UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 08-21243-CIV-ALTONAGA/Brown

League of Women Voters of Florida, *et al.*,	:
Plaintiffs,	:
vs.	:
Kurt S. Browning, in his official capacity, and Donald L. Palmer, in his official capacity,	:
Defendants.	:

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs League of Women Voters of Florida (the "League"), Florida AFL-CIO (the "AFL-CIO") (together "Organizational Plaintiffs"), and Marilynn Wills ("Ms. Wills") submit this memorandum of law in reply to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction.

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INTRODUCTION

Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction rests heavily on the State's asserted interest in protecting voters. But nowhere in their Opposition do they attempt to explain why those sections of the Florida Elections Code that make third-party voter registration organizations fiduciaries to voters and criminalize delay of voter registration forms—provisions that go unchallenged by Plaintiffs—are inadequate to serve that interest. Nor do they make any serious argument that the particular aspects of the law challenged by Plaintiffs—strict liability resulting in heavy fines—are necessary to serve that interest. Instead, Defendants rely once again on their contention, squarely rejected not only by this Court in *League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006) ("*LWVF I*"), but by every other court to consider the issue, that Plaintiffs' voter registration drives are not protected by the First Amendment. This Court should once again reject this moribund argument and again grant Plaintiffs a preliminary injunction to prevent irreparable and unjustifiable harm to their core rights of speech and assembly.

ARGUMENT

I. PLAINTIFFS' FACIAL CHALLENGE IS APPROPRIATE

Plaintiffs bring a facial challenge to Fla. Stat. §§ 97.021(36) and 97.0575, as amended by Laws of Florida, Ch. 2007-30 (the "Amended Law" or the "Law"), because they have no choice. The statute is impermissibly vague, and its threatened liability to Plaintiffs and their volunteers is so large they cannot risk conducting voter registration drives as long as the Law is in effect. Plaintiffs cannot wait and bring as-applied challenges, because if the Law becomes enforceable, they will again stop registering voters in order to avoid incurring any fines that could form the basis of an as-applied challenge. This is exactly the kind of catch-22 the facial challenge doctrine is designed to avoid.

Under Supreme Court precedent, facial challenges are appropriate in at least two circumstances: when an overbroad law threatens to chill protected speech and association, *see, e.g., Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 635 (1980), and when the text of a law is vague in such a way that it infringes on constitutionally protected rights, *see, e.g., City of Chi. v. Morales*, 527 U.S. 41, 55 (1999); *Reno v. ACLU*, 521 U.S. 844, 872 (1997); *Konikov v. Orange County*, 410 F.3d 1317, 1329 (11th Cir. 2005). Both circumstances

exist here: The Law has overly vague language and a sweep so broad it chills protected speech and association. Defendants do not claim that a facial challenge is inappropriate when challenging a law's vagueness. And Defendants' objection to a facial challenge based on the Law's overbreadth is without merit.

Defendants' sole argument against a facial challenge based on the Law's overbreadth is that Plaintiffs' concerns about the law are hypothetical because the law has not yet been enforced and the application of fines in particular circumstances may be constitutional. This Court squarely rejected that argument in *LWVF I*, 447 F. Supp. 2d at 1338-39, for good reason: it misconstrues Plaintiffs' claims, the law, and the facts.

The burdens the Law will impose on the League Plaintiffs' First Amendment activities are not hypothetical or speculative; they are imminent. The Law has actually chilled Plaintiffs' speech and association (as well as the speech and association of others), and it is undisputed that it will do so again if it becomes enforceable. As this Court previously held with respect to the original version of the challenged law, "the threat of fines has rationally chilled Plaintiffs' exercise of free speech and association, as well as that of Plaintiffs' volunteers." *LWVF I*, 447 F. Supp. 2d at 1338-39. The same is true under the Amended Law.[1] Because of this chilling effect, actual enforcement of the Law is not a prerequisite to suit. *See, e.g., Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 966-68 & n. 13 (1984) (where restriction on solicitation of funds "creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack"); *Doe v. Gonzalez*, 723 F .Supp. 690, 692-93 (S.D. Fla. 1988) ("this statute, as drafted, risks chilling free speech and is, therefore, subject to attack as facially unconstitutional."). As the Eleventh Circuit 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."

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[1] Defendants' suggestion that Plaintiffs' risk assessment ignores the state's procedural protections (Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction ("Def. Opp.") at 5 n.7) is not only legally irrelevant, it is also incorrect. No amount of procedural protections can change the substantive fact that fines are mandatory under the Amended Law even where they are unfair. And while it is true that the League Plaintiffs make every effort to return voter registration forms within ten days after collection (*id*. at 6 n.8), because the law imposes near-strict liability, they run the risk of fines for accidents or mistakes. It is this inability to control for risk that makes the Law so chilling.

The chilling effect of the Amended Law on Plaintiffs' speech and association also means that it necessarily "reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982).[2] Plaintiffs do not hypothesize a chilling effect; they have been chilled. Their protected activities will cease entirely if and when the law becomes enforceable. That is evidence of substantial overbreadth and facial unconstitutionality. *See New York v. Ferber*, 458 U.S. 747, 772 n.27 (1982).

Indeed, because the Law produces this chilling effect, the Law "in all its applications directly restricts protected First Amendment activity." *Sec'y of State of Md.*, 467 U.S. at 966 n.13.[3] And because the Law is not necessary or tailored to the state's purported interests and its burdens are not justified by those interests, *see infra*, "the statute on its face and therefore in all its applications falls short of constitutional demands." *Id*; *see id.* at 967-68 (where law restricts "protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish a State's objective are too imprecise, so that in all its applications the law creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack.").[4]

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[2] A "substantial amount" does not mean all or even most conduct that might be reached by the law. *See, e.g.*, *Schaumburg*, 444 U.S. at 635 (substantially overbroad law could nonetheless be constitutionally enforced against "traditional charitable organizations" in a large number of situations).

[3] In this respect, Plaintiffs' claim is different from a classic overbreadth challenge, where a "litigant whose own conduct is unprotected" by the First Amendment challenges a law based on the rights of others not before the court. *Secy. of State of Md.*, 467 U.S. at 966 n.13. *See id.* (noting that the term "overbreadth" may not accurately describe facial challenges based on restrictions of plaintiffs' own First Amendment rights). Regardless of the effect of the Amended Law on third parties, it has inhibited Plaintiffs themselves from engaging in protected speech and association. The cases expressing a reluctance to use the overbreadth doctrine involve concerns over the ability of a plaintiff who has not suffered a constitutional injury to rely on the rights of others. *See, e.g.*, *Ferber*, 458 U.S. at 768-69. That is not the case here.

[4] This is consistent with the Supreme Court's recent decisions regarding facial challenges in election law cases. In *Washington State Grange v. Washington State Republican Party*, 128 S. Ct 1184, 1190 n.6 (2008), the Court reaffirmed the rule that facial challenges are appropriate with respect to overbreadth challenges, though the plaintiffs in that case did not bring such a challenge. The Court denied the plaintiffs' facial challenge because they had not demonstrated that the First Amendment injury they feared would necessarily come to pass. Here, in contrast, Plaintiffs have demonstrated that they are already suffering injury to their First Amendment rights. Similarly, in *Crawford v. Marion County Elections Bd.*, 128 S. Ct. 1610 (2008), the Court held that the plaintiffs had not produced enough evidence that the challenged law burdened their constitutional rights to sustain a facial challenge, but expressly left open the possibility of future such challenges based on a fuller evidentiary record. In neither case did the law in question chill the plaintiffs' expression or association, preventing them from engaging in protected activity, as the law does here.

In short, because of its chilling effect, a facial challenge is the only way Plaintiffs are able to seek relief against the unconstitutional Amended Law. This is precisely the circumstance the facial challenge doctrine was designed to address.

II. THE FIRST AMENDMENT PROTECTS PLAINTIFFS' VOTER REGISTRATION DRIVES

Defendants once again argue—contrary to the holdings of this Court in *LWVF I* and of every other court that has considered the issue—that the First Amendment does not protect Plaintiffs' voter registration drives. This Court should once again reject this argument.

A. This Court, Like Every Other Court to Have Considered the Issue, Has Already Held that the First Amendment Protects Plaintiffs' Voter Registration Activities

This Court, in *LWVF I*, has already rejected Defendants' attempts to characterize Plaintiffs' voter registration drives as unprotected conduct. As this Court found, Defendants' position is directly contrary to governing Supreme Court precedent. In *Schaumburg*, 444 U.S. 620, the Supreme Court held that even where a law directly regulates only unprotected activity (in that case, the solicitation of funds), if that activity is characteristically intertwined with protected speech (in that case, about issues supported by the charity), the law must be scrutinized under the First Amendment. *See LWVF I*, 447 F. Supp. 2d at 1333 ("[T]he [Supreme] Court rejected the defendant's attempt to separate the plaintiff's solicitation from the accompanying speech, noting the 'reality that solicitation is characteristically intertwined with information and perhaps persuasive speech,' as well as 'the reality that without such solicitation the flow of such information and advocacy would likely cease.'"). The Supreme Court reaffirmed that reasoning in *Meyer v. Grant*, 486 U.S. 414, 422 n.5 (1988), holding that a law banning the payment of ballot initiative petition circulators must be scrutinized under the First Amendment even though the law did not directly regulate speech or association. Accordingly, this Court correctly held that the First Amendment applies here "because the collection and submission of voter registration drives is intertwined with speech and association." *Id.* at 1334. As in *LWVF I*, the evidence in this case makes clear that Plaintiffs' voter registration drives are intertwined with protected speech and association. *See* MPI at 21-22; Declarations of Dianne W. Giliotti ("Giliotti Decl.") ¶¶ 10, 14, 15, 19, 23-25; Cynthia Hall ("Hall Decl.") ¶¶ 12-14, 19; Marilynn Wills ("Will Decl.") ¶¶ 7-9; *see also* Supplemental Expert Declaration of Donald P. Green ("Green Supp. Decl.") ¶¶2-4.

The only two other courts that have considered the issue have applied the First Amendment to assess restrictions on third party voter registration drives. In *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 700 (N.D. Ohio 2006), the court preliminarily enjoined a set of restrictions on voter registration drives, including restrictions on how forms could be returned to state and county officials. The court did so because "participation in voter registration implicates a number of both expressive and associational rights which are protected by the First Amendment." Similarly, in *ACORN v. Cox*, 2006 U.S. Dist. LEXIS 87080, at *14 (N.D. Ga. Sept. 28, 2006), the court found that a regulation of the manner of collecting and submitting voter registration applications "infringe[d] Plaintiffs' First Amendment rights."

B. Defendants' Attempts to Distinguish this Case from the Clear Precedent of *Meyer* and *Schaumburg* Are Unavailing

Each of Defendants' arguments as to why *Meyer* and *Schaumberg* do not control here is unavailing. Defendants first rely on *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989), which involved salespeople who sought heightened First Amendment protection for their Tupperware-style parties by choosing to include information about home economics in their sales presentations. The Supreme Court found that the home economics information was not inextricably intertwined with but rather was unrelated to their sales presentations; accordingly, the Court analyzed the challenged restrictions under the commercial speech test applicable to the sales presentations. 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*. Here, in contrast, the very nature of a voter registration drive—asking people to register to vote—is itself expressive in the context of community-based third-party registration drives and entails conversations about political participation and political change. *See* Giliotti Decl. ¶¶ 23-25; Hall ¶¶ 13-14, 19. Indeed, Plaintiffs' expert, Yale Political Science Professor Donald Green, has submitted testimony that in his experience all third party

registration drives typically involve this kind of conversations and other speech and association. *See* Green Supp. Decl. ¶ 2.[5]

Defendants next 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. But Defendants misread those cases. In *Schaumburg*, the Court made clear that solicitation itself is not fully protected speech, 444 U.S. at 833-34 ("soliciting financial support is undoubtedly subject to reasonable regulation"), but it nonetheless applied heightened scrutiny because charitable solicitation is "characteristically intertwined" with pure 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. Similarly, *Meyer* did not rest on a finding that initiative petition circulation itself is speech. Rather, the Court found that the regulation of petition circulators 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 (focusing on ability of petitioners to "convey [plaintiffs'] message" and "to make the matter the focus of statewide discussion").

The "differences" Defendants invoke between petition circulation and voter registration drives are nothing more than distinctions without a difference.

First, Defendants claim that because initiative petitions are an effort to change the law governing a particular issue, circulation "of necessity" involves political expression that does not necessarily accompany a voter registration drive. This is wrong as a matter of fact and of law. *See* (Green Supp. Decl. ¶ 2). Registering to vote and encouraging others to register to vote are inherently political acts, as the Supreme Court has recognized. *Buckley v. Am. Const. Law*

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[5] Defendants also suggest that Plaintiffs somehow ask for a "right of success" when they claim that they will not engage in voter registration drives without the ability to collect and submit forms. They are not. They are demonstrating that, like in *Meyer*, if they are unable to collect and submit forms, the quantum of their speech will be reduced. In any case, this claim was rejected by this Court in *LWVF I* , 447 F. Supp. 2d at 1334. ("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."). Moreover, "[t]he 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.

Found., 525 U.S. 182, 195-96 (1999) ("*ACLF*") ("[T]he choice [to register or] not to register implicates political thought and expression.").

Second, Defendants argue that petition circulation differs from voter registration drives because "the state is the meaningful actor" in voter registration, whereas with petitions, "[t]he process is driven entirely by the initiative sponsors." Def. Opp. at 13. *Meyer* does not make this distinction, nor does the distinction make sense. Initiative petitioning itself is a creature of state law. No intrinsic right to place initiatives on the ballot exists. In fact, the defendants in *Meyer* argued, without success, that because they could ban the initiative petitioning process entirely, they could restrict it in lesser ways. 486 U.S. at 424-25. This belies Defendants' assertion here that initiative petitioning is somehow free of government control.

Third, Defendants note that there is no requirement that initiative petitioners return their petitions to the state, unlike with voter registration forms. But they do not explain how bears on the issue of whether or not the First Amendment protects voter registration drives.

Finally, Defendants suggest that private parties were not able to collect forms in Florida before 1995, and suggest this historical fact distinguishes *Meyer*. Neither suggestion is true. Before 1995, private parties in Florida could collect voter registration forms if they were deputized by county officials. See Hall ¶ 2; Willis ¶ 5. Moreover, that the State has only recently created a new avenue for core political speech does not allow the State to restrict that speech at will. Surely, if tomorrow a state were to enact a new initiative petition scheme, *Meyer* would govern any efforts by that state to restrict payment to petition circulators. (Indeed, Florida only enacted its initiative scheme in 1968.)

C. The Expressive Conduct Cases Are Irrelevant, And Even Under Those Cases, Plaintiffs Prevail

Because Plaintiffs are not seeking First Amendment protection for their collection of voter registration forms but rather for their protected speech and association that is intertwined with their voter registration drives, the "expressive conduct" decisions Defendants rely upon are not at all applicable here. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006); *United States v. O'Brien*, 391 U.S. 367 (1968). Both are civil disobedience cases in which the plaintiffs claimed that their non-compliance with the challenged laws was expressive conduct protected by the First Amendment. The Supreme Court held that burning a draft card and barring military branches from recruiting on campus are not "inherently

expressive" acts. *Rumsfeld*, 547 U.S. at 65-66. Plaintiffs challenging those statutes could not lay claim to First Amendment protection simply by labeling their conduct "speech." *Id.*

This case, as well as the *Meyer* and *Schaumberg* line of cases, are fundamentally different. Voter registration activities are protected because they are "inextricably intertwined" with protected speech and association. And the challenged Law, unlike the statutes at issue in *O'Brien* and *Rumsfeld,* has the "inevitable effect" of reducing protected speech and association. *LWVF I*, 447 F. Supp. 2d at 1332. Plaintiffs are not deliberately violating a law that regulates otherwise non-expressive conduct and choosing to call it expressive conduct. They are engaged in an intrinsically expressive enterprise which will be chilled by the normal operation of the Law. (That government agencies can distribute and collect registration applications does not denude community-based voter registration activities of their expressive value.)

Even if the *O'Brien* standard were applicable, Plaintiffs' challenge would be successful. Under *O'Brien*, to sustain a restriction on expressive conduct, the government must demonstrate, among other things, that "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. As shown below, the Law restricts far more speech than is necessary to further any important State interests, particularly because other existing laws are far more tailored to the State's needs. *Cf. id.* at 377 (noting that there were "no alternative means that would more precisely and narrowly" further the state's interest than a ban on "willful mutilation or destruction" of draft cards).

III. THE LAW IS UNCONSTITUTIONALLY VAGUE

The Law is unconstitutionally vague in two key ways: it fails to define "affiliate," and it fails to make clear when individuals risk personal liability when participating in registration drives organized by larger groups.[6] Defendants' arguments to the contrary rely on irrelevant cases and flawed reasoning that underscores the statute's vagueness and the burden it imposes on Plaintiffs' rights.

Defendants first argue that the term "affiliate" is not vague, citing cases from fifty years ago that challenged § 9(h) of the National Labor Relations Act, which at that time required a

[6] As Plaintiffs' voter registration drives are protected by the First Amendment, the most strict vagueness test must apply. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 and n.5; *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Konikov v. Orange County*, 410 F.3d 1317, 1329 (11th Cir. 2005).

union officer candidate to affirm that "he is not a member of the Communist Party or affiliated with such a party." 29 USC § 159(h) (1958). Only two of these cases, *Am. Communics. Assn. v. Douds*, 339 U.S. 382 (1950), and *Bryson v. United States*, 243 F.2d 837 (9th Cir. 1957), considered vagueness challenges to the phrase "affiliated with." In neither case did the courts actually address the issue, let alone hold that the term "affiliated" passed constitutional muster. Both courts instead held that the statute was not unconstitutionally vague because it only punished false statements of non-affiliation that were made "knowingly and willfully." *Douds*, 339 U.S. at 412-13; *Bryson*, 243 F.2d at 840. In fact, the Court in *Douds* (on which *Bryson* relied) *explicitly* reserved the issue whether "affiliated" might be considered a vague term in a statute lacking a scienter requirement. *Douds*, 339 U.S. at 413.

Notably, Defendants do not suggest *any* definition of the phrase "affiliate" or indicate how it would be applied to local unions of the AFL-CIO, local chapters of the League, or individual volunteers of either group. In fact, the Secretary's office has publicly stated that the Law is vague as to what would constitute an affiliated organization. *See* Damien Cave, *Election Day in Florida May Look Familiar*, N.Y. TIMES, Apr. 28, 2008, at A1, *available at* http://www.nytimes.com/2008/04/28/us/politics/28voting.html.[7]

The vagueness of "affiliate" does not affect only remote or hypothetical applications of the statute. Virtually *every* voter registration drive, by the statute's own definition, involves more than one entity—an organizing group, such as the League or the AFL-CIO, and the individuals conducting the drives, and perhaps various League chapters or local unions—often in different combinations and with different operating relationships. And in each instance, the term "affiliate" dictates the total amount by which the different entities can be fined.[8]

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7 The views of state officials who will enforce a statute are relevant even to pre-enforcement vagueness challenges. *See Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *Konikov v. Orange County*, 410 F.3d 1317, 1330-31 (11th Cir. 2005).

8 Defendants also seem to suggest that the void-for-vagueness doctrine is inapplicable because it arises in statutory provisions that define who is liable, rather than what conduct would give rise to liability. But Plaintiffs are deprived of "fair warning" just as much by uncertainty as to the amount of any penalty they risk as by uncertainty as to what conduct will give rise to the penalty. *Cf. United States v. Batchelder*, 442 U.S. 114, 123 (1979) (noting that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute"); *United States v. Brown*, 2008 U.S. App. LEXIS 9252, at *38 n.20 (11th Cir. Apr. 29, 2008) (assuming that due process requirement of fair warning is applicable to consequences of conduct as well as conduct itself); *United States v. Duncan*, 400 F.3d 1297, 1307 n.12 (11th Cir. 2005) (same).

Defendants also cannot cure the vagueness inherent in the term "third-party voter registration organization." That phrase is fatally ambiguous because it fails to specify whether and when individual volunteers working with entities like the organizational Plaintiffs will be considered "third-party organizations" subject to fines unto themselves. Pls.' Mot. For Prelim. Inj., May 14, 2008, at 11-12. Defendants assert that the Law is clear in subjecting *both* the individual and the groups for whom he or she collects applications to a fine for a given violation. Def. Opp. at 15. But that is not what the Law says. The statute imposes "[*a*] fine" on "*the* third-party voter registration organization *or* person, entity, or agent acting on its behalf. . . ." Fl. Stat. § 97.0575 (emphases added). At the same time, the statute defines "third-party voter registration organization" to include individuals who collect registration applications. *Id.* § 97.021(36).

The ambiguity is compounded by the statutory history. Defendants' suggestion that the phrase "third-party voter registration organization" contemplates joint and several liability for individuals and groups participating in registration drives cannot be reconciled with the fact that the legislature eliminated language imposing joint and several liability when they amended the statute. *See* An Act Relating to Elections, Ch. 2007-30 § 97.0575, 2007 Fla. Laws 4.

The result is an incoherent muddle. If only "[*a*] fine" per application can be assessed, and if both the individual and the group are defined as "third-party voter registration organizations," who will be fined? Are Defendants correct that more than one fine can be levied for each application? When is an individual considered to be part of or an agent of a larger group? At what level will the $1,000 per year cap apply? Individuals are included in the definition of "third-party voter registration organization," but are they included in the term "affiliated organizations"? The law's language does not answer, and Defendants—who have the statutory responsibility to interpret the statute—cannot either.[9]

Finally, Defendants argue that the possibility of discriminatory enforcement is "true of every law" and can only be raised in "post-enforcement proceedings." Defs. Opp. at 16. Both contentions are completely wrong. It is the statute's vague language—a characteristic not shared

[9] Moreover, if Defendants' interpretation is correct and the Law imposes joint liability on participants in voter registration drives, then the statute continues to impose one of the exact conditions this Court found unconstitutionally burdensome in LWVF I, namely, joint and several liability that imposes fines directly on volunteers. *See* 447 F. Supp. 2d at 1316, 1338. Indeed, it may be *more* burdensome than the Original Law, to the extent that Defendants suggest that groups may be subject to *two* fines—one in their capacity as a "third-party voter registration organization" and one in their capacity as the principal of other actors—rather than one fine for which they are jointly and severally liable.

by "every law"—that creates the threat of discriminatory enforcement. The threat is compounded (but not originally caused) by the discretion the statute grants to state officials to investigate complaints and assess fines as they see fit. *See Konikov*, 410 F. 3d at 1331 (finding unconstitutional risk of discriminatory enforcement where officers "have discretion to initiate an investigation into a possible violation"). The threat is also more than hypothetical in light of the earlier effort, deemed unconstitutional by this Court, to subject some voter registration groups but not others to the statute's terms. Moreover, when a statute implicates First Amendment rights, pre-enforcement vagueness challenges are appropriate—indeed, they are essential. *See Grayned*, 408 U.S. at 109 & n.5; *Konikov*, 410 F.3d at 1329.

IV. THE LAW IMPOSES AN UNCONSTITUTIONAL BURDEN ON PLAINTIFFS

As Plaintiffs demonstrated in their opening brief, the Law imposes an unconstitutional burden on the League Plaintiffs' First Amendment rights. The risk of significant fines, coupled with near-strict liability, arbitrary deadlines, and—as defendants now argue—joint and several liability, renders the statute functionally equivalent to the original law this Court struck down in *LWVF I*. Like the original law, the Law seriously impedes the exercise of Plaintiffs' First Amendment rights, and like the original law, it cannot be justified as necessary to advance a sufficiently weighty state interest.

A. The *Anderson* Analysis Applies and Requires That the Statute Be Narrowly Tailored to a Compelling State Interest.

Defendants' assert that *Anderson* does not provide the relevant standard of scrutiny. Their argument ignores the rulings of every court to have considered the issue in the context of restrictions on voter registration drives. *See LWVF I*, 447 F. Supp. 2d at 1331-32 and n.21; *Project Vote*, 455 F. Supp. 2d at 701; *ACORN*, 2006 U.S. Dist. LEXIS 87080 at *14. They invoke a fictitious rule—that *Anderson* applies only where voting and ballot access are at issue—that has never been articulated by the Supreme Court or the Eleventh Circuit and has been squarely rejected by this Court. And every single case cited by Defendants for the proposition that *Anderson* is inapplicable to regulations that are "tangentially related to elections but not directly regulating the electoral process" applies strict or exacting scrutiny under the First

Amendment.[10] Plaintiffs would not object if this Court were to decide, following Defendants' suggestion, that strict scrutiny is the appropriate test in this case.[11]

Defendants appear not to contest the severity of the burden imposed on Plaintiffs by the Law.[12] Under the *Anderson* analysis, a "severe restriction" on First Amendment rights must be justified by "a narrowly drawn state interest of compelling importance," *See Crawford*, 128 S. Ct. at 1616 (citing *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)). Lesser restrictions must be justified by commensurate, and commensurately tailored, state interests. *See id.* Defendants have failed to identify *any* sufficiently important state interests and have not even tried to show that the statute is "narrowly drawn"—or at all necessary—to advance those interests.

B. The Law Does Not Advance Sufficient State Interests.

Defendants purport to identify three interests that justify the law: protecting voters who rely on third parties to return their voter registration forms;[13] preventing delay in submission of incomplete applications; and ensuring "efficient administration of registration applications." Def. Opp. at 18. Each of these is a variation on the same theme: third-party voter registration groups unnecessarily delay the submission of voter registration applications they have collected. Defendants arguments fail.

Defendants have not even tried to show that the law's objectionable provisions are necessary to advance the interests they articulate. They do not explain why that interest is not adequately served by other statutory provisions, unchallenged in this litigation, that make third-

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[10] The one partial exception is *ACLF*, 525 U.S. at 187, which cites both strict scrutiny cases and cases from the *Anderson* line in reaching its conclusion. *Cf. id.* at 208 (Thomas, J., concurring) ("I suspect that when regulations of core political speech are at issue it makes little difference whether we [use the *Anderson* test and] determine burden first because restrictions on core political speech so plainly impose a 'severe burden.'").

[11] To the extent Defendants suggest rational basis review is appropriate, it is a reiteration of their argument that the First Amendment does not apply. *See supra.*

[12] Defendants do briefly note that the NVRA requires transmission of applications collected by other government agencies to be transmitted within ten days, and Florida law requires transmission within five days. Even if they were comparable, there is no penalty for an individual agency employee who fails to transmit a form under the NVRA, and it appears that only *willful* failure would be punished under Florida law—in stark contrast to the strict liability imposed on Plaintiffs here. *See* Fla. Stat. § 104.051.

[13] Defendants' phrasing of this transaction—the private actor who "takes" an application, "thereby prevent[ing] the applicant from submitting it himself"—obscures the important point that most of those who are registered through voter registration drives would not otherwise register to vote on their own—hence the important role of drives in registering voters. *See* Green Supp. Decl. ¶ 4.

party voter registration organizations fiduciaries of the voter, Fla. Stat. § 97.0575(3), and criminalize the "destr[uction] . . . of a voter registration form or "obstruct[ion] or delay [of] the delivery of a voter registration form," Fla. Stat. § 104.0615(4). Nor do they contest that the total fines for organizations, including their volunteers and local chapters, could reach into the tens or hundreds of thousands of dollars. In fact, Defendants read the statute as requiring fines on both a volunteer and her organization for the same conduct. And Defendants do not offer any justification for the Law's all-but-strict standard of liability.

This Court previously weighed these exact factors and held that the challenged provisions of the original version of the law were unnecessary to advance the State's interest. *See LVWF I*, 447 F. Supp. 2d at 1337-39.

Defendants also argue that the State has an interest in preventing third-party groups from collecting and retaining large numbers of applications. In doing so they argue both (*i*) that they need not demonstrate that any actual problem exists, and (*ii*) that in any event they have already done so. In support of the first contention, Defendants cite *Crawford* for the proposition that "a state need not prove with specificity the underlying problem it seeks to redress." Def. Opp. at 18. *Crawford* held no such thing. Rather, the Supreme Court specifically reaffirmed *Anderson*, including its requirement that the State put forward "precise interests … as justifications" for election regulations. 128 S. Ct. at 1616; *see also id. at* 1623 (internal quotation marks omitted). Accordingly, the Court examined evidence supporting the state's claimed interests in preventing voter fraud, concluding that there was some risk of some types of fraud. But the *Crawford* plaintiffs could not demonstrate anything approaching the severe burden that Plaintiffs have demonstrated in this case, and the Court scrutinized the state's asserted interests *only in that light*. *See* 128 S. Ct. at 1623 (concluding, "on the basis of the record that has been made in this litigation," that the statute imposed "only a limited burden on voters' rights" and that the interests advanced by the State were "*therefore* sufficient") (emphasis added). *Crawford* made clear that a greater burden on First Amendment rights would trigger a more exacting scrutiny of the state's interests. *See* 128 S. Ct. at 1616. *See also* MPI at 15-16 (collecting cases).

In arguing that they have already proved "facts supporting a need for the Law," Defendants rely on the factual findings and record of an unrelated case, *Diaz v. Cobb*, 541 F. Supp. 2d 1319 (S.D. Fla. 2008) and ignore the earlier version of this case. Indeed, Defendants effectively seek to turn this case into *Diaz* by asking the Court to adopt as its own the factual

findings and evidentiary record of that case. But *Diaz* is not this case. *Diaz* involved different parties litigating a different statute, different constitutional rights burdened to a lesser degree, and a different set of state interests. Its factual findings cannot bind these Plaintiffs, and neither the findings nor the record are subject to judicial notice.[14]

Meanwhile, Defendants do not even mention *LWVF I*. Yet no case could be more on point or more directly refute Defendants' position. This Court in *LWVF I* squarely rejected the precise argument Defendants now re-assert. In particular, the Court held that "the evidence in this case does not demonstrate a significant problem with voter registration applications stemming from third party voter registration organizations," and that problems relating to voter registration in the 2004 election were attributable to "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." 447 F. Supp. 2d at 1337.

This conclusion is borne out by the evidence in this case. Professor Michael McDonald's expert declaration demonstrates that any delay by third-party groups in submitting applications has little or no impact on the rates at which registration forms are returned to county supervisors.

Even if deliberate delays by third-party registration groups were a real problem—which Defendants have not and cannot demonstrate—the Law is far too blunt an instrument to address that issue without violating the Constitution. Defendants do not even try to explain why, in order to further a purported interest in preventing deliberate delays, the state must punish innocent or negligent delays. The answer is that it is not necessary, especially when existing laws, unchallenged in this suit, already address that exact issue.

V. PLAINTIFFS ARE OTHERWISE ENTITLED TO A PRELIMINARY INJUNCTION

Plaintiffs have satisfied the other requirements for a preliminary injunction. Contrary to Defendants' claims, Plaintiffs' cessation of their voter registration drives is the only rational response to the challenged law's vagueness and the burdens it imposes, and is not due to "their own decisions." Def. Opp at 21. *Cf. LWVF I*, 447 F. Supp. 2d at 1338-39 (statute "rationally chilled Plaintiffs' exercise of free speech and association, as well as that of Plaintiffs'

[14] *See* Plaintiffs' Opposition to Defendants Motion for Hearing Parameters Docket # 41.

volunteers.")[15] And in suggesting that issuing the injunction "would reduce the likelihood that Florida voters will be properly registered," Def. Opp. at 21, Defendants ignore "the unregistered citizen's interest in having and exercising choices as to how to register to vote," and the interest of citizens who would not otherwise be registered to vote. *Id.* at 1337-38.[16]

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[15] Even if the cessation of speech were Plaintiff's "own decision," it would make no difference. 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.

[16] Plaintiffs would not, contrary to Defendants' suggestion, be liable for fines incurred during the pendency of a preliminary injunction, even if it were reversed on its merits. *See Blackard v. Memphis Area Med Ctr. for Women, Inc.*, 262 F.3d 568, 578-81 (6th Cir. 2001) (defendants not liable for actions that took place while federal preliminary injunction was in effect); *see also Int'l Paper Co. v. Inhabitants of the Town of Jay*, 672 F. Supp 29, 35 (D. Me. 1987) (plaintiffs have right to be free from fines while contesting law (relying on *Okla. Operating Co. v. Love*, 252 U.S. 331, 338 (1920)); *Clarke v. United States*, 915 F.2d 699, 702 (D.C. Cir. 1990) (injunction defense against subsequent prosecution).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 6, 2008, I caused to be electronically filed the foregoing document using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified below by transmission of Notices of Electronic Filing generated by CM/ECF.

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