

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

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

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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.

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**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION  
TO DEFENDANTS' MOTION FOR AN ORDER ESTABLISHING  
PARAMETERS FOR THE HEARING ON PLAINTIFFS' MOTION  
FOR PRELIMINARY INJUNCTION**

**TABLE OF CONTENTS**

Table of Contents ..... i

Table of Authorities ..... ii

Introduction..... 1

Argument ..... 2

I. Plaintiffs Should Be Permitted to Present Testimony at the Hearing ..... 2

    A. Plaintiffs’ Challenge Involves Factual Issues That Must Be Addressed at the Preliminary Injunction Stage..... 2

    B. An Evidentiary Hearing Is Appropriate Here to Resolve Disputed Material Facts..... 4

II. The Parties Have Agreed to Pre-Hearing Discovery Deadlines, Obviating the Need for Judicial Intervention..... 6

III. Defendants Cannot Avoid an Evidentiary Hearing by Substituting Factual Findings from a Completely Different Case for Discovery and Fact Finding in this Case ..... 7

    A. The Factual Record and Findings of Diaz Are Irrelevant and Inadmissible Here. .... 8

    B. The Diaz Findings Are Not “Legislative Facts” And Not Subject to Judicial Notice. .... 12

IV. Defendants’ Proposed “Parameters” Would Deny Plaintiffs the Opportunity to Present Their Arguments..... 14

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

*All Care Nursing Serv., Inc. v. Bethesda Memorial Hospital, Inc.*,  
887 F.2d 1535 (11th Cir. 1989).....4

*Anderson v. Celebrezze*,  
460 U.S. 780 (1983) .....3, 4, 10

*Blohm v. Commissioner*,  
994 F.2d 1542 (11th Cir. 1993).....9

*Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,  
402 U.S. 313 (1971) .....12

*Crawford v. Marion County Election Board*,  
128 S. Ct. 1610 (2008) .....3, 4

*Diaz v. Browning*,  
No. 04-22572, 2008 U.S. Dist. LEXIS 27361 (S.D. Fla., Mar. 25, 2008) ..... *passim*

*Elliott v. Kiesewetter*,  
98 F.3d 47 (3d Cir. 1996).....4

*Ferguson v. Williams*,  
343 F. Supp. 654 (D. Miss. 1972) .....10

*Flynt Distributing Co. v. Harvey*,  
734 F.2d 1389 (9th Cir. 1984).....12

*Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*,  
320 F.3d 1205 (11th Cir. 2003).....5

*Holloway v. A.L. Lockhart*,  
813 F.2d 874 (8th Cir. 1987).....12

*Jackson v. Godwin*,  
400 F.2d 529 (5th Cir. 1968).....10

*Kos Pharmaceuticals, Inc. v. Andrx Corp.*,  
369 F.3d 700 (3d Cir. 2004).....12

*League of Women Voters of Florida v. Cobb*,  
447 F. Supp. 2d 1314 (S.D. Fla. 2006).....2, 3, 10

*Levi-Strauss & Co. v. Sunrise International Trading Inc.*,  
51 F.3d 982 (11th Cir. 1995).....5

*McDonald's Corp. v. Robertson*,  
147 F.3d 1301 (11th Cir. Fla. 1998).....4

*NAACP v. Browning*,  
No. 07-402 (N.D. Fla., filed Sept. 21, 2007).....5

*S. Cent. Bell Tel. Co. v. Alabama*,  
526 U.S. 160 (1999) .....9

*Solantic, LLC v. City of Neptune Beach*,  
410 F.3d 1250 (11th Cir. 2005).....4

*Stewart v. Blackwell*,  
444 F.3d 843 (6th Cir. 2006).....10

*Tashjian v. Republican Party of Conn.*  
479 U.S. 208 (1986) .....10

*Taylor v. Charter Medical Corp.*,  
162 F.3d 827 (5th Cir. 1998) .....13

*United States v. Bowers*,  
660 F.2d 527 (5th Cir. 1981).....13

*United States v. Jones*,  
29 F.3d 1549 (11th Cir. 1994).....13

*United States v. Playboy Entm't Group, Inc.*,  
529 U.S. 803 (2000) .....10

*Wyatt v. Terhune*,  
315 F.3d 1108 (9th Cir. 2003).....13

**STATE STATUTES**

Fla. Stat. § 97.021 .....1  
Fla. Stat. § 97.055 .....9  
Fla. Stat. § 97.0575 .....1

**MISCELLANEOUS**

Wright, Miller & Kane, Federal Practice and Procedure § 2949.....2, 12

Plaintiffs League of Women Voters of Florida (the “League”), Florida AFL-CIO (the “AFL-CIO”) (together “Organizational Plaintiffs”), and Marilyn Wills (“Ms. Wills”) submit this memorandum of law in opposition to Defendants’ Motion for an Order Establishing Parameters for the Hearing on Plaintiffs’ Motion for Preliminary Injunction.

## **INTRODUCTION**

Plaintiffs seek a preliminary injunction to preserve the status quo by preventing Defendants, who are state election officials, from enforcing Florida’s unusual third-party voter registration law, Fla. Stat. §§ 97.021(36) and 97.0575, as amended by Laws of Florida, Ch. 2007-30 (the “Amended Law”), until the constitutionality of that statute can be determined. The preliminary injunction hearing scheduled for June 19 is Plaintiffs’ opportunity to demonstrate that they have a substantial likelihood of success on the merits of their claim that the Amended Law violates the First Amendment. Under clear and binding precedent, the applicable First Amendment analysis involves mixed questions of law and fact, and where, as here, factual questions are in dispute at the preliminary injunction stage, an evidentiary hearing is required.

Defendants seek to hinder Plaintiffs’ ability to presenting their case at hearing. They have inappropriately moved this Court for an order disallowing live testimony at the hearing, and they urge the Court to rely on the factual findings from a different case involving different parties and challenging a different provision of state law that does not regulate third-party voter registration organizations. None of Defendants’ requests are appropriate or necessary subjects of judicial intervention at this stage, and none have any basis in law.

## ARGUMENT

### I. Plaintiffs Should Be Permitted to Present Testimony at the Hearing

Both the preliminary injunction proceedings in the earlier version of this case, *League of Women Voters of Florida v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006) (“*LWVF I*”), and a long line of Supreme Court precedent make clear that the First Amendment analysis applicable in this case raises mixed questions of law and fact which require a factual record. The facts pertinent to that analysis are in dispute here, and Defendants, having previously litigated and lost on those issues at the preliminary injunction phase of *LWVF I*, do not seriously contend otherwise.

Although a preliminary injunction may be granted based on written evidence and affidavits alone, when material facts are in dispute, as they are here, “the strong preference for using oral evidence to resolve disputes is particularly appropriate when one of the parties wishes to present witnesses.” 11A Charles Alan Wright, Arthur Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2949. Plaintiffs wish to present witnesses, and Defendants provide no credible basis to deny them their opportunity to be heard. In addition, Defendants have made clear that they plan to proffer affidavits concerning the State’s rationale for the challenged statute, and Plaintiffs are entitled to test the sufficiency of such written testimony by cross-examining Defendants’ witnesses.

#### A. Plaintiffs’ Challenge Involves Factual Issues That Must Be Addressed at the Preliminary Injunction Stage.

Defendants argue that no witness testimony should be allowed at the preliminary injunction hearing because Plaintiffs’ challenge “requires only minimal factual development.” Defs. Br. at 2. This argument ignores the applicable legal standards governing the League

Plaintiffs' challenge and is completely at odds with the procedure adopted in the earlier version of this litigation.

As this Court held in preliminary injunction proceedings in *LWVF I*, and as the Supreme Court recently affirmed, the legal standard for assessing constitutional challenges to state election laws is that set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Under that analysis, the Court must consider: the character and magnitude of the asserted injury” to constitutionally protected rights; the “precise interests put forward by the State as justifications for the burden”; and determine “the extent to which those interests make it necessary to burden the plaintiffs’ rights. . . . *Only after weighing all these factors* is the reviewing court in a position to decide whether the challenged provision is constitutional.” *Id.* at 789 (emphasis added). *See Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1616 (2008) (Stevens, J., plurality op.) (reaffirming *Anderson* test); *LWVF I*, 447 F. Supp. 2d at 1331-32 (applying *Anderson* test to the statute at issue here).<sup>1</sup>

In *LWVF I*, this Court heard and explicitly relied upon testimonial evidence in applying the *Anderson* test to decide the very same issue presented in Plaintiffs’ Motion for Preliminary Injunction in this case. *See LWVF I*, 447 F. Supp. 2d at 1330. Defendants recite some of the evidence currently in the record that parallels evidence on which the *LWVF I* court relied. But Defendants flatly assert that this evidence—which demonstrates the burden the challenged law places on Plaintiffs and undermines the state’s purported interest in the law, and, as such, formed the basis for the earlier injunction—is “unhelpful” and of “little assistance.” Defs. Br. at 3.

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<sup>1</sup> Plaintiffs bring three claims in this action: (1) a First Amendment vagueness claim on behalf of all Plaintiffs; (2) a First Amendment burden on speech and association claim on behalf of the League Plaintiffs; and (3) a First Amendment and Equal Protection burden on the right to vote claim on behalf of all Plaintiffs. The *Anderson* standard applies only to the second and third claims. Plaintiffs move for a preliminary injunction only with respect to their first two claims.

The Supreme Court recently made it clear that facts are relevant to facial challenges to election laws. In *Crawford*, the Supreme Court, applying the *Anderson* standard, extensively discussed the evidentiary record relating to the extent of the burden on Plaintiffs' First Amendment rights, the state's interests in the statute, and whether the statute was necessary to further those interests. 128 S. Ct. at 1616-23 (Stevens, J., plurality op.). The statute at issue was upheld in significant part because of the failure of the plaintiffs in that case to create a sufficient evidentiary record. *Id.* at 1622 (“[O]n the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.”). Plaintiffs here should not be denied the opportunity to create a record to support a preliminary injunction in the pending action.<sup>2</sup>

B. An Evidentiary Hearing Is Appropriate Here to Resolve Disputed Material Facts.

In the Eleventh Circuit, where material facts relevant to a preliminary injunction are in dispute, an evidentiary hearing is generally required. *See McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1311-13 (11th Cir. 1998); *All Care Nursing Serv., Inc. v. Bethesda Mem. Hosp., Inc.*, 887 F.2d 1535, 1539 (11th Cir. 1989) (court abused its discretion in failing to hold evidentiary hearing where conflicting affidavits “placed in serious dispute issues central to appellees’ claims”). *See also Elliott v. Kieseewetter*, 98 F.3d 47, 53 (3d Cir. 1996) (“A district court cannot issue a preliminary injunction that depends upon the resolution of disputed issues of fact unless

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<sup>2</sup> The only case Defendants cite in support of their position is inapposite. *Solantic, LLC v. City of Neptune Beach* involved a facial challenge to a sign code as unconstitutional for two reasons: the code made impermissible content-based distinctions and there were no time limits provided in the code. 410 F.3d 1250 (11th Cir. 2005). Neither of these issues required any factual development—in fact, they could be resolved by examining the language of the statute on its own. In contrast, the League Plaintiffs’ claim turn in part on facts relating to the burden on Plaintiffs and the purported state interest.

the court first holds an evidentiary hearing.”). “Where, as here, the material facts underlying the complaint and the injunction are disputed, the district court is required to hold a hearing which affords both parties an adequate opportunity to present their arguments and educate the court about the complex issues involved.” *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1212 (11th Cir. 2003).

Rather than addressing, or even citing, this clear Eleventh Circuit precedent, Defendants rely upon other cases where, because material facts were not in dispute, no extensive hearing was necessary. They cite *Levi-Strauss & Co. v. Sunrise International Trading Inc.*, 51 F.3d 982 (11th Cir. 1995), which did not consider whether a court may rely solely on affidavits where the facts are in dispute. To the contrary, the district court there held an evidentiary hearing which involved live testimony. And the party opposing the injunction offered no contrary evidence that would create a factual dispute of the sort that would justify a more detailed hearing. *See id.* at 984-86. There is no indication that any party asked to call witnesses but was not permitted to do so. Likewise, in the *NAACP v. Browning* case, which Defendants note involved no live testimony at the preliminary injunction hearing (Defs. Br. at 4), neither party was denied permission to call witnesses. *See NAACP v. Browning*, No. 07-402 (N.D. Fla., filed Sept. 21, 2007). An evidentiary hearing was merely unnecessary as the defendants had no material disagreements with plaintiffs’ version of the facts.

Defendants seek to exclude any live testimony from the preliminary injunction hearing on various other grounds, none of them valid. Defendants complain that if live testimony is allowed, “time will be required to prepare witnesses.” Defs. Br. at 3. Defendants fail to explain, however, how this requisite preparation time prejudices them, given that they knew the date of the hearing seven weeks in advance. They also state that “to the extent live testimony of

Defendants' employees is necessary, it will require travel to Miami." *Id.* This argument is equally invalid and has been addressed in Plaintiffs' opposition to Defendants' venue motion. There is no question that the facts relevant to the Motion for Preliminary Injunction will be hotly contested. As discussed, the severity of the burden imposed by the statute on Plaintiffs' First Amendment rights, the precise state interests that justify that burden, and whether the statute is sufficiently tailored to support the state's interests are all directly relevant to the motion and all involve factual determinations. That the *LWVF I* court found it likely that the plaintiffs could succeed in proving facts opposite from those found in *Diaz v. Browning*, No. 04-22572, 2008 U.S. Dist. LEXIS 27361 (S.D. Fla., Mar. 25, 2008), only highlights the heavily fact-intensive nature of these issues. Plaintiffs will vigorously contest the sufficiency of the state's interests and the necessity of the law to further them, and do not anticipate that Defendants will concede those points. A factual hearing is thus warranted.

## **II. The Parties Have Agreed to Pre-Hearing Discovery Deadlines, Obviating the Need for Judicial Intervention**

Defendants next ask the Court to intervene to ensure they have sufficient opportunity to respond to Plaintiffs' evidence. Defs. Br. at 5. Their request is premature and improper, as the parties have been negotiating the scheduling and scope of discovery and are submitting a Rule 26(f) Report and Proposed Joint Scheduling Order at the same time as this memorandum. Defendants acknowledge that Plaintiffs do not object to "reasonable pre-hearing deadlines" for disclosing the identity of witnesses. Defs. Br. at 9. But they do not mention that Plaintiffs have been working toward reasonable pre-hearing deadlines for providing affidavits and expert reports. In fact, Plaintiffs provided Defendants with a draft Rule 26(f) report addressing these issues on the day before Defendants filed the current motion.

Defendants emailed Plaintiffs on the afternoon of May 20 seeking agreement on certain of the parameters proposed in their motion. Plaintiffs declined to agree, pointing out that most of the scheduling issues were addressed in the draft conference report, which was still under negotiation, and that Defendants had not raised their proposed schedule in the course of those negotiations. Defendants' emailed proposal was completely unworkable in some respects; for example, it included a deadline for Plaintiffs' submission of expert reports—including a report Plaintiffs had made clear was likely to be in reply to Defendants' opposition—before Defendants' opposition was due. Rather than addressing Plaintiffs' concerns, Defendants filed the instant motion just hours later.

Defendants' suggestion that they will not have sufficient time to reply to Plaintiffs' evidence is completely misplaced. Defendants have had since May 14 to review the current affidavits from Plaintiffs' witnesses, and since April 28 to review substantially similar affidavits from the same witnesses filed with Plaintiffs' Motion for a Temporary Restraining Order. While Defendants profess alarm that Plaintiffs have disclosed two additional witnesses who have not yet submitted affidavits, they concede that Plaintiffs do not object to a reasonable deadline for designating witnesses, and that such deadline has not been established, let alone lapsed. Plaintiffs also made clear that one of the two witnesses was a *reply* witness from whom no affidavit can be expected before Defendants have filed their opposition papers. In short, Defendants' request for judicial intervention is an effort to circumvent Plaintiffs' good-faith effort to comply with their Rule 26(f) obligations.

### **III. Defendants Cannot Avoid an Evidentiary Hearing by Substituting Factual Findings from a Completely Different Case for Discovery and Fact Finding in this Case**

Defendants seek to short-circuit Plaintiffs' presentation of their case by urging the Court to forego an evidentiary hearing on the Motion for Preliminary Injunction and instead base its

ruling on certain factual findings in *Diaz v. Browning*, No. 04-22572, 2008 U.S. Dist. LEXIS 27361 (S.D. Fla., Mar. 25, 2008). Defs. Br. at 6-7. Defendants do not articulate a coherent legal or logical basis for this position, because there is no such basis. Instead, they allude to principles of collateral estoppel and, alternatively, suggest that the *Diaz* findings are “legislative facts” of which the Court may take judicial notice. But neither of those doctrines remotely supports Defendants’ motion. The factual record in *Diaz* is irrelevant and inadmissible here, and is not a substitute for a hearing on the facts specific to this matter.

A. The Factual Record and Findings of *Diaz* Are Irrelevant and Inadmissible Here.

Defendants’ suggestion that the factual record in *Diaz* provides a basis for limiting Plaintiffs’ ability to present their case is unmoored from governing law. Although they suggest that Plaintiffs’ “new litigation” is a “collateral attack” on the factual findings of *Diaz*, Defendants do not argue that Plaintiffs are formally precluded from disputing certain findings in *Diaz* under principles of collateral estoppel. Indeed, they could not make such an argument, given that the League Plaintiffs, the only Plaintiffs asserting the burden claims to which the *Diaz* findings might possibly be relevant, were neither parties to *Diaz* nor in privity with any of the plaintiffs in *Diaz*. Instead, Defendants vaguely gesture towards estoppel without citing any relevant cases. Plaintiffs are not estopped by the *Diaz* findings, and should not be prevented from putting on their evidence on that basis.

Collateral estoppel is appropriate only if all the following conditions are met: “(1) the issue must be identical in the pending case to that decided in the prior proceeding; (2) the issue must necessarily have been decided in the prior proceeding; (3) the party to be estopped must have been a party or have been adequately represented by a party in the first proceeding; and (4) the precluded issue must actually have been litigated in the first proceeding.” *Blohm v.*

*Commissioner*, 994 F.2d 1542, 1553 (11th Cir. 1993). *None* of these prerequisites is present here.

*First*, Defendants' assertion that *Diaz* involved "some of the same parties and counsel" as this case (Defs. Br. at 3) is both untrue and irrelevant. As discussed above, the League Plaintiffs were not parties to *Diaz*. In fact, the two cases do not have *any* plaintiffs in common: the national AFL-CIO was a plaintiff in *Diaz*, whereas the AFL-CIO of Florida is a plaintiff in this case.<sup>3</sup> In any case, the AFL-CIO only brings a vagueness challenge, which does not turn in any way on the resolution of facts that were at issue in *Diaz*. As to the fact that certain counsel in this case also served as counsel in *Diaz*, identity of attorneys, without more, is not enough to establish any sort of privity or virtual representation of the League Plaintiffs. *See S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 168 (1999).

*Second*, Defendants are incorrect in suggesting that the issue of "state interests" in this case is necessarily decided by the *Diaz* opinion. The two cases involve different statutes supported by different state interests. The Amended Law imposes fines on third-party voter registration organizations on a near-strict liability basis for failing to submit registration applications before various deadlines. The statute challenged in *Diaz*, Fl. Stat. § 97.055, in contrast, bars county supervisors of election from processing corrections to timely filed registration applications in time for the applicants to vote in the upcoming election. *See Diaz*, 2008 U.S. Dist. LEXIS, at \*5-6. Defendants assert that the "administrative needs of election officials" justify both statutes, and because those needs were found sufficient in *Diaz*, the Defendants should not have to "re-prove" them in this case. Defs. Br. at 6, 8. They are wrong. It is the Defendants' burden to identify "the precise interests" justifying the burden the

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<sup>3</sup> Defendants' contention that a form of estoppel should apply because AFSCME, "a former plaintiff" in this case, was a plaintiff in *Diaz* is irrelevant.

challenged law imposes. *Anderson*, 460 U.S. at 789; *LWVF*, 447 F. Supp. 2d at 1331-32; *cf. United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000) (state “bears the burden of proving the constitutionality of its actions”). A vague assertion of “administrative needs” will not suffice. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 218 (1986) (“the possibility of future increases in the cost of administering the election system is not a sufficient basis here for infringing plaintiffs’ First Amendment rights”); *see also Stewart v. Blackwell*, 444 F.3d 843, 869 (6th Cir. 2006) (administrative convenience is not a sufficient justification for infringing right to vote); *Ferguson v. Williams*, 343 F. Supp. 654, 656 (D. Miss. 1972) (administrative efficiency “may not be invoked to impinge upon the exercise of important constitutional rights”); *Jackson v. Godwin*, 400 F.2d 529, 533 (5th Cir. 1968) (“We must not play fast and loose with basic constitutional rights in the interests of administrative efficiency.”) (citations omitted).

*Third*, the strength of the “administrative needs of election officials” is only one of many issues relevant to Plaintiffs’ likelihood of success that implicate disputed facts, but it is the only one to which Defendants claim *Diaz* has any relevance. Also at issue are the severity of the burden the Amended Law imposes on Plaintiffs’ First Amendment rights (rights which are themselves different from those asserted in *Diaz*), and whether the statute is supported by or sufficiently tailored to state interests. In addition, Defendants asserted in *LWVF I*, and are likely to do so here, that the challenged statute was justified by two other purported state interests: accountability for voter registration groups, and the prevention of fraud by such groups. *LWVF I*, 447 F. Supp. 2d at 1337. These issues indisputably have factual components which cannot conceivably be resolved by the record or findings of *Diaz*. If any prior factual findings are relevant to that issue, they are this Court’s findings in *LWVF I*, where the Court explicitly made factual findings that supported its ruling. The factual record concerned the same conduct

by the same parties and a nearly identical statute as in the present case, and the legal questions in the two questions are intertwined with these facts in identical ways. If discovery or testimony is to be limited in the preliminary injunction proceedings, they should be limited to the record and factual findings from the prior version of this case.

*Fourth*, the *Diaz* facts that Defendants seek to import into this case were tangential to the claims tried there; were not fully litigated, and did not form the basis of the court's ruling. During the extensive discovery and motion practice that preceded the *Diaz* trial, defendants advanced numerous justifications for the statute at issue, none of which pertained to the conduct of third-party groups. At the conclusion of discovery, the Secretary moved for summary judgment without mentioning third-party voter registration groups in his brief, let alone arguing that the conduct of such third-party groups justified the statute at issue. The conduct of third-party voter registration groups did not become an issue until very late in the case. At trial, the Secretary elicited testimony concerning purportedly tardy submissions of voter registration applications by unnamed third-party groups, which in large part served as the basis for the court's factual findings related to third-party groups. Those findings were of only ancillary relevance to the Court's ruling on a statute that did not regulate third-party groups. The *Diaz* court's findings relating to third-party groups were not fully litigated, and cannot substitute for a factual record regarding this statute developed by these Plaintiffs in this case.

*Fifth*, insofar as Defendants intend to raise allegations of "hoarding" as part of the State's purported justification for the Amended Law, the League Plaintiffs will vigorously contest those allegations and, if necessary, demonstrate that the *Diaz* findings are simply wrong. The League Plaintiffs cannot be barred from disproving those allegations on the basis of non-collateral findings in a different case involving different parties and different issues.

Under these circumstances, to prevent Plaintiffs from litigating issues central to their efforts to redress infringements of core political freedoms would plainly violate due process. *See, e.g., Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 329 (1971); *Holloway v. A.L. Lockhart*, 813 F. 2d 874 (8th Cir. 1987) (reliance on findings from separate case not involving appellant would “abrogate the fundamental requirement of due process.”).

In a fallback attempt to convince the Court to rely upon the factual record from the *Diaz* case in lieu of an evidentiary hearing, Defendants note that courts sometimes rely on hearsay evidence at the preliminary injunction stage. Defs. Br. at 4. Defendants have not cited a single case in which a court declined to hear live testimony at a preliminary injunction hearing, and instead admitted transcripts from a different hearing in a different case concerning a different statute and involving different parties.

In determining whether and to what extent to allow hearsay materials in lieu of testimony, courts should consider whether doing so is “appropriate given the character and objectives of the injunctive proceeding.” *Kos Pharmaceuticals, Inc. v. Andrx Corp.*, 369 F. 3d 700, 719 (3d Cir. 2004) (internal quotation omitted); *see Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984) (courts may give “inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm before trial”) (citing *Wright & Miller*, § 2949, at 471 (1973)). Those objectives clearly would *not* be well served by denying an evidentiary hearing in favor of wholesale substitution of an irrelevant factual record.

B. The *Diaz* Findings Are Not “Legislative Facts” And Not Subject to Judicial Notice.

In yet another attempt to have this Court adopt the *Diaz* factual findings in lieu of hearing evidence, Defendants argue that the findings in *Diaz* constitute “legislative facts,” defined as “established truths, facts or pronouncements that do not change from case to case but apply

universally.” *United States v. Bowers*, 660 F.2d 527, 531 (5th Cir. 1981). The *Diaz* factual findings do not come close to fitting this description. In *LWVF I*, the Court found that Plaintiffs were likely to succeed in proving facts that were precisely the opposite of those determined in *Diaz*. In addition, the facts as found in *Diaz* clearly were not “established” and “universal[]” before *Diaz*; otherwise, the Court would have taken judicial notice of them rather than hearing testimony, making credibility determinations, and issuing findings of fact. Nor did the Court’s ruling transform these facts into “legislative facts.” On the contrary, that the facts were “found” by the *Diaz* Court makes them, by definition, *adjudicative* facts, not *legislative* facts. *See, e.g., Bowers*, 660 F.2d at 531 (“adjudicative facts are those developed in a particular case”). As such they can be judicially noticed only if they are indisputable, and cannot bind a party who did not previously litigate them. *See United States v. Jones*, 29 F. 3d 1549, 1553 (11th Cir. 1994); *Wyatt v. Terhune*, 315 F.3d 1108, 1114 n.5 (9th Cir. 2003) (factual findings in one case ordinarily are not admissible for their truth in another case through judicial notice) (collecting cases); *Taylor v. Charter Medical Corp.*, 162 F. 3d 827, 829-30 & n. 9-12 (5th Cir. 1998) (holding that “a court cannot take judicial notice of the factual findings of another court,” and citing similar holdings from other circuits).

Defendants appear to recognize the limits of their position, because they ask the Court to view the *Diaz* holdings as “legislative facts” only “for purposes of the preliminary injunction hearing” (Defs. Br. at 7), and suggest that any factual development necessary to the merits “can take place later in this litigation.” Defs. Br. at 8. Such a bifurcated process would be completely inappropriate where disputed factual issues are relevant at the preliminary injunction phase, and Defendants cite no authority to the contrary. Defendants’ argument reaches bottom in the suggestion that Judge King’s credibility determinations in *Diaz* somehow render those findings

binding in this case. Defs. Br. at 7. The opposite is true: the fact that the Court made credibility determinations removes its findings from any possible scope of judicial notice. *See Holloway v. Lockhart*, 813 F.2d 874, 878-79 (8th Cir. 1987).

Defendants' "legislative facts" theory fails for the simple reason that the *Diaz* findings relating to third-party registration groups are subject to dispute, and their resolution requires analysis of a factual record, including credibility determinations.

#### **IV. Defendants' Proposed "Parameters" Would Deny Plaintiffs the Opportunity to Present Their Arguments**

Defendants ask the Court to enter an order addressing six points. Each should be rejected.

Live Testimony and Witnesses: Defendants' first two requests deal with the procedure for seeking the Court's leave to call witnesses to testify at the hearing. As discussed above, Plaintiffs respectfully submit that these requests are inappropriate and legally unsupportable. (Plaintiffs have no objection to setting a schedule for disclosure of witnesses.)

Filing of Plaintiffs' Evidence: Defendants ask the Court to establish a schedule whereby Plaintiffs would file all evidence, including expert reports, no later than the fourteenth day before the hearing, and Defendants would file all evidence no later than the seventh day before the hearing. This schedule is inconsistent with the schedule the parties have agreed upon in the course of their discussions pursuant to Rule 26(f). In the draft Rule 26(f) report and in discussions with Plaintiffs, Defendants agreed that both parties would submit initial expert reports no later than June 6, 2008 and rebuttal reports no later than June 13, 2008. If Defendants wished to alter the schedule set forth in that report, they should have done so within the context of ongoing party negotiations rather than seeking relief from the Court.

Limitations of Argument Time: Plaintiffs presume that the Court will set limits on the time for oral argument as it sees fit, and do not see the need for a motion on this subject.

Date: May 27, 2008

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on May 27, 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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