UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FLORIDA RISING TOGETHER, INC.,

Plaintiff,

v.

Case No. 6:24-cv-01682-WWB-UAM

CORD BYRD, in his official capacity as Secretary of State for the State of Florida, et al.,

ORAL ARGUMENT REQUESTED

Defendants.

PLAINTIFF FLORIDA RISING TOGETHER, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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INTRODUCTION[1]

Defendants challenge Florida Rising Together, Inc.'s ("Florida Rising") standing to bring this suit and assert that the Complaint fails to state claims under the First and Fourteenth Amendments to the United States Constitution, the National Voter Registration Act ("NVRA"), and the Voting Rights Act ("VRA"). The County Supervisors of Elections ("SOEs") further allege that the Complaint fails to join indispensable parties and is a shotgun pleading. Defendants' arguments are unavailing.

Defendants' suggestion that Florida Rising lacks standing ignores an unbroken chain of Eleventh Circuit precedent, as well as the Complaint's allegations that both Florida Rising and its members have sustained concrete injuries as a direct result of Defendants' implementation of the exact match protocol ("the Protocol"), injuries that are traceable to, and redressable by an order enjoining, Defendants. The Complaint's allegations that Florida Rising has conducted voter registration and other outreach efforts to impacted individuals to combat the effects of the Protocol, that individuals contacted by Florida Rising as part of its voter registration or other voter engagement efforts have had their registration applications denied or delayed due to the Protocol, that its members and constituents have sustained injury, and that the interests Plaintiff seeks to protect are germane to its goals more than suffices to establish standing.

And on the merits, which the SOEs ignore entirely, Florida Rising has adequately pled constitutional and statutory violations. Taken as true, as they must be at the motion-to-dismiss stage, the Complaint's facts describe precisely how the Protocol violates the United States Constitution, Section 8 of the NVRA, and Section 2 of the VRA. The Court

[1] Consistent with the Court's order, Plaintiff is filing a single, 40-page brief in opposition to Defendants' motions to dismiss. *See* ECF No. 73.

should (1) decline Defendants' invitation to make factual findings at this early stage in contravention of Plaintiff's well-pled allegations, and (2) disregard Defendants' misstatements of law, particularly regarding the scope of the NVRA's uniform and nondiscriminatory provision and proper legal standard under Section 2 of the VRA.

Defendants' motions to dismiss should be denied in their entirety.

BACKGROUND

This case concerns Florida's "exact match" voter registration verification protocol, a process that has resulted in the rejection of tens of thousands of otherwise *valid* voter registration applications since 2018. *See* Complaint ("Compl.") ¶ 8. In Florida, voter registration applicants are not added to the voter rolls if certain identifying information input into the Florida Voter Registration System by election officials does not produce an "exact match" with data maintained by the Florida Department of Highway Safety and Motor Vehicles or the federal Social Security Administration. *Id.* ¶ 2. Applicants flagged through the Protocol are not allowed to cast a ballot that counts unless they overcome burdensome and unnecessary bureaucratic hurdles. *Id.*

The Protocol is plagued with errors. *Id.* ¶ 4. The transposition of a single letter or number, deletion or addition of a hyphen or initial in an applicant's name, or the accidental entry of an extra character or space can cause an applicant's identifying information to be "unmatched" or not verified, even when the lack of verification is caused through no fault of the applicant. *Id.* The verification issues and subsequent rejections of voter registration applications overwhelmingly impact Black registrants and other registrants of color. In many Florida counties, Black voter registration applicants have been rejected or deemed "unverified" at a rate more than twice their share of the registrant pool, while white applicants are denied registration and deemed "unverified" at a small fraction of

their share of the comparable electorate. *Id.* ¶ 9.

LEGAL STANDARD

"In determining whether to dismiss under Rule 12(b)(6), a court accepts the factual allegations in the complaint as true and construes them in a light most favorable to the non-moving party." *Batayeh v. Eisai, Inc.*, 2022 WL 22866937, at *1 (M.D. Fla. Mar. 25, 2022) (Berger, J.) (citing *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1269 (11th Cir. 2009)). "To survive dismissal, the factual allegations must be 'plausible' and 'must be enough to raise a right to relief above the speculative level.'" *Cincinnati Ins. Co. v. Evanston Ins. Co.*, 2024 WL 5010138, at *5 (M.D. Fla. Dec. 6, 2024) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Smith v. Ceres Marine Terminals, Inc.*, 2021 WL 12303396, at *1 (M.D. Fla. July 16, 2021) (Berger, J.) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

ARGUMENT

I. FLORIDA RISING HAS ADEQUATELY PLED STANDING

To establish standing, a litigant "must show that she has suffered, or will suffer, an injury that is concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Murthy v. Missouri*, 603 U.S. 43, 57 (2024) (cleaned up). "An organization can establish standing in two ways: (1) through its members (i.e., associational standing) and (2) through its own injury in fact that satisfies the traceability and redressability elements." *Ga. Ass'n of Latino Elected Offs., Inc. v. Gwinnett Cnty. Bd. of Registration & Elections*, 36 F.4th 1100, 1114 (11th Cir. 2022) ("*GALEO*"). An organization may establish its own injury in fact under a diversion

of resources theory. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1249-50 (11th Cir. 2020).

Florida Rising sufficiently pled both types of standing. Defendants' briefing ignores the Eleventh Circuit's decision in *Florida State Conference of NAACP v. Browning*, 522 F.3d 1153, 1160-66 (11th Cir. 2008), even though it is both controlling and dispositive. The court in *Browning* held that voter registration organizations similarly situated to Florida Rising had associational and organizational standing to challenge an earlier iteration of the same Florida law and the same data matching procedure that Florida Rising now challenges. Despite being squarely on point here, Defendants ignore *Browning* entirely.

The most notable distinction between *Browning* and this case supports denying Defendants' motions. *Browning* was decided at the preliminary-injunction stage, where the plaintiffs' evidentiary burden is higher, as opposed to the motion-to-dismiss stage, where the court must accept well-pleaded factual allegations as true and construe them in the light most favorable to the plaintiff. *GALEO*, 36 F.4th at 1112-23.

A. Florida Rising Has Pled Associational Standing

To assert associational standing, "[a]n organization may vindicate the rights of its members by suing on their behalf. In order to demonstrate the requisite standing to do so, an organizational plaintiff . . . must show that (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, 103 F.4th 765, 771 (11th Cir. 2024) (cleaned up).

The Secretary of State ("SOS") takes issue only with the first prong,[2] arguing that Florida Rising must identify the names of members who have been injured by the exact match protocol. SOS Br. at 5.[3] Although the SOS brief ignores it, the Eleventh Circuit squarely rejected the same argument in *Browning*. *Browning*, 522 F.3d at 1160-64. There, Judge Tjoflat rejected the argument that plaintiffs lack associational standing because they "have not identified any specific members who have had their registration denied due to a typographical or clerical error." *Id*. at 1160, 1163.

Although Judge Tjoflat acknowledged that "[i]n lawsuits seeking a remedy for past violations of an organization's members' rights, it makes sense that, after some discovery, the plaintiff be required to list at least one member who has been injured," *id.* at 1160, those circumstances are not present here. The harm the Protocol inflicts is ongoing and Florida Rising's complaint seeks prospective relief. *Compare* Compl. ¶ 109, *with Browning*, 522 F.3d at 1160 (observing that "[w]hen the alleged harm is prospective, we have not required that the organizational plaintiffs name names because every member faces a probability of harm in the near and definite future"). As Judge Tjoflat observed in

[2] The SOS does not address the remaining two prongs of the associational standing analysis, likely because Eleventh Circuit authority confirms Plaintiff meets those prongs. In *Browning*, the court noted that "The Secretary does not challenge the germaneness prong of this inquiry, and we find that the interests of voters in being able to register are clearly germane to plaintiffs' purposes. The Secretary likewise does not contest the third prong, and we are mindful that when the relief sought is injunctive, individual participation of the organization's members is not normally necessary." 522 F.3d at 1160 (cleaned up). As with the *Browning* plaintiffs, the interests of voters in being able to register are clearly germane to Florida Rising's purposes. *See* Compl. ¶ 16 ("Florida Rising conducts massive voter registration, voter education, voter engagement, and election protection programs in Florida"). Like the *Browning* plaintiffs, Florida Rising seeks injunctive relief in this case. *See id.* ¶ 109.

[3] "SOS Br." refers to the Secretary of State's motion to dismiss brief, ECF No. 70. "SOE Br." refers to the Supervisors of Elections' joint motion to dismiss brief, ECF No. 67.

Browning:

> Human fallibility being what it is, someone is certain to get injured in the end. By their nature, the kinds of mechanical, typographical mistakes that plaintiffs claim will illegally disenfranchise voters under Subsection 6 cannot be identified in advance.

Id. at 1164; *see also Fearless Fund*, 103 F.4th at 773 ("An organization need only 'make specific allegations' based on 'specific facts . . . that one or more of [its] members would be directly affected'") (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009)); *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1342 (11th Cir. 2014) (same). Given the Protocol's widespread impact, there undoubtedly is a realistic danger that Florida Rising's members will continue to suffer harm. *See*, *e.g.*, *Arcia*, 772 F.3d at 1342.

Rather than grapple with (or even acknowledge) *Browning*, the SOS instead suggests *Georgia Republican Party v. S.E.C.*, 888 F.3d 1198 (2018), requires a different outcome. The SOS's reliance on *Georgia Republican Party* is misplaced. In that case, plaintiffs challenged an agency order adopting a rule. The Eleventh Circuit noted that "[i]n this context, a petition for appellate review of a final agency order is more analogous to a motion for summary judgment in that both request a final judgment on the merits." *Id.* at 1201 (cleaned up). Thus, unlike at the pleadings stage, plaintiffs could not rely on "general factual allegations of injury" but were required to present evidence of specific facts. *Id.* Again, that is not the posture here.

For their part, the SOEs' sole attack on associational standing is to assert in a footnote, without support or citation, that Plaintiff lacks associational standing because the Complaint does not specifically "mention" the elements of associational standing. SOE Br. at 10 n.3. But no such requirement exists. *See Mazer*, 556 F.3d at 1272 (11th Cir. 2009) ("[A]lthough [Plaintiff], in its complaint, did not expressly allege these three

elements [of liability], we conclude that the complaint's allegations regarding [Defendant]'s conduct . . . either incorporate these elements or generate an inference of these elements sufficient for notice pleading and to withstand a Rule 12(b)(6) motion to dismiss"). To the extent the SOEs imply that the Complaint's allegations are insufficient, that concern is baseless. The Complaint alleges that Florida Rising's members "include individuals who have been impacted or may in the future be impacted by the exact match protocol," Compl. ¶ 18, which is tantamount to alleging that its members would have standing to sue in their own right.[4] The Complaint also states that Florida Rising "conducts massive voter registration, voter education, voter engagement, and election protection programs in Florida," *id.* ¶ 16, which affirms that the interests Florida Rising seeks to protect (*i.e.*, eligible Floridians' ability to register to vote) are germane to the organization's purpose. Finally, it is apparent from the Complaint that neither the claims asserted nor the relief requested require individual members' participation in the suit. *See Browning*, 522 F.3d at 1160 ("When the relief sought is injunctive, individual participation of the organization's members is not normally necessary").

[4] This allegation, along with the allegation that these individuals "are *eligible* voter registration applicants who, because of the 'exact match' protocol, have had or will in the future have their facially complete voter registration forms deemed 'unverified' and who, as a direct result of Defendants' 'exact match' protocol, will not be registered to vote as active voters on the Florida voter-registration list for upcoming elections," Compl. ¶ 18 , is sufficient to demonstrate that these individual members of Florida Rising have suffered an injury in fact. *See e.g., Greater Birmingham Ministries v. Sec'y of State for Ala.,* 966 F.3d 1202, 1219-20 (11th Cir. 2020) (holding that organization's members include "minority voters in Alabama" who "would otherwise have standing to sue" in case involving Alabama voter identification requirement), *vacated on other grounds* 992 F.3d 1299 (11th Cir. 2021).

B. Florida Rising Has Pled an Injury in Fact to Establish Organizational Standing

1. Florida Rising Has Diverted Resources to Combat the Protocol

Defendants argue that Florida Rising failed to plead that it has suffered an injury in fact due to the Protocol, which is necessary to establish organizational standing due to a diversion of resources. SOS Br. at 4-10; SOE Br. at 9-13. This argument is incorrect.

An organization may establish standing due to a diversion of its resources "if the defendant's illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts." *Jacobson*, 974 F.3d at 1250 (cleaned up); *GALEO*, 36 F.4th at 1113-17. To establish this form of standing, an organizational plaintiff "must explain where it would have to divert resources away *from* in order to spend additional resources on combating the effects of the defendant's alleged conduct. *GALEO*, 36 F.4th at 1114 (cleaned up). The Eleventh Circuit is clear that voting-rights plaintiffs need not itemize, line-by-line, the drain on their organization's resources incurred by the challenged provision at this stage of the litigation. "At the pleading stage, 'general factual allegations of injury' . . . may suffice." *Georgia Republican Party v. S.E.C.*, 888 F.3d 1198, 1201 (11th Cir. 2018); *see also GALEO*, 36 F.4th at 1115 ("GALEO's broad allegation of diversion of resources is enough at the pleading stage").

Florida Rising sufficiently alleged a diversion of resources caused by the Protocol. It alleges that it is diverting resources away from its voter registration, voter education and get-out-the-vote activities to institute an outreach program to contact impacted voters and assist them in navigating the Protocol's gauntlet. Compl. ¶ 20. Florida Rising has alleged another concrete harm: Floridians who registered with Florida Rising's assistance or whom Florida Rising contacted as part of its get-out-the-vote work had their voter-

registration applications rejected due to the Protocol. *Id*. ¶ 19. In short, Florida Rising has reached out to and tried to assist – a second time – applicants who Florida Rising previously registered or contacted and would have already been on the rolls but for the Protocol. Florida Rising also alleged:

> In light of the magnitude of the impact of Florida's 'exact match' program, Florida Rising was forced to launch an outreach program designed specifically to contact individuals whose facially valid, timely voter registration applications have been denied or placed in an 'unverified' status due to a failure to meet the 'exact match' requirements… . Undertaking the program and responding to voter confusion about registration status that stems from the 'exact match' requirements has required Florida Rising to deploy staff, volunteers, and other resources that *would otherwise be devoted to the organization's core voter registration, voter education, and get-out-the-vote work*.

Id. ¶ 20 (emphasis added).

These allegations demonstrate the types of concrete injuries Florida Rising is suffering and how it is diverting resources to combat the effects of the Protocol. These injuries are sufficient to confer standing under well-established Eleventh Circuit caselaw. *See, e.g.*, *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (concluding that the NAACP established an injury in fact by "divert[ing] resources from its regular activities to educate voters about the requirement of a photo identification and assist[ing] voters in obtaining free identification cards").

2. Florida Rising Has Standing under Browning and Other Eleventh Circuit Cases

The plaintiff organizations in *Browning*, like Florida Rising,[5] worked "to increase voter registration and participation among members of racial and ethnic minority communities in Florida," 522 F.3d at 1158. The *Browning* plaintiffs asserted they had to

[5] *See* Compl. ¶ 16.

"divert scarce time and resources from registering additional voters to helping applicants correct the anticipated myriad of false mismatches due to errors either by the Department of State or by the applicant," and that the exact match protocol would make it more difficult for eligible individuals to register and thereby undermine the organizations' goals. *Id.* at 1164-65. These are the ***exact same injuries*** Florida Rising has alleged. *See* Compl. ¶ 19 (Exact match protocol is forcing Florida Rising "to divert resources to resolve related voter-registration problems for Floridians trying to register to vote. This frustrates a core component of Florida Rising's mission by interfering with its ability to expand democracy in Florida"). *Id*.[6] The Eleventh Circuit held that the *Browning* plaintiffs had made:

> a sufficient showing that they will suffer a concrete injury under Subsection 6. The organizations reasonably anticipate that they will have to divert personnel and time to educating volunteers and voters on compliance with Subsection 6 and to resolving the problem of voters left off the registration rolls on election day. These resources would otherwise be spent on registration drives and election-day education and monitoring.

Browning, 522 F.3d at 1165-66. *Browning* remains controlling law.[7] In *GALEO*, the Eleventh Circuit held that an organizational plaintiff's "broad allegation of diversion of resources is enough at the pleading stage" to establish standing. *GALEO*, 36 F.4th at 1115 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). The Eleventh Circuit vacated a district court's erroneous holding that a civil rights organization, which, like Florida Rising, engages in voter registration and get-out-the-vote activities, failed to allege a diversion of resources. *Id*. at 1117. The court reasoned that it was more than

[6] The SOEs argue that the Complaint is "simply silent as to what harm Plaintiff is seeking to counteract and how its diversion of resources is aimed at doing so." SOE Br. at 12 (cleaned up). Paragraphs 19 and 20 of the Complaint expressly address these issues.

[7] The Eleventh Circuit recently cited the *Browning* plaintiffs' diversion of resources as exemplifying the concept of "concrete harm," *City of S. Miami v. Governor*, 65 F.4th 631, 639 (11th Cir. 2023); s*ee Jacobson*, 974 F.3d 1249-50; *GALEO*, 36 F.4th at 1114-1116.

sufficient for the organization to allege that it diverted resources from those core activities to combat defendants' failure to provide bilingual election materials by assisting voters who might need help using English-only election materials or with navigating the mail voting process. *Id.* at 1115.

Similarly, in *Arcia*, the Eleventh Circuit held that organizations engaging in voter registration and public education and get-out-the-vote work suffered an injury in fact by diverting resources to address a database-matching program similar to the Protocol which sought to identify potential noncitizen registrants. 772 F.3d at 1341-42.

In short, Florida Rising's diversion-of-resources allegations are not fatally vague or non-specific. To the contrary, they are precisely the sort of allegations that the Eleventh Circuit has repeatedly concluded meet the diversion-of-resources threshold for standing.

3. The Protocol Does Not Support Florida Rising's Mission

Next, the SOS and SOEs argue that, rather than cause Florida Rising injury in fact, the Protocol has been something of a boon for Florida Rising—in their telling, the new outreach program Florida Rising developed to combat the Protocol's adverse impacts "supports"[8] and is "in furtherance and in sync with"[9] Florida Rising's mission of conducting voter outreach and registration. This argument fails for at least two reasons.

First, accepting this argument would require the Court to ignore its obligation to accept Florida Rising's allegations of resource diversion, including that it created a new outreach program devoted specifically to targeting Protocol-impacted registrants that required diverting resources from its traditional voter registration and outreach work, as

[8] SOS Br. at 7.

[9] SOE Br. at 11.

true. *See GALEO*, 36 F.4th at 1115.

Second, the argument is logically incoherent: any restriction that prevents applicants from registering and voting plainly frustrates Florida Rising's mission of increasing access to voting. *See* Compl. ¶ 16. It is *harmful* to Florida Rising to have to double back and help registrants that the organization previously assisted with filling out a voter-registration application because that applicant is not on the voter rolls because of the Protocol.[10] Eleventh Circuit precedent confirms this commonsense approach. *Browning*, *Arcia*, *Billups*, and *GALEO* did not consider whether the various organizations' diversion of resources were "supportive" of, "in sync with," or otherwise aligned with their respective missions. Rather, the Eleventh Circuit routinely concludes diversions constituted injuries in fact to the organizations.

4. Florida Rising's Injury is Not Speculative or Hypothetical

Finally, the SOS suggests Florida Rising must allege "concrete harm to an identifiable community" and describe "how Plaintiff's members plan to register" to successfully establish organizational standing. SOS Br. at 9 (cleaned up).

The SOS's argument is flawed for several reasons. First, it is inconsistent with the Eleventh Circuit's decisions in organizational standing cases involving diversion of resources. In *Browning*, for example, the court did not consider "how Plaintiff's members plan to register" when it determined that a voting registration organization had standing to challenge the Protocol based on a diversion of resources. 522 F.3d at 1165-66. That is likely because how a plaintiff's members plan to do anything is irrelevant to a claim of

[10] *Cf. Markadonatos v. Vill. of Woodridge*, 739 F.3d 984, 996 (7th Cir. 2014) (Requiring a person arrested by mistake to pay a booking fee because he benefitted from the "services" of being photographed and fingerprinted "surely qualifies as Orwellian") (Hamilton, J., dissenting), *reh'g en banc granted, opinion vacated* Mar. 17, 2014).

organizational standing based on a diversion of resources.

Finally, unlike the harm alleged in *City of South Miami* (on which the SOS relies), there is nothing hypothetical about the future harm to be wrought by the exact match protocol. In that case, the Eleventh Circuit described the "highly attenuated chain of possibilities" required to support the plaintiffs' allegations of harm as follows:

> the federal government will target their members for deportation; the federal government will enlist the help of local authorities, even though street-level cooperation with federal officials is exceedingly rare; local officials will invoke their authority under [the challenged statute] to justify cooperation; local authorities will successfully target the organizations' members; and local authorities, following federal directives, will racially profile the organizations' members in the process despite [the statute]'s explicit ban on discrimination.

City of South Miami, 65 F.4th at 637.

In contrast to the hypothetical harms there, the Complaint here is replete with allegations of the Protocol's past and continuing harm.[11] These ongoing, concrete harms caused by the Protocol which, in turn, form the root of Florida Rising's organizational injury, require the organization to continue to divert resources to address the Protocol's pernicious effects. Florida Rising has alleged "a predictable chain of events leading from the government action to the asserted injury." *FDA v. All. for Hippocratic Med.*, 602 U.S.

[11] *See, e.g.*, Compl. ¶ 8 (More than 43,000 Floridians who submitted otherwise valid voter registration applications to Florida election officials since 2018 across 26 Florida counties have never been able to register to vote successfully solely due to the "exact match" requirement); ¶ 9 (Black voter registration applicants have been rejected or deemed "unverified" at a rate more than twice their share of the registrant pool for the counties analyzed, while white applicants are denied registration and deemed "unverified" at a small fraction of their share of the comparable electorate); ¶ 46 (In Miami-Dade County alone, since 2018, over 41,000 applications were set aside as "unverified" and flagged for further action by the applicant due to a PIN mismatch, with the applicants being sent letters by county election officials); ¶ 51 (Voters in Miami-Dade County had their provisional ballots rejected during the 2022 general election due to the county's inability to verify their PINs through the "exact match" protocol).

367, 385 (2024) ("AHM").

Because Florida Rising has adequately alleged that "the defendant[s'] illegal acts impair its ability to engage in its projects by forcing [it] to divert resources to counteract those illegal acts," *Jacobson*, 974 F.3d at 1250 (quoting *Browning*, 522 F.3d at 1165), Florida Rising has adequately pled injury in fact.

C. The Supreme Court's Decision in *Alliance for Hippocratic Medicine* Does Not Alter the Injury in Fact Analysis

The SOS's assertion that Florida Rising alleges "simply a setback to [its] abstract social interests," as well as his reliance on *AHM*, are misplaced.

In *AHM*, the Supreme Court reiterated that the purpose of requiring a showing of injury in fact is to "screen[] out plaintiffs who might have only a general legal, moral, ideological, or policy objection to a particular government action." *AHM*, 602 U.S. at 381. The *AHM* plaintiffs sued FDA to rescind FDA's approval and modifications to the conditions of use of the drug mifepristone. *Id.* at 376-77. The plaintiffs had never prescribed nor used mifepristone, nor confronted any complications from its use; they were unregulated parties who had ideological objections to mifepristone. *Id.* at 372.

The plaintiffs argued that organizational standing exists whenever an organization spends its resources in response to a defendant's actions, even if it is merely to "to gather information and advocate against" an action that does not otherwise directly impact the organization. *Id.* at 394-95. In rejecting that argument, the Court explained that *Havens Realty* – the Court's leading organizational standing case – does not provide that "all the organizations in America . . . have standing to challenge almost every federal policy that they dislike[.]" *Id*. at 395. The Court noted that the plaintiff organization in *Havens Realty* diverted resources in response to actions that "directly affected and interfered with [the

plaintiff's] core business activities." *Id*. (explaining that the plaintiff in *Havens Realty* "not only was an issue-advocacy organization, but also operated a housing counseling service" that was "perceptibly impaired" by illegal racial steering). The *AHM* plaintiffs did not allege a similar injury; they just disagreed with FDA's decisions as "concerned bystanders" without a concrete stake in the dispute. *Id*. at 382.

Florida Rising is not a bystanding ideological, moral, or policy opponent; it directly provides voter-registration services and works to increase the voting and political power of marginalized communities, a core component of which is voter registration. Compl. ¶¶ 16-17. Consistent with its mission, Florida Rising has diverted its finite resources to counteract Defendants' unconstitutional and wrongful acts that work to deny eligible Floridians the ability to register, so that those voters—to whom the Protocol applies and who have already been impacted by it—can vote. *Id.* ¶¶ 16-20. As was true of the plaintiff organization in *Havens Realty*, the Protocol has "perceptibly impaired [plaintiff]'s ability to provide" the services at the core of its mission, evidence that was absent in *AHM. AHM*, 602 U.S. at 395 (quoting *Havens Realty*, 455 U.S. at 379).

Florida Rising's resource-diversion allegations fit comfortably in the *Havens Realty* framework left undisturbed by *AHM*.

D. Florida Rising's Injury is Traceable to Defendants' Actions and Redressable by an Order Against Them

In *Browning*, the Eleventh Circuit held that the organizations' injuries stemming from the Protocol were traceable to, and redressable by an order against, the SOS: "If we accept the injury to be that Subsection 6 will hinder the organizations' ability to carry out their mission of registering eligible voters by forcing plaintiffs to divert time and resources needed to comply with the matching requirement, causation is apparent. An injunction

against the enforcement of Subsection 6 would also redress this injury by doing away with the matching requirement, thereby freeing up the organizations to get on with their business." *Browning*, 522 F.3d at 1159 n.9.

Notwithstanding *Browning*, the dispositive impact of which the SOS ignores, the SOS maintains that Florida Rising's injury is not traceable to the Secretary's Office because a federal law, the Help America Vote Act ("HAVA"), "requires the Department to use the database it uses" to "verify applicants' personal information." SOS Br. at 10-11.

This argument is a red herring. HAVA, enacted years before *Browning* was decided, is not causing Florida Rising's injury. HAVA requires the chief State election official and the head of a State's motor vehicle authority to match information in their respective databases "to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration." 52 U.S.C. § 21083(a)(5)(B)(i). Nothing in HAVA requires election officials to reject voter-registration applications—or even flag them for additional scrutiny—because the information provided by the applicant does not exactly match the applicant's information as contained in State or federal databases. Rather, HAVA permits each state, "in accordance with State law," to "determine whether the information provided by an individual is sufficient" for verification purposes. *Id.* § 21083(a)(5)(A)(iii). HAVA is directed at voter *identification*, not *eligibility*. *Browning*, 522 F.3d at 1168 ("Assuming that plaintiffs are right that section 303(a)(5) of HAVA does not impose matching as a requirement of voter registration, it also does not seem to prohibit states from implementing it").

The SOS also misunderstands the scope of the relief Plaintiff seeks. Florida Rising is not seeking to "invalidate" FLA. STAT. § 97.053(6); it is seeking to enjoin the Protocol.

The SOS has an obligation under HAVA to try to verify applicants' personal identifying information. But Defendants have drastically exceeded HAVA's requirements by implementing a program that prohibits voters flagged through the database matching process from registering and casting a regular ballot. As the Complaint notes, Florida has other tools at its disposal to comply with the statute and should, like most other states, use those instead of the Protocol. Compl. ¶ 80.

The SOS further argues, while ignoring *Browning*'s holding to the contrary, that Florida Rising's injury is not redressable by an order enjoining the SOS from enforcing the Protocol—that only an order directed at the SOEs would redress Plaintiff's injury because "[o]nly the supervisors perform th[e] task" of "plac[ing] otherwise eligible applicants on the voter rolls in active status if their voter registration application was denied solely due to a failure to satisfy the 'exact match' requirement." SOS Br. at 11 (cleaned up). For their part, the SOEs take the exact opposite position, arguing that the SOS alone can redress Florida Rising's injury. SOE Br. at 17 (arguing that "[a] decision here against the SOEs and in Plaintiff's favor would not come close to redressing Plaintiff's alleged injury because the SOEs do not control Florida's automated matching process or verification requirements.") (cleaned up). That responsibility, according to the SOEs, falls on "the Florida Department of State." SOE Br. at 18.[12]

[12] Similarly, the SOEs argue that Florida Rising's injury is not traceable to them but rather to the SOS because the identification verification task "falls on the Department of State—not the SOEs." SOE Br. at 14. But under the Protocol, if the SOS cannot match an applicant's information, he "shall flag the record as unverified and the application record is sent . . . to the Supervisor of the new applicant's county of residence." FLA. ADMIN. CODE ("FAC") § 1S-2.039(5)(a)(3); *see also Fla. St. Conf. of the NAACP v. Browning*, 569 F. Supp. 2d 569 F. Supp. 2d 1237, 1244 (N.D. Fla. 2008) ("On a daily basis . . . the Supervisors receive an electronic notification of the applications that could not be verified by DHSMV or BVRS"). The Supervisor then interacts with the unverified applicant by

As a practical matter, the SOS and the SOEs *work together* to implement the Protocol. The SOS has overall responsibility for verifying the authenticity of the personal information provided by applicants. FLA. STAT. § 97.053(6). The SOS, through the Bureau of Voter Registration Services ("BVRS"), initially seeks to resolve any data mismatches. Compl. ¶ 40. For that reason, and as the Eleventh Circuit held in *Browning*, an injunction barring the Protocol's enforcement directed to the SOS would "redress [Plaintiff's] injury by doing away with the matching requirement, thereby freeing up the organizations to get on with their business." *Browning*, 522 F.3d at 1159 n.9.

But the SOEs play a significant role in implementing the Protocol. For example, if BVRS cannot resolve a mismatch, the applicant's record is sent to the appropriate county Supervisor for further action, which includes the Supervisor sending notice letters to applicants who must verify their identity, and deciding whether to count provisional ballots cast by voters ensnared by the Protocol. Compl. ¶¶ 44-45, 47; *see also supra* n.12. The SOEs have the authority to clear applicants ensnared by the Protocol who verify their identity and add them to the voter rolls (or not). *Id.* ¶¶ 48-49; *see also supra* n.12. An injunction barring the SOEs from implementing the Protocol is therefore also warranted.

E. Although it Need Not Allege it, Florida Rising has Third-Party Standing

The SOS argues that "even assuming Plaintiff identified one of its members with an actual injury, properly alleged diversion of its resources, or traced its injury to the

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sending a letter requesting identifying information. FAC § 1S-2.039(5)(a)(3); *see also Browning*, 569 F. Supp. 2d at 1244-45 ("The Supervisors mail notice letters to applicants whose applications could not be resolved and, to the extent possible, attempt to reach the applicants by phone"; "The Supervisors' staff also researches unverified records individually, including additional proofreading, in an attempt to resolve the issue"). How, or if, the applicant responds to the letter sent by the Supervisor dictates whether the applicant will make it onto the rolls. In this way, the SOEs play a critical role in the exact match process.

Department, Plaintiff would still lack standing to challenge the voter verification statute on behalf of third parties." SOS Br. at 12. To the extent the SOS argues that irrespective of whether Florida Rising has properly alleged organizational standing and/or associational standing, the Complaint is subject to dismissal because Florida Rising fails to adequately allege third-party standing, that proposition is unsupported. None of the cases the SOS cites support it and *Browning* directly contradicts it.

In *Browning*, the district court found, separately, that plaintiffs had organizational standing, associational standing, and third-party standing, describing the latter to mean that the organizations had standing "on behalf of non-member registrants who will be denied the right to vote." *Fla. St. Conf. of the NAACP v. Browning*, 2007 WL 9697660, at *3 (N.D. Fla. Dec. 18, 2007). The Eleventh Circuit affirmed, stating, "[a]s we are satisfied that plaintiffs have met Article III's standing requirements under the alternative theories actually litigated—as representatives of their members and as organizations directly injured—we pretermit consideration of the issue of whether plaintiffs have standing to litigate the claims of nonmembers in a representative capacity." *Browning*, 522 F.3d at 1158 n.7. *Browning* therefore forecloses any argument that Florida Rising must demonstrate third-party standing for this case to proceed.

Regardless, Florida Rising does have third-party standing. The district court's analysis of third-party standing in *Browning* is instructive. The district court found that the voting-rights organizations had established an injury in fact due to their diversion of resources. Like the *Browning* plaintiffs, Florida Rising is "dedicated to advancing economic and racial justice across Florida by building power in historically marginalized communities," "with a mission to increase the voting and political power of marginalized

people and excluded constituencies." Comp. ¶ 16. Thus, Florida Rising has alleged "a close relationship with the minority community members who participate in their voter registration activities." *Compare id.*, *with Browning*, 2007 WL 9697660 at *3. Florida Rising also alleges that the Protocol "can sow confusion and leave voter registration applicants uncertain about their eligibility to vote in the time leading up to, on, and even after Election Day." Compl. ¶ 53. As in *Browning*, because of the Protocol, "registrants are hindered from protecting their own interests." 2007 WL 9697660 at *3.

Further, the SOS's reliance on *Vote.org v. Callanen*, 39 F.4th 297 (5th Cir. 2022), is severely misplaced—in fact, *Callanen* undermines the Secretary's argument. In the opinion cited by the SOS, a motions panel of the Fifth Circuit ruled that Vote.org likely lacked third-party standing to challenge a statute requiring that voter-registration applications contain a "wet" signature. *Id.* at 303. The SOS fails to note that a year later, the merits panel reached the opposite conclusion, holding that plaintiff could assert the individual voters' rights. *Vote.Org v. Callanen*, 89 F.4th 459, 472 (5th Cir. 2023) ("Vote.org's position as a vendor and voting rights organization is sufficient to confer third-party standing"). In short, Florida Rising, like the *Browning* plaintiffs, has standing to bring its claims on behalf of non-member registrants.

Accordingly, Florida Rising has adequately alleged that it has standing.

II. FLORIDA RISING HAS STATED CLAIMS AGAINST EACH DEFENDANT[13]

The SOS also seeks dismissal of Plaintiff's claims for failure to state a claim. Florida Rising adequately asserts claims under the First and Fourteenth Amendments of the United States Constitution, Section 8 of the NVRA, and Section 2 of the VRA.

[13] The SOE's merits argument comprises a single paragraph devoid of caselaw. *See* SOE Br. at 22-23.

A. Florida Rising Has Stated a Claim Under the First and Fourteenth Amendments to the United States Constitution

1. Defendants Incorrectly Categorizes the Complaint as a Facial Challenge

The SOS wrongly asserts that the Complaint presents a facial attack on Florida's voter verification statute, thereby requiring Plaintiffs to assert that the regulation is unconstitutional under all circumstances. This argument is flawed because, among other things, it fundamentally misunderstands the relief Plaintiff seeks.

Florida Rising does not seek to invalidate Subsection Six—or any other Florida statute. Instead, Florida Rising challenges the Protocol, which is not expressly set forth or required by any Florida statute. Florida law, states that "a voter registration application . . . may be accepted as valid only after the department has verified the authenticity or nonexistence of the driver license number, the Florida identification card number, or the last four digits of the social security number provided by the applicant." FLA. STAT. § 97.053(6). This language provides for data matching but does not require the *consequences* of that match—it certainly does not mandate that Floridians be denied registration due to a failure to match.

The Complaint asserts that the Protocol as applied to Floridians trying to register to vote is unconstitutional. *See* Compl. ¶¶ 1, 85, 101, 108. As-applied challenges are held to a more flexible standard than facial challenges. Rather than asserting a statute is unconstitutional in all contexts, as-applied challenges allege that the "application of the statute in the particular context" in which it is implemented is unconstitutional. *Doe v. Rausch*, 382 F. Supp. 3d 783, 800 (E.D. Tenn. 2019); *see also Williams v. Pryor*, 240 F.3d 944, 955 (11th Cir. 2001) (after dismissing a facial challenge, the court held that "the district court failed to specifically consider the as-applied challenges raised by the four

'user' plaintiffs."). Florida Rising alleges that Defendants have applied the Protocol to prevent tens of thousands of Floridians, the overwhelming majority of whom are persons of color, from registering to vote. *See, e.g.*, Compl. ¶¶ 63-64.

Because Florida Rising does not seek to invalidate § 97.053(6), it necessarily does not raise a facial challenge to the statute. That fact distinguishes this case from *Browning*, where the plaintiffs made the strategic decision to "contend that Subsection Six, on its face, violate[d] the right to vote and equal protection and [wa]s therefore facially invalid under the United States Constitution." *Browning*, 569 F. Supp. 2d at 1246. The SOS's reliance on the district court's post-remand ruling in *Browning*, *see* SOS Br. at 16, is therefore misplaced.

The as-applied *Anderson-Burdick* claim at issue in this case is like one the Eleventh Circuit recently upheld, notwithstanding similar arguments from the SOS that it should be characterized as facial. *See Democratic Exec. Comm. of Fla. v. Lee*, 347 F. Supp. 3d 1017, 1032 (N.D. Fla. 2018) ("Florida's statutory scheme as it relates to curing mismatched-signature ballots has been applied unconstitutionally."), *aff'd*, 915 F.3d 1312 (11th Cir. 2019). The court concluded that the fact that the law had burdened a modest number of voters – approximately 4,000 absentee ballots had been rejected – was no barrier to ruling in the plaintiffs' favor in an as-applied context. *Lee*, 915 F.3d at 1322. In so concluding, the Eleventh Circuit panel rejected the argument that the plaintiffs were not entitled to relief because they were bringing a facial claim.

a. Florida Rising Properly Alleges that the Protocol Creates an Undue Burden on Floridians' Fundamental Right to Vote

The Complaint alleges that the Protocol has imposed a substantial burden on Floridians' right to vote by disenfranchising thousands of otherwise eligible citizens.

Compl. ¶ 79. It also alleges that the matching process is error-prone and can lead to election officials improperly deeming *valid* voter registration applications as invalid, incomplete, and "unverified," which renders eligible voters *presumptively ineligible* and denies them the right to vote. *Id.* ¶¶ 4-5. This creates a severe burden on thousands of otherwise eligible voters—at least 43,000 individuals who submitted otherwise valid registrations have not been successfully able to vote, with a disproportionate number of those impacted being voters of color. *Id.* ¶¶ 8, 63-64. The Complaint further alleges that the Protocol is not supported by any State interest sufficient to justify the burdens it imposes. *Id.* ¶ 79-80, 82.

These allegations sufficiently state a constitutional undue burden claim under the Supreme Court's *Anderson-Burdick* framework. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

Because *Anderson-Burdick* is a balancing test that requires a *factual* record, it cannot usually be resolved at the motion-to-dismiss stage. As the Eleventh Circuit has explained, it is "impossible for [a court] to undertake the proper review required by the Supreme Court" under *Anderson-Burdick* on a motion to dismiss. *Duke v. Cleveland*, 5 F.3d 1399, 1405 (11th Cir. 1993); *see also Bergland v. Harris*, 767 F.2d 1551, 1555 (11th Cir. 1985) (remanding and ordering district court "to develop the *factual* record necessary to follow the weighing process dictated by *Anderson*"); *League of Women Voters of Fla. v. Lee*, 566 F. Supp. 3d 1238, 1258 (N.D. Fla. 2021) ("Because the *Anderson-Burdick* test 'emphasizes the relevance of context and specific circumstances,' it is particularly difficult to apply at the motion to dismiss stage) (quoting *Cowen v. Ga. Sec'y of State*, 960 F.3d 1339, 1346 (11th Cir. 2020)).

Notwithstanding the precedent directing district courts to carefully review a *factual* record in assessing *Anderson-Burdick* claims, the SOS asks the Court to dismiss Florida Rising's claim at the pleading stage, without the benefit of a factual record. This request lacks support. For example, the SOS relies on a 2008 decision in the *Browning* case, *see* SOS Br. at 16, although, in an early opinion in *Browning*, the district court denied the State's motion to dismiss the *Anderson-Burdick* claim. *Browning*, 2007 WL 9697653, at *9-10. The SOS ignores that ruling, noting instead that the court later declined to preliminarily enjoin the Protocol. But the court's preliminary injunction ruling, made based on an under-developed factual record that hobbled the court's ability to assess how the Protocol would impact voters, *see Browning*, 569 F. Supp. 2d at 1255, is irrelevant here. The other cases the SOS cites likewise involve preliminary injunction motions (*Gonzalez v. Arizona*) or orders issued after a bench trial (*Fair Fight Action, Inc. v. Raffensperger*; *Crawford v. Marion Cnty. Election Bd.*). Those cases are not instructive at the motion to dismiss stage.

b. An Undue Burden Claim Need Only Invoke the Rights of Rejected Applicants to Allege a Severe Burden Under *Anderson-Burdick*

Citing Justice Scalia's concurrence in *Crawford*, the SOS asserts that Florida Rising's *Anderson-Burdick* claim should be dismissed because it "seeks to vindicate only the rights of rejected applicants, rather than the rights of Florida voters generally." SOS Br. at 18. The SOS's reliance on a concurrence in *Crawford* is misplaced because (1) *Crawford* involved a facial constitutional challenge (not an as-applied challenge), and (2) Justice Scalia wrote only on behalf of three Justices. The Supreme Court majority rejected his approach and concluded that *Anderson-Burdick* requires consideration of whether a statute "imposes 'excessively burdensome requirements' on *any class of*

voters." *Crawford*, 553 U.S. 181, 202 (2008) (plurality op.) (quoting *Storer v. Brown*, 415 U.S. 724, 738 (1974) (emphasis added); *see also id.* at 199 (assessing the "somewhat heavier burden [that] may be placed on a limited number of persons" by the challenged law); *id.* at 212-14 (Souter, J., dissenting) (describing the burdens faced by "[p]oor, old, and disabled voters" and those who do not own cars); *id.* at 239 (Breyer, J., dissenting) (similar). The Supreme Court in *Anderson* similarly focused on the challenged law's "burden on an identifiable segment of Ohio's independent-minded voters"—not on Ohioans generally. 460 U.S. at 792.

For this reason, courts, including the Eleventh Circuit, have applied *Anderson-Burdick* to invalidate voting restrictions that impact a relatively small subset of the statewide voter pool. *See, e.g.*, *Lee*, 915 F.3d at 1322 (denying stay of preliminary injunction issued under *Anderson-Burdick* notwithstanding "tiny" subset of injured voters; less than 4,000 of more than 9 million voters impacted by the challenged statute); *Ga. Coal. For the People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1255, 1269 (N.D. Ga. 2018) (issuing preliminary injunction against citizenship-verification protocol impacting 3,141 voters); *Common Cause/New York v. Brehm*, 432 F. Supp. 3d 285, 314 (S.D.N.Y. 2020).

Accordingly, the SOS's arguments to dismiss the *Anderson-Burdick* claim fail.

B. Florida Rising Has Stated a Claim Under Section 8 of the National Voter Registration Act

1. Section 8(b) applies to all programs and activities impacting the front end of the registration process

The SOS has moved to dismiss Florida Rising's NVRA Section 8(b) claim. Section 8(b) requires that "[a]ny State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for

elections for Federal office—shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act[.]" 52 U.S.C. § 20507(b)(1). Section 8(b)'s language parallels, and must be read in tandem with, HAVA's requirement that "each State . . . shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list . . . that contains the name and registration information of every legally registered voter in the State[.]" 52 U.S.C. § 21083(a)(1)(A).

The Protocol falls within Section 8(b) ambit for at least two reasons. ***First***, Florida officials cannot maintain an accurate voter-registration list if ineligible voters are on the rolls and voting. ***Second***, and conversely, Florida officials cannot maintain an accurate list if eligible voters are kept off the rolls. The Protocol fits within both rubrics: its purpose is to ensure the accuracy of Florida's voter rolls (according to the State), and it has the effect of preventing otherwise eligible Floridians from joining the voter rolls and being allowed to vote (as the Complaint alleges). Because the Protocol determines the makeup of the statewide voter-registration list that Defendants maintain, it plainly impacts how "accurate and current" that list is.

The SOS's dictionary definitions of "maintenance," *see* SOS Br. at 19, as well as other, more common definitions from the relevant time period,[14] all support Florida Rising's reading of the Section 8(b)'s plain language. The Protocol "preserve[s] [the voter

[14] *See Maintenance,* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1992) ("The work of keeping something in proper condition; upkeep."); *Maintenance*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (1993) ((a) to "[p]reserve from failure or decline" and (b) "to sustain against opposition or danger."); *Maintenance*, BLACK'S LAW DICTIONARY (6th ed. 1990) ("The upkeep or preservation of condition of property, including cost of ordinary repairs necessary and proper from time to time for that purpose.").

rolls] from lapse, decline, [or] failure" by keeping ineligible Floridians off the voter rolls, thereby keeping Florida's voter list in "proper condition" or "good order." And, as Florida Rising alleges, the voter rolls cannot be maintained in a "proper condition" or "good order," or "preserve[d] from lapse, decline, [or] failure" if the Protocol bars eligible Floridians from joining the voting rolls.

The uniform and nondiscriminatory provision must be considered within its statutory context. It is not located in Section 8(c) of the NVRA (titled "Voter removal programs") or Section 8(d) (titled "Removal of names from voting rolls"). Instead, it is located in Section 8(b), which is titled "Confirmation of voter registration." According to Florida law, the Protocol's purpose is to "very"—that is, to *confirm*—that the applicant is who they say they are before adding them to the rolls. *See* FLA. STAT. § 97.053(6). Thus, the Protocol falls squarely within Section 8(b) of the NVRA.

The canon of consistent usage instructs that "a material variation in terms suggests a variation in meaning." *In re Failla*, 838 F.3d 1170, 1176-77 (11th Cir. 2016) (quoting ANTONIN SCALIA & BRYAN GARNER, READING LAW 170 (2012)); *see also Russello v. United States*, 464 U.S. 16, 23 (1984). The language in Sections 8(c) and (d) demonstrate that Congress knew how to reference list maintenance activities that narrowly target "remov[ing] the names of a registrant from the official list of eligible voters," *see* 52 U.S.C. § 20507(d)(1). It is significant that Congress used different, broader language in Section 8(b)'s uniform and nondiscriminatory provision.

Florida Rising's straightforward reading of Section 8(b)'s plain language is consistent with NVRA's twin purposes of (1) increasing the number of eligible citizens to register to vote and to participate in the electoral process, and (2) ensuring that accurate

and current voter registration rolls are maintained. *See* 52 U.S.C. § 20501(b). By contrast, the SOS's proposed construction of Section 8(b) divorces Section 8(b) from its statutory context and leads to absurd results. *See Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206, 1213 (11th Cir. 2010); *United States v. Velez*, 586 F.3d 875, 879 (11th Cir. 2009) ("We do not believe Congress intended such an absurd result, which nullifies the provision and divorces it from its statutory context, thereby violating basic canons of statutory construction.").

Citing a statement in the Senate Report, the SOS argues that Section 8(b) was intended "to prohibit selective or discriminatory purge programs." SOS Br. at 19 n.4 (quoting S. REP. NO. 103-6, 103rd Cong., at 31 (1993)). But that very same Senate Report states that for NVRA purposes, "registration is complete upon submitting the form to the voter registrar, motor vehicle office, designated agency or office, or on date of postmark, if mailed." S. REP. NO. 103-06, 103rd Cong., at 30-31. Because the Protocol matches information from registrants' timely submitted applications, it fits comfortably within this definition. *Cf. United States Student Ass'n Found. v. Land*, 546 F.3d 373, 386 (6th Cir. 2008) (state voter-registration program under which new registrants were rejected if a voter ID card mailed to them was returned as undeliverable was subject to Section 8(d) because the plaintiffs challenged "the rejection of eligible voters") (cleaned up).

The SOS's reliance on *Husted v. A. Philip Randolph Institute*, 584 U.S. 756 (2018) is also misplaced because (1) the plaintiffs in that case did not bring a uniform and nondiscriminatory claim and (2) the *dicta* the SOS cites merely observes in passing that Section 8(b)(1) is one of the NVRA's "two general limitations that are applicable to state removal programs." 584 U.S. at 764. The Supreme Court in *Husted* did not purport to

define Section 8(b)'s scope or describe every possible voting list maintenance activity that fit within its ambit. The district court in *Mi Familia Votes v. Fontes*, 691 F. Supp. 3d 1077 (D. Ariz. 2023), which did not have the benefit of this argument advanced by the plaintiffs there, misread *Husted* and mistakenly concluded that this *dicta* was "[b]inding authority." 691 F. Supp. 3d at 1095. This Court should not follow suit.

a. Florida Rising Adequately Alleges Non-Uniform and Discriminatory Implementation of the Protocol

Next, the SOS erroneously contends that Plaintiff fails to allege that the Protocol is non-uniform or discriminatory. This argument elides the Complaint's well-pled factual allegations, misreads key terms in the NVRA, and fails to account for on-point authority that contradicts his arguments.

The SOS's first error lies in his narrow construction of "uniform." In support thereof, the SOS offers a curious definition of "uniform," which comes from an irrelevant 1884 Supreme Court decision involving the interpretation of a tax statute. *See* SOS Br. at 20. (citing *Edye v. Robertson*, 112 U.S. 580, 594 (1884)).

The SOS's chosen source appears to be a self-serving outlier; contemporary definitions of "uniform" are far more expansive. *See, e.g.*, *Uniform*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (1993) ((i) "marked by lack of variation, diversity, change in form, manner, worth or degree"; (ii) "marked by complete conformity to a rule or pattern or by similarity in salient detail or practice"; (iii) "consistent in conduct, character, or effect: lacking in variation, deviation, or unequal or dissimilar operation"). In cases interpreting Section 8(b) of the NVRA, courts have concluded that the application of a voting restriction can be non-uniform in cases where the law is applicable to all potential registrants in the abstract. *See, e.g.*, *United States v.*

Florida, 870 F. Supp. 2d 1346, 1350-51 (N.D. Fla. 2012) (explaining that a requirement to provide proof of citizenship, that was applicable to all voters, still was non-uniform because it was more likely to have discriminatory impact on new citizens); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 703-04 (N.D. Ohio 2006).

Even if the SOS's cherry-picked interpretation of "uniform" were accurate, his argument would still fail. The Complaint alleges that the Protocol is not uniform because it does not apply to at least two groups of people: (1) applicants who register to vote at the DMV; and (2) applicants who do not have a PIN. *See* Compl. ¶¶ 33 n.3, 36. The allegations that the Protocol does not apply to all voter-registration applicants are sufficient to defeat the SOS's motion.

Finally, the SOS relies on *Husted*, this time in support of the argument that Section 8(b) "nondiscriminatory" claims are only meritorious when a voting restriction is adopted with a discriminatory purpose *and* has a discriminatory effect. *See* SOS Br. at 21. The plaintiffs in *Husted* did not bring a Section 8(b)(1) "nondiscriminatory" claim. *Husted*, 584 U.S. at 789. Justice Alito was responding to an argument in Justice Sotomayor's dissent that evidence of a racially discriminatory effect was relevant to the Court's analysis of a separate section of the NVRA – Section 8(b)(2) – that is not at issue in this case. *Compare* 52 U.S.C. 20507(b)(1), *with* 20507(b)(2); *Husted*, 584 U.S. at 789.

Florida Rising has sufficiently alleged that Defendants' illegal implementation of the Protocol violates Section 8 of the NVRA.

C. Florida Rising Has Stated a Claim Under Section 2 of the Voting Rights Act

1. Section 2 Requires Equal Openness and Does Not Require a Plaintiff to Prove Discriminatory Intent or Racial Bias

The SOS engages in a confused and ultimately inaccurate description of the legal standard that applies to Section 2 claims. *Compare* SOS Br. at 22 (arguing that Section 2(a) "requires only proof of discriminatory 'results'"), with *id.* at 24 (suggesting Section 2 requires proof of racial bias and maybe discriminatory intent). His interpretation of the proper standard is flawed. To meet its Section 2 pleading burden, Florida Rising must merely set forth plausible allegations that the Protocol results in the denial or abridgement of the right to vote on account of race by making the political process not equally open to participation by voters of color. *See* 52 U.S.C. § 10301(a)-(b).

"The essence of a [Section] 2 claim . . . is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by" white voters and voters in the relevant minority group. *Allen v. Milligan*, 599 U.S. 1, 17 (2023) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (cleaned up)); *see also Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 660 (2021). In *Brnovich*, the Supreme Court emphasized that "[t]he key requirement is that the political processes leading to nomination and election (here, the process of voting) must be 'equally open' to minority and non-minority groups alike," which can be understood as "without restrictions as to who may participate." *Brnovich*, 594 U.S. at 667-68 (cleaned up). Or, in the words of Section 2 itself, "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id*. at 668 (quoting 52 U.S.C. § 10301(b)).

Further, Section 2 does not ask whether a practice denies voters the ability to vote: instead, it asks whether a practice or procedure results in "a denial ***or abridgement*** of the right . . . to vote." 52 U.S.C. § 10301(a) (emphasis added). "Abridgement is defined as '[t]he reduction or diminution of something,' while the [VRA] defines 'vote' to include 'all actions necessary to make a vote effective including . . . ***registration*** or other action required by State law prerequired to voting . . . ." *Veasey v. Abbott*, 830 F.3d 216, 259-60 (5th Cir. 2016) (cleaned up—emphasis added).

The SOS relies on the district court decision in *Browning*, but that case misstated the standard for proving a Section 2 violation. There, the district court held that a "successful claim requires discriminatory intent or a clear showing of racial bias." 2007 WL 9697653, at *7. That is not the law. As the Supreme Court recently reaffirmed:

> [W]e have reiterated that § 2 turns on the presence of discriminatory effects, not discriminatory intent. . . And we have explained that "[i]t is patently clear that Congress has used the words on account of race or color' in the Act to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination."

Allen, 599 U.S. at 25 (citing *Chisom v. Roemer*, 501 U.S. 380, 403–04 (1991), and *Gingles*, 478 U.S. at 71, n.34). Considering this unbroken line of Supreme Court precedent, the SOS's suggestion that a Section 2 claim must demonstrate discriminatory intent or racial bias is wrong.

Under this correct legal standard, Florida Rising has plausibly alleged that the Protocol has placed a disproportionate burden on Black Floridians and Floridians of color's ability to register, thereby rendering Florida's voting process not equal open to voters of color.

2. Florida Rising Adequately Pleads Causation

The SOS suggests that Plaintiff's Section 2 claim should be dismissed because the Complaint does not allege that the Protocol causes Florida's electoral process not to be equally open. That argument fails for at least two reasons. ***First***, the Complaint plainly and repeatedly alleges that the exact match protocol is causing an abridgment of the right to vote on account of race. ***Second***, the Secretary is asking the Court to weigh facts and discount well-pled allegations, which is improper at this stage of the litigation.

As an initial matter, well-pled Section 2 claims are ill-suited for resolution at the motion-to-dismiss stage, given that (1) plaintiffs' factual allegations must be accepted as true and viewed in plaintiffs' favor, and because (2) courts are required to engage in particularly detailed factfinding under the "totality of the circumstances" test used in Section 2 cases. *Brnovich*, 594 U.S. at 668-69 (concluding that Section 2 "requires consideration of the totality of the circumstances" and that "any circumstance that has a logical bearing on whether voting is equally open and affords equal opportunity may be considered"). The SOS's arguments and citations ultimately relate to the merits of Plaintiff's claim and, as another court observed in a similar context, addressing them now "puts the cart before the horse" because "these are summary judgment arguments, at best." *Lee*, 566 F. Supp. 3d 1262, 1291 (N.D. Fla. 2021) (concluding that the *Brnovich* decision did not support dismissing a Section 2 results claim).

Not surprisingly, district courts in this circuit have followed the court in *Lee* and denied dismissal of well-pled Section 2 results claims, including after the Supreme Court decided *Brnovich*. *See, e.g.*, *Sixth Dist. of A.M.E. Church v. Kemp*, 574 F. Supp. 3d 1260, 1276-77 (N.D. Ga. 2021) (concluding that the defendants' arguments regarding the extent of the burdens placed on voters by the challenged provisions "are not appropriate at the

motion to dismiss stage" and explaining that FRCP 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief'"); *Greater Birmingham Ministries v. Merrill*, 250 F. Supp. 3d 1238, 1243-44 (N.D. Ala. 2017) (denying motion to dismiss Section 2 claim); *see also Ga. Coal. For the Peoples' Agenda, Inc. v. Raffensperger*, 2022 WL 22866291 (N.D. Ga. Sept. 29, 2022) (denying summary judgment motion in Section 2 case because of disputed issues of material fact).

Further, a court adjudicating a Section 2 claim must consider the interplay between historical discrimination (both in voting and the persistent effects of socioeconomic discrimination) and the challenged practice. *See Brnovich*, 594 U.S. at 672-74; *Gingles*, 478 U.S. at 36-37. Defendants ignore these considerations entirely. For that reason alone, the motions should be denied.

Florida Rising has properly alleged that the Protocol causes unequal access to the electoral process in violation of the Section 2 results test. The Complaint includes detailed factual allegations that the electoral process is not equally open to white, Black and other nonwhite registrants because of the Protocol, as evidenced by the stark and extreme racial disparities, supported by statistical analysis and comprehensive data, between the white and Black or other nonwhite applicants who have been prevented from registering due to the protocol. *See, e.g.*, Compl. ¶¶ 54-74. The Complaint specifically alleges that the Protocol causes those racial disparities. *Id.* ¶¶ 102, 104-05.

Next, although discovery will shed additional light on how precisely the Protocol's mechanics are causing such extreme racial disparities, the Complaint identifies certain features of the protocol that contribute to those disparities. The Complaint alleges, for example, that (1) not all registrants are run through the exact match protocol, including

those registering through the DMV or applicants lacking a PIN, *id.* ¶ 33 & n.3; (2) county election officials enjoy significant discretion, creating the potential for disparate treatment, *id*. ¶ 41-44; (3) individuals registering using paper applications are particularly vulnerable because local officials must manually enter information from those applications into the registration system, creating an increased risk of technical mistakes like misreading hard-to-read handwriting, *id.* ¶ 4; and (4) Black and other nonwhite voters, due in part to the continuing effects of racial discrimination, face particular burdens in overcoming the hurdles imposed by the Protocol. *Id*. ¶ 60-78.

And unlike in *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012), *aff'd sub nom. Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1 (2013), on which the Secretary mistakenly relies, Florida Rising has squarely alleged how Black and Latino voters' race impacts their ability to participate in the electoral process. *See id.* ¶ 102-06. In this way, and contrary to the SOS's assertion, Florida Rising has alleged "more than simply [] a relevant disparity between white voters and minority voters." SOS Br. at 24 (quoting *Browning*, 2007 WL 9697653, at *7).

Florida Rising has thus properly alleged that Floridians of color have less of an opportunity to participate in elections and that the political process in Florida is not "equally open" as a result of the Protocol.[15] *Brnovich*, 594 U.S. at 649.

The SOS's argument that Florida Rising's allegations of causation are deficient relies heavily on decisions from contexts other than motions to dismiss, like *Lee v. Virginia State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016), as well as the district court's 2007

[15] The Supreme Court has recognized that "[t]he statute's reference to equal 'opportunity' may stretch that concept to some degree to include consideration of a person's ability to use the means that are equally open." *Brnovich*, 594 U.S. at 649.

decision dismissing a Section 2 claim in *Browning*. The SOS also cites *Browning*, but that opinion is inapposite because the conclusory allegations in that complaint are nothing like those contained in the far more developed and detailed Complaint before the Court here. In *Browning*, the plaintiffs relied on "[t]he ***hypothetical possibility*** that a significant number of minorities would be disenfranchised by enactment of" Exact Match. *Browning*, 2007 WL 9697653, at *7 (emphasis added). There was no concrete evidence of harm, in part because the Exact Match Protocol had just taken effect at the time the complaint in that case had been filed. Here, by contrast, Florida Rising provides detailed factual assertions demonstrating the concrete harm Defendants have wrought using Exact Match, including tens of thousands of voters being prevented from joining the voter rolls and significant voter disenfranchisement. *See* Compl. ¶¶ 54-74.

For these reasons, Florida Rising has adequately stated a claim challenging the Protocol under the Section 2 results test.

III. THE COMPLAINT IDENTIFIES WHICH CLAIMS ARE ASSERTED AGAINST WHICH DEFENDANTS AND IS NOT AN IMPERMISSIBLE SHOTGUN PLEADING

The Complaint does not constitute an impermissible "shotgun" pleading. The SOEs' argument to the contrary suffers from at least two critical infirmities.

First, the Complaint is not a shotgun pleading because it sets forth factual allegations, statistics, and documentation that are specific to each Defendant Supervisor. For example, the complaint alleges that, "[i]n Miami-Dade County alone, since 2018, over 41,000 applications were set aside as "unverified" and flagged for further action by the applicant due to a PIN mismatch, with the applicants being sent letters by county election officials," and that "voters in Miami-Dade County, for example, had their provisional ballots rejected during the 2022 general election due to the county's inability to verify their

PINs…" Compl., ¶¶ 46, 51; *see also* ECF Nos. 1-2 (Miami-Dade template unverified notice), 1-3 (Miami-Dade provisional ballot rejection letter). The Complaint also breaks out the racial disparities in the voter registration acceptance rates in Broward, Duval, Miami-Dade, and Orange Counties resulting from the exact match protocol and includes related factual allegations that are specific to each of those counties. *See id*. at 19 (Table 2), ¶¶ 64-66, 67-68, 69-71, 72-73.

Second, and in any event, group pleading is permissible under these circumstances. *See Diamond Resorts U.S. Collection Dev., LLC v. Sumday Vacations, LLC*, 2020 WL 3250130, at *2 (M.D. Fla. Feb. 21, 2020). Group pleading is appropriate in a matter where "the role of each defendant is not unique and determinative of the defendant's liability." *Id*. In *Diamond Resorts*, as in this case, the "Complaint sufficiently alleges that Defendants engaged in the same or similar conduct and would have the same or similar liability for the alleged claims." *Id.; see also Auto. Alignment & Body Serv., Inc. v. State Farm Mut. Auto. Ins. Co.*, 953 F.3d 707, 733 (11th Cir. 2020) ("The failure to specify which particular defendants certain allegations relate to is not fatal when [t]he complaint can be fairly read to aver that all defendants are responsible for the alleged conduct." (cleaned up).

Put simply: Each claim is brought against each Defendant SOE, and each Defendant SOE is responsible for—and must therefore defend against—each act or omission. Notably, the statewide Defendants did not raise this defense; presumably, they understood the claims as pled.

The cases cited by the SOEs are inapposite. For example, in *West Coast Roofing & Waterproofing, Inc. v. Johns Manville, Inc.*, 287 F. App'x 81 (11th Cir. 2008), the Eleventh Circuit did not dismiss the operative complaint as a shotgun pleading; the Court dismissed claims against two companies for failing to allege with particularity that they had engaged in fraudulent conduct, while allowing claims against a third company to survive because the factual allegations as to its conduct were sufficiently specific. *See id*. at 88-90. Another case, *Bey v. Housing Authority of City of Winter Park*, 2023 WL 7411543, (M.D. Fla. Oct. 13, 2023), involves a very different set of facts. *Bey* involved a sovereign citizen pro se plaintiff's suit for damages against 13 defendants – 11 of them individuals, including two judges and an attorney – related to the plaintiff being evicted from her home, in which she broadly alleged harassment. *Id*. at *2.

If additional distinctions as to the individual SOE's conduct exist beyond those identified in the Complaint, those will be identified through discovery.[16]

IV. THE COMPLAINT INCLUDES ALL NECESSARY PARTIES

The SOEs fail to meet their burden to prove that the other county Supervisors of Elections (SOEs) are required parties that must be joined. The Court should reject the SOEs' efforts to shoehorn this alleged deficiency into an argument that dismissal of the entire suit is appropriate under Rule 12(b)(7).

F.R.C.P. 19(a)(1) requires joinder of a party if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's

[16] If the Court finds that Plaintiff has engaged in impermissible shotgun pleading, Plaintiff should be allowed to replead the allegations. *See Scott v. City of Daytona Beach Fla.*, 2023 WL 1765652, at *2 (M.D. Fla. Feb. 3, 2023).

> absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

The SOEs argue that all Florida election supervisors act the same way in implementing the Protocol and, therefore, all 67 supervisors must be joined. This is neither accurate nor consistent with Rule 19. The Rule asks whether the Court can provide complete relief "*among existing parties*," not whether the Plaintiff may have a similar claim against some non-party. The SOS, who is responsible for statewide oversight of the elections in Florida, is also a named defendant in this case.

In *Browning*, the district court highlighted that "variations in local resources" result in differences in how county SOEs implement the Protocol. *Browning*, 569 F. Supp. 2d at 1258. "The Supervisors are independent constitutional officers funded by county governments primarily through local property taxes. . . . resource disparities are to some degree inevitable." *Id.* Contrary to the SOEs' claim that all Supervisors work the same way, the court observed that voters in different counties have "differences in individual experiences" with the Protocol. *Id.* at 1259.

The SOEs offer no support for the argument that joinder of the other SOEs is necessary to provide complete relief here. Even if they had, the appropriate remedy would be for the Court to order Florida Rising to amend its complaint and to add the other 63 SOEs. The SOEs fail to meet their *prima facie* burden under F.R.C.P. 19(a)(1)(B)(i)

(or attempt to make an argument under subsection (B)(ii)).[17] And the SOEs' obligations under state law do not immunize them from suit or support dismissal of the Complaint:

> That the Clerk was acting in accordance with state law does not mean he is not a proper defendant. Quite the contrary. The whole point of Ex parte Young is to provide a remedy for unconstitutional action that is taken under state authority, including, as here, a state constitution or laws.

Brenner v. Scott, 999 F. Supp. 2d 1278, 1286 (N.D. Fla. 2014) (cleaned up).

None of the cases the SOEs cite are relevant here, where Florida Rising seeks only equitable relief. Those plaintiffs sought damages (one sought equitable relief in addition). In one case, the absent party was the defendants' court-appointed receiver. *Cherry v. D.B. Zwirn Special Opportunities Fund, L.P.,* 2010 WL 415313 (M.D. Fla. 2010). In the other, the absent party was the successor-in-interest to a deed the Plaintiff sought to rescind. *C & J Glob. Invs., Inc. v. Knight,* 2017 WL 3701138 (M.D. Fla. 2017). Neither factual context relates to the other SOEs or to the case at bar.

For these reasons, the County Defendants' 12(b)(7) motion should be denied.

CONCLUSION

For these reasons, Florida Rising respectfully submits that Defendants' motions to dismiss should be denied in their entirety.[18]

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[17] Under F.R.C.P. 12(b)(7), "The burden is on the moving party to show the . . . unprotected interests of the absent individuals . . . and the possibility of injury to them or that the parties before the court will be disadvantaged by their absence." CHARLES A. WRIGHT & ARTHUR R. MILLER, 5C FED. PRAC. & PROC. CIV. § 1359 (3d ed. 1998).

[18] If the Court grants the motions to dismiss, Florida Rising respectfully requests an opportunity to replead its complaint.

Dated: January 13, 2025

Respectfully Submitted,

/s/ Christopher J. Merken

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CERTIFICATE OF SERVICE

I, Christopher J. Merken, hereby certify that on January 13, 2025, a copy of the foregoing was filed electronically, and that notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

/s/ Christopher J. Merken
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