IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
Tallahassee Division

ANDREW NATHAN WORLEY, et al.
Plaintiffs,

v.

Civil Action No.
4:10-cv-00423-RH/WCS

DAWN K. ROBERTS, et al.
Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs are four individuals who wish to pool their money to buy advertisements urging Florida voters to defeat a proposed amendment to the Florida Constitution in the upcoming election on November 2, 2010. The United States Supreme Court has made clear that speech like Plaintiffs' is at the core of what the First Amendment was intended to protect. But under Florida law, Plaintiffs cannot run even a simple advertisement on local radio unless they register with the state, set up a separate bank account, submit detailed financial reports to the state, and deal with all of the other laws that apply to "political committees"—laws that even the Florida Division of Elections admits are "complex." Fla. Div. of Elections, *About Campaign Finance Reporting*, http://election.dos.state.fl.us/campaign-finance/cam-finance-reporting.shtml (last visited Oct. 4, 2010). If Plaintiffs fail to comply with these requirements, they are subject to fines and even jail time.

As the Supreme Court has held, these kinds of burdens on independent political speech are unconstitutional. "If the First Amendment has any force, it prohibits [the government] from fining or jailing citizens, *or associations of citizens*, for simply engaging in political speech." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 904 (2010) (emphasis added). Indeed, the Supreme Court recently struck down federal campaign-finance laws that were materially identical to Florida's laws, holding that they were unconstitutionally burdensome for corporations and unions. *See id.* at 897-98.

Campaign-finance laws that are too burdensome for General Motors and the AFL-CIO are too burdensome for ordinary citizens like Plaintiffs. These laws cannot survive in the wake of *Citizens United*. Accordingly, Plaintiffs ask that this Court preliminarily enjoin the State of Florida from enforcing these laws against both Plaintiffs and other groups whose electoral activities are limited to independently advocating the passage or defeat of ballot issues. Because they want to speak freely about issues that will appear on the upcoming November ballot, Plaintiffs respectfully request that this Court act by October 26th, or sooner if possible. If this Court does not do so, the right of Plaintiffs and those like them to influence the debate on the 2010 ballot will be lost forever.

STATEMENT OF FACTS

I. The Plaintiffs and Their Speech.

Nathan Worley, Pat Wayman, John Scolaro, and Robin Stublen—collectively, "Plaintiffs"—are Florida residents who want to speak out against proposed Amendment 4 to the Florida Constitution. Decl. of Andrew Nathan Worley in Supp. of Pls.' Mot. for Prelim. Inj. ¶¶ 1-4 (Worley Decl.); Decl. of Pat Wayman in Supp. of Pls.' Mot. for

Prelim. Inj. ¶¶ 1-4 (Wayman Decl.); Decl. of John Scolaro in Supp. of Pls.' Mot. for Prelim. Inj. ¶¶ 1-4 (Scolaro Decl.); Decl. of Robin Stublen in Supp. of Pls. Mot. for Prelim. Inj. ¶¶ 1-4 (Stublen Decl.). Amendment 4, if enacted, would require local governments that change their comprehensive land-use plans to submit those changes to a referendum of the voters for approval. *See* Fla. Div. of Elections, *Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans*, http://election.dos.state.fl.us/initiatives/initdetail.asp?account=37681&seqnum=2 (last visited Oct. 4, 2010). Plaintiffs consider Amendment 4 an affront to property rights that will devastate Florida's economy. Worley Decl. ¶ 4; Wayman Decl. ¶ 4; Scolaro Decl. ¶ 4; Stublen Decl. ¶ 4. Accordingly, they want to urge fellow Floridians to vote against the Amendment in the upcoming November election. *Id.*

In order to make their speech as effective as possible, Plaintiffs wish to associate with one another by pooling their money to purchase advertising time on a local talk-radio station. Worley Decl. ¶ 7; Wayman Decl. ¶ 7; Scolaro Decl. ¶ 7; Stublen Decl. ¶¶ 7-10. In addition to allowing them to purchase more ads than they could individually, associating with one another will allow Plaintiffs Nathan Worley, Pat Wayman, and John Scolaro to take advantage of Plaintiff Robin Stublen's greater experience with radio advertising. *Id.* Collectively, Plaintiffs are ready, willing, and able to spend at least $600 ($150 apiece) on their effort, and will spend even more if others agree to contribute to their efforts. Worley Decl. ¶¶ 7, 12-13; Wayman Decl. ¶¶ 7, 13-14; Scolaro Decl. ¶¶ 7, 12-13; Stublen Decl. ¶¶ 9, 15-16. Based on price quotes the Plaintiffs received from a local talk-radio station, this amount of money would allow them to run 30 advertisements

of 30 seconds at $20 a piece. Stublen Decl. ¶ 9 & Ex. A. Plaintiffs have already prepared a script for their advertisement. Stublen Decl. ¶ 10 & Ex. B. The draft advertisement consists of what Plaintiffs view as the top five reasons why voters should reject Amendment 4 and does not, as currently written, contain the legally required disclaimer discussed in more detail in Part II, below. As written, it takes approximately 30 seconds to read Plaintiffs' advertisement. Stublen Decl. ¶ 10.

Plaintiffs were not involved with the effort to get Amendment 4 on the ballot or with any of the legal challenges that sought to remove it from the ballot. Worley Decl. ¶ 5; Wayman Decl. ¶ 5; Scolaro Decl. ¶ 5; Stublen Decl. ¶ 5. Their involvement in the debate over Amendment 4 is limited to independently urging the public to vote against Amendment 4 in the upcoming election. *Id.* Nevertheless, if Plaintiffs go forward with their speech, they will be considered a "political committee" under the campaign-finance laws, and will be subject to numerous regulations, discussed in detail below.

II. Florida's Campaign-Finance Laws and Their Effect on Plaintiffs.

Under Florida law, any group of people that raises or spends more than $500 for the purpose of "expressly advocating"[1] the election or defeat of a candidate, or the passage or defeat of an issue that will appear on the ballot, is considered a "political committee." Fla. Stat. § 106.011(1).[2] Political committees, or PACs, are the most heavily

[1] "Express advocacy" is a term of art in campaign-finance law that refers to "communication[s] contain[ing] express words of advocacy of election or defeat of a candidate or issue such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'oppose,' and 'reject.'" Fla. Div. of Elections, *Meaning of "Expressly Advocates,"* DE-0506 (Sept. 21, 2005), *available at* http://opinions.dos.state.fl.us/searchable/pdf/2005/de0506.pdf (last visited Oct. 4, 2010).

[2] There are some limited exceptions to this definition, including, most notably, business corporations. Fla. Stat. § 106.011(1)(b)2.

regulated entity under campaign-finance laws. Among other things, every PAC is required to:

- register with the state within 10 days after it is organized or it "anticipates receiving contributions or making expenditures" of more than $500 in a year, Fla. Stat. § 106.03(1)(a);
- appoint a treasurer and establish a campaign depository, *id.* § 106.021(1);
- deposit all funds within five days of receipt, *id.* § 106.05;
- make all expenditures by check drawn from the campaign account, *id.* § 106.11;[3]
- keep "detailed accounts" of receipts and expenditures, current to within no more than two days, *id.* § 106.06(1);
- maintain records for at least two years after the date of the election to which the accounts refer, *id.* § 106.06(3);
- file regular reports with the Division of Elections, itemizing every single contribution and expenditure, no matter how small, *id.* § 106.07(4)(a); and
- submit to random audits by the Division of Elections, *id.* § 106.22(10).

Because Plaintiffs are required to form a PAC, they are also prohibited from certain activities. For example, if a PAC receives a contribution less than five days before an election, it may not obligate or spend that money until after the election has passed. *Id.* § 106.08(4). PACs are also prohibited from spending anonymous contributions or receiving cash contributions greater than $50, which effectively prohibits them from "passing the hat" for donations. *See id.* § 106.09; Fla. Div. of Elections, *Anonymous Contributions*, DE 89-02 (Apr. 5, 1989), *available at* http://opinions.dos.state.fl.us/searchable/pdf/1989/de8902.pdf (last visited Oct. 4, 2010).

[3] Committees are permitted to establish "petty cash" funds, but those cannot be used to pay for any advertising expenses. Fla. Stat. § 106.12(3).

Florida's disclosure requirements for PACs are particularly onerous. Unlike most states, Florida has no lower threshold for reporting contributions to, or expenditures made by, a PAC. All contributions and expenditures, regardless of size, must be individually reported. Fla. Stat. § 106.07(4)(a). This means that if the PAC receives even one dollar from a contributor, it must record that contribution and report it to the state along with the contributor's name and home address. *Id.* § 106.07(4)(a)1. The same is true of expenditures. *Id.* § 106.07(4)(a)6. All of this information is then disclosed on the Florida Division of Elections website. *See* Fla. Div. of Elections, *About Campaign Finance Database*, http://election.dos.state.fl.us/campaign-finance/cam-finance-data.shtml ("For committees, the campaign finance database contains all contributions and expenditures reported to the Florida Division of Elections since January 1, 1996.") (last visited Oct. 4, 2010).

In addition to these burdens, all speakers in Florida who make independent expenditures, including PACs, must include disclaimers in their political advertisements that prominently state "Paid political advertisement paid for by (Name and address of person paying for advertisement) independently of any (candidate or committee)." Fla. Stat. § 106.071(2). Because Plaintiffs do not wish to establish a PAC, they are not sure how this requirement would apply to them. Worley Decl. ¶ 15; Wayman Decl. ¶ 16; Scolaro Decl. ¶ 15; Stublen Decl. ¶ 18. Including all of their names and addresses in the disclaimer would be totally infeasible, because it would take up virtually the entire 30 seconds available for their advertisement. Stublen Decl. ¶ 18. But even if Plaintiffs did establish a PAC and recorded the disclaimer using the name of the PAC and one of their

home addresses, Plaintiffs estimate it would take at least six seconds—and probably longer—to read that disclaimer. *Id.* Because radio advertisements are ordinarily sold in 30-second increments, Florida's disclaimer requirement necessarily forces Plaintiffs to shorten their political message by at least 20%. Stublen Decl. ¶¶ 19-20. Plaintiffs estimate that if they are required to shorten their political message that much, they will only be able to convey three reasons to vote against Amendment 4, rather than the five reasons they have in their current script. Stublen Decl. ¶ 19.

Although the Plaintiffs wish to speak, running their proposed advertisement will trigger all of the regulations described above. This means that Plaintiffs will have to take time out of their busy schedules to learn and comply with these regulations, merely to speak out against Amendment 4. Worley Decl. ¶ 11; Wayman Decl. ¶ 12; Scolaro Decl. ¶ 11; Stublen Decl. ¶ 14. Plaintiffs are not willing to do this; they have only a limited amount of time to devote to this effort. Worley Decl. ¶¶ 11, 18-19; Wayman Decl. ¶¶ 12, 19-20; Scolaro Decl. ¶¶ 11, 18-19; Stublen Decl. ¶¶ 14, 22-23. Indeed, Plaintiff Pat Wayman has previously taken steps to avoid having to deal with the burdens of campaign-finance laws. As the leader of an activist group in Venice, Florida, she has ensured that the group never spends money on its activities so that it will not accidentally run afoul of the law. Wayman Decl. ¶ 10.

Plaintiffs are also afraid that, due to the complexity of Florida's campaign-finance laws, they may inadvertently violate those laws and subject themselves to civil liability merely for speaking out against Amendment 4. Worley Decl. ¶ 19; Wayman Decl. ¶ 20; Scolaro Decl. ¶ 19; Stublen Decl. ¶ 23. The Florida Elections Commissions, the agency

charged with enforcing Florida's campaign-finance laws, reports that, in all, "[t]here are almost 100 separate violations" possible under Florida's campaign-finance laws. Fla. Elections Comm'n, *Jurisdiction*, http://www.fec.state.fl.us/juris/index.html ("Common Violations in Chapter 106") (last visited Oct. 4, 2010). And the Division of Elections advises that political committees review "Chapters 97-106, Florida Statutes, the Constitution of the State of Florida, Division of Elections' opinions and rules, Attorney General opinions, county charters, city charters and ordinances, *and other sources . . . in their entirety* for complete information regarding campaign financing." Fla. Div. of Elections, *Political Committee Handbook* 1 (June 2010), *available at* http://election.dos.state.fl.us/publications/publications.shtml (last visited Oct. 4, 2010).

Plaintiffs' fears are compounded by the fact that, under Florida law, the Secretary of State or any other person may file a sworn complaint with the Florida Elections Commission, alleging a violation of the campaign-finance laws. *See* Fla. Stat. § 106.26(1); *see also* Worley Decl. ¶ 19; Wayman Decl. ¶ 20; Scolaro Decl. ¶ 19; Stublen Decl. ¶ 23. Because Amendment 4 is a controversial political issue, this is a real possibility—the Florida Chamber of Commerce has already filed a complaint with the Florida Elections Commission against Florida Hometown Democracy, Inc., the political committee sponsoring Amendment 4, for alleged campaign-finance violations. *See* Abel Harding, *Florida Chamber Files Complaint Against Hometown Democracy*, Fla. Times Union (July 22, 2010, 1:31 p.m.), http://jacksonville.com/opinion/blog/401574/abel-harding/2010-07-22/florida-chamber-files-complaint-against-hometown (last visited Oct. 4, 2010). All violations are subject to civil penalties, Fla. Stat. §§ 106.07(8), .265(1), and

many are subject to additional criminal penalties or even jail time, *see, e.g.*, *id.* §§ 106.071, .08(7), .09(2), .19. Because of these concerns, Plaintiffs will remain silent unless the campaign-finance laws are preliminarily enjoined. Worley Decl. ¶¶ 19-20; Wayman Decl. ¶ 20-21; Scolaro Decl. ¶¶ 19-20; Stublen Decl. ¶¶ 23-24.

ARGUMENT

Plaintiffs' motion for preliminary injunction should be granted because Plaintiffs satisfy all four factors required for the issuance of a preliminary injunction. *See Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010) (listing factors). First, Plaintiffs are likely to succeed on the merits, because the Supreme Court just struck down burdens on speech that were materially indistinguishable from those in this case. Second, Plaintiffs will suffer irreparable harm if Florida's campaign-finance laws are not enjoined because they will forever lose the opportunity to make their voices heard in the 2010 election. Third, while Plaintiffs are at risk of having their speech silenced, there is no risk of injury to the state, financial or otherwise, if an injunction is issued. Fourth, an injunction would serve the interests of the public, who benefit from a marketplace of ideas that is "uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Finally, because Plaintiffs have brought a public-interest lawsuit to vindicate their constitutional rights, and because an injunction poses no financial risk to the state, it is appropriate for this Court to waive the bond requirement of Federal Rule of Civil Procedure 65(c).

I. Plaintiffs Are Substantially Likely to Succeed on the Merits.

The First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides that government "shall make no law . . .

abridging the freedom of speech." "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). This includes speech about issues that will appear on the ballot, which the Supreme Court has called, "the essence of First Amendment expression." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

In addition to protecting speech, the First Amendment also protects political association. As the Supreme Court has explained, "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); *see also Buckley v. Valeo*, 424 U.S. 1, 15 (1976) ("The First Amendment protects political association as well as political expression."). Indeed, just last term, the Supreme Court noted, "If the First Amendment has any force, it prohibits [the government] from fining or jailing citizens, *or associations of citizens*, for simply engaging in political speech." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 904 (2010) (emphasis added).

Plaintiffs want to exercise their First Amendment rights to speak and associate about political issues, but cannot do so without being subject to onerous and intrusive regulations. First, they will have to register and operate as a "political committee," and comply with regulations that the Supreme Court has recognized are "expensive" and "burdensome," even for corporations and unions. *Id.* at 897 ("PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations."). Second, they will have to include disclaimers in their advertisements, a form of

compelled speech that both requires Plaintiffs to shorten their political message and violates their right to engage in anonymous political advocacy.

Because the burden of proof at the preliminary injunction stage tracks the burden of proof at trial, the state bears the burden of demonstrating that Florida's campaign-finance laws are narrowly tailored to serve a compelling state interest. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). As discussed below, the state cannot satisfy that high standard. Accordingly, Plaintiffs are likely to succeed on the merits of their challenge.

1. Plaintiffs are likely to succeed on the merits of their challenge to Florida's political-committee requirements for groups that speak independently about ballot issues, because those requirements are unconstitutional under *Citizens United v. FEC*.

Plaintiffs in this case are prohibited from speaking collectively unless they do so through a PAC. But this compelled choice—to speak through a PAC or not at all—is unconstitutional under the Supreme Court's recent ruling in *Citizens United v. Federal Election Commission*. That case dealt with a First Amendment challenge to a federal campaign-finance law that prohibited corporations and unions from speaking in candidate elections unless they did so through a separate PAC. The Supreme Court found that the burden of having to speak through a PAC was so severe that it amounted to a "ban on speech," even for well-heeled corporations and unions. *Id.* at 898. Accordingly, the Supreme Court subjected those burdens to strict scrutiny and held the federal regulatory scheme unconstitutional. *Id.* at 898, 913.

The reasoning of *Citizens United* applies with even greater force here. Florida's PAC requirements are at least as burdensome as the federal PAC requirements held

unconstitutional in *Citizens United*. For example, under both Florida and federal law, PACs must "appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for [2 or 3] years [respectively], and file an organization statement and report changes to this information within 10 days." *Id.* at 897. And, as the Supreme Court noted, "that is just the beginning," because, under both state and federal law, PACs must also file detailed reports with the state, "which are due at different times depending on the type of election that is about to occur." *Id.*

While these similarities alone would be enough to trigger strict scrutiny under the Supreme Court's ruling in *Citizens United*, Florida's PAC regulations are, in other respects, far more burdensome than the federal PAC requirements held unconstitutional in that case. For example, while federal law does not require itemized reporting of contributions or expenditures of $200 or less, 2 U.S.C. § 434(b)(3)(A), Florida law requires disclosure of the names and address of *all* contributors and recipients of expenditures, regardless of the amount, including "in-kind" contributions. Fla. Stat. §§ 106.011(3)(a), .07(4). Additionally, while federal law places no restrictions on independent spending by political committees, Florida law actually bans political committees from spending any contributions received in the last five days before an election. Fla. Stat. § 106.08(4).[4] Accordingly, because Florida's PAC requirements

[4] This specific provision not only fails strict scrutiny for the reasons discussed in this section, it is also in direct conflict with the Supreme Court's holdings in *Mills v. Alabama*, 384 U.S. 214 (1966) and *Buckley v. Valeo*, 424 U.S. 1 (1976). *Mills* invalidated a ban on election-day electioneering. *See* 384 U.S. at 220. *Buckley* later extended that reasoning to campaign-finance regulations to invalidate a limit on independent political spending in federal elections. *See* 424 U.S. at 50 (1976) (holding that "'no test of reasonableness

"burden political speech" to an even greater degree than the federal requirements at issue in *Citizens United*, they too are "subject to strict scrutiny, which requires the Government to prove that the restriction[s] further[] a compelling interest and [are] narrowly tailored to achieve that interest." *Citizens United*, 130 S. Ct. at 898; *see also Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1178 (9th Cir. 2007) (applying strict scrutiny to California's political-committee requirements for ballot-issue advocates).

Just like the federal PAC requirements at issue in *Citizens United*, Florida's PAC requirements cannot survive strict scrutiny, because the state has no compelling interest in regulating Plaintiffs' speech. To date, the Supreme Court has identified only one interest sufficiently compelling to justify burdens on political speech: the prevention of "*quid pro quo* corruption" of political candidates. *Citizens United*, 130 S. Ct. at 909; *Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759, 2773 (2008). But this case concerns speech about ballot issues, not political candidates, and the Supreme Court has repeatedly recognized that "[t]he risk of corruption perceived in cases involving candidate elections . . . *simply is not present* in a popular vote on a public issue." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 790 (1978) (emphasis added). Indeed, in the three cases in which the Supreme Court has considered the constitutionality of laws that burden independent speech about ballot issues, it has held those burdens unconstitutional. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (disclaimer requirements); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298-99 (1981) (contribution limits); *Bellotti*, 435 U.S. at 789-92 (spending limits).

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can save [such] a state law from invalidation as a violation of the First Amendment.'" (alteration in original) (quoting *Mills*, 384 U.S. at 220)).

Further, this case deals with independent expenditures. And as the Supreme Court recognized in *Citizens United*, even within the candidate context, "independent expenditures . . . do not give rise to corruption or the appearance of corruption." 130 S. Ct. at 909. Thus, because preventing "*quid pro quo* corruption" is the only state interest sufficiently compelling to justify burdens on political speech, and because Plaintiffs' speech poses absolutely no risk of *quid pro quo* corruption, Florida has no compelling interest in requiring Plaintiffs and those like them to comply with burdensome PAC-like registration, administrative, and reporting requirements. Accordingly, Plaintiffs are substantially likely to succeed on their claim that these requirements are unconstitutional as applied to groups whose electoral activity is limited to independent speech about ballot issues.

2. Plaintiffs are likely to succeed on the merits of their challenge to Florida's disclaimer requirement for independent speech about ballot issues, because that requirement is unconstitutional under *McIntyre v. Ohio Elections Commission*.

In addition to asking this Court to preliminarily enjoin Florida's PAC requirements as-applied to independent speech about ballot issues, Plaintiffs are also asking this Court to enjoin provisions of Florida's campaign-finance laws that require Plaintiffs to include an identifying disclaimer in their public communications. Specifically, Florida law requires that Plaintiffs' political advertisement include the message: "Paid political advertisement paid for by (Name and address of person paying for advertisement) independently of any (candidate or committee)." Fla. Stat.

§ 106.071(2).[5] Plaintiffs are likely to succeed in their challenge to this provision because it compels speech, thereby forcing Plaintiffs to change their political message and violating the right to engage in anonymous speech that the Supreme Court announced in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

Just as in this case, *McIntyre* dealt with speech about ballot issues. Margaret McIntyre, along with her son and a friend, distributed fliers opposing a local school-tax levy. *Id.* at 337. Ohio law at the time required that such fliers contain, in a prominent place, the name and address of the person responsible for the speech. *Id.* at 338 n.3. Ms. McIntyre's fliers did not contain this disclaimer and she was fined $100 by the Ohio Elections Commission. *Id.* at 338. The Supreme Court, applying strict scrutiny, struck down Ohio's disclaimer requirement as unconstitutional. *Id.* at 347, 357.

The Supreme Court based its ruling on the First Amendment right to engage in anonymous speech. As the Court recognized "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *Id.* at 342. Further, the reason a speaker has for choosing to exclude a disclaimer from their communication is immaterial: "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *Id.* 341-42. Any government regulation that interferes with this right will be upheld only if it is "narrowly tailored to

[5] The statutory term "political advertisement" means "a paid expression in any communications media," including, specifically, "radio." Fla. Stat. § 106.011(17).

serve an overriding state interest." *Id.* at 347. Finally, "[t]he simple interest in providing voters with additional relevant information," is not an overriding state interest. *Id.* at 348.

In this case, Florida's disclaimer law requires Plaintiffs to include in their advertisements "disclosures [they] would otherwise omit." *Id.* This imposes a significant burden on Plaintiffs' speech, not only because it requires them to surrender their constitutionally protected anonymity, but also because it takes up a portion of their advertising time that could be spent expressing the reasons for their disapproval of Amendment 4. Plaintiff Robin Stublen estimates that it would take at least six seconds, and probably longer, to record the required disclaimer. Stublen Decl. ¶ 18. This leaves Plaintiffs with less than 80% of the time they would otherwise have for making their point to Florida voters. Stublen Decl. ¶ 20

The state interest in requiring disclaimers for Plaintiffs' speech is no greater than the state interest at issue in *McIntyre*. It is, at most, the "plainly insufficient" interest in providing the electorate with "additional relevant information." *McIntyre*, 514 U.S. at 348-49. Further, by reducing the amount of time Plaintiffs have to speak, Florida's disclaimer requirement operates very much like a tax on political speakers, forcing them to pay more than other speakers for an equivalent amount of speaking time. *Cf. Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (striking down tax that only affected newspaper publishers). Accordingly, Plaintiffs are substantially likely to succeed on their claim that Florida's disclaimer requirement is unconstitutional as applied to independent speech about ballot issues.

II. Plaintiffs Have Demonstrated Irreparable Harm, Because Unless Florida's Campaign-Finance Laws Are Enjoined, Plaintiffs' Opportunity to Speak in the 2010 Election Will Be Lost Forever.

Florida's campaign-finance laws directly burden Plaintiffs' exercise of core First Amendment rights. The Eleventh Circuit has "repeatedly held that harms to speech rights 'for even minimal periods of time, unquestionably constitute[] irreparable injury.'" *Scott*, 612 F.3d at 1295 (alteration in original) (quoting *Elrod v. Burns*, 426 U.S. 346, 363 (1976)). Indeed, the Eleventh Circuit recently held that the injuries caused by laws that burden political speech are "obviously irreparable." *Id.*

The irreparable nature of Plaintiffs' injury is particularly acute in this case because their speech involves an issue to be voted on in the 2010 election. As the Supreme Court observed in *Citizens United*, "A speaker's ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit. By the time the lawsuit concludes, the election will be over and the litigants in most cases will have neither the incentive nor, perhaps, the resources to carry on . . . ." 130 S. Ct. at 895. Plaintiffs have only one opportunity to affect the vote on Amendment 4. If they are unable to run their advertisement before November 2, 2010, that opportunity will be lost forever. *Cf. Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring) ("[T]iming is of the essence in politics . . . and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all.").

III. The Remaining Preliminary-Injunction Factors Favors Plaintiffs, Because a Preliminary Injunction Poses No Risk to the State, and Will Serve the Public Interest.

In contrast with the severe harm Plaintiffs stand to suffer if an injunction is not issued, the state stands to suffer no harm at all. There is no risk of financial loss to the state, because an injunction will not compel the state to take any action or obligate any resources. This "is not a case in which preliminary relief would require the state to cancel or reschedule an election, discard ballots already cast, or prepare new ballots or other election materials." *Scott*, 612 F.3d at 1296. More fundamentally, the state has no legitimate interest in the continued operation of an unconstitutional law. *See id.* at 1297. To the extent that the state has any interest in the continued enforcement of Florida's campaign-finance laws against groups like Plaintiffs', the Supreme Court has made clear that this Court must "give the benefit of any doubt to protecting rather than stifling speech." *Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 469 (2007); *see also id.* at 474 ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor.").

An injunction will also serve the public interest because the public benefits from a marketplace of ideas that is "uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). As the Supreme Court has recognized, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Indeed, the Court has described "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus" as "a precondition to enlightened self-government and a necessary

means to protect it." *Citizens United*, 130 S. Ct. at 898. Accordingly, because "the public . . . has no interest in enforcing an unconstitutional law," *Scott*, 612 F.3d at 1297, "'it is always in the public interest to protect First Amendment liberties.'" *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) (quoting. *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004)).

IV. The Rule 65(c) Bond Requirement Should Be Waived Because This Is a Public-Interest Lawsuit with No Risk of Financial Loss for the State.

Having established that Plaintiffs are entitled to a preliminary injunction, the only remaining question is the amount, if any, of the security Plaintiffs must provide under Federal Rule of Civil Procedure 65(c). That Rule provides that federal courts may issue preliminary injunctions only if the applicant provides a bond in an amount determined by the court. It is "well-established," however, that "the amount of security required by the rule is a matter within the discretion of the trial court . . . [, and] the court may elect to require no security at all." *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., LLC*, 425 F.3d 964, 971 (11th Cir. 2005) (internal quotation marks omitted). In this case, waiver of the bond requirement is appropriate.

District courts within the Eleventh Circuit routinely waive the Rule 65(c) bond requirement in public-interest lawsuits against the government. *See, e.g., Complete Angler, LLC v. City of Clearwater*, 607 F. Supp. 2d 1326, 1335-36 (M.D. Fla. 2009); *Gay-Straight Alliance of Yulee High Sch. v. Sch. Bd.*, 602 F. Supp. 2d 1233, 1238 (M.D. Fla. 2009); *Broward Coal. of Condos., Homeowners Ass'ns & Cmty. Orgs., Inc. v. Browning*, No. 4:08-445, 2008 U.S. Dist. LEXIS 91591, *49 (N.D. Fla. Oct. 29, 2008). Waiver of the bond requirement is also appropriate where, as here, there is no risk of

financial loss to the enjoined party. *See, e.g., Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003); *Doctor's Assocs. v. Stuart*, 85 F.3d 975 (2d Cir. 1996). Indeed, during the 2008 elections, then-Judge Mickle of the Northern District of Florida waived the Rule 65(c) bond requirement when he enjoined the enforcement of similar provisions of Florida's campaign-finance laws. *Broward Coalition*, 2008 U.S. Dist. LEXIS 91591, at *49. Accordingly, Plaintiffs respectfully request that the Court waive the bond requirement in the event that it grants Plaintiffs' motion for preliminary injunction.

REQUEST FOR RELIEF

For the foregoing reasons, the Court should grant Plaintiffs' motion for preliminary injunction and enjoin the enforcement of Florida's campaign-finance laws as they apply to Plaintiffs and other similarly situated groups that wish to engage in independent political speech about ballot issues. If the Court declines to enjoin those laws as to all such groups, Plaintiffs still request that the Court enjoin those laws as they apply to Plaintiffs. Plaintiffs also respectfully request that the court waive the bond requirement under Federal Rule of Civil Procedure 65(c).

Dated: October 4, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October, 2010, a true and correct copy of the **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** was electronically filed using the Court's ECF system and sent via the ECF electronic notification system to:

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