

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

)	
LEAGUE OF WOMEN VOTERS OF)	
FLORIDA; COMMON CAUSE)	
FLORIDA; and JOANNE LYNCH AYE,)	
)	
Plaintiffs,)	
)	CASE NUMBER
v.)	
)	
RICHARD L. SCOTT, in his official)	
capacity as Governor of the state of Florida,)	
)	
Defendant.)	
)	

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’
EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

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PRELIMINARY STATEMENT

Defendant Rick Scott is a candidate for U.S. Senate in the 2018 election. As might be expected, he is aggressively pursuing the office he seeks. Defendant Scott is also the Governor of Florida, charged with overseeing crucial aspects of the electoral process, appointing (and suspending) state and local election officials, and ultimately certifying election results. Though Florida governors have engaged in political races while in office, and may of course do so legitimately, the authority they possess makes it especially imperative that they clearly insulate their exercise of official power from their personal efforts to win elections. Most Florida governors who have been political candidates while in office have appreciated and respected this crucial distinction.

But not Governor Scott. To the contrary, he has sought to use the powers of his office to advantage himself and disadvantage his opponent. Most egregiously, last week he used his official platform to accuse election officials in counties he expected to lose of criminal activity, despite having no evidence to support that claim. Even more alarming, he purported to have deployed state law enforcement to investigate officials in those counties. These actions would be disturbing under any circumstances, but they are particularly problematic given the state of his Senate race. He leads his opponent by a small enough margin to trigger an automatic recount. This means that the millions of Florida voters whose ballots were cast last

week will have the effect of their votes determined by the officials engaged in conducting those recounts and certifying results. Governor Scott has already misused his authority to influence that high-stakes and fast-moving process, and the powers of his office give him the opportunity to continue to misuse his authority.

Plaintiffs are an individual Broward County voter and organizations devoted to the democratic process whose members are Florida voters.¹ These voters are entitled to an electoral process that subjects every cast ballot to a neutral process of determining which ballots are valid, tabulating the votes reflected on those ballots, and certifying the ultimate results. Governor Scott has revealed his inability to oversee a suitably neutral process. Plaintiffs therefore ask this court for emergency relief to preclude Governor Scott from exercising authority over the conduct of the closely contested election in which he continues to pursue his candidacy.

FACTUAL BACKGROUND

I. The Governor's Authority over Elections

The Governor's Office has immense influence over election administration in the state of Florida. The Governor is one of three members of Florida's Elections Canvassing Commission ("ECC")—the body that certifies the result of Florida's federal, state, and multicounty elections. The ECC consists of the Governor and two

¹ Hereinafter, references to Plaintiffs' constitutional rights refer to the rights of individual Plaintiff Joanne Lynch Aye and the members of organizational Plaintiffs the League of Women Voters of Florida and Common Cause Florida.

members of the Florida Cabinet that he selected. Compl. ¶ 13; Fla. Stat. § 102.111. The Governor also has broad authority to quickly and unilaterally suspend members of the county election canvassing boards from their supervisor, judge, or county commissioner positions. Compl. ¶ 14; Fla. Const. art. IV, § 7(a); Fla. Stat. §§ 112.40, 112.50; *see also* Fla. Att’y Gen. Op. 2013-23 (2013). And the Governor appointed Florida’s chief election administrator, the Secretary of State, who is in charge of—among other things—determining whether election returns require a machine or hand recount. Compl. ¶ 15; Fla. Stat. §§ 102.141, 102.166.

II. Governor Scott’s Race for Senate and His Use of Official Authority to Advance His Candidacy

Defendant is currently a candidate for the U.S. Senate. As of 7 a.m. on November 12, he is leading his opponent, Bill Nelson, by less than 13,000 votes, or approximately .15 percentage points. *See* Florida Election Watch, *available at* <https://floridaelectionwatch.gov/FederalOffices/USSenator> (last visited November 12, 2018). Pursuant to Florida law, a candidate is entitled to a manual recount if the margin of victory is less than .25 percentage points. *See* Fla. Stat. § 102.166. Accordingly, the race has not been decided, and likely will not be until on or after

November 18, 2018. Frances Robles and Patricia Mazzei, *Florida Begins Vote Recounts in Senate and Governor's Races*, N.Y. Times (Nov. 10, 2018).²

As noted above, Defendant's statutory authorities related to elections create an inherent potential for conflict of interest when he himself is a candidate. Beyond that inherent potential, however, Defendant has taken overt action demonstrating conflict of interest and bias in discharging his duties with respect to the ongoing Senate race. Defendant has recently made clear his intention to use the power of his office to interfere with the vote-counting process and tilt the results of the election in his favor. Compl. ¶ 20. In particular, on November 8, 2018, Defendant Scott's Senate campaign, Scott for Florida, announced and held a press conference. Compl. ¶ 21; Steve Bousquet and Elizabeth Koh, *Rick Scott sues elections supervisors over vote count, orders FDLE probe*, Tampa Bay Times (Nov. 8, 2018).³ The press conference—held by Scott for Florida, *not* the Office of the Governor—took place on the steps of the Florida governor's mansion, a taxpayer-funded venue not normally used for partisan political activity. Compl. ¶ 21.

² Available online at <https://www.nytimes.com/2018/11/10/us/florida-senate-governor-votes-recount.html>.

³ Available online at <https://www.tampabay.com/florida-politics/buzz/2018/11/08/rick-scott-sues-broward-elections-supervisor-over-vote-count/>.

At the press conference, Defendant Scott called on the Florida Department of Law Enforcement (“FDLE”) to investigate Broward and Palm Beach Counties—both supervised by elected Democrats—for “rampant fraud.” Compl. ¶ 24; Patricia Mazzei, *Rick Scott Claims Rampant Fraud in Florida, as Senate and Governor Races Tighten*, N.Y. Times (Nov. 8, 2018).⁴ Both counties have significantly more registered Democrats than registered Republicans, and are counties upon which Defendant Scott’s Senate race may turn. *See* Florida Division of Elections, *Voter Registration – By County and Party* (Sept. 30, 2018).⁵

The Governor is the chief law enforcement officer of the State of Florida, and one of two heads of the FDLE. Compl. ¶ 16; Florida Department of Law Enforcement, *Our Structure*.⁶ The other head, the FDLE Commissioner, was appointed by the Governor. Compl. ¶ 16. Despite apparently appearing at the press conference in his role as a *candidate*, Defendant Scott was clearly acting in his role as *governor* when he asked the FDLE, a state agency under his control, to investigate the “unethical liberals” he accused of plotting to steal the U.S. Senate seat from him.

⁴ Available online at <https://www.nytimes.com/2018/11/08/us/florida-recount-nelson-scott-desantis-gillum.html>.

⁵ Available online at <https://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-monthly-reports/voter-registration-by-county-and-party/>.

⁶ Available online at <http://www.fdle.state.fl.us/About-Us/About-Us.aspx>.

Compl. ¶ 25. In this capacity, Defendant Scott made clear he would “not sit idly by while unethical liberals try to steal this election.” John Kennedy, *Rick Scott sues as recounts loom and vote margins thin*, Palm Beach Post (Nov. 8, 2018).⁷

Defendant Scott doubled down on his call for a criminal investigation into county vote-counting operations on Fox News’s *Hannity* show, where he attributed his shrinking margin to “left-wing activists, we’ve got some Democrat D.C. lawyers, [who are] down here for one purpose—to steal this election.” Fox News, *Rick Scott files lawsuit in contested Florida Senate race* (Nov. 8, 2018).⁸ On national television, Defendant Scott accused local election officials of “finding as many votes as it takes to . . . win this election” for Defendant Scott’s opponent, but made clear that *he*, not his opponent, was “gonna make sure we win this.” *Id.* Defendant Scott’s campaign manager has reiterated a similar message. Arek Sarkissian, *Judges side with Scott in suits against Broward, Palm Beach election supervisors*, Politico (Nov. 9, 2018).⁹

Defendant Scott produced no evidence of the alleged fraud and there have been no “indications of fraud,” so the FDLE has not actually opened an investigation.

⁷ Available online at <https://www.palmbeachpost.com/news/20181108/rick-scott-sues-as-recounts-loom-and-vote-margins-thin>.

⁸ Available online at <https://www.youtube.com/watch?v=sMHVcEOtJuw>.

⁹ Available online at <https://www.politico.com/states/florida/story/2018/11/09/judges-side-with-scott-in-suits-against-broward-palm-beach-election-supervisors-690950>.

Compl. ¶ 28; Gray Rohrer, et al., *Florida Vote: Recounts Ordered for U.S. Senate, Governor, Agriculture Commissioner*, Orlando Sentinel (Nov. 10, 2018).¹⁰ Indeed, the Florida Department of State had election monitors stationed in Broward County during the election who, even after Defendant Scott’s public accusation, affirmed that they have seen “no evidence of criminal activity” there. *See* Robles and Mazzei, *supra*.

But Defendant Scott’s announcement had immediate impact: his unfounded allegations of criminal election fraud, made from the steps of the Governor’s mansion, caused rowdy protests that forced Broward County election officials to request police protection for their vote-counting operation. Compl. ¶ 29; Alex Harris and David Smiley, *Broward County Officials Need Police Protection to Tally Florida Election Results*, Tampa Bay Times (Nov. 9, 2018).¹¹ And after a recent court hearing, the supervisor of elections of Palm Beach County was met with protestors yelling that she should be “locked up.” Compl. ¶ 29; Rohrer, et al., *supra*.

Defendant Scott’s threat of law enforcement supervision of the democratic process “underscored the lack of a clear dividing line between [Defendant’s] dual

¹⁰ Available online at <https://www.orlandosentinel.com/news/politics/political-pulse/os-florida-recount-vote-tally-deadline-20181110-story.html>.

¹¹ Available online at <https://www.tampabay.com/florida-politics/buzz/2018/11/09/broward-county-officials-need-police-protection-to-tally-florida-election-results/>.

roles as candidate for higher office and his current job as governor.” Compl. ¶ 5; Steve Bousquet and Nicholas Nehamas, *FDLE is not investigating Broward elections—because Gov. Scott didn’t order it*, Miami Herald (Nov. 9, 2018)¹². Notably, Florida law already provides an established procedure for state-level supervision of county-level election processes, making Defendant Scott’s threat to send in state police particularly extraordinary. Compl. ¶ 34; Fla. Stat. § 101.58(1).

As recently as this past Friday—as vote-counting continues across the state—Defendant Scott refused to disavow his unsubstantiated claims of fraud or his call for an investigation, even in the face of two state agencies announcing that his claims have no basis. Compl. ¶ 31; Matt Dixon, *After Scott requested investigation, law enforcement says no voter fraud allegations found*, Politico (Nov. 9, 2018).¹³

ARGUMENT

Plaintiffs seek a temporary restraining order (“TRO”) and preliminary injunction pursuant to Fed. R. Civ. P. 65 that will prevent Defendant Scott from using his authority as governor to control or influence the processing and counting

¹² Available online at <https://www.miamiherald.com/news/politics-government/state-politics/article221407235.html>.

¹³ Available online at <https://www.politico.com/states/florida/story/2018/11/09/after-scott-requested-investigation-law-enforcement-says-no-voter-fraud-allegations-found-690552>.

of ballots in the 2018 Florida election for U.S. Senate, and bar him from participating in the certification of election results from the same election.

In order to obtain a temporary restraining order or a preliminary injunction, a plaintiff must establish (1) a substantial likelihood of success on the merits, (2) that it will suffer irreparable injury unless the injunction issues, (3) that the threatened injury outweighs whatever damage the proposed injunction may cause a defendant, and (4) that the injunction will not be adverse to the public interest. *United States v. Florida*, 870 F. Supp. 2d 1346, 1348 (N.D. Fla. 2012) (citing *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (*en banc*)). “The purpose of a temporary restraining order, like a preliminary injunction, is to protect against irreparable injury and preserve the status quo until the district court renders a meaningful decision on the merits.” *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1231 (11th Cir. 2005). To that end, a “substantial likelihood of success on the merits” requires “only *likely* or probable, rather than *certain*, success.” *Id.* at 1232.

I. Plaintiffs Have a Substantial Likelihood of Success on the Merits.

A. Plaintiffs are substantially likely to prevail on their Due Process claim in light of Scott’s demonstrated intention to use his official powers to intimidate election officials.

“[T]he due process clause of the fourteenth amendment prohibits action by state officials which seriously undermine[s] the fundamental fairness of the electoral

process.” *Duncan v. Poythress*, 657 F.2d 691, 700 (5th Cir. Unit B Sept. 1981)¹⁴; *see also Curry v. Baker*, 802 F.2d 1302, 1315 (11th Cir. 1986). Due process does not allow “wilful conduct which undermines the organic processes by which candidates are elected.” *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975). The use of lawful executive authorities may violate due process when it is done with the intention to impede an election. *See Joyner v. Browning*, 30 F. Supp. 512, 519 (W.D. Tenn. 1939) (granting injunction to prevent governor from using law enforcement officers and National Guard troops to intimidate voters). These principles apply with special force where an official with power over an election process is a candidate in an ongoing race. It is axiomatic that “no man can be a judge in his own case.” *In re Murchison*, 349 U.S. 133, 136 (1955). As the Founders recognized, if an official were to do so, “his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.” James Madison, *The Federalist No. 10* (1787); *see also United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961) (conflict of interest is “an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern”). While the question of impermissible bias arises most often in the context of judicial

¹⁴ Decisions from the Fifth Circuit issued prior to October 1, 1981, are binding in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

proceedings, *see, e.g., Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 887-90 (2009), the prohibition extends to other government officials engaged in both adjudicatory and rule-making procedures, *see Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979). Both violate due process. A constitutional violation may occur even without proof of “actual bias,” but where actual bias has been shown, there is “no doubt” that it warrants relief. *Caperton*, 556 U.S. at 883.

Here, there is ample evidence that Governor Scott has sought to use his powers to interfere with the vote-counting process and tilt the results of the election in his favor. His Thursday evening press conference was announced by his Senate campaign, not his state office. *See* Alexandra Glorioso and Matt Dixon, *Democratic Group Says Scott Misused State Office to ‘Interfere With Election,’* Politico (Nov. 11, 2018).¹⁵ Yet it was held at the official state residence, a taxpayer-funded site not normally used for partisan political activity. At the press conference, he called on the Florida Department of Law Enforcement to investigate the Broward Supervisor of Elections for “rampant fraud,” even though the Florida Department of State already had election monitors in the offices of the Broward County Supervisor of Elections who had not reported any criminal activity. *See* Mazzei, *supra*. Scott made

¹⁵ Available online at <https://www.politico.com/states/florida/story/2018/11/11/democratic-group-says-scott-misused-state-office-to-interfere-with-election-691727>.

similar, unfounded allegations of fraud in a fiery appearance on Sean Hannity's Fox News broadcast. *See* Fox News, *supra*. Scott has also refused the organization Plaintiffs' written request that he recuse himself from any election-related activity. *See* Compl. ¶ 35; Steve Bousquet, *League of Women Voters Urges Gov. Rick Scott to 'Remove Yourself' from Ballot Counts*, Tampa Bay Times (Nov. 11, 2018).¹⁶

This brazen attempt to use his powers as Governor to intimidate officials responsible for counting the votes in his Senate race does not comport with the guarantees of due process. The fact that no investigation has apparently commenced does not mitigate this abuse of power—it certainly constituted a credible threat that might intimidate county election officials engaged the procedures of tabulating and recounting ballots. Indeed, the fact that Defendant failed to muster sufficient evidence to even commence an investigation, *see* Dixon, *supra*, underscores the entirely improper nature of his threat: it was clearly an attempt to use the power of his office to sway the vote without any legitimate basis. Furthermore, Defendant Scott's allegation of rampant fraud led to rowdy protests that caused Broward County election officials to request police protection for their vote-counting

¹⁶ Available online at <http://www.tampabay.com/florida-politics/buzz/2018/11/11/league-of-women-voters-urges-rick-scott-to-remove-yourself-from-ballot-counts/>.

operation, as well as crowds chanting “lock her up” at the elected county supervisors targeted by Defendant Scott. *See Harris and Smiley, supra*.

Moreover, Defendant Scott’s actions in *sua sponte* calling for an investigation by the FDLE represent a “significant[] depart[ure] from previous state election practice,” making it more likely that they constitute a due process violation. *See Warf v. Bd. of Elections of Green Cty.*, 619 F.3d 553, 559 (6th Cir. 2010). Florida law authorizes the Department of State to appoint deputies to investigate counties’ election processes “at any time it deems fit . . . or upon the petition of any candidate.” Fla. Stat. § 101.58(1). During the 2012 presidential election, Mitt Romney’s presidential campaign requested that the Division of Elections—a subdivision of the Secretary of State’s Office—appoint observers under this provision to review the manual ballot-duplication process that Palm Beach County Supervisor of Elections Susan Bucher had to undertake after a ballot misprint affected some 36,000 vote-by-mail ballots. *See Letter from Raquel A. Rodriguez to John Boynton, Florida Department of State (Oct. 18, 2012) (attached hereto as Ex. A)*. The appointment of deputies required no action from then-Governor Scott (who was not on the ballot for the 2012 election). The Division of Elections tasked two civilians — not law enforcement officers — to oversee the process. The Division of Elections’ official report in 2012 concluded that, “[f]rom first-hand observation, the observers believe that the Palm Beach County absentee duplication process for the 2012 General

Election was conducted in a fair and impartial manner that is generally consistent with Florida Election Code.” See Florida Department of State, *Election Observation Report Ballot Duplication Process* 7 (Oct. 22-24, 2012).¹⁷

Under these circumstances, it would be an unconstitutional conflict of interest for Defendant Scott to play a role in certifying the results of this election. Plaintiffs need not definitively prove that Defendant Scott is actually biased in his own favor in order to prevail in this litigation. As long as there is an objective risk that he is biased, he should not be permitted to participate in judging outcomes in his own election. See *Caperton*, 556 U.S. at 886. Recusal is required whenever, “under a realistic appraisal of psychological tendencies and human weakness,” the decision-maker’s interest in the proceedings “poses such a risk of actual bias or prejudgment” that it jeopardizes due process. *Id.* at 883-84 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

Caperton is instructive. In that case, the Court considered whether an elected justice could, consistent with due process, participate in a lawsuit involving his principal political patron. Without determining that the judge in the case actually harbored bias in favor of his patron, the Supreme Court concluded that the patron’s “significant and disproportionate influence—coupled with the temporal relationship

¹⁷ Available online at <https://dos.myflorida.com/media/693813/palm-beach-county-election-observation-report-oct-22-24-2012.pdf>.

between the election and the pending case” created a “probability of actual bias [that] rises to an unconstitutional level.” *Id.* at 886-87. *Caperton* made abundantly clear that, while there may be close cases, a due process violation occurs whenever the objective risk of bias is “extreme.” *Id.*

Governor Scott’s conduct to date demonstrates an objective risk that he will be biased towards his own candidacy if he is permitted to exercise authority over the elections process. Under Florida law, the governor has a variety of authorities over elections and election officials. The governor is ordinarily responsible for certifying the results of Florida’s senatorial election as a member of the Elections Canvassing Commission—a power especially susceptible to abuse in a race, like the current Senate election, that is headed toward a recount and may involve contested questions of whether county-level results are proper and warrant certification. Indeed, the Commission has the power to exclude returns from county canvassing boards if it is “unable to determine the true vote for any office.” Fla. Stat. § 102.131. Defendant Scott’s inherent conflict of interest as a candidate in the election, as well as his statement that his rivals are trying to “steal” the election, his unfounded allegations of “rampant fraud,” his credible threat to deploy state law enforcement agents in response to those unfounded allegations, and his attacks on particular Supervisors of Elections, all tend to show an objective risk that bias would infect his decisions with respect to these authorities. The risk of bias is even more extreme than it was in

Caperton, where the risk of bias arose indirectly from the interest of the judge's political patron; here, the risk of bias arises directly from Defendant Scott's interest in his own election to office.

Moreover, Defendant Scott's threats and the public backlash they have set in motion create a real, present, and continuing threat that Governor Scott will improperly influence the election process during the ongoing recount. The governor also has broad power to immediately suspend canvassing board members from their positions as supervisor of elections, judge, or county commissioner. *See* Fla. Const. art. IV, § 7(a); Fla. Stat. §§ 112.40, 112.50. Scott's threats risk deterring or chilling the independent exercise of judgment by these officials, who would have a reasonable fear of retaliation by Governor Scott and who would lose pay and benefits for the suspension period. And with a high likelihood of a manual recount in Florida's Senate race, Florida voters will be relying on the sound and neutral judgment of election officials to obtain an accurate result in the election. Moreover, Defendant Scott's threats to inject law enforcement officers into an otherwise bland administrative setting risks disrupting the Broward and Palm Beach County Canvassing Boards' ability to complete their recounts within the statutorily allotted time period. Under these circumstances, the Constitution forbids Defendant Scott from exercising his authorities as governor with respect to the Senate seat for which

he is a candidate, including by publicly ordering or suggesting that law enforcement officials should investigate baseless claims of fraud in the ongoing election process.

B. Plaintiffs Are Substantially Likely to Prevail on Their Claim That Defendant’s Use of Governmental Power to Influence the Election Results Violates the First Amendment.

Plaintiffs are also likely to prevail on their claim that Defendant’s repeated use of his office to advance his own political fortunes and attack his opponents violates Plaintiffs’ freedom of association under the First Amendment. State authority to regulate elections is “always subject to the limitation that [it] may not be exercised in a way that violates other specific provisions of the Constitution.” *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). “First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views.” *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring). The Supreme Court’s election law precedent repeatedly emphasizes that subjecting voters to disfavored treatment because of their political views or associations violates the First Amendment. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that firing of government employees on the basis of their political beliefs impermissibly violates the First Amendment); *California Democratic Party v. Jones*, 530 U.S. 567, 586 (2000) (holding California’s blanket primary system impermissibly burdens freedom of association); *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983) (holding state’s

filing requirements impermissibly burden First Amendment rights where those requirements “fall[] unequally” on some candidates). And in election law, as in other contexts, “a significant impairment of First Amendment rights must survive exacting scrutiny.” *Elrod*, 427 U.S. at 362.

Governor Scott’s actions to interfere with the election have been targeted to subject his political opponents and their supporters to disfavored treatment in the exercise of their First Amendment rights.¹⁸ By falsely and recklessly accusing election officials in heavily Democratic counties of election fraud and threatening them with criminal investigation, he has already impaired Plaintiffs’ First Amendment rights. Issuing clearly unfounded accusations of criminal activity, paired with a credible threat to deploy law enforcement, had only one plausible purpose: intimidating officials of counties in which he believed large numbers of voters support his opponent. Interfering with the ability of those officials to discharge their duties makes it less likely that voters in those counties will have their votes counted. Such a misuse of governmental power has the purpose and effect of penalizing voters based on their political affiliation, an exercise of authority that the First Amendment does not tolerate. It is not necessary that Defendant Scott follow

¹⁸ While Plaintiffs the League of Women Voters of Florida and Common Cause Florida are nonpartisan organizations, their membership includes voters who cast ballots for Senator Bill Nelson, Governor Scott’s opponent.

through on his threatened FDLE investigation; a credible threat of enforcement action is sufficient to establish a First Amendment injury. *See Nat'l Student Ass'n v. Hershey*, 412 F.2d 1103, 1111-12 (D.C. Cir. 1969).

C. Plaintiffs Are Substantially Likely to Prevail on Their Claim That Defendant's Use of Governmental Power to Influence the Election Results Violates the Right to Vote.

“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). “The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Moreover, the Constitution guarantees each voter the right to cast an *effective* vote—that is, a ballot that is counted correctly towards the outcome of the election. As the Supreme Court stated in *United States v. Classic*, “[o]bviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted This Court has consistently held that this is a right secured by the Constitution.” 313 U.S. 299, 315 (1941); *see also Gray v. Sanders*, 372 U.S. 368, 380 (1963) (“[T]he right to have one’s vote counted’ has the same dignity as ‘the right to put a ballot in a box.’”) (quoting *United States v. Mosley*, 238 U.S. 383, 386

(1915)). Claims asserting violation of the right to vote are evaluated under the two-part test articulated in *Anderson*, 460 U.S. at 789, and *Burdick v. Takushi*, 504 U.S. 428 (1992). See *Crawford v. Marion Cty. Elec. Bd.*, 553 U.S. 181, 204 (2008) (“To evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process—we use the approach set out in *Burdick*.”) (Scalia, J., concurring). In *Burdick*, the Supreme Court held that where the right to vote is “subjected to ‘severe’ restrictions” by state regulation, in order to survive, “the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’” 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

Here Defendant has severely burdened Plaintiffs’ right to have their votes counted fairly and accurately by subjecting them to an election system that is infected with bias and conflict of interest. Defendant has systematically signaled that he will use the official machinery of his office to diminish the effective participation of his opponents’ supporters. Operating in this context, Plaintiffs face a severe burden: ballots have been cast, but those ballots will have effect only if properly counted. Defendant has already sought to use the power of his office to skew that process in Broward and Palm Beach Counties. As recounts continue and the need to certify the election nears, Defendant may further misuse the machinery of his office to skew the counting of votes or the certification of the election, thus rendering ineffective any ballots not counted properly as a result. It is hard to fathom what

compelling state interests could support the misuse of official power to advance one's candidacy for office.

II. The Remaining Factors for the Issuance of a TRO Weigh in Plaintiffs' Favor.

The remaining requirements for a TRO are all satisfied here and weigh heavily in favor of granting preliminary relief.

Irreparable injury. Defendant Scott's threatened intervention in the tabulation, and his control over the certification, of Florida's election results violates Plaintiffs' constitutional right to a fair administration of the election in which they have voted; their right to association protected by the First Amendment; and their right to have their votes counted in a fair procedure. These are concrete and substantial injuries. And once suffered they cannot be undone. If Defendant is allowed to unlawfully interfere with the vote-counting and certification processes, it will be too late for any redress of Plaintiffs' constitutional injuries. Once election results are certified, the law provides no opportunity for the results to be re-adjudicated. *See Martin v. Kemp*, No. 1:18-CV-4776-LMM, 2018 WL 5276242 (N.D. Ga. Oct. 24, 2018), *appeal filed*, No. 18-14503 (11th Cir. Oct. 29, 2018); *see also League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("Courts routinely deem restrictions on fundamental voting rights irreparable injury."); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote therefore constitutes irreparable

injury.”). Monetary damages cannot compensate for the loss of the right to vote or to participate in a fairly administered election.

The balance of equities. The balance of hardships likewise favors Plaintiffs. Defendant is not meaningfully harmed by the issuance of the proposed injunction—and the injunction would be of substantial benefit to the public interest. As to Defendant, he has no lawful right to exercise his official duties in a biased and partisan manner as he has done. Indeed, Florida law expressly provides that “[n]o officer or employee of the state . . . shall [u]se his or her official authority or influence for the purpose of interfering with an election,” and provides that such action is punishable as a misdemeanor. Fla. Stat. § 104.31; *see also Stubbs v. Fla. State Fin. Co.*, 159 So. 527, 528 (Fla. 1935). Enjoining him from the exercise of those duties for the limited purposes of the 2018 general election would prevent him from continuing to abuse his office for partisan and political gain, but that is not a cognizable legal interest.

The public interest. The public interest would benefit substantially by the issuance of the requested TRO. Defendant’s actions to date have cast doubt on his ability to fairly oversee Florida’s senatorial election. Freezing his participation in the tabulation of votes until this Court has a chance to evaluate the constitutionality of his dual role as candidate and election overseer will bolster voters’ confidence in the integrity of their elections. Furthermore, ensuring all voters’ Constitutional rights is

itself in the public interest. *See Wesberry*, 376 U.S. at 17 (“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”). Restraining Defendant Scott’s influence on the vote tabulation process need not delay the certification of the election results. Defendant Scott’s only mandatory role in the election process is certifying the final result on Tuesday, November 20. Fla. Stat. § 102.111. This Court can move swiftly during that period to begin to resolve Plaintiffs’ claims about the constitutionality of Defendant’s role in the certification procedures.

CONCLUSION

The Constitution protects Plaintiffs’ right to participate in an election untainted by Defendant’s self-interest or partisan bias. For the reasons stated above, this Court should enter a temporary restraining order entering the relief detailed in Plaintiffs’ accompanying motion for a TRO and proposed order.

Date: November 12, 2018

Respectfully submitted,

/s/ John A. DeVault, III

JOHN A. DEVAULT, III (FL Bar No. 103979)

HENRY M. COXE III (FL Bar No. 155193)

MICHAEL E. LOCKAMY (FL Bar No. 69626)

Bedell, Dittmar, DeVault, Pillans & Coxe, P.A.

101 E. Adams Street

Jacksonville, Florida 32202-3303

Phone: (904) 353-0211

Facsimile: (904) 353-9307

jad@bedellfirm.com

hmc@bedellfirm.com

mel@bedellfirm.com

JANE W. MOSCOWITZ (FL Bar No. 586498)*

Moscowitz & Moscovitz, P.A.

201 Alhambra Circle, Suite 1200

Coral Gables, Florida 33134

Phone: (305) 379-8300

Facsimile: (305) 379-4404

jmoscowitz@moscowitz.com

LAURENCE M. SCHWARTZTOL**

Protect Democracy Project, Inc.

10 Ware Street

Cambridge, Massachusetts 02138

Telephone: (202) 945-2092

Facsimile: (929) 777-8248

larry.schwarztol@protectdemocracy.org

JAMILA BENKATO**

Protect Democracy Project, Inc.

2020 Pennsylvania Avenue, NW, #163

Washington, D.C. 20006

Telephone: (202) 945-2157

jamila.benkato@protectdemocracy.org

JESSICA MARSDEN**
Protect Democracy Project, Inc.
106 S. Greensboro Street, Suite E
Carrboro, North Carolina 27510
Telephone: (202) 672-4812
jess.marsden@protectdemocracy.org

LAWRENCE S. ROBBINS**
WILLIAM J. TRUNK**
WENDY LIU**
MEGAN D. BROWDER***
Robbins, Russell, Englert, Orseck, Untereiner &
Sauber LLP
2000 K Street, N.W., 4th Floor
Washington, D.C. 20006
Phone: (202) 775-4500
Facsimile: (202) 775-4510
lrobbins@robbinsrussell.com
wtrunk@robbinsrussell.com
wliu@robbinsrussell.com
mbrowder@robbinsrussell.com

JEFF MARCUS (FL Bar No. 310890)**
One Biscayne Tower
2 South Biscayne Boulevard, Suite 1750
Miami, Florida 33131
Phone: (305) 400-4260
jmarcus@mnrlawfirm.com

JOEL S. PERWIN (FL Bar No. 316814)*
Joel S. Perwin, P. A.
Suite 1523, Alfred I. DuPont Building
169 East Flagler Street
Miami, Florida 33131
Phone: (305) 779-6090
jperwin@perwinlaw.com

MICHAEL S. OLIN (FL Bar No. 220310)*
Buckner + Miles
3350 Mary Street
Miami, Florida 33133
Phone: (305) 964-8003
molin@bucknermiles.com

*Application for admission forthcoming

***Pro Hac Vice* forthcoming

****Pro Hac Vice* forthcoming; Admitted in CO
only; Supervised by Principals of the Firm

Counsel for Plaintiff

CERTIFICATE OF COMPLIANCE

Pursuant to Northern District of Florida Local Rule 7.1(F), the undersigned certifies that this memorandum, excluding case style, signature block, certificate of service, and certificate of compliance contains 5,234 words.

John A. DeVault, III
JOHN A. DEVAULT, III (FL Bar No. 103979)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion has been served on Pamela Bondi, Attorney General of Florida and counsel for Defendant Scott in his capacity as Governor of the State of Florida, by e-mail sent to oag.civil.eserve@myflorida.com on this 12th day of November, 2018.

s/ John A. DeVault, III
JOHN A. DEVAULT, III (FL Bar No. 103979)