

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-22572-CIV-KING

EMMA YAIZA DIAZ;
AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL
ORGANIZATIONS; AMERICAN FEDERATION OF
STATE, COUNTY AND LOCAL EMPLOYEES,
AFL-CIO; FLORIDA PUBLIC EMPLOYEES COUNCIL
79, AFSCME, AFL-CIO; and SERVICE EMPLOYEES
INTERNATIONAL UNION,

Plaintiffs,

v.

KURT S. BROWNING, Secretary of State of Florida;
BRENDA SNIPES, Broward County Supervisor of
Elections; JERRY HOLLAND, Duval County Supervisor
of Elections; LESTER SOLA, Miami-Dade
Supervisor of Elections; BILL COWLES, Orange County
Supervisor of Elections; and ARTHUR ANDERSON,
Palm Beach County Supervisor of Elections,

Defendants.

**SECRETARY OF STATE'S MOTION FOR SUMMARY JUDGMENT
AND INCORPORATED MEMORANDUM OF LAW**

Kurt S. Browning, in his official capacity as Secretary of State of the State of Florida (the "Secretary"), pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7.5, moves for summary judgment.

1. The summary judgment standard is well known. A motion for summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R.

Civ. P. 56 (c). The moving party has the burden of demonstrating that there are no genuine issues of material fact in dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-moving party then has the burden to demonstrate the existence of a material disputed fact. In doing so, the non-moving party “may not rest upon mere allegations or denials of the [moving party’s] pleading,” but should include affidavits or “specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). “A mere ‘scintilla’ of evidence supporting the [non-moving] party’s position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party.” *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990).

2. In this case, there are no material facts to be tried. Undisputed evidence demonstrates that the Plaintiffs lack standing to assert their claims. Even if the Plaintiffs had standing, the evidence demonstrates that the challenged statute is reasonably justified by the State’s regulatory interests.

3. In support of this Motion, the Secretary submits the attached Memorandum of Law, a concise statement of material facts as to which there is no genuine issue to be tried, and affidavits, deposition excerpts, and interrogatory responses supporting summary judgment.

WHEREFORE, the Secretary respectfully seeks entry of an order granting summary judgment in his favor.

MEMORANDUM OF LAW

This case began shortly before the 2004 Presidential election, when a number of individual plaintiffs and the union plaintiffs sought an order requiring Florida Supervisors of Elections to ignore critical omissions on voter registration applications. They argued that applications without checkmarks affirming voter eligibility should nonetheless be deemed valid and complete. (Doc. 1.) That issue has been resolved and is no longer before the Court. Over the next three years, various legal claims have come and gone, as have various plaintiffs. What remains is a single claim (Count II) in Plaintiffs' Third Amended Complaint: that the United States Constitution requires elections officials to provide a "grace period" during which applicants who submitted voter registration applications before the registration deadline, but who failed to mark required checkboxes, may correct their submissions after the book closing date. (Doc. 170 at 35-36, "TAC".) Because the remaining organizational plaintiffs have no standing to assert this claim—and because there are no remaining individual plaintiffs to assert this claim—the Court is without jurisdiction to consider it. But even if standing existed, there are no material facts to be tried, and the Secretary is entitled to Summary Judgment.

I. THE ORGANIZATIONAL PLAINTIFFS LACK STANDING.

A. The Organizational Plaintiffs Do Not Have Standing on Behalf of Their Members.

There are no longer any individual plaintiffs. The Court dismissed Ms. Diaz's claims against the Secretary, (doc. 201), and Mr. Lanman voluntarily dismissed his claims, (doc. 262). That leaves only the four Union Plaintiffs, which sue on behalf of their members. *See* TAC ¶ 29 (the Union Plaintiffs "bring suit on behalf of their individual members in Broward, Duval, Miami-Dade, Orange and Palm Beach Counties, who have been aggrieved by Defendants' failure to comply [with law].").

An organization has standing to assert the injuries of its members only if its members would otherwise have standing to sue on their own behalves, the interests at issue are germane to the organization's purpose, and the participation of the members is unnecessary. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 181 (2000); *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1170 (11th Cir. 2006). Under this test, members would "otherwise have standing to sue in their own right," only if (1) they have suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the defendant's challenged action; and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotations and citations omitted).

The Union Plaintiffs lack standing under this test. They do little more than assert that, in the future, some members will be harmed by the lack of a "grace period." *See, e.g.*, TAC ¶ 82. This case is no longer at the pleading stage, where unsupported allegations may be sufficient. At the summary judgment stage, "the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts." *Lujan*, 504 U.S. at 561. The Plaintiffs have identified no members who will be harmed by the absence of a "grace period" in any future election. They simply alleged past harm and assume that there will be harm in the future, and that it will be suffered by their members. But because their remaining claims seek only injunctive relief,¹ the Plaintiffs' failure to demonstrate that applicants will be harmed in the future is fatal to their standing. This case is not postured as it was when originally filed in 2004. At that time, individual plaintiffs alleged that their applications were incomplete and that—at the time of filing—it was too late to correct for the 2004 election because of the book-closing. (Doc.

¹ Based on Eleventh Amendment immunity, the Court already dismissed any claims against the Secretary for damages related to past conduct. (Doc. 167.)

1 ¶ 27-29.)² As this motion is submitted, the book-closing date for the 2008 November election is a year away, the book-closing date for the August primary is nearly ten months away, and the book-closing date for the January 29 presidential preference primary is still months away. For an individual to have standing now, he would have to allege (and provide evidence) that injury is imminent, *see Lujan*, 504 U.S. at 564, which would mean that he (with some certainty) expects to fail to check the boxes and expects to do so shortly before a book-closing deadline. *See Nat'l Alliance for the Mentally Ill v. Bd. of County Comm'rs*, 376 F.3d 1292, 1295 (11th Cir. 2004) (“Assertions about what might happen do not establish an injury that is ‘concrete and particularized.’”). Plaintiffs have produced no evidence of such an individual.

Instead of identifying problems for the 2008 election cycle, Plaintiffs rely on purported harm suffered by its members in the 2004 and 2006 cycles. This effort fails for two reasons. First, past injuries may provide standing for an action for damages, but they are an insufficient predicate for equitable relief. In *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983), the Court made clear that past exposure to harm will not, in and of itself, confer standing upon a litigant to obtain equitable relief “[a]bsent a sufficient likelihood that he will again be wronged in a similar way.” *Id.* at 111; *see also Lujan*, 504 U.S. at 560; *Rizzo v. Goode*, 423 U.S. 362, 371-73 (1976); *O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974). Anyone supposedly harmed in 2004 or 2006 has had (and still has) ample time to submit a correct application before the book closing deadline for 2008 and therefore cannot reasonably have a sufficient likelihood that he will be wronged again.

Second, and perhaps more importantly, there is no evidence of any *actual* harm caused by

² At that time, Plaintiffs argued that the Defendant Supervisors should overlook Plaintiffs’ failure to check the boxes and should complete the registration without requiring more from the applicant. (Doc. 1 ¶ 68-71.) Now, by contrast, Plaintiffs claim only that applicants who fail to check the boxes before book closing should be permitted to do so after book closing—not that any missing information should be overlooked. (TAC ¶ 129-34.)

a lack of a grace period in 2004 or 2006. Despite boldly alleging in their complaint that without a “grace period,” “[h]undreds of members of the union plaintiffs, and thousands of other eligible electors who will timely file their voter registration applications well before the close of books in 2006 will not be placed on the voter rolls,” (TAC ¶ 139), the Union Plaintiffs have failed to identify even one such member. In response to an interrogatory from the Secretary in April 2007, the Union Plaintiffs could not identify a single member who submitted a timely application in 2006 but who was unable to vote because of the lack of a “grace period.” *See* Composite Exhibit 1 (interrogatory responses of each Union Plaintiff). The Plaintiffs stated that they needed additional information from the Defendants, “which information may be necessary to identify union members injured by the lack of a grace period in 2006.” *Id.* at 10. They further stated that they “agree[d] to identify such members . . . as such information becomes available.” *Id.* Apparently such information does not exist, or at least never “became available.” On August 31, 2007, the Plaintiffs supplemented their response to that Interrogatory with a list of fifty-eight individuals, stating that the individuals on that list “*may have been* injured by a lack of a grace period in 2006.”³ *See* Composite Exhibit 2 (supplemental interrogatory responses). The Secretary has examined the records relating to those fifty-eight individuals, and the results are telling. Twenty-nine of the fifty-eight were registered to vote at the time of the 2006 election, and nineteen actually voted. *See* Exhibit 3 ¶ 6 (declaration of D. Roberts). Of the twenty-nine remaining who were unregistered at the time of the election, twenty-six were not registered for reasons unrelated to the challenged checkboxes. *Id.* Sixteen had other omissions on their applications, including missing date of birth, missing drivers’ license number, etc. *Id.* Ten submitted complete applications but included drivers license numbers or social security numbers

³ The list included fifty-nine names, but one individual was listed twice.

that did not match state records.⁴

The remaining three individuals submitted applications that were deemed incomplete because of the applicants' failure to mark the checkboxes. *Id.* at ¶ 11. Alida Rodriguez submitted an application on September 20, 2006 without marking the felon and mental capacity checkboxes. *Id.* Stephen Haber and Thomas Veal submitted applications on August 31, 2006, and October 9, 2007, respectively, also without marking the felon and mental capacity checkboxes. *Id.* There is no evidence regarding the specific facts and circumstances of these individuals' failures, and Plaintiffs have advanced no evidence that they attempted unsuccessfully to vote at any election. *Id.* A "grace period" could not help those who make no effort to correct their applications and vote.⁵ *See, e.g., Clingman v. Beaver*, 544 U.S. 581, 593 (2005) ("Many electoral regulations, including voter registration generally, require that voters take *some* action"); *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973) ("[I]f [Plaintiffs'] plight can be characterized as disenfranchisement at all, it was not caused by [the challenged law], but by their own failure to take timely steps to effect their enrollment.").

On October 3, Plaintiffs updated their information again. This time they included declarations of three of the fifty-eight previously identified individuals. But none of those declarations creates an issue of material fact for trial in this case. The first declarant, Marie

⁴ These individuals were authorized to vote a provisional ballot. Under Section 97.053(6), Florida Statutes (2006), applicants who submit an otherwise complete application, but whose identifying numbers do not match government records, may vote a provisional ballot and have it counted if they verify the accuracy of their identifying information. Counsel for Plaintiffs in this case has filed an action in the Northern District of Florida challenging this provision of Florida law based on, among other things, the First and Fourteenth Amendments. *See NAACP v. Browning*, No. 07-402 (N.D. Fla.) (Mickle, J.).

⁵ This issue relates to redressability. For standing to exist, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561. There is no evidence that the Union Plaintiffs have even a single member who faces imminent injury from the lack of a "grace period," and even if there were, there is no evidence that the relief sought would redress that injury.

Olive Gayle Kirlew, states that she submitted an application and received an incomplete notice. *See* Exhibit 4. She does not state that she failed to check a box; indeed her application was not rejected because of the checkboxes. *See* Exhibit 3 (att. A).⁶ The second declarant, Bladimir Hernandez, states that he did not receive a voter registration card in time for the 2006 election.⁷ *See* Exhibit 5. After submitting an incomplete application, Mr. Hernandez submitted a *complete* application before book closing in 2006, and his card issued before the Election. *See* Exhibit 3, ¶ 12. Because his application was timely, no “grace period” would have benefited him. Finally, Patricia Anne Benvenuto declares that she received a notice that she had not filled out her form completely. *See* Exhibit 6. She further stated that she made the necessary corrections and mailed it back. *Id.* But Ms. Benvenuto submitted a timely application with no checkboxes deficiency. *See* Exhibit 3 ¶ 12. Although her social security number failed to match, *see* Exhibit 3 ¶ 10, she could have voted a provisional ballot under Florida law, *see* note 4, *supra*. None of these individuals was harmed by the lack of a “grace period.”

Finally, on October 3 and 4, Plaintiffs served lists with hundreds of individuals who “may have been” injured in 2004 or 2006. They make no suggestion that any of these individuals are Union members, and they do not state how (if at all) they were injured. Providing such a list is plainly insufficient to create a disputed issue of material fact to prevent summary judgment.⁸

⁶ Instead of checking the felon and competency boxes, Ms. Benvenuto wrote “no” next to the text. The voter registration official who handled the intake of this application treated the boxes as marked. *Id.*

⁷ The Hernandez declaration was submitted in Spanish. The exhibit includes both his declaration and a version translated into English to the best of the ability of an employee of the Secretary’s counsel.

⁸ Plaintiffs have also indicated that they may call for trial testimony some or all of the individuals on these various lists. Because no such individuals were timely disclosed under Rule 26(a)(1) or 26(e), none should be permitted to testify. *See* Secretary’s Motion in Limine, filed concurrently with this Motion.

There is no evidence that *any* union member will be injured in the future by the lack of a “grace period.” And a party’s failure to identify a single injured constituent prevents it from asserting associational standing. *Nat’l Alliance for the Mentally Ill v. Bd. of County Comm’rs*, 376 F.3d 1292, 1296 (11th Cir. 2004) (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 (1997)); *see also Doe v. Stincer*, 175 F.3d 879, 886 (11th Cir. 1999) (the right of an association to sue on behalf of its constituents does not relieve it of its obligation to show that one of its constituents otherwise had standing to sue); *Common Cause/Georgia v. Billups*, --- F. Supp. 2d ---, 2007 U.S. Dist. LEXIS 68950, at *105 (N.D. Ga. Sept. 6, 2007) (“Further, although Mr. DuBose testified that he was generally aware of at least five individuals who would be affected by the Photo ID requirement, Mr. DuBose did not provide the names of those individuals . . . Mr. DuBose’s testimony consequently does not satisfy Plaintiff NAACP’s burden to identify a member who otherwise would have standing to sue in his or her own right. Consequently, Plaintiff NAACP does not have standing to sue based on an injury to its members.”) (citation omitted).

It is telling that not a single individual plaintiff remains in a case that Plaintiffs assert will affect countless individuals. Their initial complaint, based on different legal issues and claims, included four individual plaintiffs. (Doc. 1 at 1.) At least one individual was later added, (doc. 119), but he later voluntarily dismissed his claims, (doc. 262). The Plaintiffs also pled the case as a class action—representing all injured union members. (TAC ¶ 120-28.) But they never moved for class certification. And for their one remaining claim, the Union Plaintiffs were unable to find a single individual plaintiff to assert the constitutional claims. *Cf. Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir.) (“No doubt there are at least a few such people in Indiana [people who will not vote because of the state’s ID requirement], but the

inability of the sponsors of this litigation to find any such person to join as a plaintiff suggests that the motivation for the suit is simply that the law may require the Democratic Party and the other organizational plaintiffs to work harder to get every last one of their supporters to the polls.”), *cert. granted* --- S. Ct. ---, 2007 WL 1999941 (2007).⁹

More importantly, even if the Union Plaintiffs identified individuals who were harmed in the past, those individuals have had ample opportunity to correct their applications. To assert standing, the Union Plaintiffs would need to demonstrate evidence of *future* harm, which they cannot do. The Union Plaintiffs do not have standing on behalf of their members.

B. The Organizational Plaintiffs Do Not Have Standing on Assert Claims On Their Own Behalves.

The Plaintiffs also allege in their complaint that the book-closing deadline “has frustrated the mission of the [Union] Plaintiffs and forced them to divert substantial resources to counteract Defendants’ unlawful conduct.” TAC ¶ 29. This isolated reference in the Complaint is insufficient to establish standing or to state a claim for relief on behalf of the Unions themselves,

⁹ The lack of harm to any Union member is further borne out by deposition testimony. The Secretary took the deposition of a 30(b)(6) designee for each Union Plaintiff. Each notice included as a designated topic “the alleged harm to the union’s members caused by the challenged statute.” The designated witnesses had no knowledge of harm to specific members in 2006. *See* Exhibit 10 (deposition of AFL-CIO at 31: “Q: With respect to 2006, the 2006 November election, are you aware of any union member who submitted an incomplete application before the book closing deadline, and attempted to correct that application after the book closing deadline? [objection—asked and answered] A: I do not.”), Exhibit 11 (deposition of AFSCME Council 79 at 63: “Q: For the purposes of this deposition today, I just want to make sure that you have no specific facts about any of these AFL or service employee unions with respect to problems they may have had with registration applications. A: I have no direct knowledge of any of these other individuals.”); Exhibit 12 (deposition of SEUI at 30-32: “Q: Do you know of any SEIU member who did not vote in 2006 because of the statute that you have challenged, but who otherwise would have voted in 2006? [objection—calls for legal conclusion] A: I don’t know. * * * Q: Are you aware of any SEIU members who attempted to make corrections to his or her application after book closing in 2006? [objection—asked and answered] A: No.”). (At the time of submitting this motion, the transcript of AFSCME International’s representative was not available.)

as the Complaint nowhere states that the Unions bring suit on behalf of themselves. *Cf.* TAC ¶ 29 (“[Union Plaintiffs] bring suit on behalf of their individual members. . . .”). In Count II, the one remaining claim, Plaintiffs allege only that the challenged law will impact the fundamental right to vote. TAC ¶¶ 140-143. There is no allegation that it will harm the Unions themselves.

But even if direct standing had been properly pled, summary judgment for the Secretary would be warranted. The mere diversion of resources to challenge conduct deemed contrary to an organization’s purposes is not sufficient to create organizational standing. The D.C. Circuit considered this issue and concluded that an organization must allege that “discrete programmatic concerns are being directly and adversely affected” by the challenged activity itself. *National Taxpayers Union v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995) (internal citations and quotations omitted). The Court concluded that the impact of the challenged law upon the organization’s programs, such as educational and other initiatives, could not constitute an injury in fact. “An organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit.” *Id.* at 1434 (quoting *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990); *see also Association for Retarded Citizens v. Dallas County Mental Health & Mental Retardation Center Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994) (“The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization.”). The Court noted that the organization’s “self-serving observation that it has expended resources to educate its members and others regarding [the challenged law] does not present an injury in fact. There is no evidence that [the law] has subjected [the organization] to operational costs beyond those normally expended to review, challenge, and educate the public about revenue-related legislation.” *NTU*, 68 F.3d. at 1434.

Just as the plaintiff in *National Taxpayers Union* could not create standing simply by spending some money on education or advocacy, neither can the Unions in this case. Last month, the United States District Court for the Northern District of Georgia decided a similar issue. In *Common Cause/Georgia v. Billups*, --- F. Supp. 2d ---, 2007 U.S. Dist. LEXIS 68950 (N.D. Ga. Sept. 6, 2007), several individuals and organizations challenged Georgia's requirement that voters show photo identification at the polls. *Id.* at *3. At trial, the Plaintiffs acknowledged that all of the organizational plaintiffs, except for plaintiff NAACP, failed to demonstrate standing. *Id.* at *123. After concluding that the NAACP lacked standing to sue on behalf of its members (because it had failed to identify a single harmed member), the court considered NAACP's claim of standing on its own behalf. *Id.* at *124-25.

The court was unimpressed with the NAACP's "testimony indicating that at some undetermined time in the future, it may have 'to divert unspecified resources to various outreach efforts.'" *Id.* at *126 (quoting *Ind. Democratic Party v. Rokita*, 458 F.Supp.2d 775, 815-16 (S.D. Ind. 2006), *aff'd*, 472 F.3d 949 (7th Cir. 2007), and *cert. granted*, --- U.S. --- (Sept. 25, 2007)).

Furthermore:

[T]he claimed injury suffered by the Organization Plaintiffs is entirely of their own making since any future reallocation of resources would be initiated at the Organization Plaintiffs' sole and voluntary discretion. Such an optional programming decision does not confer Article III standing on a plaintiff. As the D.C. Circuit observed: "The diversion of resources . . . might well harm the [plaintiff's] other programs, for money spent on testing is money that is not spent on other things. But this particular harm is self-inflicted; it results not from any actions taken by [defendant], but rather from the [plaintiff's] own budgetary choices."

Id. at 127-28 (quoting *Rokita*, 458 F.Supp.2d at 816-17.) There is no evidence that the Unions will suffer any particularized harm from the challenged statute. The Unions lack standing to assert their claims, and this Court therefore lacks jurisdiction.

II. THE CHALLENGED STATUTE IS RATIONALLY RELATED TO AN IMPORTANT STATE GOAL.

Even if the Plaintiffs had standing, the Secretary would be entitled to summary judgment. The Plaintiffs have focused nearly all of their litigation efforts on proving the “feasibility” of a limited “grace period” for a limited subset of individuals. But the Constitution does not require states to take all steps that are feasible or possible. The proper inquiry is whether the book-closing period is an “arbitrary time limit unconnected to any important state goal.” *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973). It is not. Moreover, any “burdens” imposed by the book-closing deadline are minimal at best and are fully justified by the State’s regulatory interests. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). (“Lesser burdens, however, trigger less exacting review, and a State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.”) (marks omitted).

A. The Book-Closing Period is Permissible.

Like nearly all states, Florida has a voter registration deadline. Under Florida law, “[t]he registration books must be closed on the 29th day before each election and must remain closed until after that election.” § 97.055(1), Fla. Stat. (2006). Florida’s book-closing period is no longer than those in other states, which have been routinely upheld as constitutional. In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Supreme Court struck down Tennessee’s durational residency requirement, but it wrote favorably about registration deadlines. “The State closes the registration books 30 days before an election to give officials an opportunity to prepare for the election.” *Id.* at 347. The Court did not establish a particular timeframe that would pass constitutional muster, but it approved Tennessee’s thirty-day period. “[Thirty] days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud—and a year, or three months, too much.” *Id.* at 348.

Shortly after deciding *Dunn*, the Supreme Court addressed specific challenges to registration deadlines. In *Marston v. Lewis*, 410 U.S. 679 (1973), the Court considered a challenge to Arizona’s fifty-day registration deadline. Recognizing that “a person does not have a federal constitutional right to walk up to a voting place on election day and demand a ballot,” the Court upheld Arizona’s requirement. *Id.* at 680. “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.” *Id.* The Court accepted the legislative judgment “that the period is necessary to achieve the State’s legitimate goals.” *Id.*

The Court next decided *Burns v. Fortson*, 410 U.S. 686 (1973), upholding Georgia’s fifty-day registration deadline. Relying on *Dunn* and *Marston*, the Court concluded that “the 50-day period is necessary to promote . . . the orderly, accurate, and efficient administration of state and local elections, free from fraud.”¹⁰ *Id.* at 686-87 (quoting district court; ellipses in original); *see also Beare v. Briscoe*, 498 F.2d 244, 247 (5th Cir. 1974) (“We acknowledge the state’s right to impose some reasonable cutoff point for registration . . .”). It is clear from these cases that registration deadlines like Florida’s are constitutionally permissible. Indeed “registration requirements . . . are ‘classic’ examples of permissible regulation.” *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 196 n.17 (1999).

Federal Circuit Courts have piled on as well. *See, e.g., Barilla v. Ervin*, 886 F.2d 1514 (9th Cir. 1989), *overruled on other grounds, Simpson v. Lear Astronics Corp.*, 77 F.3d 1170 (9th

¹⁰ In the context of primary elections, the Supreme Court has upheld a voter registration cutoff of eleven months. *Rosario v. Rockefeller*, 410 U.S. 752, 762 (1973). In that case, voters had to register with a political party three months before a general election to be eligible to vote in the next primary election. *Id.* at 760. The Court noted that “the State is certainly justified in imposing some reasonable cutoff point for registration or party enrollment, which citizens must meet in order to participate in the next election.” *Id.* It then concluded that even the “lengthy” period between the enrollment deadline and the next primary election was connected to an important state goal. *Id.*

Cir. 1996); *Key v. Board of Voter Registration of Charleston County*, 622 F.2d 88 (4th Cir. 1980). In *Barilla*, the Ninth Circuit upheld Oregon's 20-day deadline, even though it was passed by voter initiative over the Legislature's preferred one-day period. The Court noted the brevity of the Supreme Court's decisions on this issue and concluded that the Supreme Court applied a deferential standard. *Id.* at 1532 n.10 ("The relatively lax manner in which the Court reviewed the cutoffs in *Burns* and *Marston* has not been overlooked by commentators."); *id.* at 1532 ("[I]n *Burns*, the Court upheld Georgia's 50-day cutoff in a 1 1/2 page *per curiam* opinion that, like *Marston*, did little more than state that Georgia had shown the cutoff to be 'necessary' to keep voter lists accurate.").

More importantly, the Ninth Circuit recognized the difference between a regulation that actually disenfranchises an entire class of voters and a regulation that merely requires a voter to satisfy registration requirements:

[W]e conclude that summary judgment was properly entered for the defendants. Plaintiffs *Barilla*, *Fore*, and *Knight* were all disenfranchised by their willful or negligent failure to register on time. Therefore, as applied to them, the 1986 initiative does not "totally den[y] [the plaintiffs] the opportunity to vote," as was true in *Dunn*, 405 U.S. at 335, 92 S.Ct. at 999; see also *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 806, 89 S.Ct. 1404, 1407, 22 L.Ed.2d 739 (1969) (strict scrutiny not required where plaintiffs failed to show either a suspect classification or that they were "absolutely prohibited from voting by the State."). Like the plaintiffs in *Rosario*, the three appellants in this case were not "absolutely disenfranchise[d]" by the challenged provision. 410 U.S. at 757, 93 S.Ct. at 1249. They could have registered in time for the March 31, 1987 election, but they failed to do so. What is at issue here is not a "ban" on the plaintiffs' right to vote, but rather, a "time limitation" on when the plaintiffs had to act in order to be able to vote. *Rosario*, 410 U.S. at 758, 93 S.Ct. at 1250. Accordingly, the burden imposed on these plaintiffs' right to vote is not "substantial" enough to require strict scrutiny. See *Socialist Workers Party v. Eu*, 591 F.2d 1252, 1260 (9th Cir.1978), cert. denied, 441 U.S. 946, 99 S.Ct. 2167, 60 L.Ed.2d 1049 (1979); see also *Bullock v. Carter*, 405 U.S. 134, 143, 92 S.Ct. 849, 856, 31 L.Ed.2d 92 (1972) ("not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review"). The Oregon registration cutoff easily passes the rational basis test. The evidence proffered by the defendants concerning the time required to conduct mail

verification of addresses establishes beyond dispute that the 20-day cutoff is rationally related to the legitimate state goals of preventing fraud and maintaining the accuracy of the voting lists.

Id. at 1524-25.

Florida's book-closing deadline is also consistent with federal law. In 1993, Congress passed the National Voter Registration Act, which requires states to accept voter registration applications received "not later than the lesser of 30 days, or the period provided by State law, before the date of the election." 42 U.S.C. § 1973gg-6(a). Congress therefore recognized the permissibility of state registration deadlines of no greater than thirty days. In 2002, Congress overhauled federal elections with the Help America Vote Act, *see* 42 U.S.C. § 15301, *et seq.*, but did not modify the 30-day registration deadline. Florida's book-closing deadline is permissible.

B. The Book-Closing Period is Connected To an Important State Goal.

The undisputed evidence shows that the book-closing date is connected to an important state goal. That is all that is required. *Rosario*, 410 U.S. at 762. The declaration of Patricia Hollarn, an eighteen-year veteran Supervisor of Elections, makes clear that shortly before primary and general elections, the office workload vastly increases. *See* Exhibit 7 ¶ 3. She and other Supervisors rely on the book-closing deadline to prioritize, manage, and staff all the duties that must be accomplished, in specific order, prior to election day. *Id.* ¶ 5. The book closing deadline gives the Supervisors of Elections Offices the certainty to finalize the voter list, including the newly registered, while at the same time permitting concentration on the enormous workload that accumulates in advance of any election. *Id.* ¶ 6. The book closing deadline contributes to the management of this workload spike during the four weeks prior to an election, which is the most tumultuous period of the year for the Supervisors of Elections. *Id.* The election preparation duties and responsibilities during that time visit enormous pressure and stress upon all the employees of each Florida Supervisor of Elections. *Id.* ¶ 7. Proper attention

to all of these duties and responsibilities ensure efficient elections free from fraud. *Id.* ¶ 8.

The specific duties just prior to election day, which are all outlined in the Hollarn declaration, include (i) receiving and processing of requests for absentee ballots, which can average 600 to 1,000 requests per day in Okaloosa County alone, (ii) addressing the vast increase of walk-in traffic at offices, (iii) training poll workers, a key element for election-day success, nearly every day, (iv) preparing hundreds of different ballot styles, (v) matching ballot styles with proper precincts, (vi) readying all polling sites for election day, including assuring accessibility, security and communications are in place, (vii) conducting final testing and distribution of all voting equipment and supplies, (viii) posting and mailing sample ballots, (ix) handling dozens of voter registration record changes (for registered voters) that arrive daily, including processing, scanning, acknowledging, and indexing for recordkeeping purposes, and (x) preparing final precinct registers for each precinct. *Id.* ¶ 9.

In addition to these tasks, early voting begins fifteen days before election day. § 101.657(1)(d), Fla. Stat. Early voting, which began in 2000, has substantially increased the workload of all Supervisors. *See* Exhibit 7 ¶ 9(m). These election tasks are not in dispute. Neither is their importance in conducting fair and efficient elections. The declaration of Defendant Kurt Browning further confirms this. Exhibit 8. Secretary Browning served as a Supervisor of Elections for approximately twenty-six years before being appointed Secretary of State, Florida's Chief Elections Official. *Id.* ¶ 1-2; § 97.012, Fla. Stat. (2006) ("The Secretary of State is the chief election officer of the state . . ."). As the Browning Declaration states, "[t]he voter registration book closing deadline provides a critical pre-election benchmark whereby the Supervisors of Elections have virtual certainty with respect to the number of voters in the county, and by precinct, whom they must service for absentee balloting, early voting, and election day

voting. The Supervisors rely on this certainty as a means of organizing, prioritizing and managing the numerous pre-election day responsibilities, particularly those occurring during the last four weeks before election day.” Exhibit 8 ¶ 5. These facts all demonstrate a proper state purpose justifying the book-closing date, *see Rosario v. Rockefeller*, 410 U.S. 752, 762 (1972) (“The preservation of the integrity of the electoral process is a legitimate and valid State goal.”). In the face of these facts, none of which is in dispute, the Plaintiffs focus on whether some sort of “grace period” possibly could be feasible. That is not the proper inquiry.

C. The Purported Harm Suffered Is Insufficient to Overcome the State’s Regulatory Interest.

In light of the state’s important regulatory interest in maintaining the book-closing deadline, any harm the Union Plaintiffs might allege is insufficient as a matter of law. In determining the constitutionality of a state’s election regulation, a Court must consider the purported harm caused to voters. The Court must “first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate.” *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). The character and magnitude of any burden on the Unions’ members is insignificant. *See Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973) (“[I]f [Plaintiffs’] plight can be characterized as disenfranchisement at all, it was not caused by [the challenged law], but by their own failure to take timely steps to effect their enrollment.”). And, even if the Plaintiffs could identify a handful of people who—with near certainty—will fail in the future to check the boxes and who would—with near certainty—avail themselves of some “grace period” after book closing, that “harm” is insufficient to overcome the state’s important regulatory interests established in the Browning and Hollarn declarations. “The fewer people harmed by a law, the less total harm there is to balance against whatever benefits the law might confer,” and “the less of a showing the state

need make to justify the law.” *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007). The Plaintiffs have failed to present evidence sufficient to create an issue of fact as to whether there will be substantial harm caused by the lack of a “grace period.”

D. The Constitution Does Not Require a State to Do All That Is Feasible.

The Plaintiffs hope to prove that a “grace period” of some sort would be feasible. In connection with their settlement agreement, they received declarations from five Supervisors of Elections who are former defendants. That declaration states: “If the law changed to allow grace periods, the Supervisors would make reasonable efforts to properly administer a grace period in their respective counties, including but not limited to the allocation of sufficient staff and resources, subject to their availability.” Exhibit 9, ¶ 20. The Secretary is certain the Supervisors would make reasonable efforts to comply with *all* election regulations. But what the Supervisors say they would do—or even could do—does not resolve any constitutional issue.

Feasibility is not a proxy for constitutionality when it comes to election regulation. If it were, Courts would drown in election law challenges. The Seventh Circuit recently affirmed dismissal of a suit in which working mothers argued the Constitution gave them a right to vote absentee even if they are not absent from their county on election day. *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004). The plaintiffs noted that in other states (including Florida) any voter could vote absentee. And in Oregon, all voters vote by mail. *Id.* at 1131. So the plaintiffs’ requested relief was obviously feasible. But the Court nonetheless affirmed the dismissal. “For it is obvious that a federal court is not going to decree weekend voting, multi-day voting, all-mail voting, or Internet voting (and would it then have to buy everyone a laptop, or a Palm Pilot or Blackberry, and Internet access?).” *Id.* at 1130. All of these options could be “feasible,” but that is not the issue.

The Court affirmed the dismissal without a detailed factual record and without holding

the state to any substantial burden of proof;

[The Constitution] confers on the states broad authority to regulate the conduct of elections, including federal ones. Because of this grant of authority and because balancing the competing interests involved in the regulation of elections is difficult and an unregulated election system would be chaos, state legislatures may without transgressing the Constitution impose extensive restrictions on voting. Any such restriction is going to exclude, either *de jure* or *de facto*, some people from voting; the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves.

Id. at 1130. States are not burdened to prove that every component of every election regulation is necessary to avoid an election catastrophe. For example, Florida permits early voting beginning fifteen days before an election. § 101.657(1)(d), Fla. Stat. (2006). Would it not be feasible to allow it up to twenty days before an election? Why could it not be done by phone or Internet? A request for an absentee ballot must be received no later than 5:00 p.m. on the sixth day before the election. § 101.62(2), Fla. Stat. (2006). Would it not be feasible to allow them to be received on the fifth day before the election? If polls must be open from 7:00 a.m. to 7:00 p.m., § 100.011(1), Fla. Stat. (2006), why could they not stay open until 8:00 p.m.? Or nights or weekends? Each one of these changes potentially could allow someone to vote who might not otherwise. As the Supreme Court has explained, “[e]lection laws invariably affect—at least to some degree—the individual’s right to vote . . . [but] to deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes. The Constitution does not require that result” *Clingman v. Beaver*, 544 U.S. 581, 593 (2005) (internal quotations and citations omitted). These individual issues of election regulation are best determined by state legislatures—not by interest groups through federal litigation. Moreover, Florida’s election regulation must be considered in its entirety, and attacks on individual components cannot be resolved without looking at the entire system for

administering elections.¹¹ Conducting a trial on the feasibility of implementing the Plaintiffs’ “grace period” would serve no benefit. Feasible or not, the absence of a “grace period” is a reasonable Legislative judgment that serves important state interests. *See* Exhibit 8.

E. The State Legislature Is Best Situated To Establish the Proper Registration Deadline.

The Florida Legislature enjoys substantial discretion regarding the time, place, and manner of administering elections. “[A]s a practical matter, there must be a substantial regulation of the elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. In any event, the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, *the registration* and qualifications of voters, and the selection and qualification of candidate.” *Storer v. Brown*, 415 U.S. 724, 730 (1974) (emphasis added); *accord Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (a state may impose “reasonable, nondiscriminatory restrictions upon the . . . rights of voters”).

The Florida Legislature must weigh many options when regulating the conduct of elections. It must carefully balance competing interests involved in conducting fair and efficient elections, free from fraud. Although the Legislature could modify the registration deadline, it might do so at the expense of other Legislative decisions. For example, the Legislature provides

¹¹ Attacks on limited provisions with particular circumstances in mind leave the state open to inconsistent decisions and administrative chaos. For example, if the Plaintiffs were successful in obtaining a court-ordered “grace period” for individuals who timely submitted applications missing marked checkboxes, a subsequent challenge by voters who submitted untimely applications will attack that policy of more favorably treating individuals who submitted incomplete applications than individuals who submitted no application. These limited piece-meal attacks are not workable—particularly when, as here, there is no substantial burden caused by any regulation. These issues should be reserved for the Legislature.

for early voting and absentee voting without regard to absence. *See generally* §§ 101.657, 101.662 Fla. Stat. (2006). Neither of these initiatives is constitutionally required, *see, e.g., Anderson v. Canvassing and Election Bd. of Gadsden County, Fla.*, 399 So. 2d 1021, 1023 (Fla. 1st DCA 1981), but the Legislature provides them for the benefit and convenience of Florida voters. Both of these programs provide additional challenges to—and require additional effort from—the Supervisors of Elections’ limited resources. *See* Exhibit 7. A change to the statutory book-closing deadline, which would place additional burdens upon Supervisors of Elections, could preclude the expansion of these and other innovative programs. It is up to the Legislature to make these determinations, balance competing interests, and allocate limited administrative resources in the best manner. The Constitution does not teach Federal Courts to rewrite state election codes, *Clingman*, 544 U.S. at 593, which is what Plaintiffs would have this Court do.

CONCLUSION

The Plaintiffs do not have standing to assert their claims, so this Court lacks jurisdiction. The Plaintiffs’ failure to demonstrate that even a single person will be harmed by the challenged law is dispositive of their claim. But even if they had standing, the undisputed facts demonstrate that there is a legitimate state interest in maintaining a registration deadline by which time applicants must submit complete voter registration applications. The Florida Legislature struck a reasonable balance between competing interests, and there is no evidence to suggest that the legislative determination has resulted in a substantial burden to voters. Accordingly, there are no facts to be tried, and the Secretary is entitled to summary judgment.

Respectfully submitted, this 8th day of October, 2007.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been served electronically through the Court's CM/ECF system or by United States mail this 8th day of October, 2007 (with US mail to post on October 9), to the following:

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