

No. 06-14836-D

In the United States Court of Appeals
for the Eleventh Circuit

LEAGUE OF WOMEN VOTERS, ET AL.,

Plaintiffs-Appellees,

v.

SECRETARY OF THE STATE OF FLORIDA, ET AL.,

Defendants-Appellants.

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

THE HONORABLE PATRICIA A. SEITZ

REPLY BRIEF OF APPELLANTS COBB AND ROBERTS

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ARGUMENT

Critical to this appeal is a narrow legal issue: whether the collection, possession, and handling of voter registration applications are protected First Amendment activities. In their initial brief, the Defendants presented substantial legal authority demonstrating that those activities do not invoke First Amendment protection. Instead of squarely addressing the Defendants' legal arguments, the Plaintiffs' answer brief places its focus on the district court's factual findings. Accusing the Defendants of ignoring the factual record, (Ans. Br. at 3-4), the Plaintiffs mistakenly suggest that the district court's factual findings are dispositive of this appeal. (Ans. Br. at 19.) They are not.

Throughout their brief, the Plaintiffs ask this Court to defer to the district court's conclusions. In many instances, the Plaintiffs accuse the Defendants of not acknowledging the district court's conclusions (*e.g.*, Ans. Br. at 8), and of presenting arguments that were dismissed below, (*e.g.*, Ans. Br. at 16, 47.) The Plaintiffs' efforts to couch this appeal as a factual one undoubtedly result from their desire to avoid addressing the district court's misapplication of the law. Indeed, the Plaintiffs explain that the grant of a preliminary injunction is reviewed for an abuse of discretion and that a court's factual findings may not be disturbed absent clear error. (Ans. Br. at 18-19.) But they ignore the fact that a district court's conclusions of law en route to a preliminary injunction determination are

reviewed *de novo*. See, e.g., *Teper v. Miller*, 82 F.3d 989, 993 (11th Cir. 1996) (“We review the ultimate decision of whether to grant a preliminary injunction for abuse of discretion, but we review *de novo* determinations of law made by the district court en route.”); *Haitian Refugee Ctr. v. Baker*, 953 F.2d 1498, 1505 (11th Cir. 1992) (“The grant of a preliminary injunction is reviewed for abuse of discretion. However, if the trial court misapplies the law we will review and correct the error without deference to that court’s determination.”).

Contrary to the Plaintiffs’ argument, the facial validity of the challenged legislation in this case hinges primarily on questions of constitutional law. And the challenged law withstands constitutional scrutiny notwithstanding the factual findings below. Accordingly, this Court should reverse the decision of the district court.

I. WHETHER THE LEGISLATION IMPACTS THE FUNDAMENTAL RIGHT TO VOTE IS NOT BEFORE THIS COURT.

The challenged legislation does not harm any applicant’s fundamental right to vote. Instead, it is specifically and appropriately designed to protect that right. At any rate, the rights of individual voters are not before this Court. The only issue is whether the challenged legislation violates these Plaintiffs’ constitutional rights. Nonetheless, the Plaintiffs continue to argue that low-income and poorly educated individuals would have a hard time registering absent their efforts. (Ans. Br. at, e.g., 9, 12, 38.) They contend that “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.’” (Ans. Br. at 12, quoting district court.) This argument—even if correct—does nothing to support the Plaintiffs’ claims that their collection and handling of voter registration applications are protected by *their* First Amendment rights.

II. THE CHALLENGED LAW DOES NOT IMPLICATE THE PLAINTIFFS’ FIRST AMENDMENT RIGHTS.

Below, the Plaintiffs argued that collecting and submitting applications *is* First Amendment speech. (*See, e.g.*, R.31 at 13.) On appeal, they take a more cautious approach: “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” (Ans. Br. at 35 n.12.) Because of this, the Plaintiffs argue that the expressive conduct cases are inapposite. *Id.* at 44. But the Supreme Court has “extended First Amendment protection only to conduct that is inherently expressive.” *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1310 (2006). Whether the collection is inherently expressive is certainly relevant.

A. Prior to 1993, Private Organizations Could Not Conduct Voter Registration Drives without State Approval.

As explained in the Defendants’ opening brief, before 1993, voter registration in Florida could take place only in person before a voter registration official. The Plaintiffs describe this critical fact as “irrelevant.” (Ans. Br. at 15.) Notably, they do not suggest that the earlier regime was unconstitutional. In fact, they state that “the right to collect voter registration forms is of a more recent vintage than the right to circulate ballot initiative petitions.” *Id.* at 44.¹ They then note that the right is a state-created right (as opposed to a constitutional right), but contend that Florida’s restrictions on that right violate the First Amendment. *Id.*

If Florida could constitutionally return to the pre-1993 regime,² which the Plaintiffs implicitly concede, then that necessarily means that the collection of voter registration applications is not constitutionally protected activity. This is not like in *Meyer v. Grant*, where the Court indicated that Colorado could eliminate its initiative petition process entirely, but could not restrict speech associated with the process when it was in place. *See Meyer v. Grant*, 486 U.S. 414, 425, 108 S. Ct. 1886, 1893 (1988). If Colorado took such a step, the elimination of the petition

¹ That acknowledgement presumably intends to address the fact that at the time *Meyer v. Grant* was decided, many states—including Florida—did not allow for private voter registration drives.

² Even though the Constitution would permit such a change, the National Voter Registration Act, which preempts state law, would not. The Plaintiffs, though, have not presented any claims based on the NVRA.

process would not restrict the challengers’ speech—they would remain free to advocate for the same political change they sought through the initiative process. Here, by contrast, the Plaintiffs’ entire case hinges on their argument that a restriction on their collection activities impermissibly restricts their speech. If that is the case, then they must have a constitutional right to collect applications—not simply a right to be free from regulation once Florida began allowing private registration. As explained in the initial brief, there is no such constitutional right. There was none before 1993, and there is none now. The history of registration regulation is relevant and should not be ignored.

B. The Plaintiffs Ask Too Much of *Meyer v. Grant*.

Much of the Plaintiffs’ argument on appeal, like their argument below, relies on the Supreme Court’s decision in *Meyer v. Grant*, 486 U.S. 414, 108 S. Ct. 1886 (1988). In that decision, the Court invalidated criminal restrictions on the circulation of initiative petitions. In doing so, it noted that “the prohibition against the use of paid circulators has the inevitable effect of reducing the total quantum of speech on a public issue.” *Id.* at 423, 108 S. Ct. at 1892. Based on this, the Plaintiffs in this case argue that Florida’s regulation likewise reduces the quantum of speech and therefore must be unconstitutional. (Ans. Br. at 29-30.) The Plaintiffs read *Meyer* too broadly.

The district court in this case found as a matter of fact that the Plaintiffs' voter registration activities had ceased in the face of the challenged law. (RE 57:33.)³ It further concluded that as a result of that cessation, the Plaintiffs were communicating fewer political messages. *Id.* at 32. But these facts alone cannot support a finding of unconstitutionality. Obviously, if a law's effect on the total quantity of speech, without more, rendered the law unconstitutional, very few laws would be constitutional.

In *Meyer*, the Court discussed the effect of the Colorado statute on the total quantity of speech only after concluding that "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Id.* at 421-22, 108 S. Ct. at 1892. *Meyer* did not operate the other way around. It did not conclude that initiative petition circulation amounted to core political speech *because* the

³ In fact, the voter registration activities did not cease altogether. The law became effective on January 1, 2006, some six months after its passage. *See* Ch. 2005-277, Laws of Fla. Nevertheless, Plaintiff League of Women Voters waited until March 2006 before voluntarily imposing its registration moratorium. (Doc 55:39.) And even after that, Plaintiff AFSCME conducted a voter registration drive in Jacksonville, in the face of the challenged law. (Doc 55:144-45.) AFSCME complained, though, that it had to expend resources to ensure compliance with the challenged law. (Doc 55:146-48.) Presumably, those resources were used to ensure the timely submission of voter registration applications for the benefit of the applicants and the state—hardly an objectionable result.

regulation would have some effect on the quantity of speech.⁴ The very question, then, is whether the challenged regulation directly restricts the Plaintiffs’ speech—not whether it will have an effect on the quantity of their speech. It does not.

Moreover, even if there is some speech component in the Plaintiffs’ collection and handling of voter registration applications, and even if the total quantity of that particular type of speech is reduced, the challenged legislation is valid. So long as restrictions on speech are content-neutral, a reduction in the overall quantity of speech is constitutionally permissible. *See National Amusements v. Town of Dedham*, 43 F.3d 731, 745 (1st Cir. 1995). For example, in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118 (1984), the Court upheld a Los Angeles ordinance that prohibited signs on public property. The Court assumed that ordinance would have the effect of diminishing the challengers’ total quantity of communications. *Id.* at 803 & n.23, 104 S. Ct. at 2128 & n.23. Nonetheless, the Court upheld the ordinance because a “government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free

⁴ In fact, the Court recognized that Colorado’s voter initiative mechanism is state-created and could be constitutionally eliminated altogether—a move that would unquestionably reduce the quantity of the challengers’ speech. *See Meyer*, 486 U.S. at 425, 108 S. Ct. at 1893.

expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *Id.* at 805, 104 S. Ct. at 2128-29 (quoting *United States v. O’Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 (1968)).⁵

The regulation in *Taxpayers for Vincent*, unlike the statute here, clearly and directly regulated speech—it restricted the placement of signs on public property. But its goal was not to suppress speech:

⁵ The Plaintiffs attempt to distinguish *O’Brien*, saying that it was a “civil disobedience case[] in which the plaintiff[] 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.” (Ans. Br. at 44-45.) This is no distinction at all. *O’Brien* was certainly challenging the legality of the regulation at issue—he said it violated his First Amendment rights. The fact that *O’Brien* did not involve a facial challenge only weakens the Plaintiffs’ case. What the Court said in *O’Brien* is equally applicable here:

[The challenged regulation] on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. The Amendment does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views. A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers’ licenses, or a tax law prohibiting the destruction of books and records.

United States v. O’Brien, 391 U.S. 367, 375, 88 S. Ct. 1673, 1678 (1968) (note and citation omitted). But at any rate, *Taxpayers for Vincent* makes clear that *O’Brien* applies to facial challenges on First Amendment grounds, such as the case before this Court.

[T]here is not even a hint of bias or censorship in the City’s enactment or enforcement of this ordinance. There is no claim that the ordinance was designed to suppress certain ideas that the City finds distasteful or that it has been applied to appellees because of the views that they express. The text of the ordinance is neutral—indeed it is silent—concerning any speaker’s point of view, and the District Court’s findings indicate that it has been applied to appellees and others in an evenhanded manner.

Id. at 804, 104 S. Ct. at 2128. All of these considerations are equally applicable in this case. Even if the challenged legislation regulates speech (which it does not), it does not do so in an impermissible way.

The Plaintiffs also seize on the section of *Meyer* that says “[t]he First Amendment protects appellees’ right not only to advocate their cause but also to select what they believe to be the most effective means for doing so.” *Id.* at 424, 108 S. Ct. at 1893. This cannot be read, as the Plaintiffs suggest, to mean that any conduct selected by an advocate to advance his message is likewise protected by the First Amendment. Again, the question is whether the collection and submission of state forms—voter registration applications—is protected speech. It is not.

C. The Plaintiffs' Speech is not Inextricably Intertwined with their Collection of Voter Registration Applications.

The Plaintiffs argue—as they must—that their collection efforts are inextricably intertwined with their speech. (Ans. Br. at 12.)⁶ They contend that although the conduct of collection alone might not be protected, the collection *is* protected when it is part of “an integrated First Amendment activity.” (Ans. Br. at 21, 27, 29.) If the collection of these government forms can be viewed as part of “an integrated First Amendment activity”—and thus protected under the First Amendment—then little cannot. And as explained in the Defendants’ initial brief, simply combining conduct with speech does not transform the former into the latter. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1311 (2006) (“If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into “speech” simply by talking about it.”).

In *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 109 S. Ct. 3028 (1989), the Supreme Court rejected the idea that otherwise unprotected speech is entitled to First Amendment protection simply because it is connected to protected speech. The Plaintiffs attempt to distinguish *Fox* by stating that the plaintiffs there “did not assert, nor could they, that their sales pitches in

particular or that sales pitches in general were typically intertwined with protected speech.” (Ans. Br. at 31.) That is not true. The plaintiffs in *Fox* presented the exact same “intertwinement” argument presented here: “[R]espondents contend that here pure speech and commercial speech are ‘inextricably intertwined,’ and that the entirety must therefore be classified as noncommercial.” *Id.* at 474, 109 S. Ct. at 3031. The Court rejected that argument because nothing about the challenged regulation required the unprotected speech to accompany the protected speech. *Id.* The same is true here: Nothing requires the Plaintiffs’ political speech to be accompanied by the collection of government forms.⁷

⁶ On appeal, the Plaintiffs prefer the term “characteristically intertwined,” perhaps because it is clear that there is nothing requiring political speech and the collection of government forms to be combined.

⁷ The Plaintiffs’ additional attempt to distinguish *Fox* only further illustrates this point. They describe the challengers in *Fox* as “salespeople who *chose* to include information in their sales pitches on ‘how to be financially responsible and how to run an efficient home’ and [who] claimed that the incidental inclusion of that information transformed their commercial speech into fully protected speech.” (Ans. Br. at 31.) Rather than describing a distinction, the Plaintiffs describe their own situation in this case. They chose to include non-protected collection of government forms with their protected political speech, and now they seek to transform their conduct into protected speech.

D. The Effectiveness or Ineffectiveness of Plaintiffs' Voter Registration Activities Does Not Convert Their Collection Activities into Speech or Protected Conduct.

The Plaintiffs argue that they need to collect registration applications to maximize the effectiveness of their registration drives. They rely on Professor Green's testimony that the collection of applications "imposes fewer transaction costs on the prospective registrant" resulting in more submitted applications. (Ans. Br. at 10.) They also argue that without the ability to collect and submit voter registration applications, their registration drives would "serve little purpose" and that they would have little incentive to conduct them. *Id.* As explained in the Defendants' initial brief, however, "[t]he First Amendment right to associate and to advocate provides no guarantee that a speech will persuade or that advocacy will be effective." *Smith v. Ark. State Hwy. Emps.*, 441 U.S. 463, 464-65, 99 S. Ct. 1826, 1828 (1979) (marks omitted).

III. THE EXCLUSION OF POLITICAL PARTIES DOES NOT OFFEND THE FIRST OR FOURTEENTH AMENDMENTS.

The Plaintiffs continue to argue that because the challenged law treats political parties and non-parties differently, it cannot withstand constitutional scrutiny. Florida, like other states and Congress, regulates political parties and others differently. *See generally, e.g.*, Ch. 106, Fla. Stat. This differing treatment does not render all of this regulation unconstitutional because the test for a freedom of association violation is whether the challenged legislation imposes severe

burdens on association. The question is “whether the statutory classifications amount to “sanctions for the expression of . . . views [the state] opposes.” *Ala. State Fed. of Teachers, AFL-CIO v. James*, 656 F.2d 193, 197 (5th Cir. 1981) (quoting *Arkansas State Highway Employees*, 441 U.S. 463, 465, 99 S. Ct. 1826, 1828 (1979)). The challenged legislation simply does not sanction the Plaintiffs’ non-affiliation with political parties. The Plaintiffs make no effort to distinguish *Alabama State Federation of Teachers*,⁸ and they have presented no argument that the state’s purpose is to silence any message they convey.

This case is not like *Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992), relied on by the Plaintiffs. In that case, the challenged law waived a ballot access fee for major political parties but not for minor parties. *Id.* at 1539. *Fulani* was a ballot access restriction case, and it is well established that ballot restrictions always burden the fundamental right of free association. *Id.* at 1542. Moreover, the differing treatment of major and minor political parties in *Fulani* was without

⁸ They also make no serious effort to distinguish *Lyng v. Int’l Union*, 485 U.S. 360, 108 S. Ct. 1184 (1988). They say only that, unlike this case, *Lyng* involved government subsidies. That factual distinction has no relevance to a constitutional claim. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618, 627 n.6, 638, 89 S. Ct. 1322, 1327 n.6 (1969) (invalidating law conditioning public assistance benefits on residency requirement as unconstitutional, and noting that “this constitutional challenge cannot be answered by the argument that public assistance benefits are a ‘privilege’ and not a ‘right.’”).

justification. In this case, the differences between political parties and others justify their differing regulation.

The Plaintiffs contend that because Florida's political party regulation does not directly address voter registration applications, the fact that there is other substantial political party regulation is meaningless. That argument misses the point. The Florida Division of Elections, which is tasked with enforcing the challenged statute, already has extensive regulatory authority over political parties. It has none over Plaintiffs. And it has none over the countless individuals and organizations who may wish to collect registration applications in Florida. Through its regulation, the Division has access to pertinent information about Florida's twenty-six registered political parties and their activities. Absent the challenged legislation, the Division has *no* control over non-parties such as the Plaintiffs. This obvious and critical difference alone justifies the differing treatment between political parties and others.

Finally, the Plaintiffs suggest that—at the very least—the political party exemption is a content-based restriction on speech. (Ans. Br. at 53 n.23.) In support of this theory, they cite *Police Dep't of Chicago v. Mosely*, 408 U.S. 92, 92 S. Ct. 2286 (1972), and *Solantic LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005). But those cases involve statutes that directly restrict speech: the ordinance in *Mosely* criminalized certain types of picketing, and the provision in

Solantic regulated the placement of billboards. In this case, by contrast, the challenged law regulates only the collection and handling of voter registration applications—conduct whose expressive component Plaintiffs have described as “irrelevant.” The challenged law is not a content-based restriction on speech because it is not a restriction on speech.

IV. THE FACIAL INVALIDATION OF THE CHALLENGED LEGISLATION WAS IMPROPER.

The district court invalidated the challenged legislation even though it had never been applied and even though the potentially ruinous fines the Plaintiffs fear are hypothetical at best. In *Florida League of Professional Lobbyists v. Meggs*, 87 F.3d 457 (11th Cir. 1996), *cert. denied*, 519 U.S. 1010 (1996), this Court refused to indulge “the League’s hypothesized, fact-specific worst-case scenarios” on a facial challenge. *Id.* at 460. Instead, this Court found that the challenged legislation had to operate unconstitutionally in at least *most* cases to be invalidated on a facial challenge. *Id.* at 459. In dismissing this authority, the Plaintiffs argue first that *Meggs* is distinguishable, and second that it is wrong.

The Plaintiffs contend that the challengers in *Meggs* did not claim the statute had chilled First Amendment activity or that other parties not before the court were likely to refrain from the regulated activities. (Ans. Br. at 56.) The basis for this statement is unclear. The argument before the Court in *Meggs* was “that the statute is *overbroad* and, therefore, facially invalid.” *Meggs*, 87 F.3d at 459 (emphasis

added). The entire basis of the overbreadth doctrine, of course, is the chilling effect of legislation. *See, e.g., Mass. v. Oakes*, 491 U.S. 576, 584, 109 S. Ct. 2633, 2638 (1989) (“Overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression.”); *accord Clean-Up ’84 v. Heinrich*, 759 F.2d 1511, 1514 (11th Cir. 1985) (“[T]he 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.”).

There is no appreciable distinction between *Meggs* and this case. In both instances, the plaintiffs presented a facial challenge based on the overbreadth doctrine and based on an unfounded concern of worst-case hypothetical enforcement of a facially valid statute. Furthermore, the Plaintiffs cannot escape the holding of *Meggs* by arguing that it is simply wrong. In their answer brief, citing a law review article, the Plaintiffs suggest that this Court was wrong to rely on *Salerno* in *Meggs*. (Ans. Br. at 55.) But this Court recognized that First Amendment cases are subject to a different facial invalidation standard. *Meggs*, 87 F.3d at 459 n.2. It simply (and properly) refused to indulge hypothetical worst-case scenarios on a facial challenge. On its face, the challenged legislation does not regulate speech or expression, and the district court erred by invalidating it.

CONCLUSION

The legal conclusions on which the district court based its decision were wrong. The Plaintiffs' collection and handling of voter registration applications is not speech, is not expressive conduct, is not inextricably intertwined with speech, and is not subject to First Amendment protection. No finding of fact regarding the Plaintiffs' practices or their refusal to continue advocating for their issues can convert unprotected conduct into protected speech. Moreover, Florida's legislative judgment to regulate political parties and others differently does not substantially impair the Plaintiffs' associational rights.

Florida's efforts to protect voters by ensuring that collected applications are timely submitted is constitutionally permissible, and the decision of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with Federal Rule of Appellate Procedure 32(a)(7). This brief is submitted in 14-point Times New Roman font, and it contains 4,739 words.

/s/ Allen Winsor

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CERTIFICATE OF SERVICE

This is to certify that on December 28, 2006, a copy of this brief was served on the following individuals as indicated below:

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