff’s alleged injuries were too speculative to establish standing, the Court held that the mere fact that the plaintiff’s members had children in the district’s public schools subject to the challenged plan was sufficient to establish associational standing. *Probability* of harm to members was sufficient: “[t]he fact that it is possible that children of group members will not be denied admission to a school based on their race . . . does not eliminate the injury claimed.” *Id.* at 2751. *Cf. Bryant v. Yellen*, 447 U.S. 352, 366-67 (1980) (finding standing based on the increased *probability* of harm to residents from a water-distribution policy affecting land they did not yet own); *Village of Elk Grove v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993) (“The injury is of course probabilistic, but even a small probability of injury is sufficient to create a case or controversy—to take a suit out of the category of the hypothetical-provided of course that the relief sought would, if granted, reduce the probability.”).

This doctrinal line is particularly applicable to voting-rights cases. Numerous courts have held that organizational plaintiffs have standing to assert claims on behalf of members who are in danger of losing their voting rights, *see Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004); *Bay County Democratic Party v. Land*, 347 F. Supp.2d 404 (E.D. Mich. 2004); and *Fla. Democratic Party v. Hood*, 342 F. Supp.2d 1073, 1079 (N.D. Fla. 2004). Moreover, where the

increased risk of voting-rights injury is caused by future bureaucratic error, the courts have squarely held that a particular member need not be identified. *Sandusky*, 387 F.3d at 574 (stating that “[a]ppellees have not identified specific voters who will seek to vote at a polling place that will be deemed wrong by election workers, but this is understandable; by their nature, mistakes cannot be specifically identified in advance”); *Hood*, 342 F. Supp.2d at 1079 (finding no identification of particular members necessary because “a voter cannot know in advance that his or her name will be dropped from the rolls, or listed in an incorrect precinct, or listed correctly but subject to a human error by an election worker.”).<sup>6</sup>

A contrary rule would, pragmatically, require an organization to sit idly for at least one election while its members were disenfranchised, in order to assert their voting rights. As the Supreme Court explained in *Babbitt v. UFW Nat’l Union*, 442 U.S. 289 (1979), “[c]hallengers to election procedures often have been left without a remedy in regard to the most immediate election because the election is too far underway or actually consummated prior to judgment.” *Id.* at 301 n.12. As a result, “[j]usticiability in such cases depends not so much on the fact of past injury but on the prospect of its occurrence in an impending or future election.” *Id.* Since organizational plaintiffs in election cases do not have to wait until the injury actually occurs to bring suit, it cannot be that an

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<sup>6</sup> As with *Havens Realty*, Defendant attempts to distinguish these cases without any rationale, and in ways not contemplated by the cases themselves. Standing Mot. at 5 n.4. Without explanation, he seems to assert that only political parties may assert prospective claims on behalf of members at risk of losing their voting rights. *Id.* At least with respect to the interest in ensuring that members are able effectively to register and vote, however, there is no salient difference between political party organizations and the non-partisan Plaintiff organizations at issue in this case.

otherwise legitimate and real claim can be dismissed for want of a particularly named injured person. Rather, the injury required to establish standing is whether there is a “credible threat” to the right to vote . . . in a future election that arises from “an objectively justified fear of real consequences.” *ACLU v. Santillanes*, 506 F. Supp.2d 598, 621 (D.N.M. 2007).

Defendant places substantial emphasis on the fact that the Florida NAACP and HAGC have not identified a member who was harmed by the operation of Subsection 6 in 2006 or 2007. Standing Mot. at 3-5. As emphasized above, however, Defendant’s argument neither reflects the applicable legal standard nor the facts of this case. Plaintiffs seek prospective relief from real imminent injury, and need therefore show only an increased risk of injury to members in the future. *See, e.g., Cal. Rural Legal Assistance, Inc. v. Legal Servs. Corp.*, 917 F.2d 1171, 1174-75 (9th Cir. 1990) (finding organizational standing despite no showing that any member had been denied access to the legal services sought, because many members qualified for the services and would “clearly be adversely affected” in the future if the regulation at issue were enforced).<sup>7</sup> Plaintiffs also have established that they conducted little to no structured voter

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<sup>7</sup> For this reason, Defendant’s reliance upon *Nat’l Alliance for the Mentally Ill v. Bd. of County Comm’rs*, 376 F.3d 1292 (11th Cir. 2004), and *Anderson v. Alpharetta*, 770 F.2d 1575 (11th Cir. 1985), is misplaced. Those two cases primarily concerned past actions by defendants, with claims for redress of past injury. *See Nat’l Alliance*, 376 F.3d at 1293-94; *Anderson*, 770 F.2d at 1576-77. *Anderson* also involved a geographically confined injury, with no evidence that members of the plaintiff organization were of the particular community affected. *Id.* at 1581-82. In contrast, the members of the Plaintiff organizations here, and facing specific future injury, are precisely the members of communities shown to be disproportionately injured by Subsection 6.

registration activity among their members in 2006 and 2007, *see supra* at 12, and so put few members at risk of disenfranchisement due to Subsection 6.

In 2008, as Plaintiffs Florida NAACP and HAGC have established, that the risk to their members will change substantially.<sup>8</sup> The Florida NAACP testified that a core part of its mission is to register African-Americans, including its members, to vote, Neal Dep. 49:2 – 49:18; that roughly half of these members are unregistered, *id.* 9:5 – 9:12; and that it intends to conduct extensive voter registration in 2008, *id.* 21:19–22:1; 47:9–47:19 (the Florida NAACP plans to conduct voter registration in advance of the presidential preference primary); *id.* 49:11–49:24 (the Florida NAACP has a goal of registering ten percent of the African-American voting population). The Florida NAACP expects Subsection 6 to harm African-American voter registration applicants who seek to register in 2008, including Florida NAACP members, due to the disproportionate impact that the Subsection 6 had upon African-American applicants in previous registration cycles. *See id.* 25:4–25:19 (African-Americans frequently do not have identification with them when they register and therefore may be more likely to incorrectly); *id.* 23:3–24:22 (different spellings of names in the African-American community); *id.* 47:20–49:24; 42:21–45:1 (many African Americans are suspicious of the political process and the burdens of Subsection 6 will discourage African-American voters from participating). Reply Decl. of Glenn Burhans, Jr., exh. 2.

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<sup>8</sup> The third plaintiff, Southwest Voter Registration Education Project, is not a membership organization and thus does not assert associational standing.

HAGC has also established that its members face a real and concrete increased risk of disenfranchisement due to Subsection 6. At present, HAGC has 700 individual members and plans to recruit significant numbers of new members as the 2008 election approaches. Lafortune Dep. 7:21–8:8; 49:15–50:5. Some of these individuals will be eligible, unregistered voters who will seek to register to vote and will be prevented from being added to the registration rolls because of Subsection 6. *Id.* 24:14–25:6; *cf. id.* at 14:9–17:24 (the Haitian-American community's conventions regarding naming and writing dates, and the other barriers that Subsection 6 creates, could lead to disenfranchisement); *id.* 19:7–20:8; 35:6–37:11 (describing the difficulties a Haitian American applicant could face in attempting to fix a mismatch); *id.* 31:4–32:8 (describing the impact of eligible Haitian American voters being disenfranchised).

**B. The Interest in Registering Voters is Germane to Plaintiffs' Purposes**

For many of the same reasons discussed in Section I.A.1, *supra*, effective registration of the eligible citizens in the Florida NAACP's and HAGC's respective communities is clearly germane to each organization's purpose. Each organization's mission is to empower its particular constituents through civic engagement, and voter registration is a critical component of that empowerment.

**C. The Participation of Individual Members Is Not Necessary to the Resolution of the Claim or the Relief Requested**

Plaintiffs seek injunctive and declaratory relief, which do not require the participation of individual members. *See UFCW Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996) (injunctive relief does not require the participation of individual members); *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1571 (11th Cir. 1991)

(same). Plaintiffs Florida NAACP and HAGC, the membership organizations, have thereby amply established that they have standing to pursue this suit on behalf of their members.

### **III. Plaintiffs Have Third-Party Standing on Behalf of Registrants Who Will be Denied The Right to Vote**

Finally, in addition to organizational and associational standing, Plaintiffs satisfy the requirements for third-party standing on behalf of the eligible members of their communities whom they assist in registering to vote. A litigant may bring an action on behalf of third parties if three criteria are satisfied: (1) “[t]he 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”; (2) “the litigant must have a close relation to the third party”; and (3) “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, 410-11 (1991). Plaintiffs easily meet these requirements.

#### **A. Plaintiffs Have Suffered an Injury-in-Fact**

As established at length in Section I.A., *supra*, each Plaintiff organization has established that Subsection 6 will cause it injury in fact sufficient to give each Plaintiff a concrete interest in the outcome of this litigation. *See, e.g., Havens Realty*, 455 U.S. at 379 (finding organizational injury-in-fact from defendant practices frustrating the organization’s mission of providing homebuyers with equal access to housing through counseling and referral services, and causing the organization to divert its resources); *Bay County Democratic Party*, 347 F. Supp.2d at 421-23 (finding injury in fact sufficient to

establish third-party standing for organizational plaintiffs in part because they would suffer diminished political power if their eligible members did not have their votes counted).

### **B. Plaintiffs Have a Close Relationship with Prospective Registrants**

Plaintiffs and the prospective registrants that they target have a congruence of interests in ensuring that registrants may exercise their right to vote and participate in the political process. That many particular registrants to be injured by Subsection 6 in 2008 are currently unidentified poses no barrier to third-party standing.

The Eleventh Circuit has recognized that “in certain circumstances ‘the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter.’” *Harris v. Evans*, 20 F.3d 1118, 1123 (11th Cir. 1994) (quoting *Singleton v. Wulff*, 428 U.S. 106, 115 (1976)); *see also Sec’y of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984) (purpose of “close relationship” element is to establish that “the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal”). “Where a ‘congruence of interests’ exists, it may be ‘necessary and appropriate for the litigant to raise the rights of the third party.’” *Harris*, 20 F.3d at 1123 (quoting *Powers*, 499 U.S. at 414). The Supreme Court has recognized a variety of relationships that may give rise to third-party standing, including doctor-patient, attorney-client, and vendor-vendee. *See id.* (citing cases).

Courts have found litigants to have third-party standing, notwithstanding that the identities of the third parties are unknown, in a wide variety of cases, as long as the entity

asserting third-party standing has a sufficiently close relationship with the third-party population. *See, e.g., Carey v. Population Servs. Int'l*, 431 U.S. 678, 683 (1977) (permitting third-party standing for corporate distributor of contraceptives on behalf of its potential customers); *Griswold v. Conn.*, 381 U.S. 479, 481 (1965) (observing that in *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925), “the owners of private school were entitled to assert the rights of potential pupils and their parents,” and in *Barrows v. Jackson*, 346 U.S. 249, (1953), “a white defendant . . . was allowed to raise the rights . . . of prospective Negro purchasers”); *Bay County Democratic Party*, 347 F. Supp.2d at 423-24 (plaintiffs could assert third-party standing in voting rights case, even where identities of third-parties were unknown).

Here, each Plaintiff organization has an especially close relationship with a third-party minority community of eligible citizens directly and disproportionately threatened by Subsection 6.

Southwest Voter is one of the preeminent organizations working to empower and engage the Latino community. It testified that it performs a number of education, training, and leadership grooming projects focusing on the Latino community in Florida, Fernandez Dep. 8:9–8:25; 16:1–17:20; 41:16–42:1, designed to be responsive to the community’s needs, *id.* 10:24–11:11, and in locations with large Latino populations, *id.* 17:15–17:20; 18:19–18:23; 21:15–21:24.

HAGC testified that it works for the representation and empowerment of the Haitian Community in Florida and beyond, Lafortune Dep. 7:2–7:5, and that it utilizes volunteers and multiple media to perform its functions, *id.* 9:8–9:14; 48:12–49:1. The

education and election day programs it conducts are geared specifically for the Haitian-American community, *id.* 47:12–47:22; 40:15–40:22, and their candidates of choice, *id.* 31:4–32:18; 49:9–50:5.

The Florida NACCP, of course, has a rich history of speaking and acting to advance the welfare of African-Americans in Florida, and provided specific testimony that its voter engagement programs and activities are geared toward the African-American community. Neal Dep. 7:9–7:15. For example, the Florida NAACP registers eligible African Americans, *id.* 49:7–49:15, and mobilizes them to go to the polls, *id.* 39:17–39:21, in an effort to eradicate disenfranchisement in the African-American community, *id.* 49:2–49:24.

Plaintiffs have established that they share a particularly close relationship with eligible applicants from the communities they serve, who will seek to register in 2008. Both have a shared and strong interest in ensuring that applicants are able to register and cast an effective ballot in the 2008 elections. Thus, Plaintiffs are well-suited to represent the interests of applicants in their communities who will be unable to register because of Subsection 6.

### **C. Registrants Are Unable To Protect Their Own Interests**

The third criterion for establishing third-party standing is “whether the rights of the third party will be diluted or infringed if the litigant is not allowed to assert those rights on behalf of the third party.” *Harris v. Evans*, 20 F.3d 1118, 1124 (11th Cir. 1994). This requirement does not require “an absolute impossibility of suit.” *Pennsylvania Psych. Soc’y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 290 n.14

(3d Cir. 2002) (quoting 15 James Wm. Moore et al., *Moore's Federal Practice* ¶ 101.51[3][c]).

Here, prospective registrants would face substantial hurdles in vindicating their voting rights if the organizational Plaintiffs were not permitted to assert claims on their behalf. Plaintiffs have demonstrated that registrants will face numerous barriers in protecting their right to vote in the 2008 elections against the impact of Subsection 6. These barriers include nonexistent, undelivered, and/or misleading notice inadequately identifying a particular application as deficient under Subsection 6; inadequate information as to the nature of the problem or the means to correct it; poll workers unable to instruct would-be voters as to the nature of any problem or the means to correct it; and the inability to navigate the complicated, burdensome, and misleading provisional balloting process. Pls. Supp. Evidentiary Submission Supp. Mot. Prelim. Inj. (“Supp. Submission”) at 22-28, 30-33. These barriers are such that third-party members of Plaintiffs’ communities may not be able to understand the nature of this complex and opaque problem sufficient to bring it to a court’s attention. Additionally, for the communities served by Southwest Voter and HAGC, there may be additional hurdles such as language barriers, Lafortune Dep. 10:10–10:17; 47:6–47:11, unfamiliarity with the election process, *id.*; *id.* 35:6–37:11, inability to expend the time to resolve the issue, *id.* 17:9–17:24; 19:17–20:8, as well as other culturally specific barriers, *id.* 16:20-17:9. The Florida NAACP testified that hurdles to voting imposed on the African-American community are not easily overcome because of voter suspicion, fear, and embarrassment at being disenfranchised. Neal Dep. 44:8–44:16. These impediments impair the ability

of those individuals to vindicate their voting rights in court.

Additionally, the election clock simply does not permit many registrants injured by Subsection 6 to assert their rights in time to ensure that those rights may be adequately remedied. Plaintiffs have shown that most voter registration applications will be submitted on the eve of the registration deadline, and that this spike of applications precisely at the time of year when election officials are busiest with other election preparations will increase the rate of applications unverified under Subsection 6. Decl. of Glenn Burhans, Jr. in Supp. Pls. Mot. Prelim. Inj., exh. E; Decl. of Conny McCormack in Supp. Pls. Mot. Prelim. Inj. ¶¶ 16-18, 20-21. Even given timely and comprehensible notice, a registrant applying at the voter registration deadline and unverified under Subsection 6 will have little opportunity to vindicate her rights in court before the impending election is already over. *Cf. Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (recognizing that a harmed third-party's inability to get court resolution of a case in time to avoid the threatened injury may serve as adequate hardship for third-party standing). Unless Plaintiffs are permitted to assert the prospective third-party claims of applicants in their communities affected by Subsection 6, these claims will, pragmatically, never be brought before the injury has already occurred. Given the hurdles that the affected individuals will face in asserting the claim that the Subsection 6 has interfered with their voting rights, the organizational Plaintiffs have established third-party standing to litigate this claim.

## **CONCLUSION**

Each organizational Plaintiff has established that it has standing to assert claims on its own behalf and on behalf of third parties; Plaintiffs Florida NAACP and HAGC have likewise established standing on behalf of their members.

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### **GREENBERG TRAUIG, P.A.**

*/s/ Glenn T. Burhans, Jr.* \_\_\_\_\_

GLENN T. BURHANS, JR.

FLA. BAR NO. 605867

101 EAST COLLEGE AVENUE

TALLAHASSEE, FLORIDA 32301

TEL. (850) 222-6891

FAX (850) 681-0207

### **PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP**

ROBERT A. ATKINS

D. MARK CAVE

LAUREN M. ROTHENBERG

J. ADAM SKAGGS

1285 AVENUE OF THE AMERICAS

NEW YORK, NEW YORK 10019-6064

TEL. (212) 373-3000

FAX (212) 492-0289

### **BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW**

JUSTIN LEVITT

MYRNA PÉREZ

161 AVENUE OF THE AMERICAS, 12<sup>TH</sup> FLOOR

NEW YORK, NEW YORK 10013

TEL. (212) 998-6730

FAX (212) 995-4550

### **ADVANCEMENT PROJECT**

ELIZABETH S. WESTFALL

JENNIFER MARANZANO

1730 M. STREET, NW, SUITE 910

26

WASHINGTON, DC 20036  
TEL. (202) 728-9557  
FAX (202) 728-9558

**PROJECT VOTE**  
BRIAN W. MELLOR  
196 ADAMS STREET  
DORCHESTER, MA 02124  
TEL. (617) 282-3666  
FAX (617) 436-4878

*Counsel for Plaintiffs*

### **CERTIFICATE OF SERVICE**

Undersigned counsel hereby certifies that a copy of the foregoing *Plaintiffs'* *Supplemental Brief Concerning Standing* was served via the Court's CM/ECF electronic filing system this day, December 13, 2007, upon the following:

Peter Antonacci  
Allen Winsor  
Andy V. Bardos  
GrayRobinson, P.A.  
P.O. Box 11189  
Tallahassee, Florida 32302-3189

*Counsel for Defendant Kurt Browning*

**GREENBERG TRAUIG, P.A.**

*S/ Glenn T. Burhans, Jr.* \_\_\_\_\_  
GLENN T. BURHANS, JR.  
FLA. BAR NO. 605867  
101 EAST COLLEGE AVENUE  
TALLAHASSEE, FLORIDA 32301  
Tel. (850) 222-6891  
Fax (850) 681-0207