

No. 06-14836-DD

In the United States Court of Appeals
for the Eleventh Circuit

LEAGUE OF WOMEN VOTERS OF FLORIDA, ET AL.,

Plaintiffs-Appellees,

v.

SECRETARY OF THE STATE OF FLORIDA, ET ANO.,

Defendants-Appellants.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

THE HONORABLE PATRICIA A. SEITZ

**BRIEF OF PLAINTIFFS-APPELLEES LEAGUE OF WOMEN VOTERS
OF FLORIDA, ET AL.**

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to 11th Circuit Rule 26.1-1, Plaintiffs-Appellees League of Women Voters of Florida, et al., certify that the Certificate of Interested Parties contained in Defendants-Appellants' opening brief is complete and accurate.

STATEMENT REGARDING ORAL ARGUMENT

This case presents important constitutional issues regarding Plaintiffs-Appellees' First and Fourteenth Amendment rights. Plaintiffs-Appellees respectfully request oral argument because it would assist this Court in determining the issues.

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JURISDICTIONAL STATEMENT

Defendants-Appellants properly state the basis of this Court's jurisdiction; however, in addition to the grounds they cite, the District Court also has jurisdiction under 28 U.S.C. §§ 1343(a)(3), 1343(a)(4), 1367(a), 2201, and 2202.

STATEMENT OF THE ISSUES

1. Did the District Court abuse its discretion in determining that plaintiffs are likely to succeed on the merits of their claim that Florida's new third-party voter registration law, with its severe fines and strict, joint and several liability, unconstitutionally burdens the speech and association that accompanies their voter registration drives?

2. Did the District Court abuse its discretion in determining that plaintiffs are likely to succeed on the merits of their claim that Florida's third-party voter registration law, by exempting political parties from its reach, unconstitutionally discriminates in favor of political parties?

STATEMENT OF THE CASE

On this appeal, Plaintiffs-Appellees (“plaintiffs”) League of Women Voters of Florida, People Acting for Community Together (“PACT”), Florida AFL-CIO, American Federation of State, County and Municipal Employees, Council 79 (“AFSCME”), SEIU Florida Healthcare Union, and Marilyn Wills, respectfully submit this brief in opposition to Defendants-Appellants’ (“defendants”) appeal of the District Court’s grant of a preliminary injunction enjoining the enforcement of Florida’s new voter registration law, Fla. Stat. §§ 97.021(36) and 97.0575. This new law, when it was in effect, caused an almost complete shut-down of plaintiffs’ voter registration drives in Florida. As the District Court correctly held, as a result of the law’s heavy fines, joint and several, and strict liability, and exemption for political parties, it unconstitutionally burdens plaintiffs’ speech and association rights and unconstitutionally discriminates in favor of political parties.

Statement of Facts

The factual record in this case wholly supports the District Court’s findings, clearly establishing that plaintiffs’ voter registration activities, which are protected by the First Amendment, have been unconstitutionally chilled by Florida’s overly restrictive voter registration law and that the law’s exemption of political parties unconstitutionally discriminates in favor of political parties. Defendants in their Opening Brief (“Def-App Brief”) largely ignore the factual record and the District

Court's findings, repeatedly relying on factual assertions that were rejected outright by the District Court.

The District Court issued its preliminary injunction after a two-day hearing, which included testimony from five organizational plaintiffs, a voter registration volunteer, a county elections supervisor with eighteen years of experience, and Yale University political science expert Professor Donald Green. Defendants on the other hand presented a single witness, whose testimony the District Court found to be “undercut” by her lack of “experience in the election process.” (Order RE57-Pg26 n.15.)¹ The parties also presented more than thirty exhibits, including closely analyzed data from the Secretary of State's own statewide voter registration database. Based on this substantial evidence, the District Court made lengthy and detailed factual findings in support of its injunction. Those findings cannot be disturbed on this appeal unless this Court finds them “clearly erroneous”; yet, defendants have not even attempted to show that any of the District Court's findings were flawed, much less clearly in error.

¹ Documents contained in the Record Excerpt are cited herein as “RE#-Pg#.” Other documents in the record are cited herein as “Doc#-Pg#” using the District Court docket numbers. Plaintiffs' Exhibits are cited herein as “PX.”

A. The Chilling Impact of the Challenged Law on Plaintiffs’ Voter Registration Drives

Defendants describe Fla. Stat. § 97.0575 as an innocuous voter-protection law that merely “requires third-party voter registration organizations to submit collected applications before a book-closing date, and also within ten days of their collection.” (Def-App Brief at 5.) But they omit from their description the very provisions of the law that had shut down plaintiffs’ voter registration drives prior to the District Court’s injunction—crippling fines ranging from \$250 to \$5000 *per application* for missing a deadline and the imposition of those fines on the organization that engages in voter registration, its directors and officers, and its volunteers and employees on a joint and several, strict liability basis. Fla. Stat. § 97.0575(3).² Thus, even if the failure to meet the law’s deadlines is inadvertent or unavoidable, as for example in the case of a flood or hurricane that destroys or delays applications, the law *requires* the Secretary of State to impose a fine. (Order RE57-Pg15-16 (relying in part on statement of Assistant General Counsel to the Secretary of State that third-party groups will be fined even “if some situation arises beyond the control of the organization”).)

² Specifically, Fla. Stat § 97.0575 imposes on “third-party voter registration organizations”—defined by Fla. Stat. § 97.021(36) as “any person, entity, or organization soliciting or collecting voter registration applications,” but specifically exempting “political part[ies]”—fines of \$250 for each voter registration application submitted more than ten days after it is collected, \$500 for each application submitted after any voter registration deadline, and \$5,000 for

As the District Court found, based on substantial and essentially uncontroverted testimony presented by plaintiffs, engaging in voter registration under this law would expose the organizational plaintiffs to the very real possibility of “severely drain[ed]” finances or decimated “voter registration budgets,” and would expose directors, officers, voter registration employees and *volunteers* of these organizations, “many of whom are low- or middle-income,” to “devastating” personal liability for events that are not within their control. (Order RE57-Pg16 (noting that this would be true even if the fines were “lesser or reduced”); *see, e.g.*, Plaintiffs’ Exhibit (“PX”) PD 9 ¶ 28 (describing PACT’s volunteers as mostly low-income and unable to “bear the potential liability for the law’s fines.”).) It is not surprising then, that fearing these potentially catastrophic fines, plaintiffs halted their traditional voter registration drives after enactment of

each application not submitted. The law holds personally, and jointly and severally, liable: (i) the individual volunteer, member or employee who collected the applications; (ii) the group’s registered agent; and (iii) any person in the organization responsible for the group’s day-to-day operations, including officers and board members.

The law permits reduction, but not elimination, of its fines for groups that undertake certain elaborate registration and reporting procedures. To qualify for this reduction, groups must: (i) pre-register with the state; (ii) submit timely quarterly reports “providing the date and location of any organized voter registration drives”; (iii) provide the name of a registered agent in the state; and (iv) submit the names “of those individuals responsible for the day-to-day operation of the third-party voter registration organization.” Fla. Stat § 97.0575(i).

this law. (Order RE57-Pg18-24, 32; *see also* Transcript³ Doc54-Pg145, 180 (Gonzalez, Hall testimony); Transcript Doc55-Pg16, 39, 72 (Dorfman, Wheatley Giliotti, Ewart testimony).)⁴

The District Court further found that plaintiffs' pre-injunction decision to stop conducting voter registration drives was a reasonable and sensible response to the incredibly burdensome increase in cost and risk imposed by the law. (Order RE57-Pg42-43.) Specifically, the evidence showed that it would be impossible or extremely difficult for organizations regularly to meet the ten-day deadline due to budget limitations, staff constraints, and the decentralized nature of their activities. (*Id.* at 18, 42-43; Doc54-Pg147-49, 182-83 (Gonzalez, Hall testimony); Doc55-Pg10, 14-18, 28-29, 32-34, 68-69 (Dorfman, Wheatley Giliotti, Ewart testimony).) Moreover, the evidence showed that plaintiffs had a well-founded fear that unavoidable circumstances or inadvertent, innocent mistakes by volunteers might

³ The District Court's Order and Opinion and the parties' proposed findings of fact cite to the unofficial transcript that was available at the time of the writing. The unofficial transcript is included in the Addendum to this Brief for the Court's convenience.

⁴ The sole exception occurred on one weekend when AFSCME registered community members in Jacksonville so that they could vote and express their support for healthcare workers in a contract dispute with a local hospital. AFSCME was forced to spend 12 times the usual amount and 15% of its yearly voter registration budget for the additional personnel and other precautions necessary to reduce the risk of devastating fines under this law. (Order RE57-Pg23; Doc54-Pg145 (Gonzalez testimony).)

lead to delays in submitting voter registration applications, generating substantial fines. (Order RE57-Pg16-17; Doc54-Pg147-48, 181-82 (Gonzalez, Hall testimony); Doc55-Pg18-19 (Dorfman describing impact of Hurricane Wilma on collection of applications), 40 (Wheatley Giliotti discussing her concern that an elderly volunteer’s illness or death could delay forms), 72-73 (Ewart testimony).) At the same time, the District Court rejected defendants’ contention—repeated here without acknowledging the District Court’s contrary finding—that plaintiffs discontinued their voter registration activities for their “own strategic” reasons unrelated to the law’s threatened penalties. (*Compare* Def-App Brief at 23, 33 *with* Order RE57-Pg16-24.)

B. The Importance of Collecting and Submitting Applications

The District Court also rejected defendants’ suggestion—again repeated here—that the law does not “limit anyone’s ability to encourage or assist others in registering to vote” (Def-App Brief at 14), and that plaintiffs could therefore just as easily conduct voter registration drives without collecting and submitting the forms on an applicant’s behalf. (Def-App Brief at 22 & n.7, 30.) Rather, the District Court found that plaintiffs had shown that the collection and submission of applications are integral to their voter registration efforts, and that without the ability to collect and submit forms, their voter registration activities would be “severely undermined” and would “cease.” (Order RE57-Pg17-18, 33.)

Plaintiffs amply demonstrated, and the District Court found, that they collect voter registration applications primarily to ensure that the applications are actually submitted. Indeed, the record contains substantial evidence that unless plaintiffs collect and submit voter registration forms, a substantial number of the citizens they seek to register will not complete the voter registration process. (*See* Order RE57-Pg6, 8-9, 11-12 (citing each organizational plaintiffs' declaration).) For example, Aaron Dorfman testified that when PACT collects forms, it shows prospective registrants that PACT is "with them in this process; it makes it easier for them; it makes it more likely that they will register to vote." (Doc55-Pg19.) And Alma Gonzalez stated that prospective registrants sometimes do not submit the form because they "frequently work long hours" and "juggle family and work responsibilities," or get confused about the state forms' complexity and its intricate requirements. (PX PD 8 ¶ 8.)

Although defendants assert that Florida provides numerous avenues for registration, and that the process is "simple and convenient for all applicants" (Def-App Brief 11), the factual record actually demonstrates that it is harder for low-income and lesser-educated citizens to register, and that these citizens often rely upon the assistance of third-party groups. (*See* Doc54-Pg72 (Professor Green testimony); *see also* PX 6 at 5 (March, 2006, U.S. Census Bureau report documenting that "[c]itizens with higher incomes were more likely to register and

to vote.”); *see, e.g.*, PX PD 9 ¶ 17 (Dorfman Decl.); PX PD 8 ¶ 3-5 (Gonzalez Decl.).) As Professor Green stated in his declaration, his research, including that described in his book “Get Out The Vote” (PX 12), shows that the personal collection of applications by groups “imposes fewer transaction costs on the prospective registrant” and “more effectively communicates the importance of voter participation,” resulting in more submitted applications and in turn more registered voters. (PX PD 3 ¶¶ 2, 6.)

The AFSCME representative testified that AFSCME needs copies of the forms in order to follow up with election officials on behalf of members to make sure each eligible member is added to the voter rolls, because in 2004 “a high number of the application forms [it] submitted were not appearing on the rolls.” (Doc54-Pg59.) The groups added that without collecting forms, they could not follow up with registrants by, for example, sending them voter education materials (Doc54-Pg137 (AFSCME); PX PD 8 ¶¶ 11-12 (PACT)), conducting get-out-the-vote drives (Doc54-Pg137 (AFSCME)), verifying completeness and accuracy (Doc54-Pg48, 59 (AFSCME), Pg189, 195 (AFL-CIO); Doc55-Pg73 (SEIU)), and avoiding bothering members twice (Doc55-Pg73 (SEIU)).

Based on this evidence, the District Court found that without the ability to collect and submit completed forms, voter registration drives would serve little purpose and plaintiffs would have little incentive to conduct them. (Order RE57-

Pg16-18.) Crediting the testimony of Professor Green and plaintiffs' other witnesses, the District Court found that defendants' suggestion that plaintiffs could simply encourage and assist voter registration without collection and submission "ignores the economic incentives by which campaigns are deployed and organized" (*see* Order RE57-Pg18), and that ultimately, "because the Third-Party Voter Registration Law makes it 'catastrophically risky' for non-partisan organizations to collect applications, the likely and predictable effect of the challenged Law is 'to put out of business non-party run voter registration drives.'" (*Id.* at 16-17; Doc54-Pg147-48; Doc55-Pg16-17, 39-40, 72-73.) Thus, the District Court found that "the threat of fines has rationally chilled Plaintiffs' exercise of free speech and association, as well as that of Plaintiffs' volunteers." (Order RE57-Pg42.)

C. The Speech and Association Intertwined With Voter Registration Drives

Defendants do not dispute the fact that voter registration drives typically involve political speech and association. As the District Court found, plaintiffs communicate political messages throughout the voter registration process. (*See* Order RE57-Pg6, 8-10, 12, 32.) As part of their voter registration drives, plaintiffs "persuade others to vote, educate potential voters about upcoming political issues, communicate their political support for particular issues, and otherwise enlist like-

minded citizens in promoting shared political, economic, and social positions.”

(*Id.* at 32.)

Contrary to defendants’ assertion that the collection and delivery of voter registration applications “communicate[s] no message” and can be separated from the acknowledged speech and association involved in voter registration drives (Def-App Brief at 16, 22 & n.7), the District Court found that collection and submission of applications does communicate a message and is otherwise inextricably intertwined with the speech and association typically involved in a voter registration drive. (Order RE57-Pg17, 33-34.) First, as noted, the District Court found that without the ability to collect and submit forms, plaintiffs’ voter registration drives—and their accompanying speech and association—would cease. Second, the District Court found that plaintiffs’ and Professor Green’s testimony established that by registering through a third-party group, many citizens communicate their support for the group and its principles, as well as the message that the “dominant political powers . . . should take that group and its agenda seriously.” (*Id.* at 17; Doc54-Pg72-74 (Green testimony), Pg185 (Hall testimony); Doc55-Pg11-13 (Dorfman testimony).) Consequently, if third-party voter registration organizations stop their voter registration efforts, “Florida citizens will be stripped of an important means and choice of registering to vote and associating with one another.” (Order RE57-Pg17.) Thus, the District Court found that

plaintiffs “have identified important First Amendment freedoms that are at stake—the right to advocate and pursue association . . . in furtherance of the political process” (*Id.* at 34), that Florida’s law “chills Plaintiffs’ First Amendment speech and association rights” (*Id.* at 2-3), and that the law “has, in turn, reduced the quantum of political speech and association” in Florida. (*Id.* at 32.)

D. The Failure of the Challenged Law To Serve the State’s Asserted Interests

Defendants attempted to justify this burdensome law before the District Court by claiming that it (1) ensures that all voter registrations are properly and timely submitted so that citizens can vote, (2) holds organizations accountable for the applications they collect so that they do not prevent citizens from being able to vote, and (3) prevents fraud. (*Id.* at 39.) Defendants claimed that the law was necessary to fix the allegedly substantial problems with nonpartisan voter registration groups “hoarding” applications and submitting applications after the voter registration deadline (“book-closing”), thus depriving citizens of their ability to vote.

The District Court, however, found that defendants utterly failed to demonstrate that these laudable state goals are served in any measurable way by Florida’s new voter registration law, and that the asserted “problem” with nonpartisan voter registration groups hoarding forms and returning forms late did not exist. (*Id.* at 40-42.) In their opening brief before this Court, defendants ignore

all of the evidence relied upon by the District Court and instead rely solely on testimony from a single witness whom the District Court explicitly found unreliable on this point. (Def-App Brief at 4-5; Order RE57-Pg26-29 (noting that Miller revised her testimony regarding the submission of applications several times, conceded that she did not know when applications were collected, and conceded that she had no experience with elections before the 2004 presidential election).) What the record actually shows is something very different from defendants' description.

The record shows that Florida, like the rest of the nation, experienced a healthy increase in voter registrations in 2004 and a predictable spike in submissions during the week before book-closing. (Order RE57-Pg25; PX 15 (graph of statistical data from State Voter Registration Database).) As the District Court found, this spike resulted from a natural increase in public attention and interest as the voter registration deadline approached (Order RE57-Pg25; Doc54-Pg159 (Sancho testimony)), not from the "hoarding" of applications by third-party groups as suggested by Donna Miller. (Order RE57-Pg26-28.) Indeed, the percentage of applications submitted in the week before Florida's voter registration deadline in 2004 was consistent with (or lower than) that in the previous four

presidential election years. (*Id.* at 28.)⁵ The District Court further found that the “predictable ‘crescendo’” in applications could have been addressed by proper government preparation and allocation of resources, but was instead exacerbated by ill-equipped elections offices. (*Id.* at 25-26 (relying on testimony of Miller and Gonzalez).) Finally, the District Court found that the evidence showed only a *de minimis* number of applications submitted after book-closing (0.0033% of the total), and that it did not even show “whether [the forms] were actually submitted ‘late,’ or whether they were simply signed and collected after book-closing.” (*Id.* at 28-29 (relying on testimony of Miller and fact that statistics do not provide collection-date information).) And contrary to defendants’ assertion, the District Court found that there was no evidence that *any* citizen was disenfranchised as a result of a purportedly late application. (*Id.* at 41 n.23.)⁶

⁵ Defendants’ description of Florida’ pre-1995 voter registration law is both irrelevant and incomplete. Although it is technically true that prior to 1995 “only election officials and their agents could collect voter registration applications in Florida” (Def-App Brief at 4), anyone could be deputized to register voters by attending a brief training and swearing an oath. Representatives from plaintiffs’ organizations testified that they registered voters in this manner before 1995 with minimal (or non-existent) state supervision. (Doc54-Pg187-88; Doc55-Pg96.) The deputy registrar statute also specifically forbade choosing registrars on the basis of, *inter alia*, “political affiliation, organizational involvement, or political activity.” Fla. Stat. § 98.271(2)(a) (1993).

⁶ The District Court found that “[a]lthough Defendants argue that the new Law is intended to protect citizens from losing their votes, they have not provided any evidence that the 5000 registrations submitted after book-closing [in 2004] were the registration forms of citizens who desired to vote in the elections for that book-

In sum:

[T]he evidence in this case does not demonstrate a significant problem with voter registration applications stemming from third party voter registration organizations. Undoubtedly, the supervisors of elections office had a difficult time processing applications near book-closing during the 2004 presidential election. However, the evidence demonstrates that a large part of that difficulty arose from the general increase in the number of voter registration applications received that year and the lack of preparation on the part of the supervisors of elections offices. While there was anecdotal evidence of some problems associated with third party voter registration organizations, the weight of the evidence suggested that Defendants' problems stem from other sources.

(*Id.* at 40; *see also id.* at 25-29.)

E. The Absence of Any Salient Differences Between Political Parties and Nonpartisan Voter Registration Groups

The second portion of the law plaintiffs challenge is the exemption for political parties. Fla. Stat. § 97.021(36)(a). Defendants' assertion that "substantial differences" between third-party organizations and political parties support their disparate treatment under this law (Def-App Brief 34-35), once again disregards the record and the District Court's findings. Defendants here regurgitate two purported differences that the District Court rejected as unrelated to voter registration: (1) that political parties are highly regulated by the state and (2) a

closing, i.e. that those citizens in fact lost their right to vote in that election." (Order RE57-Pg41 n. 23).

vague reference to the “nature” of political parties. (Order RE57-Pg37-39.) As the District Court found, “Defendants have not cited one regulation [of political parties] that pertains to the collection of voter registration applications,” and nonprofit groups and labor unions are also highly regulated. (*Id.* at 37.) Moreover, the District Court credited Professor Green’s testimony that political parties are not inherently more accountable for submitting registrants’ forms and in fact may be less accountable. (*Id.* at 29; Doc54-Pg77 (Green testimony).) And the District Court found that defendants presented “no evidence whatsoever that political parties are better than other non-partisan organizations at collecting and submitting voter registration forms in a timely and responsible manner.” (Order RE57-Pg38.)

Most significantly, the District Court found that the evidence, including testimony from 18-year veteran Elections Supervisor Ion Sancho, showed that “there is no appreciable difference in the timeliness of voter registration applications submitted by political parties, as compared to those submitted by non-partisan voter registration groups.” (*Id.* at 29; Doc54-Pg159-60 (Sancho testimony).) In fact, the defendants stipulated before the District Court that both nonpartisan groups and political parties submitted voter registration forms after book-closing in 2004. (Doc44-Pg4 ¶ 4.) Consequently, the District Court found that “the record in this case does not include any salient differences between non-partisan groups and political parties.” (Order RE57-Pg38; *see id.* at 39.)

* * *

In sum, the challenged law so heavily burdened the speech and association plaintiffs engage in as part of their voter registration activities that, before the District Court's preliminary injunction, plaintiffs had shut those activities down. Citizens who would have registered to vote did not. Citizens who would have associated with and shown their support for these organizations and their missions by registering to vote through them could not. Citizens who would have promoted civic participation, government accountability, community movements, and economic and social policies did not. Every day that it was in place, the challenged law reduced the quantum of core political speech and association in Florida. On what basis was this First Amendment activity curtailed? *A de minimis* number of applications were turned in by some organizations, *including political parties*, after book-closing in 2004. Although defendants have identified some laudable voter-protection goals, this law simply does not promote any of their proffered interests.

Standard of Review

The District Court's grant of a preliminary injunction is reviewed for abuse of discretion, *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., LLC*, 425 F.3d 964, 968 (11th Cir. 2005), an extremely deferential standard. *Cumulus Media, Inc. v. Clear Channel Communications, Inc.*, 304 F.3d 1167, 1171

(11th Cir. 2002); *Revette v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers Local 798*, 740 F.2d 892, 893 (11th Cir. 1984) (per curiam). In particular, the District Court's factual findings in support of the injunction will not be disturbed unless they are clearly erroneous, as "the trial court is in a far better position than this Court to evaluate th[e] evidence." *Cumulus Media*, 304 F.3d at 1171.

SUMMARY OF ARGUMENT

The only question on this appeal from the District Court's grant of a preliminary injunction is whether Judge Seitz abused her discretion in determining that plaintiffs are likely to succeed on the merits of their claims that Florida's new voter registration law (1) unconstitutionally burdens their First Amendment rights to speech and association, and (2) unconstitutionally discriminates in favor of political parties. As the District Court found, the direct effect of the challenged law has been to close off a key means by which nonpartisan groups in Florida communicate and associate with their fellow citizens to advance shared objectives through the electoral process: voter registration drives.

Nowhere in their brief do defendants argue that any of the District Court's extensive factual findings, supported by substantial record evidence, are clearly erroneous. Nor do defendants point to any significant record evidence to justify second-guessing those findings. Those findings are dispositive of this appeal.

First, the District Court’s findings that voter registration drives characteristically involve speech and association about political issues, and that the challenged law has had the inevitable and rational effect of causing plaintiffs to stop conducting those drives, compel the conclusion that the law unduly infringes on plaintiffs’ First Amendment rights. In contrast to the significant burden the challenged law imposes on plaintiffs’ First Amendment activities, the District Court found that the law did not materially advance any asserted state interest.

In light of those factual findings, the Supreme Court’s decisions in *Anderson v. Celebrezze*, *Buckley v. American Constitutional Law Foundation*, and *Meyer v. Grant* require the law’s invalidation under the First Amendment. Under those cases, any election regulation that burdens speech or association—especially a regulation, such as the law at issue here, that has the effect of diminishing core political speech and association—is subject to First Amendment scrutiny. Such a regulation can stand only if, at a minimum, it is supported by a sufficiently weighty state interest that makes it necessary to burden plaintiffs’ rights. The District Court’s factual findings make clear that the challenged law cannot meet that test.

Rather than seriously attempting to justify the law, defendants argue that the law does not implicate any First Amendment rights. They seek to avoid First Amendment review by arguing that the law directly regulates only the “conduct” of collecting and submitting voter registration applications, standing alone. But

this argument was rejected by the District Court as it ignores the context in which such collection and submission take place. Plaintiffs seek primarily to vindicate their First Amendment interests in engaging in political speech and association through their voter registration drives as a whole, not merely their interests in collecting and submitting forms.

The Supreme Court has repeatedly rejected attempts, like defendants' attempt here, to artificially separate out one aspect of an integrated First Amendment activity to insulate its regulation from constitutional scrutiny. The District Court found, based on an extensive record, that the collection and submission of voter registration forms is characteristically intertwined with that speech and association. The District Court also found that the actual and inevitable effect of the challenged law has been not only to prevent plaintiffs from collecting voter registration forms, but also to stop them from engaging in any of the speech and association that typically accompany their voter registration drives. The law therefore significantly burdens plaintiffs' First Amendment rights.

Second, the District Court's findings that Florida's political parties are no more likely than other third-party groups to submit voter registration forms in a timely manner, and that they are no more accountable to prospective registrants or the state in their voter registration drives, compel the conclusion that the law's exemption of political parties is wholly unjustified. Under Supreme Court and

Eleventh Circuit precedent, laws that discriminate in favor of political parties in the elections context are especially difficult to justify under the First and Fourteenth Amendments. In light of the District Court’s amply supported findings, defendants cannot justify the law here, since the state has no legitimate interest in discriminating between political parties and nonpartisan groups with respect to voter registration drives.

ARGUMENT

I. THE CHALLENGED LAW UNCONSTITUTIONALLY RESTRICTS PLAINTIFFS’ CORE POLITICAL SPEECH AND ASSOCIATION.

A. The District Court Applied the Proper Legal Framework and Correctly Held That Plaintiffs Are Likely to Succeed on the Merits of Their Speech and Association Claims.

The District Court correctly enjoined Florida’s new voter registration law as a result of a straightforward application of the balancing test the Supreme Court uses to assess the constitutionality of state election laws. (Order RE57-Pg30.)

Under *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564 (1983), and its progeny, a court evaluating an election law must

first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which

those interests make it necessary to burden the plaintiff's rights.

Id. at 789, 103 S. Ct. at 1570; *see also Fulani v. Krivanek*, 973 F.2d 1539, 1543 (11th Cir. 1992).⁷ Under this framework, when an election regulation imposes a severe burden on First Amendment activity, it is subject to strict scrutiny. *See, e.g., Buckley v. Am. Constitutional Law Found.* (“ACLF”), 525 U.S. 182, 192 n.12, 119 S. Ct. 636, 642 n.12 (1999); *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 2063 (1992). When its burdens are lesser, the law will be upheld only if its requirements are “reasonable [and] nondiscriminatory” and serve “important regulatory interests,” which make it “necessary to the burden plaintiff’s rights.” *Anderson*, 460 U.S. at 788-89, 103 S. Ct. at 1570. In making the judgments

⁷ Defendants incorrectly suggest that the *Anderson* test applies only in ballot access cases. (Def-App Brief at 43-44.) This suggestion is belied by *Anderson* itself, which speaks of “a State’s election laws” generally, 460 U.S. at 789, 103 S. Ct. at 1570, and explicitly mentions laws regulating voter registration. *Id.* at 788, 103 S. Ct. at 1570 (“Each provision of [state election] schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends.”). Moreover, the *Anderson* framework has been applied to assess a variety of state election laws outside the ballot access context. *See, e.g., ACLF*, 525 U.S. at 192, 119 S. Ct. at 642 (circulation of ballot initiative petitions); *Wexler v. Anderson*, 452 F.3d 1226, 1232 (11th Cir. 2006) (recount procedures); *Weber v. Shelley*, 347 F.3d 1101, 1105-06 (9th Cir. 2003) (voting machines without paper trails); *Common Cause/Ga. League of Women Voters v. Billups*, 439 F. Supp. 2d 1294, 1345 (N.D. Ga. 2006) (photo identification requirement for voters); *Libertarian Party of Ind. v. Marion County Bd. of Voter Registration*, 778 F. Supp. 1458, 1462-63 (S.D. Ind. 1991) (access to voter registration lists).

required by *Anderson*, courts must “be vigilant . . . to guard against undue hindrances to political conversations and the exchange of ideas.” *ACLF*, 525 U.S. at 192, 119 S. Ct. at 642.⁸ Applying the *Anderson* test, the District Court correctly found that the challenged law does not pass constitutional muster.

In considering the “character and magnitude” of the injury to plaintiffs’ rights, the District Court correctly determined—as have two other courts enjoining enforcement of recently enacted restrictions on voter registration in other states—that restrictions on private voter registration drives implicate core First Amendment rights to speech and association. (Order RE57-Pg31-35.) *See also ACORN v. Cox*, No. 1:06-CV-1891-JTC (N.D. Ga. Sept. 28, 2006) (order granting prelim. inj.) (enjoining enforcement of law that prohibited voter registration drives

⁸ Paradoxically, defendants suggest that the District Court was incorrect to apply *Anderson* because a *stricter* standard of review is appropriate for laws regulating core political speech and association, as opposed to the mechanics of the electoral process. (Def-App Brief at 25 n.8, 44-45.) Defendants are correct that courts subject laws burdening core political speech and association to more exacting scrutiny. As Justice Thomas has explained, “when regulations of core political speech are at issue it makes little difference whether we determine burden first because restrictions on core political speech so plainly impose a ‘severe burden.’” *ACLF*, 525 U.S. at 208, 119 S. Ct. at 650 (Thomas, J., concurring); *accord id.* at 192 n.12, 119 S. Ct. at 642 n.12 (majority opinion). The cases defendants cite thus do not undermine the District Court’s application of the *Anderson* framework here. That said, the law fails under any level of *Anderson* review. Moreover, defendants are incorrect to assert that the district court “refused to apply strict scrutiny” in this case. (Def-App Brief at 25 n.8.) The District Court did not determine the appropriate level of scrutiny, presumably because the challenged law so plainly failed under any level of review under *Anderson*.

from collecting applications not in sealed envelopes); *Project Vote v. Blackwell*, No. 1:06-CV-1628, 2006 U.S. Dist. LEXIS 64354 (N.D. Ohio Sept. 8, 2006) (enjoining enforcement of law that imposed several restrictions on voter registration drives).

That determination was based on extensive findings of fact concerning the voter registration process in Florida and the nature of plaintiffs' voter registration activities. *See supra* Statement of Facts ("SOF") pt. A. As the District Court correctly found, when plaintiffs conduct voter registration drives, they engage potential voters in face-to-face conversations at community events, religious services, workplaces, and other locations in their communities. They encourage those citizens to register to vote, discussing the importance of civic participation, and of registering and voting. They engage those citizens in discussions about current political issues, including proposed state legislation and constitutional amendments, and encourage citizens to take a stand. And they seek to associate with those citizens at the ballot box to advance shared political, economic, and social positions. (Order RE57-Pg5-13.) The District Court's determination in this respect is fully consistent with the Supreme Court's repeated recognition that this kind of "interactive communication concerning political change" is at the heart of the First Amendment's protections. *ACLF*, 525 U.S. at 186, 119 S. Ct. at 639; *Meyer v. Grant*, 486 U.S. 414, 422, 108 S. Ct. 1886, 1892 (1988).

The District Court further found that the challenged law imposed a serious burden on the exercise of plaintiffs' rights, causing plaintiffs to stop their voter registration drives and their attendant speech and association. (Order RE57-Pg32.) In fact, the District Court found that cessation was the inevitable effect of the law, because its "heavy, strict, joint and several liability fines" place individual volunteers and workers, as well as nonprofit organizations, at serious risk if they participate in voter registration drives. (*Id.* at 2-3.) The challenged law therefore directly led to a diminution in the political speech and association in Florida that is characteristic of voter registration drives. This determination too was based on extensive findings of fact supported by substantial record evidence. *See supra*, SOF pt. A.

Second, after considering the "precise interests" the state claimed were served by the law, the District Court correctly found that those interests were insufficient to justify the burdens the law imposed on plaintiffs' rights. Specifically, the District Court found that the law did not materially further the state's asserted interests in ensuring that voter registration forms were properly and timely submitted, holding organizations accountable, and preventing fraud. (Order RE57-Pg40-43.) Again, this determination was based on substantial record evidence. In light of these findings, the only reasonable conclusion was that

plaintiffs were likely to succeed in their claim that the law violated the First Amendment.

Defendants do not seriously attempt to justify the challenged law. Nor do they argue that any of the District Court’s findings of fact, which formed the basis for its application of the *Anderson* balancing test, were clearly erroneous. Instead, defendants claim that the District Court was wrong to apply the *Anderson* test altogether because the law implicates no First Amendment rights. As is set forth in detail below, defendants are wrong.

B. The District Court Correctly Rejected Defendants’ Attempt to Characterize the Challenged Law as Affecting Only “Conduct.”

Although Florida’s new voter registration law has caused plaintiffs to cease this core First Amendment activity, defendants argue that the law is immune from First Amendment review because it regulates only conduct, not speech.

Specifically, defendants claim that the challenged law directly regulates only a single aspect of plaintiffs’ voter registration drives—the collection and submission of voter registration forms. (Def-App Brief at 14.) Defendants’ argument suffers from a fatal flaw: the Supreme Court has repeatedly rejected similar attempts to parse out components of First Amendment activity and declare them regulable “conduct.” First, as the Court has made clear, the proper First Amendment analysis is not concerned with whether a particular aspect of a regulated activity is “conduct,” but rather with whether the regulated aspect is “characteristically

intertwined” with protected speech and association. Second, the Court has also made clear that where a regulation has the “inevitable effect” of reducing such protected speech and association, it is subject to First Amendment scrutiny.

1. The Collection of Voter Registration Forms Is “Characteristically Intertwined” with Core Political Speech and Association.

In *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632-33, 100 S. Ct. 826, 833-34 (1980), the Supreme Court invalidated under the First Amendment a law limiting door-to-door charitable solicitation. In doing so, the Court rejected an attempt by the defendants in that case to parse a cohesive activity into discrete components, as defendants seek to do here:

It is urged that the ordinance should be sustained because it deals only with solicitation and because any charity is free to propagate its views from door to door in the Village without a permit as long as it refrains from soliciting money. But this represents a far too limited view of our prior cases

Id. at 628, 100 S. Ct. at 831. Instead, the Court looked to the context in which the solicitation takes place, focusing on the protected speech that typically accompanies the solicitation:

Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken *with due regard for the reality that solicitation is characteristically intertwined with* informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, *and for the reality that without solicitation the flow of such information and advocacy would likely cease.*

Id. at 632, 100 S. Ct. at 833-34 (emphases added).

Similarly, in *Meyer*, the Supreme Court invalidated a law that prohibited the payment of ballot initiative petition circulators. The law did not directly regulate any speech component of petition circulation; rather, it regulated only the employment relationship, or the “conduct” of paying petition circulators. If the applicability of the First Amendment depended only on the specific conduct directly regulated by the law, as defendants suggest, then the analysis would have stopped there, and *Meyer* would have been decided differently. But the *Meyer* Court did not countenance such a narrow approach to the First Amendment. Rather, the Court recognized that the specific conduct regulated—the payment of petition circulators—was part of an activity that is “characteristically intertwined” with protected speech and association. *Meyer*, 486 U.S. at 422 n.5, 108 S. Ct. at 1892 n.5 (citing *Schaumburg*, 444 U.S. at 632, 100 S. Ct. at 833). And, as set forth below, in assessing the burden imposed on First Amendment activity, the Court looked to whether the prohibition on paying petition circulators had the “inevitable effect” of reducing that speech and association. *Id.* at 423, 108 S. Ct. at 1892. Since the broader activity of which the payments were a part—the circulation of initiative petitions—involved protected speech and association, and since the law challenged in that case had the effect of diminishing that speech, the Court

subjected the law to First Amendment scrutiny. *Id.* at 421-23, 108 S. Ct. at 1891-93.⁹

That is exactly the case here. Although collecting forms, standing alone, might be subject to reasonable, nondiscriminatory regulations, the District Court correctly found, based on the overwhelming weight of the evidence presented, that collecting voter registration forms is characteristically “intertwined” with the protected speech and association that take place in voter registration drives. (Order RE57-Pg33.) The District Court further found not only that it is likely that the “the flow of . . . information and advocacy” in voter registration drives would cease if collection were penalized, but also that it in fact *had* ceased. (*Id.* (quoting *Schaumburg*, 444 U.S. at 632, 100 S. Ct. at 833)) As a result, the District Court correctly determined that “the question is not whether Plaintiffs’ conduct comes within the protections of the First Amendment, but whether Defendants have regulated such conduct in a permissible way.” (*Id.* at 33-34.)

Defendants cite *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 109 S. Ct. 3028 (1989), for the proposition that First Amendment protections cannot be invoked “by illogically linking protected speech

⁹ In *ACLF*, the Court reaffirmed this analysis in striking down three limitations imposed by Colorado on initiative petition circulation. The rules were subject to First Amendment scrutiny not because they directly regulated speech or association, but because each “discourage[d] participation in the petition circulation process.” *Id.* 525 U.S. at 200, 119 S. Ct. at 646.

to unprotected activity.” (Def-App Brief at 21.) But *Fox* does not help defendants, because there is nothing illogical about linking protected speech and association to the collection of voter registration forms. To the contrary, the District Court correctly found that the two were intertwined, and rationally so. (Order RE57-Pg33.) Indeed, the record contains no evidence of *any* voter registration drive that does not involve the collection and submission of forms and intertwined speech and association.

In contrast, the plaintiffs in *Fox* sought to obtain heightened First Amendment protection for their Tupperware-style sales parties by bootstrapping unrelated speech. They argued that because they often included information about home economics in their presentations, restrictions on their parties should not be analyzed under the Supreme Court’s more lenient commercial speech doctrine. *Fox*, 492 U.S. at 474, 109 S. Ct. at 3031. The *Fox* plaintiffs did not assert, nor could they, that their sales pitches in particular or that sales pitches in general were typically intertwined with protected speech. They were salespeople who *chose* to include information in their sales pitches on “how to be financially responsible and how to run an efficient home” and claimed that the incidental inclusion of that information transformed their commercial speech into fully protected speech. *Id.* But, as the Supreme Court found, “[n]o law of man or of nature makes it impossible to sell housewares without teaching home economics.” *Id.* Here, in

contrast, the very nature of a voter registration drive—asking people to register to vote—will typically involve speech about political participation and political change. *See infra* part I.B.3 (discussing political expression inherent in registering to vote).

Defendants next seek to avoid First Amendment review by suggesting that “collection and submission could easily be separated from their speech.” (Def-App Brief at 22 n.7.) Defendants are simply wrong that the First Amendment question turns on whether, hypothetically, plaintiffs could engage in political speech and association without collecting and submitting voter registration forms. Again, the cases show the legal standard is whether the private collection and submission of voter registration applications *typically* is accompanied by core political speech and association. *See supra*.

For the same reason, defendants are also wrong to insist that the collection of voter registration forms must necessarily be accompanied by speech to be afforded First Amendment protection. (Def-App Brief at 25.) The controlling Supreme Court decisions do not demand that alleged non-speech activity be inseparable from protected speech or association, but rather that it be “characteristically intertwined” with or often “involve” protected speech and association. *See ACLF*, 525 U.S. at 186, 119 S. Ct. at 639; *Meyer*, 486 U.S. at 421-22 & nn.4-5, 108 S. Ct. at 1892 & nn.4-5; *Schaumburg*, 444 U.S. at 631-32, 100 S.

Ct. at 833-34. It is of course possible to collect a voter registration form—just as it is possible to verify a ballot initiative signature or to solicit money—without engaging in protected speech and association. It is, however, unlikely that this would occur. The appropriate inquiry is whether in the real world those activities typically involve interactive speech concerning political change.

The Supreme Court treats the question of whether an activity is typically intertwined with speech and association as a *factual* question to be answered by reference to the record. For example, the *Meyer* Court looked to the record evidence to determine whether a regulation affecting petition circulation should be analyzed under the First Amendment:

The record in this case demonstrates that the circulation of appellees' petition involved political speech. . . . [O]ne of the appellees . . . testified about the nature of his conversations with voters in an effort to get them to sign the petition. . . . This testimony provides an example of advocacy of political reform that falls squarely within the protections of the First Amendment.

486 U.S. at 421 n.4, 108 S. Ct. at 1892 n.4 (emphasis added). Here too, the record clearly demonstrates that plaintiffs' voter registration activities typically involve political speech and association. (Order RE57-Pg5-13 (finding that each of plaintiffs' voter registration drives is intertwined with speech and association).)

In encouraging citizens to register and to vote, plaintiffs necessarily engage in conversations regarding the significance of registering and voting and on how

the political process can be made responsive to citizens' needs. (Order RE57-Pg5-12.) Plaintiffs' voter registration drives also involve a variety of additional political messages. *See supra* SOF pt. C. In addition, as the District Court found, citizens who register through a nonpartisan group at times do so to convey the message that "the dominant political powers that be should take that group and its agenda seriously."¹⁰ (Order RE57-Pg17.) Defendants ignore these findings.

Defendants also attempt to avoid constitutional review by analogizing private voter registration drives to the activities of government officials who collect voter registration applications as part of their job duties. (Def-App Brief at 25.)¹¹ But the fact that the collection of voter registration applications at government offices may not typically involve protected speech and association does not mean that the same is true for private voter registration drives. In *Schaumburg*, the activity at issue—door-to-door solicitation of money—is often conducted by salespeople who do not accompany their demands for money with protected speech, but rather engage in ordinary commercial solicitation. But the

¹⁰ For example, union members "often register through their unions to bolster the union's political clout." (Order RE57-Pg17.)

¹¹ That analogy is dubious, since unlike private voter registration groups, government employees do not seek to, nor could they, communicate political views or associate with citizens for political change when they accept voter registration forms. Moreover, in contrast to private voter registration groups, which encourage citizens to register and vote, government employees typically are passive recipients of voter registration forms submitted by members of the public.

Court found that the law must be analyzed with respect to the class of nonprofit issue advocacy organizations who do engage in such speech. *See Schaumburg*, 444 U.S. at 635-38, 100 S. Ct. at 835-37. The same is true here.

For all of these reasons, defendants’ efforts to separate “the collection and submission of voter registration applications” from plaintiffs’ voter registration drives, and thereby insulate their regulation from First Amendment scrutiny, is unavailing.¹²

2. The Inevitable Effect of the Challenged Law Is To Reduce Plaintiffs’ Speech and Association.

Defendants’ claim that the challenged law regulates only unprotected conduct fails for the additional reason that, as the District Court found, the law’s inevitable effect has been to reduce the core political speech and association characteristic of plaintiffs’ voter registration drives. *See supra* SOF pt. A.

The defendant in *Meyer* made a similar argument that the law at issue in that case regulated only unprotected conduct. *See* Brief for Appellants, *Meyer v. Grant*, 1987 WL 880992, at *12 (Apr. 4, 1988). The Supreme Court rejected that argument, holding that the state’s “refusal to permit appellees to pay petition

¹² Defendants’ argument that the collection and submission of voter registration forms is not “inherently expressive” (Def-App Brief at 15), is similarly misplaced. Whether or not the collection and submission of forms are themselves expressive is irrelevant. What matters is that they are part of an expressive and associative activity, and that, by penalizing the collection and submission of forms, the challenged law has seriously burdened that activity. *See infra*, part I.C.

circulators restricts political expression” because the “inevitable effect” of the state law was to “reduc[e] the total quantum of speech on a public issue.” *Meyer*, 486 U.S. at 422-23, 108 S. Ct. at 1892. The law reduced speech in two ways:

First, it limit[ed] the number of voices who will convey appellees’ message and the hours they can speak and, therefore, limit[ed] the size of the audience they can reach. Second, it ma[de] it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.

Id. (footnote omitted). Thus, even though the plaintiffs in *Meyer* remained free to pay canvassers to go door-to-door and discuss the merits of a particular political position—even encourage them to sign an initiative petition, so long as they did not collect and verify signatures—the Court scrutinized the law under the First Amendment because its actual effect was to hinder them from doing so.

In *ACLF*, the Supreme Court further explained that courts must “be vigilant . . . to guard against undue hindrances to political conversations and the exchange of ideas.” 525 U.S. at 192, 119 S. Ct. at 642. Thus, the Court said, if a law “significantly inhibit[s] communication with voters about proposed political change,” *id.*, or “produces a speech diminution,” *id.* at 194, 119 S. Ct. at 643, then courts must scrutinize it under the First Amendment. *Id.* at 192, 119 S. Ct. at 642. What matters is not the specific conduct being regulated, but rather the effect of the regulation on associated speech and association: “Although Colorado’s

registration requirement does not *directly* regulate speech, it operates in the same fashion that Colorado’s prohibition on paid circulators did in *Meyer*—the requirement reduces the voices available to convey political messages.” *Id.* at 210, 119 S. Ct. at 651 (Thomas, J., concurring).

In the present case, the inevitable and direct effect of Florida’s law was to shut down plaintiffs’ voter registration drives and to chill volunteers and members from participating in those drives. (Order RE57-Pg16-17.) Indeed, the uncontroverted expert testimony established more generally that groups would be extremely unlikely to engage in voter registration drives if they could not collect and submit the forms. (*Id.*; PX PD 3 ¶¶ 16-17.)¹³ The District Court thus found that “the likely and predictable effect of the challenged Law is ‘to put out of business non-party run voter registration drives.’” (Order RE57-Pg16-17.) This has significantly reduced the amount of political speech and association occurring in Florida. The speech-reducing effect of Florida’s law is even more severe since it applies to both paid and volunteer speakers. The net effect of the law, the District Court found, has been to “reduce[] the [total] quantum of [plaintiffs’] political speech and association.” (Order RE57-Pg32.)

¹³ Plaintiffs also demonstrated that their voter registration drives would largely be futile without the ability to collect and submit applications, since most individuals would fail to otherwise properly submit applications before the relevant voter registration deadlines. *See supra* SOF pt. B.

Moreover, worse than the laws at issue in *Meyer* and *ACLF*, Florida’s law not only reduces free speech but also reduces the number of citizens able to vote and to associate with plaintiffs by making their voices heard through the ballot box. As a result of the challenged law, fewer citizens were joining plaintiffs by registering to cast ballots for candidates who support their causes, signing petitions to place on the ballot initiatives advancing plaintiffs’ goals, and effectively associating with plaintiffs to influence labor negotiations with municipal officials or lobby elected representatives (because the fewer members of a group registered to vote, the less political power a group is able to exercise). (*See, e.g.*, PX PD 5 ¶¶ 10-12; PX PD1. ¶ 17.)

Despite the clear effect of the law, defendants assert that the cessation of voter registration drives “is not a direct result of the challenged legislation,” but instead of “Plaintiffs’ own strategic decisions.” (Def-App Brief at 29.) This is both incorrect and irrelevant. First and most important, the District Court expressly found to the contrary, *see supra* SOF pt. A, and defendants offer no basis to disturb that finding. Second, even if it were true as a matter of fact, it would make no difference as a matter of law. Indeed, the same could be said of the speech diminutions produced by the laws at issue in *Schaumburg*, *Meyer*, and *ACLF*; the plaintiffs in each of those cases could still have solicited charitable funds or circulated petitions in compliance with the challenged laws, if they had

been willing to assume great cost and burden—that is, if they made different “strategic” choices.

Moreover, the Supreme Court rejected a similar argument in *Meyer*. The Court made clear that the issue is not simply whether plaintiffs *could* speak through other means, but whether the challenged law has the *effect* of limiting political speech that otherwise would take place: “That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection. [The challenged law] restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication.” *Meyer*, 486 U.S. at 424, 108 S. Ct. at 1893.

For similar reasons, the District Court was also right to reject defendants’ argument that plaintiffs are asking for a right to success in their voter registration drives. (Order RE57-Pg34 (“Plaintiffs are not asking for success in their voter registration drives, but a right to continue their speech and advocacy in furtherance of the political process.”).) “The First Amendment protects [plaintiffs’] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.” *Meyer*, 486 U.S. at 424, 108 S. Ct. at 1893.

3. The First Amendment Principles Announced in *ACLF*, *Meyer*, and *Schaumburg* Are Fully Applicable Here.

In attempting to distinguish the clear precedential force of *ACLF*, *Meyer*, and *Schaumburg*, defendants assert that there are stark differences between the gathering of initiative petition signatures and the solicitation of funds on the one hand and the collection and submission of voter registration forms on the other.

First, defendants claim that, unlike the collection of voter registration forms, both the solicitation of funds and the gathering and verification of signatures are themselves fully protected speech, and that the decisions in *Schaumburg* and *Meyer* depended on that fact. (Def-App Brief at 22, 24.) But defendants misread those cases. In *Schaumburg*, the issue was whether the challenged ordinance would be analyzed under the lesser scrutiny applied in commercial speech cases, or the heightened scrutiny applied in cases involving pure speech. 444 U.S. at 632, 100 S. Ct. at 833-34. The Court made clear that solicitation itself is not pure (that is, non-commercial) speech, *id.* (“soliciting financial support is undoubtedly subject to reasonable regulation”), but it nonetheless applied heightened scrutiny because charitable solicitation is “characteristically intertwined” with protected speech. *Id.* In other words, the decision depended not on the communicative nature of the solicitation act, but rather on the speech that accompanied that act.

Smith v. City of Fort Lauderdale, 177 F.3d 954 (11th Cir. 1999), cited by defendants, is not to the contrary. While this Court held that, “[l]ike other

charitable solicitation, begging is speech entitled to First Amendment protection,” *id.* at 956, the Court carefully reserved the question “of whether begging is commercial speech entitled to a lower level” of protection. *Id.* at 956 & n.2. The answer to that question depends on whether begging is typically intertwined with fully protected speech. In *Loper v. New York City Police Dep’t*, 999 F.2d 699 (2d Cir. 1993), relied on in *Smith*, the Second Circuit engaged in that inquiry. In determining that an ordinance banning loitering in a public place for the purpose of begging violated the First Amendment, the court expressly found that begging is typically accompanied by protected speech. *Id.* at 704 (“While . . . begging does not always involve the transmission of a particularized social or political message, it seems certain that it usually involves some communication of that nature. Begging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation.” (citation omitted)) Begging and solicitation are not protected because asking for money itself is fully protected speech, but because it is typically accompanied by fully protected speech.¹⁴

¹⁴ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S. Ct. 1364 (1997), which defendants cite, does not support their effort to avoid First Amendment scrutiny under the *Anderson* test. In that case, the Supreme Court *applied* the *Anderson* test to assess the constitutionality of Minnesota’s ban on fusion candidacies. *Id.* at 358-59, 117 S. Ct. at 1369-70. Moreover, unlike the case here, the law challenged in *Timmons* did not have the effect of dramatically reducing core political speech and association.

Defendants’ effort to distinguish *Meyer* on this ground is similarly unavailing. The *Meyer* decision did not rest on a finding that signature gathering itself *is* speech. Rather, the Court found that the regulation of signature gathering implicates speech because it has the effect of limiting petition supporters’ ability to convey *other* political messages—namely, messages about the issues they seek to advance through the petition process. *Meyer*, 486 U.S. at 422-23, 108 S. Ct. at 1892 (focusing on ability of petitioners to “convey [plaintiffs’] message” and “to make the matter the focus of statewide discussion”). In any event, the relevant comparison for the petition circulation in *Meyer* is not the *collection* of voter registration forms, but rather the participation in voter registration drives. (As discussed above, the law at issue in *Meyer* did not regulate the circulation of petitions, but rather the payment of petition circulators.)

Second, defendants seek to differentiate *Meyer* and *ACLF* by claiming that the state is the primary actor in the voter registration process, but not in the initiative process. (*See* Def-App Brief at 25-26.) Defendants assert that while initiative petitions are tools of advocacy, registration forms are creations of the state. Of course, the initiative process itself is state-created, state-regulated, and state-controlled; indeed, the state has “the power to ban initiatives entirely.”

Meyer, 486 U.S. at 425, 108 S. Ct. at 1893.¹⁵ But even if voter registration were subject to greater state control, that would be irrelevant to the constitutional analysis: the *Meyer* and *ACLF* decisions did not rest on the advocacy value of the petition itself. Moreover, contrary to defendants’ contention (Def-App Brief at 26-27), plaintiffs do not seek to express themselves on the voter registration form itself, but rather through their voter registration drives.

Third, defendants suggest that voter registration is different from petitioning because registering a voter does not require one to express a political point of view. (Def-App Brief at 25.) This is wrong as a matter of fact and of law. Plaintiffs communicate a variety of political positions as part of their voter registration drives. *See supra* SOF pt. C. At a minimum, asking a citizen to register to vote necessarily involves a conversation about the franchise and the political process. As the *ACLF* Court recognized, “the choice[to register or] not to register implicates political thought and expression.” 525 U.S. at 195-96, 119 S. Ct. at 644. Even if the message plaintiffs convey is simply that registering to vote is desirable, “the

¹⁵ Under Florida law, for instance, laws and regulations govern who may sponsor a petition, *see* Fla. Stat. §§ 15.21, 106.03; require disclosure of the identities of sponsors and the funds they expend, *see id.* § 106.03; require preapproval of the title, substance, and text of the initiative, *see id.* §§ 100.371, 101.161; require compliance with the single-subject rule for constitutional amendments, *see* Fla. Const. art. 11, § 3; and allow circulation only of petitions that meet stringent regulations governing the content and format of the petition form itself, *see* Fla. Admin. Code. Ann. R. 1S-2.009.

level of scrutiny cannot turn on the content or sophistication of a political message.” *ACLF*, 525 U.S. at 211 n.3, 119 S. Ct. at 651 n.3 (Thomas, J., concurring). Indeed, the petition circulators the *ACLF* Court held to be protected by the First Amendment “do not discuss the merits of a proposed change by initiative in any great depth.” *Id.*

Finally, the fact that Florida has different regulations for voter registration drives and initiative petitions is irrelevant to the constitutional analysis. So is the fact that the right to collect voter registration forms is of a more recent vintage than the right to circulate ballot initiative petitions. Both rights are state-created (and the former is also federally mandated), but that does not mean that the state may regulate them in a manner that restricts political speech and association without justifying that regulation under the First Amendment.

C. The Expressive Conduct Cases Are Inapposite.

Plaintiffs’ argument does not depend, as defendants suggest (Def-App Brief at 14-23), on this Court determining that the collection and submission of forms must itself be considered “speech,” or even expressive conduct. The “expressive conduct” cases defendants cite are thus not at all applicable here. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, ___ U.S. ___, 126 S. Ct. 1297 (2006); *United States v. O’Brien*, 391 U.S. 367, 88 S. Ct. 1673 (1968). Both cases were civil disobedience cases in which the plaintiffs did not challenge the legality

of the government laws they were protesting, but rather claimed that their conduct of non-compliance with those laws was protected by the First Amendment because it was expressive. In neither case was the underlying conduct “characteristically intertwined” with protected speech and association the way voter registration is. Moreover, in neither case did the government prohibition at issue have the “inevitable effect” of reducing protected speech and association that typically accompanies the conduct the way the law challenged here does. Prohibiting the burning of draft cards does not undermine the reason for engaging in war protest speech and is not at all likely to reduce that speech. But prohibiting the collection of voter registration forms makes it highly unlikely that groups will do voter registration. (Order RE57-Pg16-18.)¹⁶

Even considering plaintiffs’ voter registration drives under the expressive conduct cases, the challenged law would still fail. It does a disservice to the importance and historical significance of the franchise to suggest that advocating for citizens to exercise their right to vote is not an inherently expressive course of conduct.

¹⁶ Defendants’ reliance on *Dallas v. Stanglin*, 490 U.S. 19, 109 S. Ct. 1591 (1989), is similarly misplaced. Unlike the present case, the plaintiffs in *Stanglin* asserted “a generalized right of ‘social association’” that supposedly included the right of persons under the age of 18 to engage in “chance encounters” with adults in dance halls. *Id.* at 25, 109 S. Ct. at 1595. In finding that no such right exists, *Stanglin* expressly differentiated cases, like this one, in which individuals seek to “associate for the purpose of engaging in those activities protected by the First Amendment.” *Id.* at 24, 109 S. Ct. at 1594 (internal quotation marks omitted).

Defendants suggest that because government officials collect forms, collection cannot be expressive, but *Texas v. Johnson*, 491 U.S. 397, 109 S. Ct. 2533 (1989), the seminal expressive conduct case, instructs otherwise. Although Johnson’s flag-burning, taking place in the middle of a protest at the Republican National Convention, was clearly expressive, burning a flag in a rubbish heap or to honorably dispose of it is not. The same is true of burning a draft card. *See O’Brien*, 391 U.S. at 367, 88 S. Ct. at 1673. Context matters in the expressive conduct cases; the context of plaintiffs’ drives clearly demonstrates their expressive content. (*See* Order RE57-Pg5, 8-10, 12, 16-18 (describing conduct of plaintiffs’ voter registration drives and messages expressed through collection and submission).)

Under *O’Brien*, in order to sustain a restriction on expressive conduct, the government must demonstrate that “it is within the constitutional power of the Government; . . . it furthers an important or substantial governmental interest; [that] interest is unrelated to the suppression of free expression; and . . . the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” 391 U.S. at 377, 88 S. Ct. at 1679. The District Court’s findings make clear that the challenged law restricts far more speech than is necessary to further any important government interests.

D. The State's Interests Do Not Justify the Challenged Law

Under the final prong of the *Anderson* balancing test, the District Court correctly determined, based on substantial evidence, that the state's interests in the challenged law were insufficient to justify its burdens on plaintiffs' First Amendment rights. (Order RE57-Pg39-43.) Indeed, the District Court found that the law does not materially advance any of those interests. (*Id.* at 40.) On appeal, defendants assert the same interests rejected by the District Court as unfounded, without demonstrating that the District Court's findings were clearly erroneous.

Defendants first argue that the state's interest in timely and correct submission of voter registration applications makes the challenged law necessary. (Def-App Brief at 40-42.) But they do not show that the District Court erred in its findings that none of the problems the state identifies—"hoarding," late submission and failure to submit forms—in fact exist.¹⁷ As the District Court found, "the evidence in this case does not demonstrate a significant problem with voter registration applications stemming from third party voter registration organizations." (Order RE57-Pg40.)

¹⁷ Defendants claimed below that during the 2004 election cycle, a rise in third-party voter registration resulted in increased numbers of forms submitted just before the election deadlines and in forms collected before, but returned after, the deadlines. But as the District Court properly found, forms were not submitted close to or after the deadline in any greater proportion than in earlier presidential cycles. (Order RE57-Pg 28-29, 40-41.)

Defendants also suggest that their interest in efficient administration of elections supports the challenged law.¹⁸ Once again, defendants fail to explain why the District Court’s finding that “a large part of [the] difficulty [in administering the 2004 election] arose from the general increase in the number of voter registration applications received that year and the lack of preparation on the part of the supervisors of elections offices” is incorrect. (*Id.*)¹⁹

Even if the District Court had not correctly rejected the factual foundation of the interests proffered by defendants, “Defendants have not demonstrated that the combination of strict liability, heavy fines, and joint and several liability is necessary” to achieve the state’s interests. (*Id.* at 40.) Florida law has adequate alternative provisions that actually serve the state’s interests, including the criminal

¹⁸ Defendants cite to four other states that have imposed some sort of restriction on private voter registration drives. None of those laws, however, impose burdens as onerous as the high fines and strict and personal liability of the challenged law. Moreover, every court to consider these recent restrictions on private voter registration drives has found them unconstitutional. *See supra* part I.A.

¹⁹ While states have a valid interest in having sufficient time to process voter registration applications, the National Voter Registration Act’s requirement that no state set its registration deadline more than thirty days out from an election represents Congress’s judgment that any greater requirement would unnecessarily burden constitutional rights. Moreover in *Burns v. Fortson*, 410 U.S. 686, 687, 93 S. Ct. 1209, 1210 (1973), the Supreme Court described a “50-day registration period [as] approach[ing] the outer constitutional limits in this area.” By requiring third-party groups to return forms within ten days of collection, even as long as six months before an election, the challenged law imposes deadlines far outside what the state’s interests might require.

penalties which make it a felony to “knowingly destroy, mutilate, or deface a voter registration form or election ballot *or obstruct or delay* the delivery of a voter registration form or election ballot,” Fla. Stat. § 104.0615 (emphasis added), punishable by up to five years in jail and/or a \$5000 fine. *Id.* §§ 775.082(3)(d), 775.083(1)(c). Defendants have identified what are important state interests in the abstract, but they fail to explain why those interests make it necessary to burden the plaintiffs’ rights in this manner.

II. THE CHALLENGED LAW UNCONSTITUTIONALLY DISCRIMINATES IN FAVOR OF POLITICAL PARTIES.

Under both the Supreme Court’s decision in *Anderson* and this Court’s decision in *Fulani*, election-related laws that discriminate in favor of particular groups, including political parties, are intrinsically suspect and rarely, if ever, upheld. As the Supreme Court stated in *Anderson*, “it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint [or] associational preference,” including those groups “whose political preferences lie outside the existing political parties.” 460 U.S. at 793-94, 103 S. Ct. at 1572. Consequently, the Supreme Court has repeatedly held that, in the election law context, even incidental restrictions on First Amendment rights are constitutional only if they are reasonable and *nondiscriminatory*. *See, e.g., Burdick*, 504 U.S. at 434, 112 S. Ct. at 2063 (citing *Anderson*).

In *Fulani*—which defendants nowhere cite—this Court applied the *Anderson* balancing test to invalidate a discriminatory exemption to a Florida law that allowed certain financially burdened candidates and groups, but not candidates of minor political parties, to waive signature-verification fees. 973 F.2d at 1547. *Fulani* made clear that the state has the burden to justify the discriminatory classification itself, not just the underlying law. To do so, the state must identify the “precise interests” that justify the discrimination and show that the discriminatory classification “is necessary to advance” those interests. *Id.* at 1547.²⁰

In this case, the District Court correctly applied *Anderson* and *Fulani* to hold that the challenged law is facially invalid because it discriminates in favor of political parties without justification. (Order RE57-Pg38-39.)²¹ After concluding that the law injures plaintiffs by preventing them from registering voters “in the

²⁰ The principle that facial discrimination between political participants is intrinsically suspect is true regardless of whether the discriminatory law would, if evenly applied, survive constitutional review. In *Fulani*, a one-time fee of \$5,631.20, which this Court described as a “not insurmountable” burden, 973 F.2d at 1545 (emphasis omitted), was held unconstitutional because it was imposed only on minor parties, even though this Court had previously upheld the amount of that fee. *Id.* at 1540.

²¹ At least one other court has applied the *Anderson* balancing test to invalidate discriminatory restrictions on who may perform voter registration. See *Iowa Socialist Party v. Slockett*, 604 F. Supp. 1391 (S.D. Iowa 1985) (holding that state law restricting deputy registrars to political party nominees violates First and Fourteenth Amendments).

manner that they previously enjoyed, whereas political parties are free to continue their voter registration activities without concerns for the Law's penalties or reporting requirements" (*Id.* at 36), the District Court held that the exemption of political parties from the law's reach did not accomplish Florida's asserted goal of protecting the franchise.

First, the District Court found "no evidence whatsoever that political parties are better than other non-partisan organizations at collecting and submitting . . . forms in a timely and responsible manner." *Id.* at 38. Citing *Florida Star v. B.J.F.*, 491 U.S. 524, 109 S. Ct. 2603 (1989), the District Court concluded that the law's "underinclusiveness" actually "undermined" the defendants' "asserted justification" for the exemption, since exempting political parties would not protect Florida citizens from those political parties that submit forms late. *Id.* at 39.

The District Court also rightly rejected defendants' argument that the exemption was justified because political parties are already highly regulated in Florida, because "Defendants [had] not cited one regulation that pertains to the collection of voter registration applications." (*Id.* at 37.) It also properly rejected defendants' argument that alleged differences in the nature of political parties and plaintiffs justified the exemption, since "the record in this case does not include

any *salient* differences between non-partisan groups and political parties.” (*Id.* at 38 (emphasis added).)²²

Defendants argue on appeal that the District Court erred in relying on *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976), to find that the challenged law penalizes plaintiffs for their non-association with political parties, suggesting that the burdens imposed by the challenged law are insufficient to support an association claim. (Def-App Brief at 36-38.) But courts have recognized that even where there is “no right, in the abstract, to” engage in voter registration activity, “the First Amendment does protect the right” to engage in that activity “unhampered by invidiously discriminatory rules.” *Rhode Island Minority Caucus, Inc. v. Baronian*, 590 F.2d 372, 376 (1st Cir. 1979) (internal quotations omitted); *see also Morse v. Martineau*, 685 F. Supp. 860, 870 (D.N.H. 1988) (assuming right of free association would be implicated if state deputizes only members of certain

²² Defendants’ reliance on *McConnell v. FEC*, 540 U.S. 93, 124 S. Ct. 619 (2003), is misplaced. While it is generally true that legislatures may account for “the real-world differences” between different kinds of groups when drawing classifications, they may do so only where these differences are real and salient to the law’s purpose, which is not true here. The differences at issue in *McConnell*—the “special relationship and unity of interest” that parties enjoy with candidates and officeholders, *id.* at 145, 124 S. Ct. at 661—was relevant to Congress’s purpose in enacting campaign finance regulation: to reduce the real and apparent corruption of candidates and officeholders. *Id.* at 159-60, 124 S. Ct. at 669.

groups as volunteer registrars).²³ For this reason, even if plaintiffs' voter registration activity were not protected by the First Amendment, the challenged law would still fail as an unconstitutional discrimination on the basis of First Amendment association.²⁴

III. THE DISTRICT COURT PROPERLY CONSIDERED PLAINTIFFS' FACIAL CHALLENGE TO THE ENJOINED LAW.

Defendants argue that the District Court improperly heard plaintiffs' facial challenge below, suggesting that plaintiffs should instead be forced to wait for the statute to be applied to them before challenging its burden on their speech and association. Defendants suggest that the Secretary of State should be trusted not to exercise her discretion to apply the law unconstitutionally, and that unless plaintiffs demonstrate that all applications will be unconstitutional, a facial challenge to the law is insupportable. But as many court decisions have demonstrated, facial challenges to overly broad laws are necessary to protect the

²³ The political party exemption is also unconstitutional as a content-based discrimination between different types of political speech and speakers. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 92 S. Ct. 2286 (1972); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005).

²⁴ *Lyng v. International Union*, 485 U.S. 360, 108 S. Ct. 1184 (1988), cited by defendants, is not to the contrary. *Lyng* concerned the denial of food stamps to striking workers, and held that "the strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right." *Id.* at 368, 108 S. Ct. at 1190. Here, plaintiffs do not ask the state to subsidize their right of association, but to refrain from burdening it.

rights to free speech and association. *See, e.g., Schaumburg*, 444 U.S. at 635, 100 S. Ct. at 835. Defendants’ arguments were rejected below and should be rejected here as well.

Defendants first suggest that the Secretary of State has discretion in applying the challenged law and should be presumed to apply that discretion in a reasonable manner.²⁵ But they point to no court decision refusing to enjoin a state law under the First Amendment on the ground that state officials “could” exercise discretion in its enforcement. In fact, the opposite is true: when executive officials are granted the ability to exercise discretion—and hence to discriminate—in enforcing a law that touches on the First Amendment, *that alone* may be enough to render the law *unconstitutional*. *See, e.g., City of Chi. v. Morales*, 527 U.S. 41, 60-64, 119 S. Ct. 1849, 1861-63 (1999); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129, 112 S. Ct. 2395, 2401 (1992).

Defendants then argue that under *Florida League of Professional Lobbyists v. Meggs*, 87 F.3d 457 (11th Cir. 1996), plaintiffs must wait until they have been fined and then bring as-applied challenges to the voter registration law. But plaintiffs would be unable to bring such a suit because they would have ceased

²⁵ This suggestion is directly contrary to the District Court’s finding that “the Assistant General Counsel for the Florida Department of State has confirmed that third-party voter registration organizations will be fined even ‘if some situation arises beyond the control of the organization.’” (Order RE57-Pg42 n.24.)

their voter registration drives as a result of the law. As this Court explained in sustaining a facial challenge in *Clean-Up '84 v. Heinrich*, 759 F.2d 1511, 1514 (11th Cir. 1985), “the danger in an overbroad statute is not that actual enforcement will occur or is likely to occur, but that third parties, not before the court, may feel inhibited in utilizing their protected first amendment communications because of the existence of the overly broad statute.” As the District Court found, the challenged law “could severely drain [plaintiffs’] finances . . . and decimate their voter registration budgets” and “the threat of crippling fines is not hypothetical, but imminent.” (Order RE57-Pg16, 42.) The District Court concluded that “the threat of [such] fines has rationally chilled Plaintiffs’ exercise of free speech and association.” (*Id.* at 42.)

For this reason, the *Salerno* principle relied upon in *Meggs*, that a facial challenge “must establish that no set of circumstances exists under which the Act would be valid,” is inapplicable. *United States v. Salerno*, 418 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987). In *Salerno* itself, the Court particularly excepted First Amendment overbreadth challenges from this principle. *Id.*²⁶ In *Meggs*, while the

²⁶ See Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 238 (1994) (*Salerno* principle does not “accurately reflect[] the Court’s practice with respect to facial challenges”); see also *Morales*, 527 U.S. at 54 n.22, 119 S. Ct. at 1858 n.22 (“To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself” (citing Dorf, *supra*)) (plurality opinion).

plaintiffs alleged that the statute was overbroad, they did not claim that the statute had chilled any First Amendment activity or that they or other parties not before the court were likely to refrain from such activity as a result of the challenged law. 87 F.3d at 457. The First Amendment injury in *Meggs* could thus have been remedied by as-applied challenges in a way that is simply unavailable to plaintiffs here. As the District Court found, “[t]he instant case is distinguishable from *Meggs* because” plaintiffs have shown that the “rational[]” response to the law is to be “chilled” from engaging in speech or association through voter registration drives. (Order RE57-Pg42.) They have thus shown that the challenged law causes constitutional injury in a “substantial number of . . . applications.” *Meggs*, 87 F.3d at 460; *cf. Schaumburg*, 444 U.S. at 635, 100 S. Ct. at 835 (sustaining facial challenge where lower court identified a “class of charitable organizations” to which the rule “could not constitutionally be applied”).

IV. THE DISTRICT COURT CORRECTLY DETERMINED THAT PLAINTIFFS MET THE REMAINING REQUIREMENTS FOR A PRELIMINARY INJUNCTION.

As the District Court correctly found, plaintiffs have demonstrated each of the other prerequisites to injunctive relief: that they will suffer irreparable injury without an injunction; that the injury to plaintiffs outweighs any harm to defendants; and that the injunction will not be adverse to the public interest. (Order RE57-Pg43); *see Ne. Fla. Chapter of Ass’n of Gen’l Contractors of Am. v.*

City of Jacksonville, 896 F.2d 1284, 1285 (11th Cir. 1990). On appeal, defendants assert that these remaining prerequisites are not met because plaintiffs' injuries are not ascribable to the challenged law, and because the state's interest in protecting voters outweighs plaintiffs' First Amendment interests. (Def-App Brief at 48-49.) These arguments are no more than a reiteration of defendants' arguments on the merits, and they were properly rejected by the District Court.

First, if the law chills the exercise of plaintiffs' First Amendment rights, then it necessarily causes irreparable harm. *See Elrod*, 427 U.S at 373, 96 S. Ct. at 2689 ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). In this case, the law caused plaintiffs to abandon their First Amendment activities. The District Court was thus correct to find that plaintiffs "have suffered and will continue to suffer irreparable harm unless the Court enjoins the challenged statute." (Order RE57-Pg44.)

Second, as the District Court found, no material state interest is actually advanced by the challenged law. (Order RE57-Pg37-43.) Because the law does not materially serve the state's claimed interest in protecting voters, enjoining the law cannot harm that interest. Moreover, any minimal benefit to this interest is outweighed by the severe burden on plaintiffs' First Amendment rights. Both the balance of hardships and the public interest therefore weigh in favor of granting the injunction. *See Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th

Cir. 2002) (noting the “significant public interest in upholding First Amendment principles” in preliminary injunction cases).

CONCLUSION

For the foregoing reasons, the District Court’s preliminary injunction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with Federal Rule of Appellate Procedure 32(1)(7). This brief is submitted in 14-point Times New Roman font, and it contains 13,691 words.

/s/ Wendy Weiser
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