

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 1:08-21243-CIV-ALTONAGA**

LEAGUE OF WOMEN VOTERS OF FLORIDA,  
FLORIDA AFL-CIO, and MARILYNN WILLS,

Plaintiffs,

vs.

KURT S. BROWNING, in his official capacity  
as Secretary of State of the State of Florida, and  
DONALD L. PALMER in his official capacity as  
Director of the Division of Elections within the  
Department of State for the State of Florida,

Defendants.

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**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION  
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Defendants Kurt S. Browning, in his official capacity as Secretary of State for the State of Florida, and Donald L. Palmer, in his official capacity as Director of the Division of Elections, respectfully submit this memorandum of law in opposition to Plaintiffs' Motion for Preliminary Injunction, filed May 14, 2008 (doc. 24).

## MEMORANDUM OF LAW

Florida citizens who are not registered may not vote, and citizens who register later than twenty-nine days before a particular election may not vote in that election. Since 1995, private actors have been collecting registration applications without owing any duty to the applicants. To introduce accountability, and to protect the right to register and vote, the Legislature enacted Section 97.0575, Florida Statutes—the legislation challenged here (the “Challenged Law” or the “Law”). Notwithstanding Plaintiffs’ insistence that the Law punishes core speech, and notwithstanding their doomsday conjecture, the Law’s purpose is objectively reasonable and plainly legitimate. The Challenged Law imposes a modest duty on private actors choosing to collect voter registration applications from prospective voters: Turn the applications in to election officials, and do so timely. If the applications are submitted late—or never submitted at all—the prospective voters who trusted the private actors cannot vote.

Instead of recognizing the Law’s simple requirements as necessary efforts to protect the right to vote, Plaintiffs initiated this challenge. Based on a smattering of irrelevant facts and a spurious patchwork of constitutional theories, Plaintiffs allege that the Law will violate their purported constitutional right to collect and handle government forms free from regulation.

This Court should deny Plaintiffs’ motion for preliminary injunction. First, the Law has never been enforced, and Plaintiffs are unable to maintain a facial challenge under the present circumstances. Even if Plaintiffs could survive this threshold issue, their claims still fail. Plaintiffs cannot demonstrate that the Law implicates their core speech rights or that it is otherwise invalid.

### **I. FLORIDA VOTER REGISTRATION AND THE CHALLENGED LAW.**

Historically, there has been no recognition of any constitutional right to physically collect voter registration applications from applicants. In fact, until 1995, there was no provision in Florida law for the private distribution of voter registration applications.<sup>1</sup> Instead, “voter

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<sup>1</sup> Plaintiff Marilyn Wills declares that she has been conducting voter registration in Florida since the 1970s. (Doc. 24-4, ¶ 7.) Presumably her pre-NVRA registration activities were as a deputized election official, directly accountable to election officials. “Prior to 1995, only state officials and individuals deputized by supervisors of elections as registrars could collect voter registration applications in Florida.” *LOWV v. Cobb*, 447 F. Supp. 2d 1314, 1317 (S.D. Fla. 2006); see also § 98.271, Fla. Stat. (1993) (regulating appointment of “volunteer deputy voter registrars”; requiring training and written oath).

registration in Florida (with limited exceptions) had to be effected by the applicant coming in person to the headquarters office of the registrar and filling out the application before the county registrar.” *Diaz v. Cobb*, 541 F. Supp. 2d 1319, \*19 (S.D. Fla. 2008)<sup>2</sup>; *see also* §§ 98.041, 98.271, Fla. Stat. (1993). In response to the National Voter Registration Act of 1993 (NVRA), the Florida Legislature enacted the Florida Voter Registration Act (FVRA), which greatly expanded access to voter registration. Among other things, the FVRA provided that applications must be made available to “[i]ndividuals or groups conducting voter registration programs.” § 97.052(1)(b)2.<sup>3</sup> Only then were third party private actors first permitted to distribute and collect voter registration applications.

The FVRA greatly simplified voter registration. “Currently, voter registration in Florida is simpler, more convenient and efficient than it was in the past. It can be accomplished in a number of different ways by anyone desiring to vote.” *Diaz*, 541 F. Supp. 2d at \*20. Voter registration forms are offered and accepted in the offices of each of Florida’s sixty-seven supervisors of elections, the Division of Elections, any driver’s license office, any military recruitment office, any public assistance office, any office serving persons with disabilities, any center for independent living, and any public library. §§ 97.021(40), 97.053(1). Applicants may also register by mail. § 97.053(1).

Critically, the FVRA also allowed private actors to collect applications from prospective voters. § 97.052(1)(b)2. While presenting additional registration opportunities for applicants, this substantial change also presented new challenges for prospective voters and election officials. For the first time, prospective voters could entrust their applications to third parties—usually strangers—and for the first time, the applicants’ registration and ability to vote hinged on those third parties’ actions. The Challenged Law addresses this problem by making third-party private actors accountable for the applications they collect.

Under the Law, a third-party registration organization must deliver registration applications within ten days of their collection and before the book-closing date for any given election. § 97.0575(3)(a-b). A “third-party registration organization” is defined as “any person,

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<sup>2</sup> Page citations for the Federal Supplement Second Reporter are not yet available on Westlaw or Lexis. Defendants will use the Lexis page citations for the *Diaz* case, which are available at 2008 U.S. Dist. LEXIS 27361.

<sup>3</sup> Unless otherwise indicated, statutory references are to Florida Statutes (2007).

entity, or organization soliciting or collecting voter registration applications.” § 97.021(36). The definition excludes certain election officials and agents, as well as individuals collecting applications only for family members. *Id.* (The Challenged Law is attached as Exhibit “A.”)

A third party is liable for a \$50 fine for each application submitted later than ten days after its collection or \$100 for each application submitted after the book-closing deadline. § 97.0575(3). If a third party fails to submit an application altogether, it may be assessed a \$500 fine. *Id.* The fines are greater—\$250, \$500, and \$1,000, respectively—if the third party acted willfully.<sup>4</sup> *Id.* The Law provides no criminal penalties and limits the aggregate annual fine to be assessed against a third party and its affiliates to \$1,000. § 97.0575(3). Additionally, fines may not be imposed if the failure to timely submit an application is because of “*force majeure* or impossibility of performance.” *Id.*

The Challenged Law does not regulate the distribution of voter registration materials, nor does it limit anyone’s ability to encourage or assist others in registering to vote. Its sole purpose is to protect voting rights by ensuring that voter registration applications entrusted to otherwise unregulated private actors are submitted—and timely submitted—to election officials.

## **II. PLAINTIFFS CANNOT MAINTAIN A FACIAL CHALLENGE.**

The Challenged Law has never been enforced. Not once. Nonetheless, Plaintiffs seek its facial invalidation on the basis of contrived scenarios that lie on the periphery of imagination. Indeed, Plaintiffs’ Motion is most notable for what it does *not* argue. It does not argue that Plaintiffs have a constitutional right to discard or destroy applications entrusted to them. It does not argue that Plaintiffs have a right to deprive applicants of their vote by carelessly submitting applications after the book-closing deadline. Rather, Plaintiffs ask the Court to overturn the Law simply because they can hypothesize some potential applications that they believe would be improper. This is not a basis for a facial challenge, because it “is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application.” *New York*

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<sup>4</sup> All fines are subject to a 75-percent reduction if the third-party complies with Section 97.0575(1), which establishes certain reporting provisions. *Id.* A third party must register with the Division before commencing registration efforts and submit quarterly reports of registration drives. § 97.0575(1). This reduction in potential fines provides the sole inducement for compliance with the reporting requirements; there are no penalties for non-compliance. § 97.0575(2). Plaintiffs have alleged that they are unable to comply with these rudimentary reporting requirements, (MPI at 19 n.5), but they do not challenge them.

*v. Ferber*, 458 U.S. 747, 772 n.27 (1982).

Ordinarily, a facial challenge will be successful only if the challenger can establish “that no set of circumstances exists under which the [law] would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987). In the First Amendment context, the Supreme Court has created a very limited exception to the *Salerno* standard. See *Horton v. City of St. Augustine*, 272 F.3d 1318, 1332 (11th Cir. 2001).<sup>5</sup> Due to “concern that the threat of enforcement . . . may deter or ‘chill’ constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions”—a facial challenge will lie against a statute that reaches a substantial number of impermissible applications. *Va. v. Hicks*, 539 U.S. 113, 119 (2003).<sup>6</sup> Under this standard, only “a statute that is *substantially* overbroad may be invalidated on its face,” *City of Houston v. Hill*, 482 U.S. 451, 458 (1987) (emphasis added), while a statute that “covers a whole range of easily identifiable and constitutionally proscribable . . . conduct” may not, *CSC v. Letter Carriers*, 413 U.S. 548, 580-81 (1973).

The fact that a plaintiff can conceive of some impermissible applications cannot invalidate a statute based on an overbreadth challenge. *Mem. of City Coun. of LA v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Unless the overbreadth is substantial, “not only in an absolute sense, but also relative to the scope of the law’s plainly legitimate applications,” *Hicks*, 539 U.S. at 120, a case-by-case analysis is appropriate, *Broadrick v. Okl.*, 413 U.S. 601, 615-16

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<sup>5</sup> Because the Challenged Law does not implicate the First Amendment, *see infra*, the Court need not consider the overbreadth doctrine. This entire Section assumes First Amendment implications for the purposes of Plaintiffs’ argument.

<sup>6</sup> Plaintiffs do not bother to discuss the overbreadth standard—the applicable standard for a facial challenge under the First Amendment. They seem instead to assume that their own self-created and self-inflicted subjective “chill” is itself constitutionally dispositive. It is not. As the Supreme Court explained, the possibility that a statute might “chill” or discourage speech justifies the substitution of the overbreadth standard for the *Salerno* standard, but it is not itself the touchstone of a statute’s constitutionality. See *Hicks*, 539 U.S. at 119; *see also Cameron v. Johnson*, 390 U.S. 611, 619 (1968) (“Any chilling effect on the picketing as a form of protest and expression that flows from good-faith enforcement of this valid statute would not, of course, constitute that enforcement an impermissible invasion of protected freedoms.”). Moreover, the “overbreadth doctrine’s concern with chilling protected speech attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from pure speech toward conduct.” *Hicks*, 539 U.S. at 124 (marks omitted). Here, where the unprotected behavior consists entirely of conduct—the mishandling of applications—concern for chilled speech reaches its nadir. Indeed, as explained in the next section, the Law does not regulate protected conduct at all, so the overbreadth doctrine is entirely inapplicable.

(1973). Plaintiffs have not shown that the Law’s impermissible applications—if any—are substantial. They posit that the Law’s application to individual volunteers who exercise due care but make “innocent mistakes” or suffer family emergencies might be onerous, (MPI 6-7)—for example, where a volunteer experiences a family crisis, Giliotti Decl., ¶ 36, has a “gravely injured or hospitalized spouse or child,” *id.*, is involved in a car accident, Wills Decl., ¶ 16, or otherwise hospitalized, *id.* Likewise, Plaintiffs suppose that if each of the AFL-CIO’s 500,000 members improbably incurs the maximum penalty,<sup>7</sup> the Secretary *might* assess fines of \$500 million, for which the AFL-CIO *might* be liable. Hall Decl., ¶ 24; *cf.* Giliotti Decl., ¶ 34 (fanaticizing that the League’s exposure might reach \$2.9 million).<sup>8</sup>

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<sup>7</sup> This hypothetical cynically ignores the statutory \$1,000 annual cap for fines assessed against any person. It also assumes that at least one million Floridians might be deprived of the right to vote by the irresponsibility of 500,000 individual members of the AFL-CIO. It next assumes that the Secretary will have sufficient evidence of 1,000,000 distinct offenses to support the assessment of 1,000,000 distinct \$500 fines (the largest fine for losing an application without willfulness). More fundamentally, this demonstrates Plaintiffs’ misunderstanding of Florida administrative law. Plaintiffs seem to believe that the Secretary may casually assess fines at his whim, affording Plaintiffs no recourse. Instead, before the Secretary (or any state agency) can assess a fine, he must serve an administrative complaint on the accused, which must include a statement of rights. *See* FAC R. 28-106.2015. Florida’s Administrative Procedure Act entitles the accused to a formal hearing, complete with substantial procedural protections. §§ 120.569; 120.57. The accused may be represented by counsel, introduce evidence, summon witnesses, cross-examine adverse witnesses, and appeal adverse rulings to the District Courts of Appeal. § 120.68. Thus, Plaintiffs’ doomsday scenario would require (in addition to their losing 1,000,000 applications), the Secretary’s serving 500,000 administrative complaints on 500,000 individuals, each alleging no fewer than two distinct violations. Then, the Secretary would have to prove his claims in 500,000 administrative hearings, each of which would have to be upheld on appeal. Then, the AFL-CIO would have to decide (without obligation) to indemnify each of these 500,000 individuals. If this absurd hypothetical can support a facial challenge, it is doubtful that any hypothetical could not. Rather than now addressing “the League’s hypothesized, fact-specific worst-case scenarios,” this Court can “in the future . . . to the extent necessary, evaluate the statute’s constitutionality as-applied.” *Fla. League of Prof. Lobbyists v. Meggs*, 87 F.3d 457, 460 (11th Cir. 1996).

<sup>8</sup> While they ground their pre-enforcement facial challenge on a handful of hyperbolic examples, Plaintiffs represent that they do not engage in the “range of easily identifiable and constitutionally proscribable . . . conduct” the statute forbids. *See CSC*, 413 U.S. at 580-81. Thus, neither the League nor its members “hoards” applications or delays their submission, or has ever “collected a properly completed application before a book-closing deadline and then submitted the application . . . after that book-closing deadline.” Giliotti Decl., ¶ 28. League members “act extremely responsibly and conscientiously” and only “rarely” have submitted an application more than ten days after its collection.” *Id.*, ¶¶ 28-29. Similarly, Marilyn Wills, who has been assisting applicants for about 35 years, has “never had a problem submitting voter

Facial invalidation for overbreadth is “strong medicine that should be used sparingly and only as a last resort.” *Fla. Ass’n of Prof. Lobbyists v. Div. of Leg. Inf. Servs.*, -- F.3d --, 2008 WL 1808820 (11th Cir. Apr. 23 2008) (marks omitted). The overbreadth doctrine is especially disfavored where it sweeps away restrictions on harmful and proscribable conduct. *See, e.g., Broadrick*, 413 U.S. at 615 (“[O]verbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment . . .”). As the Supreme Court explained, “there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law—particularly a law that reflects legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.” *Hicks*, 539 U.S. at 119 (marks omitted). This is so because “there are substantial costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct.” *Id.* Unquestionably, Florida has legitimate interests relating to the handling and submission of voter registration applications. And where “a conduct-regulating statute reflects legitimate governmental interests and is not substantially overbroad, whatever overbreadth does exist should be cured on a case-by-case basis.” *Horton v. City of St. Augustine*, 272 F.3d 1318, 1333 (11th Cir. 2001).<sup>9</sup>

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registration forms before the registration deadline.” Wills Decl., ¶¶ 5, 12. Based on experience, therefore, Plaintiffs would, at most, be subject—and only “rarely”—to a \$50 fine. Plaintiffs’ challenge in the present case unmoors itself from reality and experience and instead explores the utmost extremes of unsupported conjecture.

<sup>9</sup> Judicial reluctance to apply the overbreadth doctrine to such a statute reflects a more general aversion to facial challenges. The Supreme Court recently explained that:

Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.

*Wash. State Grange v. Wash. State Repub. Party*, 128 S. Ct. 1184, 1191 (2008) (marks and citations omitted).

### **III. THE CHALLENGED LAW DOES NOT IMPLICATE PLAINTIFFS' SPEECH.**

Plaintiffs contend that any regulation of the collection and handling of voter registration applications is equivalent to regulation of their political speech. But the Challenged Law—which includes no provisions regulating speech, expressive conduct, or associational choices—does not implicate the First Amendment.<sup>10</sup>

#### **A. There Is No Communication in the Collection of Voter Registration Forms.**

The physical collection of voter registration applications is conduct, not speech. And although First Amendment protection extends beyond literal speech and protects expressive conduct, *see Tex. v. Johnson*, 491 U.S. 397, 404 (1989), there is nothing expressive about the act of collecting an application. Moreover, the Supreme Court has “extended First Amendment protection only to conduct that is *inherently* expressive.” *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 66 (2006) (emphasis added).

Plaintiffs struggle to articulate their claims of “expression” through collection. Although they say they conduct registration to “communicate political messages,” (MPI at 3), their memorandum makes little effort to describe the messages they convey by taking possession of another’s application. Instead, they state generally that they “educate potential voters about salient political issues” and observe that “[c]ommunity-based registration drives build a personal relationship between the voter and the third-party organization.” *Id.* at 21. This is not akin to saying their collection is speech, but even so, simply “saying conduct is undertaken for expressive purposes cannot make it symbolic speech.” *Rumsfeld*, 547 U.S. at 69; *accord United States v. O’Brien*, 391 U.S. 367, 376 (1968) (rejecting idea that “conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”).

Even if there were a communicative component of Plaintiffs’ collection and submission of applications, the Law nonetheless regulates only the *non-communicative* component. This is not like cases in which the conduct includes a substantial communicative component, such as *Johnson*, 491 U.S. at 406 (flag burning); *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 508 (1969) (wearing black armbands in protest); *Amalgamated Food Emp. Un. v. Logan Valley Plaza*, 391 U.S. 308, 313-14 (1968) (picketing). In each of those cases, the Court

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<sup>10</sup> Plaintiffs’ Complaint also alleges that the Law implicates their members’ right to vote. Because Plaintiffs represent that they do not advance this claim at the preliminary injunction stage, (doc. 41 at 3 n.1), Defendants do not respond to it here.

concluded that the states' regulation of conduct amounted to a substantial restriction on expression. In *O'Brien*, on the other hand, the Court sustained a regulation prohibiting the destruction of draft cards because the regulation was "unrelated to the suppression of free expression." 391 U.S. at 377. In that case, a protester was convicted for burning his draft card. On appeal, he challenged the constitutionality of the regulation, claiming that it abridged his speech rights. *Id.* at 370. The Court rejected the idea that the punishment flowed from his expression:

The governmental interest and the scope of the [regulation] are limited to preventing harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he willfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted.

*Id.* at 382.<sup>11</sup> The Court distinguished cases "where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." *Id.*<sup>12</sup>

The parallel here is plain. The Challenged Law authorizes civil fines against third parties that do not timely submit collected applications. The regulation is limited to protecting the rights of voter registration applicants and ensuring the reliable and efficient operation of the voter registration system. Any fine would flow from the organization's failure to submit applications—not from the exercise of any expression or speech.<sup>13</sup>

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<sup>11</sup> The Court also rejected facial invalidation. The statute "on its face deals with conduct having no connection with speech. . . . 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." *O'Brien*, 391 U.S. at 375. And, no more than a law prohibiting the mishandling of registration applications.

<sup>12</sup> Even if Plaintiffs were able to articulate the message they convey in their physical collection of applications, they could not legitimately argue that the state finds that message harmful and is seeking to regulate it. Plaintiffs make no argument that the Law is anything other than content-neutral. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 792 (1989). Such regulations are valid so long as they promote "a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 799. The Challenged Law plainly does that.

<sup>13</sup> Moreover, unlike in *O'Brien*, the conduct regulated by the Law is one step removed from any speech component. If the "speech" takes place when the collection takes place, the

**B. Any Connection Between Plaintiffs’ Speech and Their Collection of Voter Registration Forms Does Not Transform Their Conduct into Protected Speech.**

Further seeking a basis for First Amendment protection of their conduct, Plaintiffs argue that their conduct is *connected to*—even “characteristically intertwined”—with their speech. (MPI at 17, 22.) The problem with this argument is that conduct *related* to speech does not *become* speech. As Plaintiffs have made clear, their collection efforts go hand in hand with their actual speech. *Id.* But whatever message they express when they collect applications results from that actual speech—not the collection itself. “The expressive component of [Plaintiffs’] actions is not created by the conduct itself but by the speech that accompanies it. The fact that such explanatory speech is necessary is strong evidence that the conduct at issue is not so inherently expressive that it warrants protection.” *Rumsfeld*, 547 U.S. at 66. And the fact that conduct and speech accompany one another does not transform the former into the latter:

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. For instance, if an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes, we would have to apply *O’Brien* to determine whether the Tax Code violates the First Amendment.

*Id.*

In this case, it is clear that Plaintiffs’ speech is not “characteristically intertwined” with their collection and submission of government forms. In *Board of Trustees of SUNY v. Fox*, 492 U.S. 469 (1989), the Supreme Court rejected a similar argument. *Id.* at 474. The challenged regulation restricted commercial access to university facilities and had the practical effect of prohibiting Tupperware parties in student dormitories. *Id.* at 472. The plaintiffs acknowledged that their Tupperware parties involved commercial speech, but argued that they also touched on other subjects, “such as how to be financially responsible and how to run an efficient home.” *Id.* at 474. The plaintiffs therefore argued that the pure speech and commercial speech were “inextricably intertwined” such that the entirety should be classified as noncommercial. *Id.* The Court disagreed:

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Law’s requirements have not yet been triggered. The Law regulates what happens *after* collection—namely, requiring the collector to timely turn it in. *Cf. Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 199 (1999) (“In contrast, the affidavit requirement [not invalidated] must be met only after circulators have completed their conversations with electors . . .”).

[T]here is nothing whatever “inextricable” about the noncommercial aspects of these presentations. No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the regulation prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.

*Id.* at 474-75. Likewise, there is nothing “inextricable” about the collection of government forms on the one hand and speech regarding political issues on the other. Nothing about the Law prevents Plaintiffs from conveying any message, and nothing requires any message to be combined with the collection of government forms.<sup>14</sup> Indeed, applications are submitted daily to motor vehicle agencies and to other government and private actors without political messages.

In support of their argument that conduct deserves First Amendment protection if it is related to speech, Plaintiffs rely on *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), in which the Court invalidated a local restriction on charitable solicitation. The Court determined that “solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes.” *Id.* at 632. Seeking a parallel, Plaintiffs in this case argue that “collecting voter registration forms is characteristically ‘intertwined’ with the protected speech and association that take place in voter registration drives.” (MPI at 22.) This misses the point. The solicitation of charitable contributions is protected not merely because it is intertwined with speech, but because it *is* speech. *See Vill. of Schaumburg*, 444 U.S. at 632 (“[C]haritable appeals for funds, on the street or door to door,

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<sup>14</sup> Plaintiffs’ claim that their registration efforts will be less successful if they do not collect others’ forms is of no constitutional moment. Nor is the issue of whether Plaintiffs’ strategy is “the most effective way to increase the percentage of Florida citizens who are registered to vote.” (MPI at 5.) “The 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 (1979) (marks omitted); *accord Biddulph v. Mortham*, 89 F.3d 1491, 1500-01 (11th Cir. 1996) (“[T]he constitution does not require Florida to structure its initiative process in the most efficient, user-friendly way possible.”). In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), the Supreme Court made clear that an organization’s *success* is not protected by the First Amendment. In invalidating Minnesota’s ban on fusion candidates (*i.e.*, candidates appearing on the ballot for more than one political party), the circuit court emphasized its belief that minor parties could not thrive without fusion-based alliances. *Id.* at 361. After noting the speculative nature of that conclusion, the Supreme Court explained that, “more importantly, the supposed benefits of fusion to minor parties does not require that Minnesota permit it.” *Id.* at 362. More to the point, “[t]he Constitution does not require that Minnesota compromise [its] policy choices . . . to accommodate the New Party’s fusion strategy.” *Id.* at 365.

involve a variety of speech interests . . . that are within the protection of the First Amendment.”); *id.* at 633 (“[Our] cases long have protected speech even though it is in the form of . . . a solicitation to pay or contribute money.”) (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363 (1977)) (alterations in *Vill. of Schaumburg*); *Smith v. City of Ft. Lauderdale*, 177 F.3d 954, 956 (11th Cir. 1999) (“Like other charitable solicitation, begging is speech entitled to First Amendment protection.”). Because the same is not true of collecting and submitting government forms, the charitable solicitation cases are inapplicable.

Plaintiffs also rely on *Meyer v. Grant*, 486 U.S. 414 (1988). In that case, the Court recognized that the circulation of citizen initiative petitions is “core political speech” and that its regulation is subject to heightened scrutiny. *Id.* at 420. This proposition is well established, and the Eleventh Circuit reached the same conclusion several years earlier. *See Clean-Up ’84 v. Heinrich*, 759 F.2d 1511, 1513 (11th Cir. 1985) (“[W]e agree with the district court that asking a voter to sign a petition is protected speech . . . .”) (marks omitted). Based on this conclusion, the Supreme Court invalidated Colorado’s criminal restriction on the use of paid circulators of initiative petitions. Because Colorado’s restriction on circulators was a restriction on core political speech, it would have caused the “inevitable effect of reducing the total quantum of speech on a public issue.” 486 U.S. at 423.<sup>15</sup> As in the solicitation cases, the Court invalidated the statute not merely because of its *effect* on speech, but because petition circulation *is* speech:

Appellees seek by petition to achieve political change in Colorado; their right freely to engage in discussions concerning the need for that change is guarded by the First Amendment. The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. . . . This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. Thus, 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 (note omitted). *Meyer* is inapplicable to this case because circulation is different from collection, and initiative petitions are different from voter registration applications.

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<sup>15</sup> *Meyer* certainly did not, as Plaintiffs argue, invalidate the restriction simply because it would reduce the quantity of speech. That is not the law. Countless measures—including, for example, postal rate increases—may decrease the *quantity* of speech without implicating First Amendment rights. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803 (1984) (upholding sign ordinance despite fact that it “presumably diminishes the total quantity of [challengers’] communication in the City”).

First, “[t]he circulation of an initiative petition *of necessity* involves both the expression of a desire for political change and a discussion of the merits of the proposed change.” *Id.* at 421 (emphasis added). In that sense, the circulation of initiatives is akin to handbill distribution—another protected First Amendment activity. *See Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 190-91 (1999) (“Initiative petition circulators . . . resemble handbill distributors, in that both seek to promote public support for a particular issue or position.”). The collection of a voter registration application, by contrast, does not “of necessity involve” such political expression—not when a motor vehicle clerk collects it, and not when a third party collects it.

Next, with voter registration—unlike initiative petitions—the state is the meaningful actor. The state makes registration forms available, assists applicants in the process, and accomplishes the ultimate registration of any applicant. With initiative petitions, on the other hand, “[t]he state does not initiate the petition, does not draft the language of the petition, does not address the merits of the proposal and does not participate in any way in the circulation of the petition or in the collection of signatures.” *Delgado v. Smith*, 861 F.2d 1489, 1497 (11th Cir. 1988). The process is driven entirely by the initiative sponsors, who advocate for their cause. “[C]irculators act on behalf of themselves or the proponents of ballot initiatives.” *Buckley*, 525 U.S. at 192 n.11. They advocate by circulating their petitions—the tools of their advocacy. Voter registration applications, though, are not advocacy tools—they are the state’s means of ensuring orderly elections and ensuring that eligible citizens are permitted to vote.<sup>16</sup>

Finally, there is no requirement that those collecting initiative petitions timely (or ever) submit them to state officials.<sup>17</sup> And as explained above, Florida did not permit third parties to

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<sup>16</sup> In *Timmons*, the Supreme Court rejected the argument that an election ballot is a forum for advocacy. The Court acknowledged that the challenged regulation prevented political parties from using the ballot to communicate their support of particular candidates. 520 U.S. at 363. It was “unpersuaded, however, by the Party’s contention that it has a right to use the ballot itself to send a particularized message.” *Id.* “Ballots serve primarily to elect candidates, not as fora for political expression.” *Id.*; *accord Burdick v. Takushi*, 504 U.S. 428, 445 (1992) (Kennedy, J., dissenting) (“As the majority points out, the purpose of casting, counting, and recording votes is to elect public officials, not to serve as a general forum for political expression.”). Likewise, voter registration applications serve exclusively to register voters—the essential predicate to casting, counting, and recording votes—not as a vehicle for Plaintiffs’ political expression.

<sup>17</sup> Whether to submit collected initiative petitions is solely up to the initiative sponsor, who is solely responsible for the collection and submission of initiative petitions. § 100.371(4) (“The sponsor shall submit signed and dated forms . . .”). Collected petitions are frequently abandoned when sponsors lose interest or change direction. *See, e.g., Advisory Op. to Attorney*

collect voter registration applications at all until 1995. Indeed, when the Supreme Court recognized the speech interest in circulating petitions in *Meyer*, Plaintiffs were not legally permitted to conduct the very same activities in which they now claim a constitutional privilege. *Cf. Republican Party v. White*, 536 U.S. 765, 785 (2002) (“[A] universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional.”). Circulating initiative petitions is core political speech. Collecting voter registration applications is not. Therefore, *Meyer* is inapplicable.<sup>18</sup>

#### **IV. THE CHALLENGED LAW IS NOT UNCONSTITUTIONALLY VAGUE.**

Plaintiffs’ vagueness claim necessarily hinges on their core speech claim because absent First Amendment implications, vagueness challenges are judged only as applied. *United States v. Powell*, 423 U.S. 87, 92 (1975). But even if Plaintiffs could bring a facial vagueness challenge, it would fail. “[V]ague laws are objectionable as transgressions of due process guarantees on two grounds: (1) they fail to provide fair warning to citizens charged with their observance, and (2) by failing to provide clear guidelines, they lend themselves to arbitrary applications by those charged with their enforcement.” *Bama Tomato Co. v. U.S. Dep’t of Agric.*, 112 F.3d 1542, 1547 (11th Cir. 1997). Here there is no fair question about what conduct is required by the Law: Timely submitting collected voter registration applications. Faced with this clarity, Plaintiffs resort to two unpersuasive arguments—that the term “affiliate” is unconstitutionally vague, and that the Law may or may not apply to individuals. Neither argument has merit.

First, the term “affiliate” as used in the Law has no bearing on what is prohibited; it applies only to the statutory cap of annual aggregate fines. *Cf. Parker v. Levy*, 417 U.S. 733, 756 (1974) (“[O]ne to whose conduct a statute clearly applies may not successfully challenge it [facially] for vagueness.”). Plaintiffs nonetheless claim that they cannot determine whether their

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*General re Indep. Nonpart. Comm’n to Apportion Leg. & Cong. Dists*, 926 So. 2d 1218, 1221 n.4 (Fla. 2006) (sponsors of one initiative petition voluntarily dismissed a second petition).

<sup>18</sup> For the same reason, *Meyer*’s subsequent companion—*Buckley*—is inapplicable. *Buckley* also invalidated certain provisions of a Colorado statute regulating petition circulation. Notably, though, that the Court did not invalidate the state requirement that collectors submit timely reports to state officials. *Buckley*, 525 U.S. at 199. This is true even though their failure to submit reports carried consequences and could “chill” a collector’s desire to participate. Nor did *Buckley* invalidate a provision limiting the time during which collectors could solicit initiative petitions. *Id.*

local chapters are “affiliates.” But the term has a common meaning, and it cannot be said that an individual of ordinary intelligence could not know whether he was affiliated with another. For this reason, courts have repeatedly rejected vagueness claims related to the term “affiliate”—even in the criminal context where the clarity requirement is substantially heightened.<sup>19</sup> In rejecting one vagueness claim, the Supreme Court explained that “[p]etitioners, quite understandably, would require instructions as specific as mathematical formulas. But such specificity often is impossible. The phrases ‘member of’ and ‘affiliated with,’ especially when applied to the relationship between persons and organizations that conceal their connection, cannot be defined in absolute terms.” *Killian v. United States*, 368 U.S. 231, 258 (1961). The Court disposed of a similar argument in an earlier case:

The argument as to vagueness stresse[d] the breadth of such terms as ‘affiliated,’ . . . . There is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question. The applicable standard, however, is not one of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed.

*Am. Comm. Ass’n v. Douds*, 339 U.S. 382, 412 (1950); accord *Bryson v. United States*, 243 F.2d 837, 840 (9th Cir. 1957) (rejecting argument that the term “affiliation” was unconstitutionally vague and stating that “an abstract definition of affiliation which would eliminate all cases of doubt is not required in order to avoid the objection of vagueness”).<sup>20</sup>

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<sup>19</sup> Where, like here, a non-criminal law is at issue, the vagueness standard is relaxed. *High Ol’ Times, Inc. v. Busbee*, 673 F.2d 1225, 1229 (11th Cir.1982). “[A] non-criminal statute is not unconstitutionally vague if persons of reasonable intelligence can derive a core meaning from [it].” *Cotton States Mutual Ins. Co. v. Anderson*, 749 F.2d 663, 669 n. 9 (11th Cir.1984) (marks omitted).

<sup>20</sup> Reviewing other terms upheld as not facially vague further demonstrates the validity of the term “affiliate.” A statute prohibiting music “with louder volume than is necessary for convenient hearing” is not facially vague. *DA Mortg. v. City of Miami Beach*, 486 F.3d 1254, 1271 (11th Cir. 2007). Nor are terms like “loud” and “raucous.” *Kovacs v. Cooper*, 336 U.S. 77, 79 (1949). Nor are “entice” or “induce,” which have plain meanings. *United States v. Panfil*, 338 F.3d 1299, 1301 (11th Cir. 2003). The seminal case in this area—*Grayned v. City of Rockford*, 408 U.S. 104 (1972), upheld a regulation limiting “any noise or diversion which disturbs or tends to disturb the peace” near a school. See also *Cameron v. Johnson*, 390 U.S. 611, 616 (1968) (“obstruct” and “unreasonably interfere” not vague). Plaintiffs rely on *Konikov*, 410 F.3d at 1322, in which the court observed that “only Konikov’s as-applied challenges have merit.” Plaintiffs also rely on *United States v. Williams*, 444 F.3d 1286 (11th Cir. 2006), which actually *did* facially invalidate a statute for vagueness. But last week, the Supreme Court reversed, holding that the statute was *not* unconstitutionally vague. 553 U.S. \_\_\_ (May 19, 2008).

“Affiliate” is not vague—and certainly not unconstitutionally so. Its meaning “can be ascertained fairly by reference to judicial decisions, common law, dictionaries, and the word[] [itself] because [it] possess[es] a common and generally accepted meaning.” *United States v. Eckhardt*, 466 F.3d 938, 944 (11th Cir. 2006) (marks omitted), *cert. denied*, 127 S. Ct. 1305 (2007). No statutory definition could reach every possible factual scenario, and “we can never expect mathematical certainty from our language.” *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972):

There are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

*Joel v. City of Orlando*, 232 F.3d 1353, 1360-61 (11th Cir. 2000); *see also id.*, (“That [the law] may not have defined ‘camping’ as precisely as [the plaintiff] would have wished is of no constitutional moment.”).<sup>21</sup>

Plaintiffs next argue that the Law “leaves open the possibility that each individual volunteer or employee participating in voter registration drive could be personally liable.” (MPI at 11.) The Law leaves no question at all. An individual can face liability if he collects an application and fails to timely submit it. A “third-party registration organization” is defined to include “any person, entity, or organization.” § 97.021(36). This includes individuals. § 1.01(3) (in construing Florida statutes, “‘person’ includes individuals.”). Nothing about the Law suggests that an individual can escape liability by volunteering for another. Plaintiffs complain that they cannot determine whether an organization’s volunteer would be individually liable or whether, as an agent of the organization, only the organization would be liable. This argument demonstrates Plaintiffs’ misunderstanding of agency law. An agent generally cannot escape liability for his wrongdoing simply because he works for a principal. *See, e.g.*, Rest. (Third) of Agency § 7.01 (“Unless an applicable statute provides otherwise, an actor remains subject to liability although the actor acts as an agent . . .”). If an agent of the AFL-CIO collects an

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<sup>21</sup> Plaintiffs’ declarations suggesting they are confused by the statute are simultaneously incredible and irrelevant. “[T]he issue of whether a statute is void for vagueness is a question of law for the judge, and not the jury, to determine.” *Konikov*, 410 F.3d at 1330; *see also Gonzales v. Carhart*, 127 S. Ct. 1610, 1626 (2007) (upholding abortion statute against vagueness challenge despite physicians’ testimony that they were personally unsure of the statute’s reach).

application but fails to turn it in, the agent and the AFL-CIO may be liable.

Plaintiffs' last vagueness argument warrants little discussion. They complain that the law *could* be subject to discriminatory enforcement—allowing officials to enforce the Law disproportionately against “disfavored groups.” (MPI at 12.) This, of course, is true of every law. Even traffic laws *could* be enforced disproportionately against “disfavored groups,” but the solution is not to facially invalidate these laws. Instead, Plaintiffs “may raise this due process claim only in a post-enforcement proceeding where they may attempt to show that the . . . statute [is] being enforced in an unconstitutional manner.” *Fla. Businessmen for Free Ent. v. Hollywood*, 673 F.2d 1213, 1220 (11th Cir. 1982).<sup>22</sup> Plaintiffs' unsupported prediction that discriminatory enforcement is “likely” is plainly insufficient to warrant facial invalidation.<sup>23</sup>

## V. THE CHALLENGED LAW IS MORE THAN JUSTIFIED.

Throughout their papers, Plaintiffs suggest that the Law is unjustified. Without discussion, they assume that the *Anderson v. Celebrezze* balancing test applies. 460 U.S. 780 (1983). It does not. *Anderson*'s intermediate scrutiny applies only when First Amendment interests are at stake—and even then, only when voting or ballot access is involved. In this case, the Challenged Law is not a regulation on voting or ballots; it is a regulation on third-parties' handling of registration applications. Because it does not affect the mechanics of the electoral process, intermediate scrutiny is not appropriate. See *McIntyre v. Ohio Elect. Comm'n*, 514 U.S. 334, 345 (1995) (refusing to apply intermediate scrutiny to statute limiting distribution of campaign literature because the statute “does not control the mechanics of the electoral

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<sup>22</sup> Moreover, the Supreme Court's “cases permitting facial challenges to regulations that allegedly grant officials unconstrained authority to regulate speech have generally involved licensing schemes that vest unbridled discretion in a government official over whether to permit or deny expressive activity.” *Ward*, 491 U.S. at 793 (marks and alterations omitted). That is obviously not an issue here.

<sup>23</sup> Plaintiffs argue that the permissive language of the Law—“[t]he Division *may* investigate” has constitutional significance. It does not. Even with seemingly mandatory language, the Secretary has no affirmative duty to investigate potential violations of the statute or to assess fines. It is well settled that an executive charged with enforcement of a law enjoys discretion to do so. See *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 761 (2005) (noting the “deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands”); *Chicago v. Morales*, 527 U.S. 41, 62 n.32 (1999); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); see also *Grayned*, 408 U.S. at 114 (“As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible.”).

process”). In other cases challenging regulations tangentially related to elections but not directly regulating the electoral process, the Supreme Court has not applied *Anderson*. See, e.g., *Buckley*, 525 U.S. 182 (initiative petition gathering); *Burson v. Freeman*, 504 U.S. 191 (1992) (voter solicitation at polling places) (plurality); *Meyer v. Grant*, 486 U.S. 414 (1988) (initiative petition gathering). This Court should not apply *Anderson*. Instead, it should apply rational basis review. See *Lyng v. Int’l Union*, 485 U.S. 360, 364 (1988) (rejecting application of strict scrutiny review because “the statute does not infringe either the associational or expressive rights of appellees”); *Lofton v. Sec’y of DCFS*, 358 F.3d 804, 818 (11th Cir. 2004) (same).

Even if this Court applies a heightened scrutiny, though, Defendants easily satisfy it. The right to vote is a fundamental right of critical importance to all Floridians. When a private actor takes a prospective voter’s application—and thereby prevents the applicant from submitting it himself—Florida has an undeniable, overriding interest in ensuring that the application is properly and timely submitted. The Florida Legislature made a reasonable and responsible policy decision to hold otherwise unregulated private actors accountable for the applications they collect. Applicants who believe they are registered because they submitted an application to a third party would not likely re-apply absent some knowledge that the earlier application was not submitted. Those applicants could allow the book-closing date to pass, thinking they were already registered. Defendants have indeed received formal complaints from applicants relating to this precise unfortunate scenario. See Exh. “B.”

Even if an application is eventually submitted—and submitted before the book-closing date—any unnecessary delay in submission poses a problem for an individual whose application is incomplete. Applicants who submit incomplete applications are not registered, § 97.052(6), and they must complete their applications before the book-closing deadline to be eligible for that election, § 97.053(2). A citizen who submits an application to a third party well before the registration deadline—but whose application is not timely submitted—will necessarily have more difficulty completing the application in time to allow voting in the next election. See *NAACP v. Browning*, 522 F.3d 1153, 1158 n.4 (11th Cir. 2008) (“This rule has the practical effect of moving back the date before each election by which voters must register, which is currently set at twenty-nine days before the election. Since there is always a risk of making a mistake on the form, applicants must know to file the application early enough so that they can be notified of a [problem] and refile the application before the book closing date.”) (citation

omitted). By requiring third parties to submit all applications within ten days of their collection, the Law reduces the likelihood that these problems will continue.<sup>24</sup>

Last, the Law benefits election officials by promoting efficient administration of registration applications. By prohibiting third parties from “hoarding” applications and dumping large quantities all at once, the Law will reduce the administrative burden on officials responsible for processing applications and completing the registration process. And the Law seeks to reduce the unavoidable errors that accompany dramatic spikes in processing workload.

The last sixty days before an election (including the twenty-nine-day book closing period) are the most tumultuous times in a Supervisor’s office. During this time, officials must review, process, and input the substantial volume of voter registration applications that are received shortly before the book closing period. They must prepare for and conduct early voting, which begins fourteen days after the book-closing deadline. They must review and respond to thousands of absentee ballot requests. They must recruit and train poll workers. They must respond to an increased volume of telephone and other inquiries from candidates and the voting public. They must process address and other changes of registered voters. They must prepare polling places, including addressing security needs. They must prepare and test voting equipment and plan for its distribution. They must distribute election day materials, including ballots. They must prepare, assemble, and deliver precinct registers. In addition, they must address any contingencies that may arise.

*Diaz*, 541 F. Supp. 2d at \*24; *see also Marston v. Lewis*, 410 U.S. 679, 680 (1973) (“States have valid and sufficient interests in providing for some period of time—prior to an election—in order to prepare adequate voter records and protect its electoral processes from possible fraud.”).

Plaintiffs suggest that (i) the State must prove the need for the Law and (ii) that it cannot do so. They are wrong on both. First, the Supreme Court recently made clear that—even in the *Anderson* context—a state need not prove with specificity the underlying problem it seeks to redress. In *Crawford*, the Court upheld a voter identification law despite the fact that the record contained “no evidence of any such fraud actually occurring in Indiana at *any time in its history*.” 128 S. Ct. at 1619 (emphasis added). Notwithstanding that lack of evidence, the Court found

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<sup>24</sup> The ten-day requirement is consistent with Congress’s judgment that timely submission of these applications serves the interests of prospective voters and election officials. The NVRA requires motor vehicle and other state agencies to submit applications they collect within ten days. *See* 42 U.S.C. §§ 1973gg-3(e), 1973gg-5(d). Furthermore, Florida law requires state voter registration agencies, such as public assistance offices, to submit all applications to election officials within five days of receipt. § 97.058(6).

that Indiana had an unquestionable interest in protecting against fraud.

Even if Defendants bore the burden of proving facts supporting a need for the Law, they have already done so. In related litigation, this Court found that “many voter registration applications are collected by third-party groups, which frequently hoard applications, delivering them at the last moment.” *Diaz*, 541 F. Supp. 2d at \*21. “Third-party groups that conduct voter registration drives hoard voter registration applications that were completed weeks or months in advance and submit them at once to local election officials at the last possible moment.” *Id.* at \*47. In 2004, a third party delivered a bundle of 27,000 applications to Hillsborough County *on the book-closing deadline.* *Id.* at \*48. The same day, Broward County received 20,000, most of which were from third parties. *Id.* at \*22, 48. “In Miami-Dade County, ten thousand voter registration applications—many of them dated months earlier—were submitted immediately before the 2004 registration deadline.” *Id.* Critically, “[t]he actions of such third-party individuals in holding the registrations back in ‘bundles’ or ‘groups’ until the last day prior to the book closing deadline is an incredible imposition on the supervisors and their staffs to complete the voter registration rolls prior to election day.” *Id.* at \*22.<sup>25</sup> The Law is plainly justified.<sup>26</sup>

**VI. PLAINTIFFS HAVE FAILED TO ESTABLISH THE PREREQUISITES FOR A PRELIMINARY INJUNCTION.**

For the reasons explained above, Plaintiffs have failed to demonstrate a likelihood of success on the merits. They have likewise failed to demonstrate that the other preliminary injunction factors weigh in their favor. Plaintiffs cannot demonstrate irreparable harm. They allege they would be irreparably harmed because absent relief, they could not participate in the registration of voters for the upcoming election. But to the extent Plaintiffs curtail their registration activities, it will be because of their own decisions—not because of the Law. As explained above, Plaintiffs can engage in political speech and advocate their positions—all

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<sup>25</sup> Re-proving these legislative facts should not be necessary—particularly not at the preliminary injunction stage. Nonetheless, Defendants attach as Exhibit “C” excerpts of sworn trial testimony of several witnesses from the related *Diaz* litigation, including five called by Plaintiffs.

<sup>26</sup> In fact, hoarding has been carried to such an extreme in this state that it “is almost susceptible to an interpretation that some third-party groups have held back the applications for the purpose of disruption of the fair voting process mandated by Florida and federal law. At a minimum, it is a thoughtless, inconsiderate disruptive practice; at a maximum, it can frustrate the whole election process.” *Diaz*, 541 F. Supp. 2d at \*22.

without implicating the Law or risking a fine. Their stated unwillingness to engage in voter registration activity without taking possession of the applications, and their purported inability (or unwillingness) to take control over, and responsibility for, the applications they do collect are insufficient to demonstrate irreparable harm.<sup>27</sup>

Plaintiffs also fail the balance-of-harm test. Enjoining enforcement of the Challenged Law would reduce the likelihood that Florida voters will be properly registered. The Florida Legislature enacted the Law to ensure that applicants entrusting their applications to third parties would, in fact, have their application submitted for processing. Without the Law, those who entrust their applications to private actors will be less likely to achieve registration—and more likely to lose their right to vote. These interests are critical to voter registration applicants and election officials, particularly as we approach the book-closing deadlines for the 2008 primary and general elections, which are July 28, 2008, and October 6, 2008, respectively. For these same reasons, the injunction would not serve the public interest.

### CONCLUSION

Because Plaintiffs have not demonstrated their entitlement to a preliminary injunction, Defendants respectfully request that this Court deny their Motion.

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<sup>27</sup> Moreover, if their fear of potential fines sincerely precludes their registration activities, a preliminary injunction will be of no avail to Plaintiffs. A preliminary injunction reflects a prediction of ultimate success—it does not guarantee it. Therefore even if a preliminary injunction order entered, Plaintiffs could later be liable for conduct occurring during the injunction period if it is later determined that the Challenged Law is valid. “Generally, new rules of law are applied retroactively as well as prospectively.” *Glazner v. Glazner*, 347 F.3d 1212, 1216 (11th Cir. 2003) (en banc) (quoting *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 544 (11th Cir. 2002)). In *Glazner*, the defendant was exposed to civil liability for wiretapping his spouse even though at the time of his conduct, the Eleventh Circuit recognized a common-law spousal exception to the federal wiretap statute. *Id.* The *Glazner* defendant should have been aware not only of the decisional law apparently permitting his conduct, but also of “the more fundamental law that any of our decisions, including [the one he relied on], are subject to being overruled at any time by the Supreme Court or by this Court sitting en banc.” *Id.* at 1222 (Carnes, J., concurring).

**CERTIFICATE OF SERVICE**

**I hereby certify** that a true and correct copy of the foregoing was served through the Court's CM/ECF system on all counsel or parties of record on the attached service list this 28th day of May, 2008.

*/s/ Allen Winsor*

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## **Exhibit “A” – The Challenged Law**

### **Section 97.021(36), Fla. Stat. - Definitions:**

“Third-party registration organization” means any person, entity, or organization soliciting or collecting voter registration applications. A third-party voter registration organization does not include:

- (a) A person who seeks only to register to vote or collect voter registration applications from that person’s spouse, child, or parent; or
- (b) A person engaged in registering to vote or collecting voter registration applications as an employee or agent of the division, supervisor of elections, Department of Highway Safety and Motor Vehicles, or a voter registration agency.

### **Section 97.0575, Fla. Stat. – Third-party voter registrations:**

(1) Prior to engaging in any voter registration activities, a third-party voter registration organization shall name a registered agent in the state and submit to the division, in a form adopted by the division, the name of the registered agent and the name of those individuals responsible for the day-to-day operation of the third-party voter registration organization, including, if applicable, the names of the entity’s board of directors, president, vice president, managing partner, or such other individuals engaged in similar duties or functions. On or before the 15th day after the end of each calendar quarter, each third-party voter registration organization shall submit to the division a report providing the date and location of any organized voter registration drives conducted by the organization in the prior calendar quarter.

(2) The failure to submit the information required by subsection (1) does not subject the third-party voter registration organization to any civil or criminal penalties for such failure, and the failure to submit such information is not a basis for denying such third-party voter registration organization with copies of voter registration application forms.

(3) A third-party voter registration organization that collects voter registration applications serves as a fiduciary to the applicant, ensuring that any voter registration application entrusted to the third-party voter registration organization, irrespective of party affiliation, race, ethnicity, or gender shall be promptly delivered to the division or the supervisor of elections. If a voter registration application collected by any third-party voter registration organization is not promptly delivered to the division or supervisor of elections, the third-party voter registration organization shall be liable for the following fines:

- (a) A fine in the amount of \$50 for each application received by the division or the supervisor of elections more than 10 days after the applicant delivered the completed voter registration application to the third-party voter registration organization or any person, entity, or agent acting on its behalf. A fine in the amount of \$250 for each application received if the third-party registration organization or person, entity, or agency acting on its behalf acted willfully.

(b) A fine in the amount of \$100 for each application collected by a third-party voter registration organization or any person, entity, or agent acting on its behalf, prior to book closing for any given election for federal or state office and received by the division or the supervisor of elections after the book closing deadline for such election. A fine in the amount of \$500 for each application received if the third-party registration organization or person, entity, or agency acting on its behalf acted willfully.

(c) A fine in the amount of \$500 for each application collected by a third-party voter registration organization or any person, entity, or agent acting on its behalf, which is not submitted to the division or supervisor of elections. A fine in the amount of \$1,000 for any application not submitted if the third-party registration organization or person, entity, or agency acting on its behalf acted willfully.

The aggregate fine pursuant to this subsection which may be assessed against a third-party voter registration organization, including affiliate organizations, for violations committed in a calendar year shall be \$1,000. The fines provided in this subsection shall be reduced by three-fourths in cases in which the third-party voter registration organization has complied with subsection (1). The secretary shall waive the fines described in this subsection upon a showing that the failure to deliver the voter registration application promptly is based upon *force majeure* or impossibility of performance.

(4) (a) The division shall adopt by rule a form to elicit specific information concerning the facts and circumstances from a person who claims to have been registered by a third-party voter registration organization but who does not appear as an active voter on the voter registration rolls.

(b) The division may investigate any violation of this section. Civil fines shall be assessed by the division and enforced through any appropriate legal proceedings.

(5) The date on which an applicant signs a voter registration application is presumed to be the date on which the third-party voter registration organization received or collected the voter registration application.

(6) The civil fines provided in this section are in addition to any applicable criminal penalties.

(7) Fines collected pursuant to this section shall be annually appropriated by the Legislature to the department for enforcement of this section and for voter education.

(8) The division may adopt rules to administer this section.