**No. 22-13396**

In the
**United States Court of Appeals**
**For the Eleventh Circuit**

RYAN GRAHAM, *et al.*,

*Plaintiffs – Appellants*

v.

GEORGIA ATTORNEY GENERAL, *et al.*

*Defendants – Appellees*

Appeal from the United States District Court
For the Northern District of Georgia

**APPELLANTS' REPLY**

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**Graham v. Georgia Attorney General**
**22-13396**

## Certificate of Interested Persons and Corporate Disclosure Statement

I hereby certify under Eleventh Circuit Rules 26.1, 26.1-2, and 26.1-3 that these persons and entities have or may have an interest in the outcome:

Burge, David

Carr, Christopher M.

Cohen, Mark H.

Georgia Government Transparency and Campaign Finance Commission

Graham, Ryan

Hicks, Darryl

Kreyenbuhl, James D.

Libertarian Party of Georgia, Inc.

Sells, Bryan

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Thompson, Rick

Vaughan, Elizabeth

Watts, Robert A.

Webb, Bryan L.

Willard, Russel D.

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No publicly traded company has an interest in the outcome.

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## Argument

### I. The plaintiffs didn't sue the wrong defendants.

The appellees don't dispute that the named defendants are responsible for enforcing Georgia's statutory restrictions on political contributions. The appellees also don't dispute that Graham could face prosecution by the named defendants if he were to accept a contribution that exceeds the limit that applies to him (but not to his political opponent). Indeed, their brief concedes those facts. (Appellees' Br. 28-29.)[1] That is enough, under the well-established caselaw cited in the appellants' opening brief, to establish that the plaintiffs here sued the right defendants. *See, e.g., Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1304 (11th Cir. 2017) (en banc); *Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1428 (11th Cir. 1998); *ACLU v. The Florida Bar*, 999 F.2d 1486, 1492 & n.13 (11th Cir. 1993). (Appellants' Br. 20-21.)

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[1] Throughout this brief, citations to the appendix will be in the form "Document Number at Page." For court documents, the cited page number is the number that appears in the header generated by the court in which the document was originally filed. A dotted underline indicates a hyperlink to the cited authority.

The appellees simply ignore this caselaw. They don't even cite *Wollschlager, Wilson,* or *ACLU*—all of which hold that a reasonable threat of prosecution is a sufficient injury to establish standing. The appellees' only response is that there has been no "actual threat" of prosecution as a matter of fact. (Appellees' Br. 27.) But that isn't the legal standard, and the appellees don't even argue that it is.

Nowhere do the appellees suggest that Georgia's contribution limit would not or could not be enforced. Under well-established law, Graham therefore has a reasonable fear of prosecution. *See, e.g., Virginia v. Am. Booksellers Ass'n, Inc.,* 484 U.S. 383, 393 (1988) (concluding that the plaintiffs had a "well-founded fear that the law will be enforced against them" where "[t]he State has not suggested that the newly enacted law will not be enforced").

The only case that the appellees tackle head-on is *Jacobson v. Florida Secretary of State*, 974 F.3d 1236 (11th Cir. 2020). (Appellees' Br. 29-30.) That case held that the plaintiffs' injuries were only traceable to the officials who enforced the challenged election statutes. *Jacobson*, 974 F.3d at 1253. The appellees

suggest, however, that the plaintiffs here have sued the named defendants only because of the defendants' supervisory roles in the administration of elections—a connection that this Court found to be insufficient to establish standing in *Jacobson*. (Appellees' Br. 29.) But the plaintiffs here didn't sue the named defendants because of any general supervisory role. Unlike the defendants in *Jacobson*, the named defendants here are charged by statute with enforcing the challenged statutes, and no one else is. The appellees' attempt to distinguish *Jacobson* thus fails.

The appellees also argue that the plaintiffs have sued the wrong defendants because an injunction against these defendants wouldn't change the contribution limits that apply to Graham. (Appellees' Br. 30-31.) But a carefully crafted injunction plainly *could* change those limits and thereby erase Graham's fear of prosecution. As the appellants pointed out in their opening brief, an injunction prohibiting the defendants from enforcing the portion of the leadership committee statute that limits leadership committees to the nominees of "political parties" would mean that Graham could create a leadership committee and accept a contribution that

exceeds the statutory limit without fear of prosecution. (Appellants' Br. 22.)

The appellees don't address such an injunction. Instead, they suggest that a *different* injunction—one striking down the leadership-committee statute in its entirety—"would not affect Plaintiffs in any way." (Appellees' Br. 31.) But as the appellants have also pointed out, *that* injunction would redress the plaintiffs' unequal-treatment injury. (Appellants' Br. 22 n.5.)

The plaintiffs here didn't sue the wrong defendants. The appellees identify no cases holding—as the district court did here—that a private individual is the only proper defendant in a First-Amendment challenge to a state statute. Nor does their brief even mention the considerable state-action issues that such a holding necessarily entails. There is no dispute that Graham could be prosecuted by the named defendants if he were to accept a contribution that exceeds the limits that apply to him. And a carefully crafted injunction could fix that. The plaintiffs therefore have standing to bring their First Amendment claim against the named defendants.

## II. The plaintiffs didn't challenge the wrong statute.

The appellees insist that the plaintiffs have "challenged the wrong statute." (Appellees' Br. 13.) But that argument misses its mark for at least two reasons.

First, both of the plaintiffs' claims arise from O.C.G.A. § 21-5-34.2, which creates unequal contribution limits for Graham and his opponent. That inequality is obviously at the core of the plaintiffs' Equal Protection claim. *See, e.g., Riddle v. Hickenlooper*, 742 F.3d 922, 927 (10th Cir. 2014) (holding that differential contribution limits for third-party candidates violate the Equal Protection Clause). That inequality is also at the heart of the plaintiffs' First Amendment claim because it is *that* inequality that renders the contribution limit in O.C.G.A. § 21-5-41 unconstitutional. *See, e.g., Davis v. FEC*, 554 U.S. 724, 744 (2008) ("imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat is antithetical to the First Amendment"). The plaintiffs here aren't challenging the contribution limit in O.C.G.A. § 21-5-41 as unconstitutional in isolation. *See, e.g., Randall v. Sorrell,* 548 U.S. 230, 248 (2006)

(holding that Vermont's contribution limits were "too low" to comply with the First Amendment).

The appellees' argument simply ignores the plaintiffs' Equal Protection claim. They don't even cite *Riddle,* the main case on which the plaintiffs rely, and their reading of *Davis* is mistaken. The appellees suggest that the plaintiff in *Davis* had standing because the statute that he challenged applied directly to him. (Appellees' Br. 26.) But that is only half right. The plaintiff challenged one provision of federal law that raised contribution limits for his opponents (Section 319(a)) and a second provision that imposed greater disclosure requirements on the plaintiff himself (Section 319(b)). *See Davis,* 554 U.S. at 729-32. And the Supreme Court held that the plaintiff had standing to challenge *both* provisions. *See id.* at 734-35. As in *Davis*, the plaintiffs here have challenged the statute that raises the contribution limit on Graham's opponent.

Second, the plaintiffs aren't required to identify the precise statute or statutes they challenge. The Federal Rules of Civil Procedure require only "a short and plain statement of the claim

that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Leatherman v. Tarrant Cnty. Narcotics Intel. Coordination Unit*, 507 U.S. 163, 168 (1993) (cleaned up). There is no heightened pleading standard here. *See id.* The appellees are acutely aware of the plaintiffs' claims and the grounds upon which they rest. Nothing more is required, and the appellees have identified no case holding that it is.

## III. The plaintiffs' claims are distinct.

The appellees defend the district court's failure to address the plaintiffs' Equal Protection claim by arguing that the claim is "identical" to the plaintiffs' First Amendment claim. (Appellees' Br. 33.) Not so.

As explained in the appellants' opening brief, the plaintiffs' Equal Protection injury is different from their First Amendment injury. (Appellants' Br. 28-29.) Whereas the First Amendment injury is the threat of prosecution that chills protected speech, the plaintiffs' Equal Protection injury is "the denial of equal treatment." *N.E. Fla. Chapter of Associated Gen. Contractors v.*

*Jacksonville*, 508 U.S. 656, 666 (1993). The appellees ignore that distinction.

The caselaw is also different. Whereas the leading First Amendment case is *Davis*, the leading Equal Protection case is *Riddle*. The appellees ignore that distinction, too. Like the district court, the appellees don't even cite *Riddle*.

The appellees claim that the appellants "have not even made an argument that the district court should have somehow applied a different standing analysis to their Equal Protection claim." (Appellees' Br. 33.) But that isn't a fair reading of the appellants' opening brief, which contains an entire section making that argument. (Appellants' Br. 28-30.)

The plaintiffs brought two distinct claims, and the district court's failure to address one of them was error.

## IV. The district court's legal errors abused its discretion.

Finally, the appellees argue that, despite its legal errors, the district court didn't abuse its discretion when it denied the plaintiffs' motion for a preliminary injunction. (Appellees' Br. 34-

38.) That's because, they contend, the plaintiffs can't establish the irreparable harm and other factors typically required to obtain a preliminary injunction. *See generally Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc). But that argument fails for at least three reasons.

First, it is well established that "[a]n error of law is an abuse of discretion *per se*." *Resnick v. Uccello Immobilien GMBH, Inc.*, 227 F.3d 1347, 1350 (11th Cir. 2000); *accord Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 n.2 (2014). The appellees simply ignore this rule. The district court's conclusion that the plaintiffs lack standing and therefore aren't likely to succeed was legal error that constitutes an abuse of discretion *per se*.

Second, the district court didn't find that the plaintiffs couldn't establish the other preliminary-injunction factors. The court based its ruling on the first preliminary-injunction factor—the likelihood of success—which it based entirely on its erroneous conclusion that the plaintiffs lack standing. (App. 16 at 26-27.)

There is thus no alternative holding for this Court to affirm. *Compare Siegel*, 234 F.3d at 1176-77 (affirming the denial of a preliminary injunction on the basis of an alternative holding).

Third, this Court has recognized that an ongoing violation of the First Amendment constitutes irreparable injury. *Speech First v. Cartwright*, 32 F.4th 1110, 1128 (11th Cir. 2022). More generally, harms that touch upon the constitutional and statutory rights of political parties, candidates, and voters are not compensable by money damages and are therefore considered irreparable. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *League of Women Voters v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986); *Ga. State Conf. of the NAACP v. Fayette Cnty. Bd. of Comm'rs*, 118 F. Supp. 3d 1338, 1347 (N.D. Ga. 2015). And such harms outweigh any harm to the State because the public has no legitimate interest in the enforcement of an unconstitutional statute. *Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010).

Here, Graham's injuries were neither speculative nor theoretical. He had identified a donor willing to give him a contribution that exceeded the statutory limit, but he couldn't accept the contribution because of O.C.G.A. § 21-5-34.2. (App. 11-1 at 2.) That chilled protected activity and put him at a distinct disadvantage compared to his political opponent.

## V. The Court should vacate and remand.

The district court's denial of a preliminary injunction rested entirely on an error of law. For that reason, "the district court is in a better position to evaluate [the evidence], having heard the evidence and arguments in the first instance, [and] we think it more appropriate to remand to that court for reconsideration than attempt it ourselves." *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974)[2]; *see also, e.g., Boulan S. Beach Master Ass'n v. Think Properties,* LLC, 617 F. App'x 931, 935 (11th Cir. 2015); *Speer v. Miller*, 15 F.3d 1007, 1010–11 (11th Cir. 1994). This

[2] The Eleventh Circuit has adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

Court should therefore vacate and remand the district court's ruling on the plaintiffs' First Amendment claim.

In addition, because the district court failed to address the plaintiffs' Equal Protection claim, this Court should also vacate the district court's order and remand the case for consideration of that claim in the first instance. *See, e.g., Callahan v. U.S. Dep't of Health & Human Servs.,* 939 F.3d 1251, 1254 (11th Cir. 2019) (remanding the denial of a preliminary injunction "[b]ecause the district court failed to address two of plaintiffs' claims").

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## Certificate of Compliance

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because, excluding parts of the brief exempted by Rule 32(f), it contains 2,059 words. This brief also complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) because it has been prepared in the 14-point Century Schoolbook typeface in roman style.

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