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.
_____/

SECRETARY OF STATE'S SUPPLEMENTAL RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Defendant Kurt S. Browning, in his official capacity as Secretary of State for the State of Florida (the "Secretary"), files this supplemental response to Plaintiffs' Motion for Preliminary Injunction (doc. 4) and respectfully requests the Court to dismiss this action for lack of subject matter jurisdiction.

ARGUMENT

"Standing is a doctrine that stems directly from Article III's 'case or controversy' requirement, and thus it implicates [a court's] subject matter jurisdiction." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 984 (11th Cir. 2005). Indeed, "it is perhaps the most important jurisdictional doctrine." *U.S. v. Hays*, 515 U.S. 737, 742 (1995). Each element of the standing requirement "must be supported in the same way as any other matter on which the plaintiff bears

the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

In the present case, Plaintiffs have had the benefit of numerous public records productions from Florida election officials over the course of more than a year and months of discovery in which they conducted ten depositions and obtained copious document productions from state and local officials. Among other things, these document productions included no fewer than three distinct data files: (i) applicants who have applied since the effective date of the challenged law; (ii) applicants whose identifying numbers could not be matched to information in official databases at any time; and (iii) applicants whose applications are pending as a result of the absence of a match or subsequent verification. Despite this, Plaintiffs have failed to identify a single organizational member who has been burdened or prevented from voting by the challenged law. In addition, Plaintiffs' assertions of direct organizational injury are insufficient as a matter of law, both as it regards the nature of the injury and the factual showing made in its support, to establish the constitutional requirements of standing.

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. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs*., 528 U.S. 167, 181 (2000); *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1170 (11th Cir. 2006). Under this test, members would have standing to sue in their own right only if (1) they have 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 the

injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. at 560-61 (quotations and citations omitted).

An organization's "failure to identify an injured constituent prevents [it] from asserting associational standing." *Nat'l Alliance for the Mentally Ill v. Bd. of County Comm'rs*, 376 F.3d 1292, 1296 (11th Cir. 2004). Accordingly, in *National Alliance*, the Eleventh Circuit affirmed the grant of summary judgment against two organizational plaintiffs that failed to identify injured constituents. The organizations challenged the county's decision not to fund a mental health facility. *Id*. at 1293-94. During discovery, the county provided the plaintiffs "information pertaining to persons who were eligible for treatment." *Id*. at 1296. Despite their access to this information, the plaintiff organizations failed to identify a single injured member. The Court explained that the organizations "could have used those materials to ascertain the identities of injured constituents," and their failure to do so was fatal to their standing. *Id*. at 1296.

Similarly, in *Anderson v. City of Alpharetta*, 770 F.2d 1575 (11th Cir. 1985), the NAACP intervened to challenge a city's placement of public housing. The Court afforded the NAACP an opportunity through discovery to establish standing and "pointed out . . . that the NAACP would have to identify injury to particular members." *Id*. at 1577, 1579, 1582. When it failed to do so, the Eleventh Circuit held that "the NAACP [had] failed to aver adequately injury in fact" and that it lacked standing to sue on behalf of its members. *Id*. at 1583. More recently, in *Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333 (N.D. Ga. 2007), the Court held that the NAACP lacked standing to challenge a requirement that voters produce photo identification at the polls. The NAACP failed to "satisfy [its] burden to identify a member who otherwise would have standing to sue" and was therefore precluded from pursuing the claim. *Id*. at 1372.

Plaintiffs here lack standing for the same reason. After more than a year of preparation

and months of discovery, during which the Secretary provided Plaintiffs the necessary data to identify injured members, Plaintiffs have been unable to identify a single member of their organizations who has been substantially burdened or prevented from voting by the challenged law. Neal Depo., 22:5-13; LaFortune Depo., 25:14-20, 26:16-27:6.[1] The executive director of the Florida State Conference of the NAACP testified that she was unaware of even a single complaint by her members that the challenged law hindered their ability to register to vote. Any dialogue about the statute was only "a discussion of what *could* happen." Neal Depo., 25:20-26:14 (emphasis added). Similarly, the chairman of the Haitian-American Grassroots Coalition (the "HAGC") testified to his organization's inability to identify any member that was prevented from voting by the challenged law. LaFortune Depo., 25:14-20. He further testified that no member of the HAGC has ever even complained about the challenged law. *Id*., 23:19-23.[2]

Plaintiffs have had both opportunity and means to identify an injured member. In discovery, the Secretary requested that Plaintiffs identify the members of their organizations who were substantially burdened or prevented from voting by the challenged law. For reasons now made more clear, Plaintiffs objected, and the Secretary moved to compel. *See* doc. 45. Judge Sherrill granted the Secretary's Motion and, echoing the assurances of Plaintiffs' counsel,[3] noted in his Order that "Plaintiff does not yet have such information, but hopes to have such information through discovery." Doc. 52 at 2. The Secretary then provided Plaintiffs a CD-ROM containing a data file of all voter registration applicants whose identifying numbers could

[1] All deposition excerpts cited herein are attached hereto as a composite Exhibit A.

[2] The third Plaintiff, the Southwest Voter Registration Education Project, is not a membership organization and thus cannot assert associational standing.

[3] At the hearing on the Motion, Plaintiffs' counsel noted that Plaintiffs were "circling in on that information" but contended that they were "hamstrung" until they were given access to information in the Secretary's database. *See* Exhibit B at 8:4-19. Plaintiffs have now been in possession of that data for about six weeks, and the search appears to have gone cold.

not be matched. As in *National Alliance*, Plaintiffs, who cannot identify an injured member of their own accord, were provided with materials sufficient to identify injured members. They have not done so. Because Plaintiffs have failed to identify even one member that has suffered or will imminently suffer injury in fact, they lack standing to sue on their members' behalves.[4]

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

Plaintiffs would have direct standing only if (1) they have 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. Thus, to "satisfy the injury prong of Article III standing, a plaintiff must present specific, concrete facts showing that the challenged conduct will result in a demonstrable, particularized injury to the plaintiff." *Bochese v. Town of Ponce Inlet*, 405 F.3d at 984 (internal marks omitted).

Plaintiffs' bare assertions that the challenged law will induce them to devote resources to resolving registration problems and frustrate their mission to promote the registration of voter registration applicants, doc. 12 ¶ 17-19, are insufficient to establish injury in fact. In *Common Cause/Georgia v. Billups*, the Court held that the NAACP did not have direct standing to challenge a requirement that voters present photo identification at the polls. The NAACP "failed to show that it already expended resources in connection with the photo ID requirement" and "simply presented testimony indicating that at some undetermined time in the future, it may have

[4] *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004); *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404 (E.D. Mich. 2004); and *Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073 (N.D. Fla. 2004); in which the standing of political parties was recognized, are not apposite. Courts have held that "political parties and

to divert unspecified resources to various outreach efforts." 504 F. Supp. 2d at 1372-73 (internal marks omitted). Such "imprecise and speculative claims concerning potential future actions," the Court explained, "are a far cry from the kind of organizational expenditures" sufficient to confer standing. *Id*. at 1373. In addition, this alleged harm would be:

> [E]ntirely of [the plaintiffs'] own making since any future reallocation of resources would be initiated at [their] sole and voluntary discretion. Such an optional programming decision does not confer Article III standing on a plaintiff. . . . The diversion of resources . . . might well harm the [plaintiff's] other programs, for money spent on [one thing] is money that is not spent on other things. But this particular harm is self-inflicted; it results not from any actions taken by [defendant], but rather from the [plaintiff's] own budgetary choices.

Id. A contrary interpretation, the Court noted "would completely eviscerate the standing doctrine. If an organization obtains standing merely by expending resources in response to a statute, then Article III standing could be obtained through nothing more than filing a lawsuit." *Id*. at 1373. Such an interpretation "flies in the face of well-established standing principles." *Id*. Finally, 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." *ACORN v. Fowler*, 178 F.3d 350, 361 n.7 (5th Cir. 1999).

The generalized expectation of a voluntary reallocation of resources is equally insufficient to establish injury in the present case. There is no showing that any of the Plaintiffs has already reallocated resources in response to the challenged law, despite the fact that the law has been in effect for nearly two years. In fact, as in *Billups*, Plaintiffs merely say they might at some undetermined time divert unspecified resources to particular election activities in preference to others. Such loose and indeterminate predictions are not the sort of concrete, demonstrable, imminent harm that courts require to establish organizational standing. Moreover,

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candidates have standing to represent the rights of voters." *Bay County Democratic Party*, 347

any reallocation of resources in response to the challenged law would be entirely voluntary. The standing doctrine repels the conclusion that an organization may confer standing on itself by its own discretionary decisions. *See National Taxpayers Union v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995) (holding that the impact of a challenged law upon an organization's programs, such as educational and other initiatives, could not constitute an injury in fact; an organization's "self-serving observation that it has expended resources to educate its members and others regarding [the challenged law] does not present an injury in fact").

Plaintiffs reliance on *Charles H. Wesley Education Foundation, Inc. v. Cox*, 408 F.3d 1349 (11th Cir. 2005), must fail. In *Wesley*, a charitable organization that conducted a voter registration drive challenged a Georgia law that restricted the right to conduct voter registration drives to officially authorized individuals. *Id*. at 1351. Because the challenged law violated the organization's "right to conduct voter registration drives"—a "legally protected interest" under federal law—the organization had standing to challenge the regulation's direct restriction on its activities. *Id*. at 1353-54. Here, by contrast, the challenged law does not restrict Plaintiffs' activities or invade Plaintiffs' legally protected interests. Plaintiffs are free to conduct voter registration drives and to assist applicants in meeting the requirements of federal and state law. Plaintiffs do not have a right to effect the registration of any applicant or to be free from laws to which they might choose to respond by voluntary allocations of resources. And it certainly does not follow that any person or entity that conducts or might conduct a voter registration drive has standing to challenge any state law requirement applicable to voter registration applicants.[5]

F. Supp. 2d at 422. None of the Plaintiffs is a political party or candidate.

[5] *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and its progeny are also distinguishable. Those cases hold that a plaintiff whose counseling and referral services have been "perceptibly impaired" by discriminatory housing practices has standing to sue under the Fair Housing Act. *Id*. at 379. The broad analysis adopted by *Havens* has not been extended

Even if the nature of the injury alleged by Plaintiffs were sufficient to create standing (which it is not), Plaintiffs have failed to produce specific, concrete facts showing demonstrable harm that is actual or imminent. Indeed, Plaintiffs cannot and do not allege that the challenged law adversely affected their operations during the 2006 election cycle, when it was already in effect.[6] *See* Neal Depo., 32:25-33:17; LaFortune Depo., 11:4-8; 40:5-9; Fernandez Depo., 27:19-20. Rather, they advance abstract suggestions that, though their operations were unaffected in 2006, the law will at some future time affect their voter registration activities. This allegation, vague in itself, is belied by facts. One of the Plaintiffs—the HAGC—conceded that it does not conduct any voter registration activity at all. LaFortune Depo., 10:18-11:8. Another—the Southwest Voter Registration Education Project (the "SVREP")—has no plans to conduct voter registration activity in anticipation of the January 29, 2008, presidential preference primary election. Fernandez Depo., 21:1-10. And the NAACP, like the HAGC, did not conduct any voter registration activities in 2006, leaving such activities to its local branches. Neal Depo., 34:13-25. When asked whether the NAACP expects that its voter registration activities will increase in 2008, its executive director offered nothing more concrete than: "We're hoping to." *Id*., 47:12-15. "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan*, 504 U.S. at 564 (emphasis in

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beyond the narrow context of fair housing. *See Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 815-16 (S.D. Ind. 2006); *Billups*, 504 F. Supp. 2d at 1372.

[6] The law which Plaintiffs claim hampered their voter registration activities in 2006—Section 97.0575, Florida Statutes—was enjoined in August, 2006, in sufficient time for Plaintiffs to conduct voter registration activities prior to the 2006 general election. *See League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1317 (S.D. Fla. 2006).

original). As a result, none of the Plaintiffs[7] can demonstrate imminent injury, and none alleges with any specificity the purported diversion of resources on which they ground their claim of standing. Plaintiffs have alleged only vague hypotheses of injury—not "specific, concrete facts showing that the challenged conduct will result in a demonstrable, particularized injury." *Bochese v. Town of Ponce Inlet*, 405 F.3d at 984 (internal marks omitted).

CONCLUSION

Plaintiffs have failed to show specific, concrete facts establishing a demonstrable, particularized, actual or imminent injury either to their members or themselves. Consequently, Plaintiffs are without standing, either on behalf of their members or organizationally, to bring this action, and this Court is without jurisdiction and must dismiss.

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

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[7] Asked whether the HAGC has any plans to educate voters about the challenged law, its chairman replied: "As of today we do not have a plan, but that doesn't mean we will not have a plan . . . ." LaFortune Depo., 31:14-23. Indeed, Plaintiffs' standing argument is premised on the theory that, though they have no actual or imminent injury, it does not mean that they will not be injured. The constitutional case and controversy requirement requires a party to do more than assert that some indeterminate time it will be injured in some indeterminate way.

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CERTIFICATE OF SERVICE

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