

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

LEAGUE OF WOMEN VOTERS OF
FLORIDA, INC., et al.,

Plaintiffs,

v.

LAUREL M. LEE, in her official
capacity as Florida Secretary of State,
et al.,

Defendants,

and

REPUBLICAN NATIONAL
COMMITTEE, et al.,

Intervenor-Defendants.

Cases Consolidated for Trial:

Case No.: 4:21-cv-186-MW/MAF
4:21-cv-187-MW/MAF
4:21-cv-201-MW/MAF
4:21-cv-242-MW/MAF

SECRETARY LEE'S RESPONSE TO ORDER CONCERNING STANDING

Pursuant to the Court's Order for Briefing on Standing (ECF No. 543) and the Court's direction on the record on February 4, 2022, Defendants offer the following concise summary of controlling and persuasive authorities in response to the Court's three inquiries regarding the organizational Plaintiffs' standing.

LIST OF RELEVANT AUTHORITY

I. Controlling Authority

1. Whether this Court’s analysis of associational standing differs, if at all, when an organization has only “constituents” rather than traditional, individual members. *See, e.g., Doe v. Stincer*, 175 F.3d 879 (11th Cir. 1999).

- When an organization lacks traditional members, it generally cannot assert associational standing. *See Jacobson v. Fla. Sec’y of State*, 974 F.3d 1236, 1249 (11th Cir. 2020) (“[F]ive of the six organizations failed to even allege, much less prove, that they have *any* members. . . . That failure is fatal to their associational standing.”).
- There is an exception for “constituents” of an organization if the organization proves that the individuals or entities on whose behalf it is suing have the “indicia of membership.” *Doe v. Stincer*, 175 F.3d 879, 885 (11th Cir. 1999) (quoting *Hunt v. Washington State Apple Advert. Comm’n*, 432 U.S. 333, 344 (1977)); *see also Nat’l All. for the Mentally Ill v. Bd. of Cnty. Comm’rs*, 376 F.3d 1292 (11th Cir. 2004). Associational standing on behalf of an organization’s *constituents* has additional hurdles that do not exist for associational standing on behalf of *members* where the likelihood of standing is greater. For instance, this exception for constituents who have the indicia of membership focuses on circumstances such as whether the individuals control the organization, fund the organization, and authorize the litigation. *See id.* at 886 (“Much like members of a traditional association, the constituents of the Advocacy Center possess the means to influence the priorities and activities the Advocacy Center undertakes.”). Furthermore, the facts in *Stincer* were limited to an organization that “provides the means by which [its constituents] express their collective views and protect their collective interests.” *Id.* (citing *Hunt*, 432 U.S. at 345).
- Additionally, associational standing for constituents does not extend to all beneficiaries of an organization’s activities, much less all of its intended beneficiaries. For instance, *Stincer*’s application of associational standing was limited to an organization representing the interests of its constituents who were the “*primary* beneficiar[ies] of its activities,” *Stincer*, 175 F.3d at 886 (emphasis added). This is a far cry from *all* beneficiaries of the organization’s

activities. Similarly, the scope of “constituents” has never been extended to all individuals who are merely the focus of the organization’s efforts.¹

- Organizations seeking third-party standing to assert the rights of another must make a showing that the “party asserting the right has a ‘close’ relationship with the person who possesses the right.” *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). This showing must necessarily be higher for “constituents” of organizations than for members; more evidence is needed for the former.

2. What an organization must demonstrate for associational standing if the organization does not have individual members and/or constituents testify about any injury to those individual members and/or constituents.

- Every organization, whether it has members or not, must identify a member or constituent with the “indicia of membership” who is injured by the statute to have associational standing. *See Ga. Republican Party v. SEC*, 888 F.3d 1198, 1203-05 (11th Cir. 2018); *Jacobson*, 974 F.3d at 1249 (holding that organizations must prove that at least one member of their organization has been injured); *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) (“[T]he Court has required plaintiffs claiming an organizational standing to identify members who have suffered the requisite harm.”).
- For an organization to substantiate its associational standing, admissible evidence (whether or not it comes from the individual member) is necessary at the trial stage to show harm to identified individual members. This is because the burden on the party attempting to establish standing increases at each stage of the litigation. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (Each element of standing “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.”).

¹ Otherwise, organizations like the American Association of Retired Persons (“AARP”), for example, would automatically have associational standing in every jurisdiction where there are retired individuals, regardless of whether AARP has members in those jurisdictions (or any relationship to those individuals whatsoever), simply because AARP works to benefit all retired individuals.

3. Whether a diversion-of-resources injury exists when the diversion involves an organization’s time, separate and apart from an organization’s funds.

- Diversion of time can in some circumstances constitute an injury. *See Arcia v. Fla. Sec’y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014). But diversion of resources (including diversion of time) cannot be a self-inflicted injury. *See Swann v. Secretary*, 668 F.3d 1285, 1288 (11th Cir. 2012) (“[A] controversy is not justiciable when a plaintiff independently caused its own injury.”)
- Diversion of “time” alone is more suspect than diversion of funds because it is harder to quantify or disprove than actual dollars and cents. *Cf. Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008) (“[P]laintiffs cannot bootstrap the cost of detecting and challenging illegal practices into injury for standing purposes.”).
- As with any injury, the future time-related injury must be “certainly impending.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410 (2013). And Plaintiffs “cannot manufacture standing” by voluntarily incurring costs (spending more time and resources) to avoid something that is itself a non-injury. *Id.* at 402.

II. Persuasive Authority

1. Whether this Court’s analysis of associational standing differs, if at all, when an organization has only “constituents” rather than traditional, individual members. *See, e.g., Doe v. Stincer*, 175 F.3d 879 (11th Cir. 1999).

- The Northern District of Alabama applied *Jacobson*, 974 F.3d 1236, to determine that an organization did not have associational standing to assert claims of groups and individuals that the organization partnered with in the community, even though its efforts benefitted those groups and constituents, and even though those partner groups were closely associated with the organization. *See People First of Ala. v. Merrill*, 491 F. Supp 3d 1076 (N.D. Ala. 2020) (holding that an organization did not have associational standing over partner community groups and people associated with those partner groups because they were not “individual members” of the organization who were harmed by the challenged provisions).
- It is not enough for an organization to identify a group of individuals as its constituents to establish associational standing; actual membership or “indicia of membership” is necessary. *See Greater Birmingham Ministries v. Alabama*, 161 F. Supp. 3d 1104, 1115 (N.D. Ala. 2016) (“[T]he Court

questions whether a mere ‘constituent’ with an injury can confer associational standing without actual membership or ‘indicia of membership.’”); *see also id.* (Plaintiffs had not shown associational standing to assert the rights of Alabama voters without photo IDs because they failed to show a “close relationship to voters without photo IDs”).

- Regarding how far the scope of “constituents” extends, associational standing does not extend to class members with criteria “unrelated” to actual membership in the organization. *See In re Takata Airbag Prods. Liab. Litig.*, No. MDL No. 2599, 2016 U.S. Dist. LEXIS 195099, at *140 (S.D. Fla. Mar. 10, 2016) (holding that Plaintiff Automotive Recyclers Association (“ARA”) lacked associational standing where it brought action on behalf of *all* automotive recyclers because ARA’s complaint contained putative classes of individuals with “criteria unrelated to being an ARA member”). Being a constituent thus requires a membership-like relationship to the organization. *See Stincer*, 175 F.3d at 886.
- Being a beneficiary is not the same as being a member or constituent for purposes of organizational standing. *See Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1010 n.4 (6th Cir. 2006) (Plaintiff coalition claiming representational standing on behalf of the homeless individuals served by the organization asserted a theory of standing “never recognized by any court”); *see also id.* at 1013 (McKeague, J., concurring) (“Insofar as plaintiffs’ standing implicitly rests on assertion of the interests of nonmembers for whose interests plaintiff . . . advocates, e.g., homeless persons, plaintiffs are operating outside the bounds of traditional associational standing.”).
- The second prong of the *Hunt* test for associational standing also limits the scope of individuals who can qualify as “constituents” of an organization for purposes of associational standing. If the constituents’ interests that the organization seeks to protect are not germane to the organization’s purpose, the organization lacks standing to assert the interests of those constituents. *See Drummond v. Zimmerman*, 454 F. Supp. 3d 1210, 1221 (S.D. Fla. 2020) (“The HOA exists for the benefit of the homeowners and the mobile home park; it is not a disability advocacy group. The HOA lacks standing to assert ADA claims on behalf of its members.”).

2. What an organization must demonstrate for associational standing if the organization does not have individual members and/or constituents testify about any injury to those individual members and/or constituents.

- No additional persuasive authority at this time.

3. Whether a diversion-of-resources injury exists when the diversion involves an organization's time, separate and apart from an organization's funds.

- “Not every diversion of resources to counteract the defendant's conduct . . . establishes an injury in fact.” *City of Kyle*, 626 F.3d at 238. Plaintiff must also “identif[y] specific projects [it] had to put on hold or otherwise curtail.” *Id.* “[S]elf-inflicted injuries” cannot be used to establish standing because they are not fairly traceable to a defendant's conduct. *Ass 'n of Comm. Orgs. For Reform Now (“ACORN”) v. Fowler*, 178 F.3d 350, 358 (5th Cir. 1999). Because diversion of time is harder to quantify than diversion of funds, Plaintiff must provide evidence of how the time-related injury was not self-inflicted.

Dated: February 7, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 7, 2022, a true and correct copy of the foregoing was filed via CM/ECF, which served a copy on all parties of record.

/s/ Mohammad O. Jazil
Attorney