

No. 06-14836-D

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In the United States Court of Appeals  
for the Eleventh Circuit

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LEAGUE OF WOMEN VOTERS, ET AL.,

*Plaintiffs-Appellees,*

v.

SECRETARY OF THE STATE OF FLORIDA, ET AL.,

*Defendants-Appellants.*

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

**THE HONORABLE PATRICIA A. SEITZ**

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**INITIAL BRIEF OF APPELLANTS COBB AND ROBERTS**

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## **CERTIFICATE OF INTERESTED PARTIES**

*League of Women Voters v. Secretary of the State of Florida*, Case No. 06-14836

Pursuant to 11th Circuit Rule 26.1-1, Appellants Cobb and Roberts furnish a complete list of the following:

1. Advancement Project, attorneys for appellees
2. American Federation of State, County and Municipal Employees, Council 79 (AFSCME), plaintiff/appellee
3. Peter Antonacci, attorney for appellants
4. Becker & Poliakoff, PA, attorneys for appellees
5. Brennan Center at NYU Law School, attorneys for appellees
6. Sue M. Cobb, Florida Secretary of State, defendant/appellant
7. Florida AFL-CIO, plaintiff/appellee
8. Florida Department of State, defendant/appellant
9. GrayRobinson, PA, attorneys for appellants
10. Emily Grondyke, attorney for appellees
11. Kramer, Levin, Naftalis & Frankel LLP, attorneys for appellees
12. League of Women Voters of Florida, plaintiff/appellee
13. Jennifer Maranzano, attorney for appellees
14. Renee Paradis, attorney for appellees
15. People Acting for Community Together (PACT), plaintiff/appellee
16. Dawn K. Roberts, Director, Florida Division of Elections, defendant/appellant
17. Estelle Rogers, attorney for appellees
18. Gary C. Rosen, attorney for appellees

19. Honorable Patricia A. Seitz, presiding district court judge
20. SEIU Florida Healthcare Union, plaintiff/appellee
21. Craig Siegel, attorney for appellees
22. Eric Tirschwell, attorney for appellees
23. Erin Walters, attorney for appellees
24. Wendy R. Weiser, attorney for appellees
25. Elizabeth Westfall, attorney for appellees
26. Marilyn Wills, plaintiff/appellee
27. Allen Winsor, attorney for appellants

## **STATEMENT REGARDING ORAL ARGUMENT**

This case presents important constitutional issues relating to Florida's ability to protect voters and regulate its voter registration process. Appellants, the Florida Secretary of State and the Director of the Florida Division of Elections, respectfully request oral argument, which Appellants believe would assist this Court in the determination of these issues.

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## **STATEMENT OF JURISDICTION**

Appellees initiated this action pursuant to 42 U.S.C. § 1983, alleging violations of their rights under the United States Constitution. The district court had jurisdiction under 28 U.S.C. § 1331. The district court entered an order preliminarily enjoining the Appellants from enforcing a provision of Florida law. Pursuant to 28 U.S.C. § 1292(a)(1), this Court has jurisdiction to consider the interlocutory appeal of that preliminary injunction order. The district court entered its preliminary injunction order on August 28, 2006, and Appellants filed a timely notice of appeal.

## STATEMENT OF THE ISSUES

This appeal presents these distinct issues of constitutional law:

(i) Does Florida's regulation holding third-party voter registration organizations accountable for the voter registration applications they collect from prospective voters implicate the Plaintiffs' rights of free speech?

(ii) Does Florida's differing regulation of political parties and others violate voter registration organizations' rights of free association and equal protection?

(iii) Is facial invalidation of a legislative act warranted when there has been no enforcement and when the challenged legislation does not regulate expression or association on its face?

## STATEMENT OF THE CASE

During its 2005 session, the Florida Legislature enacted legislation to protect its citizens' right to register and to vote. The new legislation simply requires those collecting voter registration applications from prospective voters to timely submit them to election officials. § 97.0575, Fla. Stat. It imposes fines on organizations and individuals that fail to do so. *Id.* On May 18, 2006, the Plaintiffs initiated this action by filing a complaint under 42 U.S.C. § 1983, alleging that this legislation violates their rights under the First and Fourteenth Amendments to the United States Constitution by restricting their speech and free expression. (RE 1.)<sup>1</sup> This is an appeal from the district court's order granting the Plaintiffs' motion for preliminary injunction. (RE 57.)

### Procedural History

The Plaintiffs filed their Complaint on May 18, 2006, (RE 1), and their motion for preliminary injunction on June 6, 2006. (Doc 10.) The Defendants responded to the preliminary injunction motion (Doc 24) and filed a motion to dismiss the complaint (Doc 26). On July 25, 2006, and continuing on July 26 and August 3, the district court conducted a hearing on the preliminary injunction

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<sup>1</sup> Throughout this brief, the Record Excerpts will be referred to as "RE #." The record will be cited as "(Doc # : Pg #.)"

motion. (Doc 54, 55, 56.) On August 28, 2006, the district court entered its “Order Granting in Part and Denying in Part Plaintiffs’ Motion for Preliminary Injunction and Granting in Part and Denying in Part Defendants’ Motion to Dismiss.” (RE 57.)<sup>2</sup> It is from that interlocutory order that the Defendants now appeal.

### **Statement of the Facts**

The relevant facts in this case are straightforward, and the parties have stipulated to many of them. (RE 44, 50.) Prior to 1995, only election officials and their agents could collect voter registration applications in Florida. (RE 50:3.) In 1995, Florida amended its Election Code and began permitting third-party groups to collect applications from prospective voters. *Id.* Since that time, election officials have received complaints about third-party groups that do not timely deliver voter registration applications to election officials. (RE 44 ¶¶ 3-4.)

Under Florida law, if a registration application is not submitted at least twenty-nine days before an election, the prospective registrant is not eligible to vote in that election. (RE 50 ¶ 13; Doc 54:103.) In 2004, thousands of applications collected by third-party groups were submitted after the book-closing

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<sup>2</sup> The style of this order suggests that the court granted only part of the relief the Plaintiffs sought. In fact, the order granted all of the preliminary injunctive relief requested—it completely enjoined enforcement of the challenged legislation—but rejected the Plaintiffs’ alternative theory based on unidentified individuals’ fundamental right to vote.

date (RE 57:28), and those thousands of voters could not vote. In response, Florida's Legislature enacted Chapter 05-277, Laws of Florida, to help remedy this problem.

The challenged legislation requires third-party voter registration organizations to submit collected applications before a book-closing date, and also within ten days of their collection. § 97.0575(3), Fla. Stat. In 2004, there was a substantial increase in the number of voter registration applications submitted nationwide, including over 2.8 million new applications in Florida. (RE 50:¶ 14.) Although voter registration applications may be completed and submitted at any time, far more applications are submitted immediately before book-closing than at any other time. (RE 57:25; 50:4.) In fact, one in seven applications submitted in 2004 was submitted within the seven days immediately before the book-closing deadline. (RE 57:25 n.13.) The practice of third-party organizations' hoarding applications and submitting them in bulk immediately before the book-closing deadline makes it more difficult for election officials to process the new applications so that a voter may, in fact, become registered. (RE 57:27; Doc. 34, Miller Dec. ¶ 8.)

The Plaintiffs include three labor unions, one individual, and two nonprofit organizations. (RE 50:¶ 4.) Before the challenged legislation became effective on January 1, 2006, the Plaintiffs collected prospective voters' registration

applications. (RE 57:7-13.) Since then, they have curtailed their collection of applications, although in some cases they have continued to collect them. (RE 57:44.) The challenged statute has not been enforced against any Plaintiff. (RE 57:42-43.)

### **Standard of Review**

A district court's decision to grant or deny a preliminary injunction is reviewed for an abuse of discretion. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004). A district court abuses its discretion, though, when it misapplies the law, and this Court reviews a district court's legal determinations *de novo*. *Id.* at 1096-97. Thus, the district court's legal conclusions—which are dispositive of this appeal—are reviewed *de novo*.

## SUMMARY OF ARGUMENT

In Florida, like most states, citizens must register to vote before they are eligible to cast their ballots. They must register at least twenty-nine days before any given election to be eligible to participate in that election. Until 1995, Florida law required applicants to register in person with an elections official. But now, federal and Florida law allow third-party organizations to distribute and collect voter registration applications. Many third parties provide a valuable service in this respect by assisting others with the registration process. But unfortunately, some third parties provide a tremendous disservice by hoarding applications, submitting applications in bulk immediately before a registration cutoff, submitting applications after a registration cutoff, or never submitting collected applications at all. Reacting to the practices of the latter category of third parties, the Florida Legislature enacted a law to regulate the handling and submission of voter registration applications by third-party organizations. It did so to protect citizens who surrender their voter registration applications to those organizations—citizens whose fundamental right to vote is threatened when their applications are not timely submitted to election officials.

Objecting to the new accountability requirements, the Plaintiffs argue that the new regulation implicates their speech interests. It does not. The collection and handling of government forms is not speech, and there is no communicative

value in the Plaintiffs' collection of voter registration applications. Furthermore, even if the Plaintiffs' collection of government forms is somehow *related* to their speech interests, a relationship between unprotected conduct and protected speech does not transform the former into the latter.

The new legislation does not regulate Florida's political parties, but that classification does not abridge the Plaintiffs' Equal Protection or freedom of association rights. Because the legislation impacts no fundamental right and is supported by a rational basis, it does not violate Equal Protection. And because it does nothing to penalize non-association with political parties, it does not violate the Plaintiffs' freedom of association. The legislation appropriately governs Florida's twenty-five registered political parties—all of which are already extensively regulated by the Division of Elections—differently than the countless individuals and organizations that are not.

Finally, the challenged legislation has not been enforced against the Plaintiffs or anyone else. The Plaintiffs' facial challenge should not be permitted when there is no indication that the challenged legislation—on its face—violates any constitutional rights. The new law does nothing to regulate the Plaintiffs' protected activities, and there is no indication that the legislation will be applied in an unconstitutional manner.

## ARGUMENT

A new Florida statute imposes simple and logical requirements on those who make a practice of collecting registration applications from prospective voters: They must submit collected applications to election officials, and they must do so promptly. If they submit the applications late—or never submit them at all—the prospective voters lose an opportunity to vote. And under the new law, those responsible for the late submission may be assessed civil fines. The question presented in this appeal is whether this new legislation, which regulates only the collection and submission of government forms, implicates First Amendment speech and associational rights of third-party organizations wishing to collect the forms. It does not.

### **I. BACKGROUND ON VOTER REGISTRATION IN FLORIDA.**

Like nearly all states, Florida maintains a system of voter registration, and citizens must become registered before they are permitted to vote. *See* § 97.041(1), Fla. Stat. Until 1995, eligible applicants were required to register in person, before a state voter registration official. *See* §§ 98.271, 98.041, Fla. Stat. (1993). Currently, Florida law provides eligible applicants with numerous avenues through which they may register, including registration by mail. *See* § 97.053(1), Fla. Stat. This change in the law opened the door to the new practice of third-

parties' collecting the registration applications of others. And it ultimately led to the legislation challenged in this case.

**A. Prior to the Florida Voter Registration Act, Third Parties Could Not Collect Voter Registration Applications in Florida.**

At issue in this case is whether the collection and submission of state voter registration applications by third parties is a constitutionally protected activity. Historically, there has been no recognition of any such protection. Until recently, for example, third-party collection of voter registration applications was not even possible. Before the adoption of the Florida Voter Registration Act, Florida law made no provision for the private distribution of voter registration applications. *See generally* Chapter 98, Fla. Stat. (1993). Instead, Florida law required applicants to appear personally before a supervisor of elections, deputy supervisor of elections, or volunteer deputy voter registrar. *See* §§ 98.041, 98.271, Fla. Stat. (1993); *see also Revitalizing Democracy in Florida*, The Governor's Select Task Force on Election Procedures, Standards and Technology (2001), at 48, *available at* [http://www.collinscenter.org/usr\\_doc/Election%20Report.pdf](http://www.collinscenter.org/usr_doc/Election%20Report.pdf) (last visited Oct. 24, 2006).<sup>3</sup>

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<sup>3</sup> In-person registration requirements were not unique to Florida. Before 1994, only thirty states accepted voter registration forms by mail, and only about half of the states offered voter registration application through the driver's license application process. *See* H.R. Rep. 103-9, 1st Sess. (1993) at 130-31.

In response to the National Voter Registration Act of 1993 (NVRA), which imposed on states certain requirements related to voter registration, the Florida Legislature enacted the Florida Voter Registration Act in 1994.<sup>4</sup> This Act greatly increased access to voter registration applications and provides that applications must be made available, upon request, to “[i]ndividuals or groups conducting voter registration programs.” § 97.052(1)(b)2, Fla. Stat. Only after the 1994 amendments to Florida’s Election Code, which followed Congress’s enactment of the NVRA, were third-party groups in Florida first able to distribute and collect voter registration applications.

**B. Florida Law Currently Provides Numerous Avenues for Voter Registration.**

Following enactment of the Florida Voter Registration Act, the registration process in Florida became simple and convenient for all applicants. Now, voter registration forms must be accepted in the office of each of Florida’s sixty-seven supervisors of elections, the office of the Division of Elections, any driver’s license office, any armed forces recruitment office, any office providing public assistance, any office serving persons with disabilities, any center for independent living, and any public library. §§ 97.021(40), 97.053(1), Fla. Stat. And even if an applicant

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<sup>4</sup> The Plaintiffs do not pursue any NVRA or other statutory claims in this case; they rely only on the First and Fourteenth Amendments to the United States Constitution. (RE 1.)

is unable to visit any of these offices, he may easily register by mail. § 97.053(1), Fla. Stat.

As explained above, the Florida Voter Registration Act also created another new avenue for voter registration: It allows third-party groups to collect applications from prospective voters. *See* § 97.052(1)(b)2, Fla. Stat. That new avenue presented additional registration opportunities for applicants, but it 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’ ultimate registration became dependent on those third parties’ actions. The Florida Legislature addressed this challenge by making third-party registration organizations accountable for the applications they collect. And it is that accountability to which the Plaintiffs object.

**C. Florida’s New Legislation Protects Voter Registration Applicants by Making Third-Party Voter Registration Organizations Accountable for the Applications they Collect.**

Under the new law, a third-party voter 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), Fla. Stat. A “third-party registration organization” is defined as “any person, entity, or organization

soliciting or collecting voter registration applications.” § 97.021(36), Fla. Stat.<sup>5</sup>

The definition excludes political parties, certain election officials and agents, and individuals collecting applications only for family members. *Id.*

A voter registration organization can be liable for a \$250 fine for each application submitted more than ten days after its collection or \$500 for each application collected before but submitted after the book-closing date.

§ 97.0575(3), Fla. Stat. If an application is collected but never submitted, the organization may be assessed a \$5,000 penalty. *Id.* These fines are subject to a seventy-five percent reduction if the organization complies with Section 97.0575(1), which establishes certain reporting provisions. *Id.* Under that section, a third-party voter registration organization names a registered agent and designates those responsible for the organization’s day-to-day operations.

§ 97.0575(1), Fla. Stat. That section also requires quarterly reports with the date and location of organized voter registration drives conducted by the organization.

*Id.* The seventy-five percent reduction in potential fines provides the sole inducement for compliance with the reporting requirements; there are no civil or criminal penalties associated with the reporting provisions. § 97.0575(2), Fla. Stat.

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<sup>5</sup> The statutory definition of this type of “organization” thus includes individuals. Likewise, throughout this brief, the term “organization” will include those individuals governed by the challenged legislation.

The legislation 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 submitted by otherwise unregulated registration organizations are, in turn, timely submitted to the appropriate election officials.

## **II. THE COLLECTION OF VOTER REGISTRATION APPLICATIONS IS NOT SPEECH.**

The Plaintiffs contend that any regulation of the collection and handling of voter registration applications amounts to regulation of their political speech. They further claim that their speech is chilled because they fear the administrative fines associated with the legislation. But the collection and submission of voter registration applications is not speech, and Florida's regulation of those activities does not implicate the First Amendment. The legislation includes no provisions that regulate speech, expressive conduct, or associational choices. It regulates nothing other than the collection and handling of government forms. Accordingly, the district court erred in concluding that the legislation violates the Plaintiffs' First Amendment interests. (RE 57:33-34.)

### **A. There Is No Communicative Value in the Collection and Handling of Voter Registration Forms.**

The physical collection of voter registration applications is conduct, not speech. But that does not end the inquiry, of course, because the freedom of

speech guaranteed by the First Amendment extends beyond literal speech and protects expressive conduct. *See Tex. v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 2539 (1989). There is nothing inherently expressive, however, about the act of collecting an application. And the Supreme Court has “extended First Amendment protection only to conduct that is inherently expressive.” *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1310 (2006).

The Plaintiffs’ claims of “expression” through collection are spurious at best. They introduced the expert testimony of Donald P. Green, a political science professor, (Doc 54:95-98), who testified that by taking possession of prospective voters' applications, rather than allowing applicants to submit the form themselves, the Plaintiffs were communicating a “personal touch.” (Doc 36, Green Dec. ¶¶ 10, 12.) The Plaintiffs, Professor Green opined, were expressing the “personal touch,” without which applicants would be less likely to submit their applications. *Id.* ¶ 10.<sup>6</sup> The Plaintiffs also argued that they communicate support for certain causes and candidates by delivering applications in bulk. (Doc 31:14.) For example, they

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<sup>6</sup> Professor Green conceded on cross-examination that the Plaintiffs could, of course, deliver a “personal touch” and a message of caring even without collecting the application. (Doc 54:95-98.) He concluded, though, that although this message of “caring” could still be communicated, the message conveyed without actual collection would lead to less effective voter registration drives. (Doc 54:97.) As explained in Section II(D)(2), *infra*, however, the First Amendment does not protect conduct simply because it may be effective in achieving political goals.

claim they “communicate messages of political support for their organizations . . . when they deliver applications.” (Doc 31:13.)

Fortunately, just “saying conduct is undertaken for expressive purposes cannot make it symbolic speech.” *Rumsfeld*, 126 S. Ct. at 1312. And the collection and delivery of these government forms simply communicate no message. But even if there were *some* expressive component of this conduct, it is not the type of expressive conduct that justifies First Amendment protection. Indeed, “[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one’s friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.” *Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S. Ct. 1591, 1595 (1989). The claimed communicative component of the Plaintiffs’ conduct—even if it existed—would not warrant First Amendment protection.

As the Supreme Court said, “[i]n deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.” *Johnson*, 491 U.S. at 404, 109 S. Ct. at 2539 (marks omitted). Whatever particularized message the Plaintiffs claim to convey

through their collection and delivery of applications would surely be lost on applicants submitting applications as well as state officials receiving them. *See Rumsfeld*, 126 S. Ct. at 1312. Accordingly, the collection cannot be considered speech.

**B. Even if There Is Some Communicative Value in the Collection of Applications, Florida May Regulate the Non-Communicative Component of the Conduct.**

Assuming for purposes of argument that there is *some* communicative component of the Plaintiffs' collection and submission of applications, the challenged legislation nonetheless regulates only the *noncommunicative* component. This case is not like those in which the conduct includes a substantial communicative component, such as *Johnson*, 491 U.S. at 406, 109 S. Ct. at 2540 (communication in burning flag); *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 508, 89 S. Ct. 733, 737 (1969) (communication in wearing black armbands to protest war in Vietnam); *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313-14, 88 S. Ct. 1601, 1605-06 (1968) (communication in picketing). In each of those cases, the Court concluded that the states' regulation of conduct amounted to a substantial restriction on expression.

In *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 (1968), 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.” In that case, a war protester was convicted for burning his draft card. On appeal, he challenged the constitutionality of the regulation, claiming that it abridged his right of free speech. *Id.* at 370, 88 S. Ct. at 1675. 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, 88 S. Ct. at 1681-82. The Court went on to distinguish 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.*, 88 S. Ct. at 1682.

The parallel here is obvious. The challenged law authorizes civil fines against organizations that do not timely submit collected applications. The regulation is limited to ensuring reliable and efficient operation of the voter registration system and the administration of those very documents. Any fine would flow from the organization’s failure to submit applications—not from the exercise of any expression or speech. *See also Rumsfeld*, 126 S. Ct. at 1310 (law schools’ facilitation of military recruiters is not expression); *Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S. Ct. 1591, 1595 (1989) (coming together for recreational dancing is not expression).

C. **A Connection Between the Plaintiffs’ Actual Speech and Their Collection of Voter Registration Forms Does Not Transform Their Non-Expressive Conduct into Speech.**

Further seeking a basis for First Amendment protection of their unprotected conduct, the Plaintiffs argue that their conduct is *connected* to their speech. It is undisputed that the Plaintiffs seek to encourage voter participation, which logically begins with voter registration. (Doc 10:4.) They seek to encourage civic participation, engage citizens in discussions about current political issues, and encourage citizens to support those issues. (Doc 10:4.) Unquestionably, all of these are entitled to First Amendment protection. But critically, none of them is regulated in any way by the challenged legislation. Nonetheless, the Plaintiffs argued below that their conduct was related—even “inextricably intertwined”—with their speech, specifically advocacy of voter rights. (Doc 31:13.) The problem with this argument is that conduct *related* to speech does not *become* speech. The *collection* of registration applications cannot manifest itself as speech or advocacy merely because it may relate to the Plaintiffs’ advocacy goals. Extending free speech protection to all conduct *related to* organizational goals, would, of course, turn constitutional jurisprudence on its head.

As the Plaintiffs have made clear, their collection efforts go hand in hand with their actual speech. (Doc 31:13.) But whatever message they express when they collect applications results from that actual speech—not the collection itself.

As in *Rumsfeld*, “[t]he 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.” 126 S. Ct. at 1311. 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.* Indeed, if non-expressive conduct were protected by the First Amendment simply because the conduct related to an effort that involved protected speech, then there would be precious little conduct not protected by the First Amendment. *Cf. United States v. O’Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 1678 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”).

In this case, it could hardly be clearer that the Plaintiffs’ speech is not “inextricably intertwined” with their collection and submission of government forms. The Supreme Court rejected an attempt to extend First Amendment

protections by illogically linking protected speech to unprotected activity. In *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 109 S. Ct. 3028 (1989), the Court considered whether to apply the commercial speech standard or the pure speech standard to a combination of the two. *Id.* at 474, 109 S. Ct. at 3031. The challenged regulation in that case restricted commercial access to university facilities and had the effect of prohibiting Tupperware parties in student dormitories. *Id.* at 472, 109 S. Ct. at 3030. The plaintiffs acknowledged that their Tupperware parties involved commercial speech, but they 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, 109 S. Ct. at 3031. 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 rejected the idea:

[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.

Including these home economics elements no more converted [plaintiffs’] presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech.

*Id.* at 474-75, 109 S. Ct. at 3031-32. Likewise, there is nothing “inextricable” about the collection of government forms on the one hand and speech regarding political issues on the other. Nothing in Florida’s regulation prevents the Plaintiffs from conveying any message, and nothing requires any message to be combined with the collection of government forms.<sup>7</sup>

In support of their argument that conduct deserves First Amendment protection if it is related to speech, the Plaintiffs also rely on *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S. Ct. 826 (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, 100 S. Ct. at 834. The district court in this case applied *Schaumburg*, concluding that “the collection and submission of voter registration [applications] is intertwined with speech and association.” (RE 57:33.) But this assertion misses the point. The solicitation of charitable contributions is protected not merely because it is intertwined with speech, but because it *is* speech. *See Village of*

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<sup>7</sup> The district court agreed with the Plaintiffs and based its decision, in part, on its erroneous conclusion that “the collection and submission of voter registration drives is intertwined with speech and association.” (RE 57:33.) It may in practice be “intertwined,” but it is certainly not “inextricably intertwined” because the Plaintiffs’ collection and submission could easily be separated from their speech. So to the extent the two may be “intertwined,” they are indeed “*extricably* intertwined.”

*Schaumburg*, 444 U.S. at 632, 100 S. Ct. at 833 (“[C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests . . . that are within the protection of the First Amendment.”); *id.* at 633, 100 S. Ct. at 834 (“[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 Az.*, 433 U.S. 350, 363 (1977) (alterations in *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.

**D. Because the Regulation Does Not Implicate the First Amendment, Any Indirect Effect on the “Quantum of Speech” is Immaterial.**

The district court’s decision was based in part on its conclusion that the challenged legislation would *force* the Plaintiffs to communicate fewer political messages and would therefore “reduce the total quantum of speech.” (RE 57:32.) Indeed, that is a central premise of the Plaintiffs’ argument. (RE 1:2-3.) The challenged legislation, though, forces no such reduction. And because the legislation does not directly or indirectly limit speech, any indirect *effect* it may have on the quantity of speech is immaterial. Furthermore, to the extent the legislation led to a reduction in the quantity of the Plaintiffs’ speech, that reduction was directly caused by the Plaintiffs’ own strategic choices—not the regulation.

**1. The Meyer decision is inapplicable.**

The “quantum of speech” argument originates from *Meyer v. Grant*, 486 U.S. 414, 108 S. Ct. 1886 (1988), on which the Plaintiffs heavily rely. In that case, the Court recognized that the circulation of citizen initiative petitions is “core political speech” and that its regulation is subject to exacting scrutiny. *Id.* at 420, 108 S. Ct. at 1891. This Court 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 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.” *Id.* at 423, 108 S. Ct. at 1892. As in the solicitation cases, the Court invalidated the statute not merely because of its direct or indirect *effect* on speech, but because the circulation of petitions *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, 108 S. Ct. at 1891-92 (note omitted). *Meyer* is inapplicable to this case because circulation is different from collection, and initiative petitions are different from voter registration applications.<sup>8</sup>

First, as the Supreme Court recognized, “[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, 108 S. Ct. at 1891 (emphasis added). In that sense, the circulation of initiative petitions is akin to the distribution of handbills—another protected First Amendment activity. *See Buckley v. American Const. Law Found.*, 525 U.S. 182, 190-91, 119 S. Ct. 636, 641 (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. Just as a motor vehicle clerk, library worker, or supervisor of elections expresses no political point of view by accepting a prospective voter’s application, neither do the Plaintiffs.

Next, with voter registration—unlike initiative petitions—the state is the primary actor. The state makes registration forms available, assists applicants in

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<sup>8</sup> Although the district court concluded that this case was “analogous to *Meyer*” and relied on its holding, (RE 57:31-35), the district court refused to apply strict scrutiny, which is the appropriate review for a regulation of core political speech, *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002).

the process, and accomplishes the ultimate registration of any voter. It does all of this to promote orderly elections and to ensure that voting is limited to those who are eligible. *Cf. Storer v. Brown*, 415 U.S. 724, 730-31, 94 S. Ct. 1274, 1279 (1974) (states have substantial interest in requiring registration). The state has provided the avenue for registration, and it enjoys the benefit of the registration system.

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, 119 S. Ct. at 642 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 only eligible citizens are permitted to vote.

In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363, 117 S. Ct. 1364, 1372 (1997), the Supreme Court rejected an argument that political parties have a right to express themselves through an election ballot. The Court

acknowledged that Minnesota’s challenged regulation prevented political parties from using the ballot to communicate with the public their support of particular candidates. *Id.* 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 for a fora political expression.” *Id.*; accord *Burdick v. Takushi*, 504 U.S. 428, 445, 112 S. Ct. 2059, 2069 (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 the Plaintiffs’ political expression.

At any rate, it is illogical to believe that the collection of registration applications could express anything other than the collector’s intent to assist in registration. Unlike initiative petitions, voter registration applications are point-of-view neutral. Applications do not commit the registrant to a candidate or cause, and the same form is used for everyone—regardless of the individual’s views or political interests.

Because of the fundamental differences between voter registration applications and initiative petitions, the Florida Legislature treats the two differently. For example, current Florida law prohibits payments to those

collecting voter registration applications when the payment is based on the number of forms collected. § 104.012(3), Fla. Stat. There is no such restriction on payments for the collection of initiative petitions. Likewise, there is no requirement that those collecting initiative petitions timely (or ever) submit them to state officials.<sup>9</sup> And as explained above, until 1995, Florida did not permit third parties to collect voter registration applications at all. *See* Section I(A), *supra*; *see also* Stipulated Facts (Doc 50:¶ 11). Indeed, when this Court recognized the speech interest in circulating petitions in 1985, *Clean-Up '84*, 759 F.2d at 1513, and when the Supreme Court did the same thing three years later, *Meyer*, 486 U.S. at 416, the 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, 122 S. Ct. 2528, 2540 (2002) (“[A] universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional.”).

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<sup>9</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), Fla. Stat. (“The sponsor shall submit signed and dated forms . . .”). Collected petitions are frequently abandoned when sponsors lose interest or change direction. *See, e.g., Advisory Opinion to Attorney General re Independent Nonpartisan Comm’n to Apportion Legislative and Congressional Districts*, 926 So. 2d 1218, 1221 n.4 (Fla. 2006) (sponsors of one initiative petition voluntarily dismissed a second petition).

All of these distinctions lead to the inescapable conclusion that the collection and submission of government forms is not analogous to distributing initiative petitions. Circulating initiative petitions is core political speech. Collecting voter registration applications is not. Therefore, *Meyer* is inapplicable.

2. **Any reduction in the quantity of speech is due to the Plaintiffs' own strategic decisions, not due to the regulation.**

Any reduction in the Plaintiffs' voter registration activities—or the speech that accompanies them—is not a direct result of the challenged legislation but a direct result of the Plaintiffs' decision to abandon them. To the extent the Plaintiffs are engaging in less speech, it is of their own volition. Indeed, *any* legislative enactment may have the indirect consequence of affecting the quantity and type of speech available in the marketplace of ideas. A tax increase, for example, could lead to a reduction of political speech from those advocating that tax increase. And an increase in postal rates could lead to a substantial reduction in speech altogether. But neither a tax increase nor a postal rate increase regulates speech rights. Likewise, a law regulating only the collection of voter registration applications does not regulate the Plaintiffs' speech.

In *Timmons*, the Supreme Court upheld Minnesota's anti-fusion regulation, which prohibited candidates from appearing on the ballot as the nominee for more than one political party. In doing so, the Court rejected the Eighth Circuit's conclusion that the anti-fusion regulation "forces" members of a minor political

party to abandon support of their candidates. *Id.* at 360, 117 S. Ct. at 1371.

“Minnesota has not directly precluded minor political parties from developing and organizing. . . . The New Party remains free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen.” *Id.* at 361, 117 S. Ct. at 1371. The Plaintiffs in this case are likewise free to spread their message to all who will listen, and their decision not to do so does not invalidate Florida’s voter protection legislation.

The Plaintiffs’ expert even testified to the obvious—that the Plaintiffs could continue to advocate voter registration, assist applicants, and convey their political messages, all without collecting applications. (Doc 54:96-98.) And by not taking possession of any applications, the Plaintiffs could avoid the reach of the challenged legislation. The Plaintiffs’ objection to this approach is based on their pessimistic belief that their constituents cannot be counted on to mail applications themselves. (Doc 31:14) (“[M]ost individuals would fail to otherwise properly submit applications before the relevant voter registration deadlines.”). Therefore, they conclude, their registration efforts would be less effective absent the Plaintiffs’ collection and handling of applications. *Id.* The Plaintiffs argue that they could not *effectively* persuade other citizens to vote without collecting those citizens’ voter registration applications. (Doc 31:16). Similarly, they allege that their “success in registering new voters . . . depends on their ability . . . to collect

applications.” (RE 1:¶ 36.) But none of these facts, even if true, entitles the Plaintiffs to First Amendment protection. There is simply no First Amendment right to success or effectiveness. “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, 99 S. Ct. 1826, 1828 (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*, 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, the Eighth Circuit emphasized its belief that minor parties could not thrive without fusion-based alliances. 520 U.S. at 361, 117 S. Ct. at 1371. 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, 117 S. Ct. at 1371. 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, 117 S. Ct. at 1373. In this case, whatever benefits the Plaintiffs would enjoy from a complete lack of accountability do not control, and Florida’s regulation is permissible.

Related to their argument that their registration drives would not be effective without the collection and submission of government forms is the Plaintiffs’ repeated assertion that the challenged law is bad for voters and bad for democracy. They point to the number of voters that register with the help of organizations like them, and they suggest that many voters would be unable to vote without their help. (RE 1:¶¶ 40-43; Doc 10:5.) They also argue that the NVRA encourages voter registration drives and cite this Court’s decision in *Charles H. Wesley Education Foundation, Inc. v. Cox*, 408 F.3d 1349, 1353 (11th Cir. 2005), in which this Court notes that the NVRA “impliedly encourages them.” (Doc 24:21.) None of this, of course, turns the Plaintiffs’ activities into protected speech, and the Plaintiffs have not pursued an NVRA—or any statutory—claim.<sup>10</sup> (RE 1.)

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<sup>10</sup> The Plaintiffs’ Complaint included claims on behalf of voters—claims that the district court properly dismissed on standing grounds. (RE 57:45-46.) Nonetheless, the district court based its decision in part on the plight of voters: “Defendants have not addressed the unregistered citizen’s interest in having and exercising choices as to how to register to vote . . . . The Law has essentially nullified a significant array of registration vehicles for Florida’s citizens, especially those to whom the Plaintiffs dedicate their efforts.” (RE 57:40-41.) As explained in Section I(B) above, though, Florida offers numerous avenues for registration, and, at any rate, trial testimony demonstrated that numerous third-party organizations (including at least one Plaintiff) have continued to conduct voter registration drives notwithstanding the new law. (Doc 54:145-46; Doc 55:185.) Finally, any suggestion that the regulation will harm voters is entirely speculative. To the contrary, the law’s purpose is to protect voters and their ability to exercise their franchise.

Instead, they seek the creation of a new constitutional right—the right to collect voter registration applications free from reasonable regulation.

**E. The Challenged Legislation Does Not Chill The Exercise of Any Protected Constitutional Rights.**

The Plaintiffs argued, and the district court concluded, that the liability imposed by the challenged legislation “chilled” the Plaintiffs’ conduct. (RE 57:31.) The Supreme Court has recognized that “constitutional violations may arise from the deterrent, or ‘chilling,’ effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights.” *Laird v. Tatum*, 408 U.S. 1, 11, 92 S. Ct. 2318, 2324 (1972). The concept of a “chilling effect” relates to the doctrine of overbreadth, which applies when people whose expression is protected are “chilled” from exercising their rights because of an overly broad statute regulating speech. *See, e.g., New York v. Ferber*, 458 U.S. 747, 768, 772, & n.27, 102 S. Ct. 3348, 3360, & n.27 (1982).

As explained above, though, the First Amendment is not implicated by regulations on the collection, submission, and administration of voter registration applications. The legislation does nothing to deter or chill protected First Amendment liberties; it only deters or chills the mishandling and late submission of government forms—a laudable public policy goal. Indeed, the solitary goal of the challenged legislation is to deter—or “chill”—the improper handling of these government forms.

### **III. THE FLORIDA LEGISLATURE’S DIFFERING TREATMENT OF POLITICAL PARTIES IS PERMISSIBLE.**

Florida’s political parties are subject to myriad state regulations, but not subject to the statute challenged in this case. The Plaintiffs argue that the law therefore penalizes the Plaintiffs based on their non-association with political parties. (RE 57:35.) Accordingly, the argument goes, the challenged legislation violates the Plaintiffs’ First Amendment rights of association and Equal Protection. Not every legislative classification, though, gives way to a freedom of association or Equal Protection claim. If the opposite were true, there would be very little that states could legislate, as one size rarely fits all.

The differing treatment of political parties and others results from the Legislature’s recognition of substantial differences between them. The United States Supreme Court recently considered an Equal Protection challenge to Federal campaign finance regulations, in which the challengers alleged that a portion of the legislation discriminated against political parties in favor of other groups by placing contribution limitations on the parties. *McConnell v. FEC*, 540 U.S. 93, 188, 124 S. Ct. 619, 686 (2003). The Court rejected the challenge: “Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation.” *Id.*; accord *FEC v. National Right to Work Commn.*, 459 U.S. 197, 210, 103 S. Ct. 552, 561 (1982). Congress has likewise recognized a difference between labor unions

and unincorporated associations and regulated them accordingly. “The differing restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process.” *California Med. Ass’n v. FEC*, 453 U.S. 182, 201, 101 S. Ct. 2712, 2724 (1981) (rejecting Equal Protection challenge).

**A. There Are Substantial Differences Between Political Parties and Other Voter Registration Organizations.**

Not surprisingly, the Florida Legislature has similarly concluded that the differences between parties and non-parties merit different types of regulations. Florida currently has only twenty-five registered political parties, (RE 44:¶ 5), all of which are already extensively regulated by the Florida Division of Elections. Florida law establishes organizational requirements for parties and requires them to report the names of their officers. § 103.091(1-3), Fla. Stat. More significantly, parties are required to file quarterly disclosures detailing all contributions received and expenditures made. *See* §§ 106.29, 106.07, Fla. Stat. Through this regulation, Florida’s political parties are registered with the Division of Elections, accountable to the Division of Elections, and identifiable by the Division of Elections. In other words, the political parties are fully transparent. There is absolutely no parallel regulation for the Plaintiffs.

In addition to substantial differences in the regulation of political parties and other organizations, there are obvious differences in the nature of the organizations. Political parties depend on broad public support for their very existence. In this sense, they are significantly more accountable to the public than their non-party counterparts. In contrast to political parties, voter registration organizations do not select and present slates of candidates for elections and are not subject to the same public or media scrutiny under which political parties operate. They do not necessarily depend on the votes and political decisions of others to achieve their objectives. The Florida Legislature is entitled to rely on the substantial differences between political parties and others in crafting legislation that regulates the two types of organizations differently. The challenged legislation does not violate either Equal Protection or the freedom of association.

**B. The Legislation Imposes No Burden that Could Support a Freedom of Association Claim.**

The Plaintiffs contend that they are penalized for their non-association with political parties. As a preliminary matter, there is nothing about the legislation that requires the Plaintiffs to affiliate or to not affiliate with political parties. In fact, Dianne Wheatley-Giliotti, the president of Plaintiff League of Women Voters, testified that she is a registered Republican *and* a member of the non-partisan lead Plaintiff. (Doc 55:32.) The legislation simply does not sanction those who are not members of political parties.

In *Lyng v. Int'l Union*, 485 U.S. 360, 108 S. Ct. 1184 (1988), labor unions and their members challenged an act of Congress that restricted the availability of food stamps for striking union members. They claimed, among other things, that the restriction burdened their right of free association. *Id.* at 363-64, 108 S. Ct. at 1188. The Court rejected the argument:

[I]n this case, the statute at issue does not directly and substantially interfere with appellees' ability to associate for this purpose. It does not "order" appellees not to associate together for the purpose of conducting a strike, or for any other purpose, and it does not "prevent" them from associating together or burden their ability to do so in any significant manner.

*Id.* at 367, 108 S. Ct. at 1189-90 (marks and citation omitted). Furthermore, the Court noted that it is "exceedingly unlikely" that the statute would prevent individuals from continuing to associate together in unions. *Id.*; *see also Smith v. Ark. State Hwy. Emp. Local 1315*, 441 U.S. 463, 465, 99 S. Ct. 1826, 1828 (1979) ("In the case before us, there is no claim that the Highway Commission has prohibited its employees from joining together in a union, or from persuading others to do so, or from advocating any particular ideas.").

As this Court's predecessor noted, the question in a freedom of association claim is whether the statutory classifications amount to "sanctions for the expression of . . . views [the state] opposes." *Ala. State Fed. of Teachers, AFL-CIO v. James*, 656 F.2d 193, 197 (5th Cir. 1981) (quoting *Arkansas State Highway*

*Employees, supra*).<sup>11</sup> But far from trying to discourage or sanction non-membership in political parties, all Florida has done is subject political parties and non-parties to differing regulations. That differing regulation cannot support a freedom of association claim. If it could, very little could not.<sup>12</sup>

**C. Because the Legislation Impacts no Fundamental Right or Suspect Classification and Has a Rational Basis, It Does Not Violate Equal Protection.**

The district court did not address the Plaintiffs' Equal Protection claim in its order, but because that claim is so closely related to the freedom of association

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<sup>11</sup> Like every other party before this Court over the past 25 years, Defendants must note that decisions issued by the Fifth Circuit before October 1, 1981, are binding on this Court. *See Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

<sup>12</sup> The Plaintiffs and the district court relied on *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976), in which the Court invalidated a local sheriff's practice of discharging employees who were not members of his political party. It is easy to distinguish between the burdens the practice of political patronage imposes on the freedom of association and any "burdens" in this case:

In order to maintain their jobs, respondents were required to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party, usually at the price of one of the first three alternatives. Regardless of the incumbent party's identity, Democratic or otherwise, the consequences for association and belief are the same. An individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk.

*Id.* at 355, 96 S. Ct. at 2680-81. These are real and substantial burdens, unlike those in the cases cited above, and unlike any purportedly suffered by the Plaintiffs in this case.

claim, the Defendants will address it briefly. Legislative classifications that neither involve invidious discrimination nor significantly impair interests protected by the First Amendment are subject only to a rational basis review. *Clements v. Fashing*, 457 U.S. 957, 972-73, 102 S. Ct. 2836, 2848 (1982). The classification “is accorded a strong presumption of validity, and must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Lofton v. Sec’y of the Dep’t of Children & Fam. Servs.*, 358 F.3d 804, 817-18 (11th Cir. 2004) (marks and citation omitted), *cert. denied*, 543 U.S. 1081 (2005). In this case, there is ample justification for the challenged legislation, as discussed in greater detail below. Accordingly, there is no Equal Protection violation.

#### **IV. FLORIDA’S REGULATION SERVES LEGITIMATE STATE INTERESTS.**

As demonstrated above, the challenged legislation does not implicate First Amendment protections. Accordingly, it is subject only to a rational basis review. *See Lofton*, 358 F.3d at 818; *see also Lyng v. Int’l Union*, 485 U.S. 360, 364, 108 S. Ct. 1184, 1189 (rejecting application of strict scrutiny review because “the statute does not infringe either the associational or expressive rights of appellees”). Florida certainly has a rational basis for the challenged legislation.

**A. The Challenged Legislation Serves a Valuable Purpose.**

The right to vote is a fundamental right of critical importance to all Florida voters. When a voter registration organization convinces an applicant to register to vote, that organization has provided a valuable service. But when the organization takes the application—and thereby prevents the applicant from submitting it—Florida has an undeniable interest in ensuring that the application is properly and timely submitted. That is precisely what the challenged legislation is designed to do. The Florida Legislature made a reasonable and responsible policy decision to hold otherwise unregulated organizations accountable for the applications they collect. Other states have recently made similar policy decisions—all for the purpose of ensuring timely submission of collected applications. *See, e.g.*, Colo. Rev. Stat. § 1-2-701, *et seq.*; N.M. Stat. Ann. § 1-4-49; Va. Code Ann. § 24.2-1002.01; Wash. Rev. Code § 29A.08.115.

Logically, applicants who surrender their applications to another party will assume that the other party will properly submit the application. And there can be little doubt that the other party has an obligation to do so. As the Legislature recognized, 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.” § 97.0575(3), Fla. Stat.

By making voter registration organizations accountable based on their fiduciary obligation to applicants, the new legislation seeks to reduce the likelihood that individual applicants would not ultimately be registered. Applicants who think they are registered because they submitted a valid application to a voter registration organization would not likely re-apply absent some knowledge that the earlier application was never properly submitted. Those applicants could allow the book-closing date to pass, thinking they were already registered. In that instance, they would be denied their right to vote in that particular election because of the failure of the registration organization. Through the new legislation, the Legislature seeks to reduce the likelihood of this reoccurring scenario.

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), Fla. Stat., and they must complete their applications before the book-closing deadline to be eligible for that election, § 97.053(2), Fla. Stat. A citizen who submits an application to a third-party voter registration organization 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. By requiring voter registration organizations to submit all applications within ten days of their collection, the challenged legislation reduces the likelihood that these problems will continue.

Last, in addition to benefiting applicants and reducing fraud, the new legislation benefits election officials by promoting efficient administration of registration applications. The new law requires voter registration organizations to submit the applications within ten days of their collection. By prohibiting the organizations from “hoarding” applications and dumping large quantities all at once, the legislation aims to reduce the administrative burden on the officials who must process the applications and complete the registration process. And it seeks to reduce the unavoidable errors that accompany predictable and dramatic spikes in processing workload. In upholding registration deadlines, courts have recognized that state officials need time to process voter registration applications in advance of elections. *See, e.g., Marston v. Lewis*, 410 U.S. 679, 680, 93 S. Ct. 1211, 1212 (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.”); *accord Burns v. Fortson*, 410 U.S. 686, 686-87, 93 S. Ct. 1209, 1210 (1973).

These are legitimate policies that are properly within the purview of the legislature, and they are sufficient to support the new legislation.

**B. The District Court Erred by Applying a Heightened Scrutiny.**

Instead of applying a rational basis review, the district court applied the heightened review articulated in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564 (1982). (RE 57:30 n.21.) In *Anderson*, the Court considered a candidate's challenge to an Ohio statute limiting ballot access. The Court observed that ballot access restrictions impact the fundamental rights of candidates and voters.

Nonetheless, the Court refused to apply strict scrutiny, noting the States' important interests in regulating elections. Instead, the Court adopted a modified balancing test, which has been applied by numerous courts to other election regulations.

The *Anderson* test, however, is applied only when a plaintiff's First or Fourteenth Amendment rights are implicated. "To assess the constitutionality of a state election law, we *first* examine whether it burdens rights protected by the First and Fourteenth Amendments." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222, 109 S. Ct. 1013, 1019 (1989) (emphasis added). In this case the regulation does not implicate any First Amendment rights, so the inquiry should end there. Moreover, the *Anderson* balancing test is typically applied in ballot access cases. This Court has characterized the test as "the case-by-case balancing test called for by the Supreme Court in the ballot access cases."

*Biddulph v. Mortham*, 89 F.3d 1491, 1500 n.10 (11th Cir. 1996); accord *Green v. Mortham*, 155 F.3d 1332, 1336 (11th Cir. 1998) (“[I]n *Anderson*, the Supreme Court set forth the test for considering whether a state’s ballot access requirements impermissibly infringe a candidate’s constitutional rights.”). Logic informs the application of an intermediate scrutiny in ballot access cases because requiring something more could lead to ballots with countless candidates. “There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization’s candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.” *Jeness v. Fortson*, 403 U.S. 431, 442, 91 S. Ct. 1970, 1976 (1971).

In this case, however, the challenged regulation 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 Elections Comm’n*, 514 U.S. 334, 345, 115 S. Ct. 1511, 1518 (1995) (refusing to apply intermediate scrutiny to statute limiting distribution of campaign literature because the statute “does not

control the mechanics of the electoral process”).<sup>13</sup> In other cases challenging regulations related to elections but not directly regulating the electoral process, the Supreme Court has not applied *Anderson*. See, e.g., *Meyer v. Grant*, 486 U.S. 414, 108 S. Ct. 1886 (1988) (initiative petition gathering); *Burson v. Freeman*, 504 U.S. 191, 112 S. Ct. 1846 (1992) (voter solicitation at polling places) (plurality opinion). This Court should not apply *Anderson*.

**V. THE CHALLENGED LEGISLATION HAS NOT BEEN APPLIED TO THE PLAINTIFFS, AND THE PLAINTIFFS CANNOT SUSTAIN A FACIAL CHALLENGE.**

This action is a facial challenge. The Defendants have not enforced the challenged legislation against the Plaintiffs or anyone else. The Plaintiffs’ fear is that it will be. They claim to fear seven-figure *aggregate* fines (Doc 10:10) even though the fines authorized by the statute are \$250, \$500, and \$5,000 depending on the violation. And there is no indication that the Secretary of State intends to enforce the challenged law to impose ruinous liability in the form of aggregate fines. On this facial challenge, this Court should not assume that she will exercise

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<sup>13</sup> As explained in note 10, *supra*, the Plaintiffs originally brought claims on behalf of prospective voters based on the fundamental right to vote. (RE 1.) The district court dismissed those claims on standing grounds but invited the Plaintiffs to amend their complaint to allege associational or third-party standing of prospective voters. (RE 57:45-46.) The right to vote claims are therefore not before this Court. At any rate, the Plaintiffs cannot prevail on those claims because Florida—even without third-party registration—has provided ample opportunities for voter registration. See Section I(B), *supra*. It cannot be said that Florida’s avenues for voter registration are constitutionally insufficient.

her discretion in an unreasonable manner.<sup>14</sup> If, to use the Plaintiffs' example, the AFL-CIO were actually assessed a \$2.5 million fine after hundreds of applications "were destroyed by a flood or hurricane," then a constitutional challenge might be warranted (although not based on free speech or association). (Doc 10:10.) Or if the League of Women Voters is actually assessed a fine for its entire annual budget of \$80,000 (*id.* at 2), a federal court could consider the impact of that fine on the League's constitutional rights.

Putting these exaggerated examples aside, the Plaintiffs must demonstrate on this facial challenge that, at a minimum, the challenged legislation would "would operate unconstitutionally in *most* cases." *Fla. League of Prof. Lobbyists v. Meggs*, 87 F.3d 457, 459 (11th Cir.), *cert. denied*, 519 U.S. 1010 (1996); *accord United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

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<sup>14</sup> 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 possesses discretion to do so. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 125 S. Ct. 2796, 2806 (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, 119 S. Ct. 1849, 1861 n.32 (1999); *Heckler v. Chaney*, 470 U.S. 821, 832, 105 S. Ct. 1649, 1657 (1985).

The liability associated with the new law is not such that it would be unconstitutional in all—or even most—cases. Indeed, it is difficult to imagine a circumstance in which it could be applied in an unconstitutional manner. The Florida Legislature rightly intended to hold those collecting applications—applications on which citizens depend for their right to vote—accountable. And to advance that accountability, the Florida Legislature implemented a regime to allow for fines against those who do not properly handle these critical government documents. If that regime ultimately results in an unconstitutional application to any party, that party can turn to a federal court. Like the Eleventh Circuit said in *Meggs* in response to “the League’s hypothesized, fact-specific worst-case scenarios”: “[I]n the future courts can, to the extent necessary, evaluate the statute’s constitutionality as-applied.” *Id.* at 460. That time has not come, the statute has not been enforced, no plaintiff has been harmed (beyond self-inflicted harms), and invalidation of the challenged legislation is not warranted.

Putting aside the hypothetical issue of an unconstitutional application, there is nothing on the face of the statute that abridges free speech. As the Court in *O’Brien* said with respect to the draft card regulation, 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, 88 S. Ct. at 1678. The Court went on to consider the defendant’s as-applied challenge because O’Brien—unlike the Plaintiffs in this case—had been charged under the challenged statute. *Id.* Because the challenged law is not facially invalid, the district court should not have invalidated it.

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

The prerequisites for a preliminary injunction are well established. The plaintiff must establish a substantial likelihood of success on the merits, a showing of irreparable harm absent an injunction, proof that the threatened injury outweighs any harm that might result to the defendants, and a showing that the public interest will not be disserved by the preliminary injunction. *See Cunningham v. Adams*, 808 F.2d 815, 819 (11th Cir. 1987). As explained in the preceding sections, the Plaintiffs have failed to establish a constitutional violation, so they cannot demonstrate a likelihood of success on the merits. But the Plaintiffs have also failed to establish the remaining prerequisites.

The Plaintiffs cannot demonstrate irreparable harm. According to the Plaintiffs and the district court, the Plaintiffs would be irreparably harmed because absent relief, they could not participate in the registration of voters for the upcoming election. (RE 57:44.) But to the extent they curtailed their registration activities, it was because of their own decisions—not because of the challenged

legislation. As explained above, the Plaintiffs can engage in political speech, advocate their positions, and assist in voter registration—all without implicating the challenged legislation or risking a fine. Their 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.

The Plaintiffs also fail the balance-of-harm test. By enjoining enforcement of the challenged legislation, the district court reduced the likelihood that Florida voters will be properly registered. Florida enacted the legislation to ensure that applicants who entrusted their applications to third parties would, in fact, have their forms submitted for processing. Without the challenged legislation, those who entrust their applications to third parties will be less likely to achieve registration—and more likely to lose their right to vote. These interests are critical to the state and to voter registration applicants. For these same reasons, the injunction would not serve the public interest.

## CONCLUSION

The legislation challenged in this case regulates one thing: the collection and submission of voter registration applications. The regulated conduct is not speech, is not expressive conduct, and does not implicate any First Amendment protected rights. The challenged legislation seeks to protect voter registration applicants by making those entrusted with voter registration applications accountable for the timely submission of those applications. This accountability protects the electoral process by ensuring that those who register to vote through third-party voter registration organizations are ultimately registered. The Defendants and the Florida Legislature have a solemn duty to protect that process and defend the right of all eligible Floridians to register and vote.

Because the challenged legislation does not implicate any First Amendment protected speech or conduct, none of the Plaintiffs' First Amendment claims can stand. And because the legislation includes no impermissible discrimination, the Equal Protection and associational claims likewise must fail. There is absolutely no constitutional right to collect, handle, or submit government forms. For these reasons, the Plaintiffs did not satisfy their substantial burden in seeking the preliminary enjoinder of a legislative enactment. Accordingly, the Secretary of State of the State of Florida, and the Director of the Florida Division of Elections respectfully request that this Court reverse the decision of the district court.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with Federal Rule of Appellate Procedure 32(a)(7). This brief is submitted in 14-point Times New Roman font, and it contains 11,353 words.

/s/ Allen Winsor  
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## CERTIFICATE OF SERVICE

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