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

LEAGUE OF WOMEN VOTERS OF FLORIDA, et al..,

Plaintiffs,

v. Civil Case No. 4:11cv628-RH/WCS

KURT S. BROWNING, et al.,

Defendants.
_____/

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

PAMELA JO BONDI
ATTORNEY GENERAL OF FLORIDA
Blaine H. Winship
Special Counsel
Office of the Attorney General of Florida
The Capitol, Suite PL-01
Tallahassee, Florida 32399-1050
Telephone: (850) 414-3300
Facsimile: (850) 488-4872
Counsel for All Defendants

FLORIDA DEPARTMENT OF STATE
Daniel E. Nordby
General Counsel
Ashley E. Davis
Assistant General Counsel
Florida Department of State
R.A. Gray Building
500 S. Bronough Street
Tallahassee, Florida 32399-0250
Tel. 850-245-6536
Fax 850-245-6127
Counsel for Defendants
Secretary of State Kurt S. Browning and
Director of the Division of Elections Gisela Salas

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Statutes

Constitutional Provisions

Pursuant to Rule 65 of the Federal Rules of Civil Procedure and the Court's Scheduling Order of January 3, 2012 [Doc. 29], all Defendants[1] jointly submit this memorandum in opposition to Plaintiffs' Motion for Preliminary Injunction, which seeks to alter the status quo *pendente lite* by preventing enforcement of various provisions of statutes and rules currently in effect in Florida. As shown below, and further supported in the accompanying Affidavit of Dr. Gisela Salas, the Director of Florida's Division of Elections, while Plaintiffs bear the burden of meeting all of the requisites for the extraordinary relief of a preliminary injunction – a burden that is heightened for facial constitutional challenges – they satisfy none.

Plaintiffs contend that recent legislative amendments enacted by the Florida Legislature and related administrative rule provisions adopted by the Florida Department of State ("DOS"), establishing new legal requirements governing third-party voter registration organizations ("3PVROs") and their agents, are facially unconstitutional. However, none of these requirements is beyond the constitutional authority of the Legislature to address the process of voter registration by 3PVROs. These requirements plainly do not implicate, much less burden, Plaintiffs' core political speech or associational rights under the First Amendment to the Constitution of the United States; nor are they unconstitutionally vague; nor do they violate federal election law provisions. Hence, Plaintiffs cannot establish the requisite likelihood of prevailing on the merits.

At bottom, stripped of their pervasive sky-is-falling hyperbole, Plaintiffs complain that the new 3PVRO requirements are at odds with their preexisting methods for encouraging and assisting persons to register to vote in Florida. However, Plaintiffs' chosen methods for

[1] Defendants are Kurt S. Browning, Secretary of State of Florida; Pamela Jo Bondi, Attorney General of Florida; and Dr. Gisela Salas, Director of the Division of Elections of the Florida Department of State. All Defendants are named solely in their official capacities.

conducting voter registration drives, and their desire to maintain contact with registered voters at later stages of the election process, do not remove or limit legislative and rulemaking discretion when it comes to 3PVROs. Florida has the right to impose fiduciary duties, submission deadlines, and reporting requirements on 3PVROs insofar as they take physical custody of voter registration applications. Any curbing or halting of Plaintiffs' voter registration efforts in Florida is by their own choice, and not because Florida's 3PVRO requirements force them to give up their activities. Indeed, Plaintiffs' activities up to the point of actually collecting or soliciting to collect voter registration applications are *untouched* by the 3PVRO requirements they challenge. As a consequence, Plaintiffs cannot meet their burden of demonstrating irreparable harm to themselves if their motion is denied. Nor can they show that the balance of hardships tilts in their favor, or that the public interest favors granting their motion. Indeed, any self-imposed "moratoriums" by Plaintiffs on their voter registration activities in Florida are entirely unnecessary and cannot justify the extraordinary relief now sought.

Relevant Prior Legislation and Litigation Between the Parties

This action is the third brought by the League of Women Voters of Florida ("LWVF") to challenge the constitutionality of Florida statutes and administrative rule provisions addressing 3PVROs. The first, *League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006) ("*LWVF I*"), resulted in the granting of preliminary injunctive relief in favor of plaintiffs; the second, *League of Women Voters of Fla. v. Browning*, 575 F. Supp. 2d 1314 (S.D. Fla. 2008) ("*LWVF II*"), resulted in the denial of such relief.

As shown below, while the issues raised here are clearly distinct from those addressed in *LWVF I*, they are very similar to those addressed in *LWVF II*. More importantly, the reasoning

behind the district court's denial of plaintiffs' motion for a preliminary injunction in *LWVF II* applies fully here, directing the same outcome.

A. Florida Law Prior to 2005

Until 1995, only state officials and persons deputized by county supervisors of elections were allowed to collect voter registration applications in Florida. To be deputized, a person had to reside in the county where the applicants resided and to undergo a training session. *See LWVF II*, 575 F. Supp. 2d at 1302-03.

In 1993 Congress enacted the National Voter Registration Act ("NVRA"), 42 U.S.C. § 1973gg *et seq.*, to increase the numbers of eligible voters registered to cast ballots in federal elections. The NVRA took effect in 1994.

The following year, Florida implemented the NVRA and began to allow third-party groups to collect voter registration applications without having to be deputized by the supervisor of elections. *See LWVF II*, 575 F. Supp. 2d at 1303.

B. Section 97.0575, Florida Statutes (2005), and *LWVF I*

Section 97.0575, Florida Statutes, was enacted and took effect in 2005. Section 97.0575 established various requirements for the registration and application-collection processes of 3PVROs. *See LWVF II*, 575 F. Supp. 2d at 1303. Unlike the current version of the law, discussed *infra*, section 97.0575 initially excluded political parties from the registration requirement, and imposed much higher levels of fines (ranging from $250 to $5,000 for each violation) assessable against 3PVROs,with no cap on total fines (thereby subjecting a 3PVRO to potentially unlimited exposure). Based on those two distinguishing factors, in *LWVF I* the court determined that plaintiffs were likely to prevail on the merits of their constitutional challenge to the statute. The court stated, in pertinent part:

> While the Court is extremely reluctant to set aside an enactment of the Legislature, given the magnitude of Plaintiffs' First Amendment freedoms at stake in this case, the Third-Party Voter Registration Law's civil penalties scheme and exclusion of political parties is unconstitutional.

LWVF I, 447 F. Supp. 2d at 1339.

C. Section 97.0575, Florida Statutes (2007), and *LWVF II*

Section 97.0575 was amended by the Florida Legislature in 2007, and the revised version took effect in early 2008. Among other things, the revisions substantially reduced the amount of fines (to a range of $50 to $500, depending on the nature of the violation), implemented a $1,000 annual cap on fines payable by a 3PVRO (for itself and its affiliates), removed the exception for political parties, and provided for waiver of fines where infractions were attributable to force majeure or impossibility of performance. *See LWVF II*, 575 F. Supp. 2d at 1304.

Plaintiffs in *LWVF II* filed suit seeking a declaration that the statute was facially unconstitutional. There, as here, they contended that the statute was unconstitutionally vague, and that it unconstitutionally burdened political speech and association.

1. Vagueness Claims

With respect to vagueness, "Plaintiffs claim[ed] that the Amended Law [was] vague in two respects: (1) regarding when individual workers are personally liable for violations, and (2) regarding when an entity related to a third-party voter registration organization will be seen as a separate entity and thus be potentially liable for an additional $1,000 in fines." *Id.*, 575 F. Supp. 2d at 1312. In determining the standard to apply to the vagueness claims, the court stated:

> [T]he Amended Law regulates Plaintiffs' handling of voter registration applications *after their collection*, only indirectly impacting Plaintiffs' protected activities. However, in an abundance of caution and giving wide berth to the freedoms afforded by the First Amendment, Plaintiffs' vagueness challenges are considered using the higher standard of certainty required of laws regulating speech.

Id. at 1315 (emphasis added). Thus, the court gave plaintiffs the benefit of the doubt. (The appropriate standard for Plaintiffs' instant vagueness contentions is discussed further below.)

Even after applying the higher standard of assessment in plaintiffs' favor, the Court determined that the vagueness claims lacked merit, concluding:

> Measured against the standards of "common intelligence," [*Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926),] and an "ordinary person exercising ordinary common sense," [*U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 579 (1973),] the Amended Law provides fair notice to those who would engage in voter registration activities in the State of Florida and establishes clear guidelines for enforcement sufficient to avoid arbitrary and discriminatory application. For these reasons, Plaintiffs have not demonstrated a likelihood of success on their claim of facial vagueness.

LWVF II, 575 F. Supp. 2d at 1319.

2. Free Speech and Association Claims

Plaintiffs in *LWVF II*, in support of their claim of unconstitutional burdens on free speech and association, contended that "the vaguely worded Amended Law put[] them at risk of severe fines due to its near strict liability." *Id.* at 1313. They further alleged that

> the severe fines could potentially place the organizations in a ruinous financial situation. Individuals may be deterred from volunteering due to the risk of personal financial liability, and the threat of severe fines may cause Plaintiffs to cease their voter registration drives.

Id. (citations to plaintiffs' complaint omitted).

The parties disputed the proper legal standard to be employed in assessing the free speech and association claims. Plaintiffs argued that *Anderson v. Celebreeze*, 460 U.S. 780, 789 (1983), governed. Defendants countered that First Amendment protections traditionally have been extended "only to conduct that is inherently expressive," quoting from *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 66 (2006), and that the collection and handling of

voter registration applications was not inherently expressive. Once again the court gave plaintiffs the benefit of the doubt, stating:

> The undersigned agrees that the collection and handling of voter registration applications is not inherently expressive activity. However, *for purposes of the present analysis*, the Court accepts the characterization of the Amended Law as an election regulation and evaluates it under the *Anderson* standard.

LWVF II, 575 F. Supp. 2d at 1319 (emphasis added).

The court then turned to the *Anderson* standard, to determine whether to apply the strict scrutiny test (as plaintiffs urged) or the less demanding reasonableness test. Citing controlling authority that subjected less-restrictive voting regulations to the reasonableness test, the court stated:

> However, "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest … would tie the hands of States seeking to assure that elections are operated equitably and efficiently." [Quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).] "If a statute imposes only modest burdens … then 'the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions' on election procedures." [Quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S. Ct. 1184, 1191 (2008) (itself quoting *Anderson*, 460 U.S. at 788).] Thus, "lesser burdens … trigger less exacting review." [Quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).] Indeed, the Supreme Court has "'repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls." [Quoting *Washington State Grange*, 128 S. Ct. at 1192 (itself quoting *Burdick*, 504 U.S. at 438).]

LWVF II, 575 F. Supp. 2d at 1320.

Turning to the question of whether the regulations at issue were severe enough to trigger the strict scrutiny standard, the court flatly rejected plaintiffs' positions, finding:

> Undoubtedly, Plaintiffs' interactions with prospective voters in connection with their solicitation of voter registration applications constitute constitutionally protected activity. However, … the Amended Law does not place any direct restrictions or preconditions on those interactions. For instance, it does not place any restrictions on who is eligible to participate in voter registration drives or what methods or means third-party voter registration organizations may use to

> solicit new voters and distribute applications. Instead, the Amended Law simply regulates an administrative aspect of the electoral process – the handling of voter registration applications by third-party voter registration organizations *after* they have been collected from applicants. Thus, the impact of this regulation of Plaintiffs' "one-to-one, communicative" interactions with prospective voters is far more indirect and attenuated than the statute addressed in *Meyer [v. Grant*, 486 U.S. 414 (1988)].

LWVF II, 575 F. Supp. 2d at 1321-22 (emphasis in original).

The court further stressed the significance of the reductions in fines, stating:

> The Amended Law contains a number of significant changes made in response to the decision in *LWVF I*. The first significant change in the Amended Law is the sharp reduction in the amount of potential fines. More importantly, it substantially reduces the total exposure of third-party voter registration organizations and their affiliates by imposing a $1,000 cap on the amount of fines that may be imposed. In combination, these provisions significantly reduce the concerns addressed in *LWVF I* that the fines could literally bankrupt a given organization.

LWVF II, 575 F. Supp. 2d at 1322.

The court went on – after observing that the plaintiffs had concocted "highly speculative" factual scenarios "relying on the possibility that hundreds of thousands of applications will be mishandled" resulting in the imposition of maximum fines, *id.* – to note that the law's new force majeure and impossibility provisions further relaxed the strict liability concerns. *Id.* at 1322-23.

The court then noted the nondiscriminatory nature of the 3PVRO provisions, stating:

> Finally, and perhaps most significantly, the Amended Law does not discriminate between the treatment of political parties and other third-party voter registration organizations. In sharp contrast to the Original Law, the Amended Law is facially neutral. All third-party organizations collecting applications are subject to the same regulations regarding the handling of voter registration applications. Such content neutral election regulations are generally determined to be significantly less constitutionally onerous tha[n] the facially discriminatory statute addressed in *LWVF I*.

LWVF II, 575 F. Supp. 2d at 1323 (citations omitted).

The court then rejected plaintiffs' argument that their First Amendment free speech and association claims should be assessed under the strict scrutiny standard, stating:

> The undersigned concludes the Amended Law does not impose a "severe" burden on Plaintiffs' First Amendment rights. Strict constitutional scrutiny is therefore inappropriate. Instead, the Court will determine whether defendants have presented "sufficiently weighty" regulatory interests to justify the limited burdens imposed on Plaintiffs' rights by the Amended Law.

Id.

Turning to the question of whether sufficient regulatory interests existed to justify the regulations at issue, the court began by noting defendants' stated justifications and acknowledging, as the court in *LWVF I* had done, that those interests are legitimate:

> Defendants maintain that the Amended Law is designed to address at least three of Florida's legitimate regulatory interests: 1) ensuring that all voter registration applications are properly and timely submitted; 2) holding third-party voter registration organizations accountable for the applications they receive; and 3) preventing instances of fraud. As was recognized in *LWVF I*, "*Defendants' stated interests are indisputably important and within the purview of the Florida legislation*" because "[t]he right to vote is fundamental, forming the bedrock of our democracy." *LWVF I*, 447 F. Supp. 2d at 1337 (quoting *Wexler v. Anderson*, 452 F.3d 1226, 1232 (11th Cir. 2006)).

LWVF II, 575 F. Supp. 2d at 1323 (emphasis added).

The court rejected plaintiffs' arguments that defendants had failed to show that their interests were,or li kely would be, impaired by 3PVRO activities in the absence of the challenged provisions. *Id.* After noting defendants' evidence of instances in which 3PVROs had hoarded applications, the court expressly questioned whether defendants even had to proffer any evidence at all, stating: "'It is well established that, in the election context, there is no need for an "elaborate, empirical verification of the weightiness of the State's asserted justifications."'" *Id.* at 1324 (quoting *Fla. State Conference of N.A.A.C.P. v. Browning*, 569 F. Supp. 2d 1237 (N.D. Fla. 2008) (itself quoting *Timmons*, 520 U.S. at 364)). The court then cited controlling authority

establishing that a legislature need not wait until potential problems actually have arisen before enacting laws to address those problems. *LWVF II*, 575 F. Supp. 2d at 1324 (citing and quoting from *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986), and *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 128 S. Ct. 1610, 1619 (2008)).

The court acknowledged the obvious interests of defendants in regulating 3PVROs, noting:

> Similarly, it is an obvious proposition not requiring extensive affirmative evidence that delayed or untimely submission of voter registration applications is likely to impair Defendants' interests in ensuring that Florida voters are registered to vote. Although there may be differing views concerning how best to address the mishandling of voter registration applications, *that Florida has an interest in making sure its voters are timely and properly registered cannot reasonably be disputed.*

LWVF II, 575 F. Supp. 2d at 1324 (emphasis added). The court then concluded "that Florida's interests are '"sufficiently weighty to justify the limitation"' imposed on Plaintiffs' activities." *Id.* at 1325 (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

Lastly, the court dismissed plaintiffs' contention that the State was adequately protected without the challenged legislation by section 104.0615(4), Florida Statutes, which makes it a felony "knowingly … [to] obstruct or delay the delivery of a voter registration form." After noting that Florida's interests are not limited to knowing or willful violations but extend as well to unintentional or negligent mishandling of voter applications, the court stated:

> The harm to a prospective voter whose application is submitted after the book-closing deadline, or whose application is not timely processed, is identical whether it is the result of an intentional act, mere negligen[ce], or even an innocent mistake. The Amended Law addresses this threat to the voter by imposing civil sanctions for unintentional or negligent mishandling subject to limited exceptions, thereby alleviating concerns which are not addressed by Florida's criminal laws.

LWVF II, 575 F. Supp. 2d at 1325.

The court, having determined that plaintiffs had failed to demonstrate their likelihood of prevailing on the merits, denied their motion for a preliminary injunction. Because the movant must establish each and every one of the four requisites for that relief, plaintiffs' failure was dispositive; the court did not bother to consider the other three requisites. *Id.*

The 2011 Changes to Section 97.0575, Florida Statutes, and Florida Administrative Code Rule 1S-2.042 At Issue

Like the 2007 provisions which passed muster in *LWVF II*, the 2011 version of section 97.0575, Florida Statutes, and Rule 1S-20.42, Florida Administrative Code (collectively the "2011 Florida Law"), now assailed by Plaintiffs, addresses Florida's legitimate regulatory interests: (1) to ensure that all voter registration applications are properly and timely submitted; (2) to hold third-party voter registration organizations accountable for the applications they receive; and (3) to prevent instances of fraud. *See LWVF II*, 575 F. Supp. 2d at 1323.

The 2011 Florida Law declares that 3PVROs are fiduciaries with respect to applicants whose applications are collected by 3PVROs, and is designed to ensure that those applications are sent to the Division of Elections or the county supervisor of elections promptly. Once the applications are received by elections officials, the law places heavy burdens on those officials to review the applications, to input data contained in them, to ascertain whether any deficiencies are presented, and if so to contact the applicants in order to cure those deficiencies, all within statutorily prescribed deadlines. All of these burdens are undertaken *so that the applicants are registered to vote*, and registered as quickly as practicable – hopefully before the next book-closing date, so that they can vote in the next scheduled election. *See* Dr. Salas Aff. at ¶¶ 22-25. Indeed, the duty to ensure that applicants "have an opportunity to complete the application form to vote in the next election up until the book closing for that next election" is placed on

elections officials – not 3PVROs. § 97.052(6), Fla. Stat. (2011). It is elections officials who are ultimately responsible for adding applicants to the voter registration rolls.

In this third action against Florida's statutes and rules governing 3PVROs, mounted again by the LWVF (and others), Plaintiffs object to provisions of the 2011 Florida law requiring:

- that 3PVROs register with the Division of Elections;
- that 3PVROs disclose their registration agents to the Division of Elections;
- that 3PVROs' agents sign a sworn statement that they have read and will abide by the legal requirements incumbent upon them;
- that the unique registration number assigned to a 3PVRO by the Division of Elections appear on voter registration applications submitted by the 3PVRO;
- that a 3PVRO account for voter registration applications that it provides to or receives back from its agents;
- that a 3PVRO deliver within 48 hours or mail within two days the applications of which it takes custody;
- that a 3PVRO can be liable for a fine ranging from $50 to $500 for each untimely application (depending on whether the infractions are willful and whether applications are received after the book-closing deadline), but with an annual aggregate fine cap of $1,000 for any 3PVRO (including its affiliates);
- that the force majeure and impossibility provisions, which previously were discretionary bases for excusing violations, are now affirmative defenses to violations – even though the Secretary of State may waive fines based upon such a showing; and

- that violations may be referred by the Secretary of State to the Attorney General for enforcement, following which the Attorney General may file a civil action for a violation or to prevent a violation of the 2011 Florida Law.[2]

Conspicuously, while Plaintiffs also complain about section 97.021(37), Florida Statutes, which defines 3PVROs to include (with certain enumerated exceptions) "any person, entity, or organization soliciting or collecting voter registration applications," Plaintiffs ignore the parallel provision of Rule 1S-2.042(2)(b), which defines "[e]ngaging in any voter registration activities" to mean "that the organization is soliciting *for collection* or collecting voter registration applications from Florida voter registration applicants." (Emphasis added.)

Thus, it is only organizations soliciting voter registration applications *for the purpose or with the expectation of taking custody of those applications* that need concern themselves with the requirements of section 97.0575 and Rule 1S-2.042. Organizations that do not seek to take custody of applications simply do not qualify as 3PVROs under the 2011 Florida Law.

Nothing in the 2011 Florida Law restricts organizations or their members from seeking to educate prospective voters about: democratic processes, the value of becoming registered to vote, the value of casting votes, the merits (or demerits) of any particular candidate or ballot initiative, or any other aspect of voting or participating in the electoral process. *See* Dr. Salas Aff. at ¶ 5. *Nothing in the 2011 Florida Law restricts organizations or their members from engaging in*

---

[2] Plaintiffs attempt to impugn the Florida Legislature's motives in enacting the revisions to section 97.0575, Florida Statutes, in 2011, by extensive references to comments made by certain legislators outside of any formal legislative history. Although the statute's terms are clear (as shown further below), rendering legislative history irrelevant, the law is settled that such comments are not indicative of legislative history. *See Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 522 n.12 (1994) (comments of a single subcommittee member were not sufficient to show legislative intent); *Heintz v. Jenkins*, 514 U.S. 291, 298 (1995) (statement of one legislator after passage "simply represents the views of one informed person on an issue about which others may (or may not) have thought differently").

political speech with anyone willing to listen. See id. Nothing in the 2011 Florida Law prevents organizations or their members from obtaining contact information from prospective voters and maintaining contact with them throughout and beyond any given election cycle. *See id.* at ¶ 5.

These distinctions are highly significant in at least two fundamental respects. First, they underscore that the 2011 Florida Law does not affect political speech. Second, they underscore that, pursuant to the 2011 Florida Law, 3PVROs in Florida are deemed to assume *fiduciary obligations* on behalf of those persons whose voter registration applications are physically taken by the 3PVROs (or their agents).

At bottom, Plaintiffs object to undertaking such fiduciary obligations. Instead, they seek, by mischaracterizing their objections as constitutional infirmities, to effectuate a judicial re-writing of the 2011 Florida Law to allow them to conduct their registration drives in Florida as *they* wish. But well-settled law is squarely to the contrary.

Argument

To prevail on a motion for a preliminary injunction, Plaintiffs must show:

> "(1) a substantial likelihood of success on the merits of the underlying case, (2) the movant will suffer irreparable harm in the absence of an injunction, (3) the harm suffered by the movant in the absence of an injunction would exceed the harm suffered by the opposing party if the injunction issued, and (4) an injunction would not disserve the public interest."

N. Am. Med. Corp. v. Axiom Worldwide, Inc., 522 F.3d 1211, 1217 (11th Cir. 2008) (quoting *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1246-47 (11th Cir. 2002)).

Accordingly, if Plaintiffs fail to carry their burden as to any one of these four requisites, their motion must be denied. *Davidoff & CIE, S.A. v. PLD Int'l Corp.*, 263 F.3d 1297, 1300 (11th Cir. 2001) ("It is well established in this circuit that '[a] preliminary injunction isa n

extraordinary and drastic remedy not to be granted unless the movant clearly established the burden of persuasion' as to all four elements.") (quoting *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000)).

Plaintiffs' burden is all the higher where they seek a preliminary injunction based on a claim that a statute is facially unconstitutional. As the district court in *LWVF II* noted, in the context of evaluating (and rejecting) LWVF's motion for a preliminary injunction against the 2007 version of the Florida Law:

> The Supreme Court recently stated "[f]acial challenges are disfavored" because they "raise the risk of 'premature interpretation of statutes on the basis of factually barebones records' ..., run contrary to the fundamental principle of judicial restraint ... [and] ... threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Washington State Grange v. Washington State Republican Party*, [552 U.S. 442, 128 S. Ct. 1184, 1191 (2008)] (internal citations and quotations omitted). Courts "must keep in mind that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Id.* (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, [546 U.S. 320, 329 (2006)]). Thus Plaintiffs bear a heavy burden in demonstrating a substantial likelihood of success on their facial challenge to the Amended Law. *See Crawford v. Marion County Election Bd.*, [553 U.S. 181, 128 S. Ct. 1610, 1621 (2008)] ("Given the fact that petitioners have advanced a broad attack on the constitutionality of [the election provision], seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion.").

LWVF II, 575 F. Supp. 2d at 1314.[3]

Here, as in *LWVF II*, Plaintiffs plainly fail to meet that heavy burden.

[3] In *Church v. Huntsville*, 30 F.3d 1332 (11th Cir. 1994), the Eleventh Circuit emphasized the elevated burden on movants seeking to enjoin the operation of statutes, noting that because such injunctions "interfere with the democratic processes and lack the safeguards against abuse or error that come with a full trial on the merits, [they] must be granted reluctantly and only upon a clear showing that the injunction before trial is definitely demanded by the Constitution and by the other strict legal and equitable principles that restrain courts." *Id.* at 1343.

I. PLAINTIFFS FAIL TO DEMONSTRATE SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS

Count I of the First Amended Complaint for Declaratory and Injunctive Relief ("Complaint") alleges violations of the First and Fourteenth Amendments to the United States Constitution, arising from the burdening of core political speech and associational rights by the 2011 Florida Law. Count II alleges violations of First and Fourteenth Amendments, in that the 2011 Florida Law is vague. Count III alleges that the 2011 Florida Law violates the NVRA.

None of these claims is supported in law, fact, or reason. As a consequence, with respect to the likelihood of prevailing on the merits, Plaintiffs fall far short of meeting even the usual heavy burden required to obtain a preliminary injunction. *A fortiori*, they fail the much heavier burden that must be met where injunctive relief is sought based on claims of facial unconstitutionality of legislation.[4]

A. The 2011 Florida Law Does Not Unconstitutionally Burden Plaintiffs' Core Political Speech and Associational Rights

Plaintiffs assert that they "exercise core political speech and associational rights when they help other citizens register to vote. Voter registration events foster discussion about issues and candidates on the ballot, encourage group volunteerism and organizing, and provide opportunities for Plaintiffs to inform and amplify the political power of like-minded citizens." Doc. 9-1 at 20.

However, Plaintiffs cannot explain how the exercise of their core political speech and associational rights is undermined by the requirements for 3PVROs under the 2011 Florida Law, because those rights are not at all affected by the challenged law. Plaintiffs remain entirely free

[4] Count IV of the Complaint, alleging denial or abridgement of right to vote on account of race or color in violation of section 2 of Voting Rights Act, 42 U.S.C. § 1975, is not at issue for purposes of this motion. *See* Plaintiffs' Memorandum at 10 n.4.

to organize voter registration drives, to engage in political discussions with potential voters (whether registered to vote or not), to obtain contact information from potential voters (to the extent that persons are willing to share that information), and to maintain contact with those persons *without becoming 3PVROs*. *See* Dr. Salas Aff. at ¶ 5. Plaintiffs are unrestrained by the 2011 Florida Law to converse freely with "citizens about civic engagement, creating a responsive government, and – when pertinent – current issues such as ballot initiatives," communicate the organization's "missions," and "associat[e] with fellow citizens to advance a shared belief in the importance of participatory democracy," as the Plaintiffs stated their voter registration activities often entail. *See* Doc.9-1 at 4; *see also* Dr. Salas Aff. at ¶ 5.

Even with respect to assisting persons to register to vote, Plaintiffs remain entirely free to offer any and every sort of assistance *short of taking physical custody of applications*, all without becoming 3PVROs. The registration applications are available from multiple sources, including the Internet. Plaintiffs may hand out voter registration forms (*see* Doc. 14, ¶ 14; Doc. 13, ¶ 38) and may even "assist[] [new and existing voters] with completing registration forms," and "assist those who need help filling out their voter registration forms accurately and completely" (*see* Doc. 9-1 at 6) without registering as a 3PVRO. *See* Dr. Salas Aff. at ¶ 5. Not even the "RTV online voter registration tool" described in the Smith Declaration (Doc. 11 at ¶¶ 10-15) transforms Plaintiff Rock the Vote ("RTV") into a 3PVRO subject to the 2011 Florida Law. (Doc. 11 at ¶ 14) (alleging that "applicants are thus responsible for independently signing and mailing the form.... RTV is not responsible for mailing. RTV does not have access to the complete, signed forms...."). *See* Dr. Salas Aff. at ¶ 5. And, of course, Plaintiffs may "recruit new volunteers and members" without registering as 3PVROs. *See* Doc. 9-1 at 6; *see also* Dr.

Salas Aff. at ¶ 5. These activities are not "voter registration activities" that transform "a person, entity, or organization" into a 3PVRO subject to the 2011 Florida Law. Rule 1S-2.042(2)(b).

Thus, with respect to core political speech and associations, Plaintiffs fail to identify any activity in which they cannot engage. In assessing Plaintiffs' claims that the 2011 Florida Law restricts their political speech and associational rights in violation of the First and Fourteenth Amendments, this fundamental reality is critical to both the alpha and the omega of the analysis.

1. The Absence of Restraints on Plaintiffs' First Amendment Freedoms Should Result in Outright Rejection of Their Claims

On the front end, the lack of impact of the 2011 Florida Law on Plaintiffs' speech and associations removes the need to engage in any sort of balancing test. Application of the proper standard should lead to dismissal of their claims – and, perforce, to the denial of injunctive relief.

In *LWVF II*, the court initially had to consider whether to apply the balancing test of *Anderson v. Celebreeze* or to embrace the traditional standard articulated in *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.* As the court noted, "the Supreme Court has traditionally 'extended First Amendment protection only to conduct that is inherently expressive[,]'" quoting *Rumsfeld*, 547 U.S. at 66. *LWVF II*, 575 F. Supp. 2d at 1319.

In *Rumsfeld*, the Supreme Court unanimously rejected the contention that law schools, by denying military recruiters access to their campuses while welcoming other recruiters, were engaging in protected speech. The Court noted that "[a]s a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do* – afford equal access to military recruiters – not what they may say or not say." 547 U.S. at 60 (emphasis in original). The Court stated: "Prior to the adoption of the Solomon Amendment's equal access requirement, law schools 'expressed' their disagreement with the military by treating military recruiters differently from other recruiters. But these actions were expressive only because the

law schools accompanied their conduct with speech explaining it." *Id.* at 66. The Court further explained that "[t]he expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it." *Id.* But the Court – almost anticipating the instant Plaintiffs' free-speech arguments – stated: "If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.*

In this case, however, no restraint on "speech" arises from the 2011 Florida Law's regulations governing 3PVROs' and their agents' *conduct* in connection with taking custody of voter registration applications. No accompanying speech can credibly transform the *conduct* required for compliance with those regulations into constitutionally protected speech.

The Court in *Rumsfeld* also rejected the law schools' argument that forcing them to allow military recruiters on campus violated their First Amendment associational rights. After explaining that the right to associate is "for the purpose of speaking, which we have termed a 'right of expressive association,'" *id.* at 68 (citation omitted), the Court stressed that "[r]ecruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students – not to become members of the school's expressive association." *Id.* at 69.

Here, persons who seek to register to vote are not, by dint of allowing a 3PVRO to take custody of their applications, signifying that they are joining the 3PVRO or endorsing its members' views; they are simply entrusting the 3PVRO to deliver their applications promptly. Any "association" arising from the fact of so minimal an encounter does not implicate First Amendment rights, because it lacks any speech component. Insofar as any further association is forged between 3PVROs and persons seeking to register, it is independent of the 3PVRO's fiduciary duty to handle applications properly *after it has taken custody of those papers.*

Conspicuously absent from *Rumsfeld* is any sort of balancing test, regardless of where it might fall along the continuum from strict scrutiny to rational relationship. Notably, the Court rejected the Third Circuit's view that the Solomon Amendment "does not pass muster under [*United States v. O'Brien*, 390 U.S. 367 (1968)] because the Government failed to produce evidence establishing that the Solomon Amendment was necessary and effective. … As a result, the Government – according to the Third Circuit – failed to establish that the statute's burden on speech is no greater than essential to furthering its interest in military recruiting." 547 U.S. at 67. The Supreme Court stated: "We disagree with the Court of Appeals' reasoning and result." Accordingly, no showing was required that the Solomon Amendment's "burden on speech" was "no greater than essential to furthering" the government's interest for the Court to reject the law schools' First Amendment claims out-of-hand. In overturning the Third Circuit's preliminary injunction, the Court concluded that the plaintiffs had "attempted to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect … while exaggerating the reach of our First Amendment precedents." *Id.* at 70.[5]

The district court in *LWVF II*, having cited *Rumsfeld*, acknowledged defendants' argument that the collection and handling of voter registration applications does not constitute inherently expressive conduct. Yet, it opted "for purposes of the present analysis" to proceed as though the opposite were true.

---

[5] The Court went on to note that, "even if the Solomon Amendment were regarded as regulating expressive conduct, it would not violate the First Amendment under *O'Brien*." *Id.* at 67-68. *O'Brien* upheld a law criminalizing the burning of Selective Service cards. There, the Court, while rejecting the characterization of the conduct as expressive speech, alternatively noted that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." 391 U.S. at 376-77. Here, no "speech" element is combined with the "nonspeech" regulation of 3PVROs.

Defendants in *LWVF II* were correct there, and the instant Defendants are correct here, that the collecting and handling of physical voter registration applications is not "inherently expressive activity" for First Amendment purposes. Indeed, the court in *LWVF II*, in language fully applicable here, laid a firm foundation for that conclusion, noting:

> Undoubtedly, Plaintiffs' interactions with prospective voters in connection with their solicitation of voter registration applications constitute constitutionally protected activity. However, and in contrast to both [*Meyer v. Grant*, 486 U.S. 414 (1988) (overturning restrictions on paying persons to circulate initiative petitions to amend Colorado's Constitution)] and [*Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) (finding an ordinance barring door-to-door contacts by various charities with potential donors to be unconstitutionally overbroad)], the Amended Law does not place any direct restrictions or preconditions on those interactions. For instance, it does not place any restrictions on who is eligible to participate in voter registration drives or what methods or means third-party voter registration organizations may use to solicit new voters and distribute applications. Instead, the Amended Law simply regulates an administrative aspect of the electoral process – the handling of voter registration applications by third-party voter registration organizations *after* they have been collected from applicants. Thus, the impact of this regulation of Plaintiffs' "one-to-one, communicative" interactions with prospective voters is far more indirect and attenuated than the statute addressed in *Meyer [v. Grant*, 486 U.S. 414 (1988)].

LWVF II, 575 F. Supp. 2d at 1321-22 (emphasis by the court). Thus, while Plaintiffs and any other 3PVROs may engage in "interactions with prospective voters in connection with their solicitation of voter registration applications," they also may engage in precisely the same interactions without physically collecting applications. That both interactions and application-*collecting* are part of the election process does not render the two inseparable, such that associational rights depend on organizations being allowed to take custody of applications without having to qualify in accordance with 3PVRO regulations.

Much the same point is made by the district court in *Am. Ass'n of People with Disabilities v. Herrera*, 580 F. Supp. 2d 1195 (D.N.M. 2008), in which it denied preliminary injunctive relief to plaintiffs, 3PVROs, who were challenging features of New Mexico's law

regulating 3PVROs that are substantially similar to those provisions of the 2011 Florida Law at issue in the case at bar.[6] There, the court stated:

> As the Plaintiffs admit, the Plaintiffs can engage in the political speech they seek to protect regardless of whether they are registering voters. Nothing prohibits them from engaging others in conversations concerning the issues of the day, political change, and the reasons why it is important to vote. The Plaintiffs could even use the opening line upon which they rely to initiate political dialogue: "Have you registered to vote?"

Id. at 1227 (record citation omitted). The court further noted, with respect to plaintiffs' objections to pre-registration, disclosure, and training requirements imposed on 3PRVOs under New Mexico law:

> The Plaintiffs are entitled to spontaneously engage whomever they choose in speech of a political nature. [The statute] has no detrimental impact on their ability to do so; it merely limits the Plaintiffs' ability to use registration as an opening line. And even then, the limitation is slight. *If New Mexico law prohibited third-party voter registration organizations all together, the Plaintiffs would still be able to initiate contact with individuals with discussions about registering to vote.*

Id. at 1232 (emphasis added). The court concluded: "The Plaintiffs cannot demonstrate that they have lost any First Amendment freedoms, for a minimal – or any – period of time." *Id.* at 1245.

Thus, a critical distinction exists between (1) an organization engaging in speech and associational activities in the course of a voter registration drive, and (2) an organization taking physical possession of voter registration applications. While the both types of activity *relate* to the voting process, the latter activity has no speech or associational attributes. It concerns activity undertaken *after* applications have been collected.[7]

---

[6] If anything, New Mexico's training requirement and its 50-form limit, among other provisions, make New Mexico's 3PVRO law more onerous than the 2011 Florida Law.

[7] Plaintiffs' cited cases (Doc. 9-1 at 23) are not to the contrary, but instead deal with contexts in which speech or associational rights were directly impeded, threatened, or penalized.

This distinction is underscored by the *Herrera* court's statement, quoted above, to the effect that no speech or associational rights require a State to allow independent third-party organizations to collect applications in the first place.

Consistently, until 1995 Florida did not allow 3PVROs at all. Instead, it deputized *individuals* residing in a given county, after undergoing training, to assist the county supervisor of elections in registering voters by taking possession of voter registration applications. *See LVVF II*, 575 F. Supp. 2d at 1302-03. Yet, organizations such as the LWVF were free to mount registration drives and to exercise their freedoms of speech and association without encumbrance. Indeed, Plaintiff LWVF affirmatively represents that it has been engaging in such activities for some *70 years*.[8] Doc. 5 at 6.

The Eleventh Circuit has made it clear that any alleged burden on First Amendment rights must constitute "direct penalization, as opposed to incidental inhibition." *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983); *Siegal v. LePore*, 234 F.3d 1163, 1178 (11th Cir. 2000) (en banc) (requiring an "imminent likelihood that pure speech will be chilled or prevented altogether").

Here, despite Plaintiffs' sweeping exaggerations, there is no basis for inferring that the 2011 Florida Law "directly penalizes" free speech or associational rights. Indeed, while "incidental inhibitions" of those rights are insufficient as a matter of law to predicate Plaintiffs' claims, no such inhibitions arise under the 2011 Florida Law.

Defendants are mindful that, where a State's laws impose burdens on voters, classes of voters, or political parties, some justification that is commensurate with the burden must be demonstrated. *See*, e.g., *Crawford v. Marion County Election Bd.*, 559 U.S. 181 (2008), in

[8] Defendants presume that LWVF did not, however, engage in taking possession of completed voter applications throughout that extended time period.

which the Court considered a challenge to an Indiana law requiring voters to have photographic identification. There, the Court stated:

> In neither [*Norman v. Reed*, 502 U.S. 279 (1992) (addressing Illinois's restrictions on a political party's access to the ballot)] nor [*Burdick v. Takushi*, 504 U.S. 428 (1992) (concerning Hawaii's prohibition of write-in voting)] did we identify any litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters. However slight that burden may appear, as [*Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (regarding imposition of a $1.50 poll tax on voters)] demonstrates, it must be justified by relevant and legitimate state interests "sufficiently weighty to justify the limitation."

Crawford, 559 U.S. at 191 (citation omitted). The Court then applied the *Anderson* balancing test, which requires "that a court evaluating a constitutional challenge to an election regulation weigh the asserted *injury to the right to vote* against the 'precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Id.* at 190 (citation omitted; emphasis added).[9]

However, what distinguishes the Supreme Court cases identified above, including *Anderson*, (as well as the Eleventh Circuit decision in *Wexler v. Anderson*; *see* note 9) from this case is that they were concerned with actual burdens placed by States upon the voters themselves, either directly or through their political parties. Thus, while those cases may refer broadly to "election laws" or the "election process" in applying the *Anderson* approach, they do not fairly stand for the proposition that *every aspect* of regulations touching on *any aspect* of the overall voting process must be subjected to that approach – even where, as here, the challenge is to First Amendment freedoms that plainly are not implicated, and no added burdens are imposed upon voters by the 2011 Florida Law.

---

[9] *See also Wexler v. Anderson*, 452 F.3d 1226, 1232 (11th Cir. 2006) ("Recognizing that '[e]lection laws will invariably impose some burden upon individual voters,' the Supreme Court has explained that the level of scrutiny courts apply to state voting regulations should vary with *the degree to which a regulation burdens the right to vote*.") (citation omitted; emphasis added).

It follows that Plaintiffs' First Amendment attacks on the 2011 Florida Law must fail, and therefore that Plaintiffs cannot demonstrate the requisite likelihood of success on the merits. Thus, the balancing test under *Anderson v. Celebreeze*, 460 U.S. 780, 789 (1983), should not be employed. There simply are no restraints of Plaintiffs' speech or associational rights to be put on the judicial scale for balancing purposes.[10]

Despite the patent absence of any restraint of speech or association, should the Court opt to go further and engage in the *Anderson* balancing test as Plaintiffs urge, clearly it would be inappropriate to subject the 2011 Florida Law to the strict scrutiny standard. No court has applied that standard to State regulations of 3PVROs. Instead, the most relaxed standard, looking to whether there is a rational relationship to a legitimate state interest, would be called for; this is the standard which the courts in *LWVF II* and *Am. Assoc. of People with Disabilities v. Herrera*, 580 F. Supp. 2d 1195 (D.N.M. 2008), employed in denying motions for preliminary injunctive relief against State regulations of 3PVROs. Under that standard, the 2011 Florida Law passes muster by a considerable margin.[11]

---

[10] *Cf. Doe v. Reed*, 130 S. Ct. 2811 (2010), in which the Court, in upholding the Ninth Circuit's overturning of a preliminary injunction, applied "exacting scrutiny" in assessing the claim that Washington State's public disclosure of the names of signatories of public referendum petitions violated constitutional free speech protections. But there, unlike the case at bar, genuine First Amendment concerns arose, because "[a]n individual expresses a view on a political matter when he signs a petition under Washington's referendum procedure." *Id.* at 2817. Even under the higher standard of scrutiny, the Court found that Washington's "interest in preserving the integrity of the electoral process suffices to defeat [Plaintiffs' argument]...." *Id.* at 2819.

[11] *Cf. Diaz v. Cobb*, 541 F. Supp. 2d 1319 (S.D. Fla. 2008). There, in assessing the constitutionality of book-closing deadlines for voters to register, the court rejected the strict scrutiny standard, then found the challenged restriction to pass constitutional muster under the reasonableness standard because the restriction "advances an important state interest in the conduct of an honest, fair and orderly election. The challenged registration deadline does not impose a severe burden on the constitutional rights of the citizens of this state. Florida provides an ample opportunity for all its citizens to vote well in advance of the registration deadline." *Id.* at 1340. But the regulation at issue in *Cobb* affected voters' right to cast ballots, a far cry from the regulations of 3PVROs at issue in the instant case.

2. The 2011 Florida Law Readily Passes Any Balancing Test

There can be no reasonable disagreement that Florida has a fundamental interest in regulating the electoral process, including the registration and regulation of 3PVROs that interject themselves into the voter registration process between applicants and elections officials. Indeed, Plaintiffs agree that "as a general matter, the State has a legitimate interest in preventing registration fraud and ensuring voter registration forms are submitted in time for voters to be added to the [voter registration] rolls." Doc. 9-1 at 35. Plaintiffs argue, however, that the 2011 Florida Law is not "appropriately tailored" for the sole reason that the "legislative record provides no insight as to why the Law's ... requirements are appropriately tailored to promote the integrity of the registration process." Doc. 9-1 at 35-36. But legislatures are under no obligation to justify or explain their legislation through legislative history. Rather, it is Plaintiffs who bear a "heavy burden" in seeking to invalidate a statute. *See Crawford*, 128 S. Ct. at 1621.

States' right to legislate with respect to the election process was expressly recognized in *Green v. Mortham*, 155 F.3d 1332 (11th Cir. 1998), where the Eleventh Circuit upheld various requirements for candidates to qualify to appear on ballots. There, the Court stated:

> The Constitution provides that states may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art I, § 4, cl. 1. The Supreme Court long has recognized that states have important and compelling interests in regulating the election process and in having ballot access requirements. The states' compelling interests include maintaining fairness, honesty, and order, minimizing frivolous candidacies, and "avoiding confusion, deception, and even frustration of the electoral process...."

Id. at 1335 (citations omitted). In applying the *Anderson* balancing test, the Court expressly refused to subject the challenged provisions to the strict scrutiny standard, and instead limited its inquiry to whether the provisions imposed reasonable and nondiscriminatory restrictions. The fact that filing fees were required of candidates was not unreasonable, inasmuch as "alternative

means of ballot access" existed. *Id.* at 1337. That filing fees were increased, and a verification fee for signatures on candidates' qualifying petitions was assessed, were held not to be unreasonable. *Id.* at 1337-38. The Court stated: "Having concluded that Florida's fee and petition alternatives impose reasonable restrictions on ballot access, we also conclude that the requirements are justified by the state's compelling objectives." *Id.* at 1338. Lastly, the Court, while noting plaintiffs' point that other States imposed lesser burdens and that Florida was "at the high end of that range[,]" squarely rejected a "comparative approach" to assessing the constitutionality of Florida's requirements, stating: "A court is no more free to impose the legislative judgments of other states on a sister state than it is to substitute its own judgment for that of the legislature." *Id.* at 1339.

Florida's compelling interest in having deadlines for the submission of voter registration applications by 3PVROs, well articulated in Dr. Salas's Affidavit at ¶¶ 22-25, was acknowledged in *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1338 (S.D. Fla. 2008). There, in applying the reasonableness standard, the court went to considerable lengths to explain the heavy burdens on Florida's elections officials, and the tremendous problems engendered by the hoarding of voter registration applications by 3PVROs and the dumping *en masse* of applications on the officials' doorstep at or near to the book-closing deadlines, stating:

> The undisputed evidence shows that, between the registration deadline and election day, local election officials operate under immense pressure to complete the multitude of critical tasks imposed on them by law and by practice. First, immediately before the close of books, the number of applications submitted to election officials experiences a dramatic increase. Third-party groups that conduct voter registration drives hoard voter registration applications that were completed weeks or months in advance and submit them at once to local election officials at the last possible moment. Supervisor Sweat testified that, in Manatee County, third-party groups "keep the applications in their car for three, four, five weeks" and "flood us at the last minute." In 2004, one third-party group delivered 27,000 applications in a bundle to the Supervisor's office in Hillsborough County on the last day of registration in 2004, and, on the same day, no fewer than 20,000

> applications were delivered to the Supervisor's office in Broward County. In Miami-Dade County, ten thousand voter registration applications – many of them dated months earlier – were submitted immediately before the 2004 registration deadline. Even the Division of Elections in Tallahassee received thousands of applications daily before the 2004 general election and the 2008 presidential primary.
>
> Florida law requires election officials to enter the information on each application into the statewide voter registration database within thirteen days after receipt. For a period of five days *after* the book-closing deadline, election officials continue to receive applications that are treated as timely, so long as they are postmarked by the registration deadline, § 97.0535(4), Fla. Stat. (2007), or were timely received by voter registration agencies, *id.* § 97.058(6). Meanwhile, officials must send notices, within five days after the entry of data into the statewide database, to all applicants who submitted incomplete applications. In the weeks before an election, applications received after the deadline are frequently set aside for want of time.

Id. at 1335-36 (record citations omitted; emphasis in original).

The court concluded:

> The evidence presented at trial clearly establishes that the challenged law advances an important state interest. The book-closing deadline is hectic and chaotic. ...
>
> The Florida statutory requirement of the deadline that must be met by voter registration applicants for submitting a complete and correct application on the 29th day before an election is a reasonable, non-discriminatory restriction that advances an important state interest in the conduct of an honest, fair and orderly election. The challenged registration deadline does not impose a severe burden on the constitutional rights of the citizens of this state. Florida provides ample opportunity for all of its citizens to register to vote well in advance of the registration deadline.

Id. at 1340. The court denied injunctive relief and dismissed the complaint with prejudice.

In *LWVF II*, the district court noted that defendants, on behalf of Florida, had "offered evidence of instances in which third-party voter registrations have 'hoarded' applications, failed to submit applications prior to the book-closing deadline, or even failed to submit applications at all." 575 F. Supp. 2d at 1324 (record citations omitted). The Court concluded:

> "[I]t is an obvious proposition not requiring extensive affirmative evidence that delayed or untimely submission of voter registration applications is likely to impair Defendants' interests in ensuring that Florida voters are registered to vote. Although there may be differing views concerning how best to address the mishandling of voter registration applications, that Florida has an interest in making sure its voters are timely and properly registered cannot reasonable be disputed. This observation, and the fact that Defendants have proffered evidence of the very problems the Amended Law is designed to address, lead the Court to conclude that Florida's interests are "'sufficiently weighty to justify the limitation'" imposed on Plaintiffs' activities.

Id. at 1325-25 (citation omitted). *See also Herrera,* 580 F. Supp. 2d at 1238 (balancing test favored 3PVRO statute as means to avoid voter fraud and disenfranchisement).

Even apart from the Salas Affidavit, the factual findings by the district courts in *Diaz v. Cobb*, *LWVF II*, and *Herrera*, without more, amply suffice to provide a firm basis for the Florida Legislature's enactment of the current version of section 97.0575 (and the DOS's adoption of Rule 1S 2.042).[12] The potential threats to the electoral process posed by 3PVROs, and the heavy burdens on Florida's state and local elections officials, have not materially (if at all) changed since passage of the earlier versions of section 97.0575 and the enactment of the New Mexico statute. Indeed, these concerns continue to arise from the very nature of the democratic election processes and the well-established public policy goals of facilitating registration of eligible voters while preventing registration of ineligible voters. The problems presented by 3PVROs are not logically or factually confined to Florida, as evidenced by the fact that 3PVROs operating nationally are directly or indirectly involved in this case. It follows that New Mexico's own problems with 3PVROs and its legislature's statutory response thereto are highly relevant here.

---

[12] Defendants hereby request the Court to take judicial notice of the findings and conclusions of the district courts in *Diaz v. Cobb*, *LWVF II*, and *Herrera*, pursuant to Fed. R. Evid. 201. (In *LWVF II*, defendants, *inter alia*, relied on testimony given in *Diaz v. Cobb; see LWVF II*, 575 F. Supp. 2d at 1310.)

Moreover, in light of the obvious and strong interests of Florida articulated above, there should be no need for *any* evidentiary showing in support of the 2011 Law. As the district court in *LWVF II* noted:

> [H]aving identified indisputably significant interests in ensuring that Florida voters are properly and timely registered, it is not clear that Defendants are required to submit affirmative evidence that third-party voter registration organizations have previously engaged in these activities for the Amended Law to survive this facial challenge. "It is well established that, in the election context, there is no need for an 'elaborate, empirical verification of the weightiness of the State's asserted justifications.'" *Fla. State Conf. of N.A.A.C.P. v. Browning*, [569 F. Supp. 2d 1237] (N.D. Fla. 2008) (quoting [*Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)]. Indeed, the Supreme Court has "'repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls." [Quoting *Washington State Grange*, 128 S. Ct. at 1192 (itself quoting *Burdick*, 504 U.S. at 438).]

LWVF II, 575 F. Supp. 2d at 1324.

As a consequence, Florida's substantial interest in regulating the electoral process – including but not limited to book-closing deadlines, the availability of voter registration applications, and the registration and regulation of 3PVROs – is firmly established.

3. Plaintiffs' Objections to the 2011 Florida Law Lack Merit and Upon Balance Must Fail

Defendants having more than satisfied their part of the *Anderson* balancing test, the inquiry should end here. That result is further compelled by the complete absence of any counterbalancing adverse impact from the 2011 Florida Law on the First Amendment speech and associational rights of 3PVROs and their agents, as established *supra*.

Instead of showing genuine restraint of their First Amendment freedoms, Plaintiffs offer up a smorgasbord of constitutionally-irrelevant objections to various regulatory features of the Florida Law that they and other 3PRVOs are required to follow as fiduciaries taking physical possession of voter registration applications from the respective applicants. None of the

challenged regulatory features exceeds the lawful powers of the Florida Legislature and the rulemaking authority of DOS. Indeed, Plaintiffs' objections – either directly or categorically – already have been considered and rejected by the district courts in *LWVF II* and *Herrera*.

In their restraint of speech and associational rights argument, Plaintiffs complain: (1) that 3PVROs must register with the Division of Elections before they seek to take physical custody of voter registration applications; (2) that 3PVROs must comply with regulatory requirements that enable the Division to monitor their application-gathering activities; (3) that 3PVROs must, within 48 hours of taking custody of applications, deliver or mail the applications to the Division or the county supervisor of elections; and (4) that 3PVROs can be subjected to fines for failure to make proper and timely delivery of applications. None of these complaints has any merit.

Registration requirements. As noted *supra*, while Plaintiffs object to the registration requirement for 3PVROs, the authority of the Florida Legislature to require that 3PVROs register is beyond question, and is recognized in both *LWVF II* and *Herrera*. Moreover, Plaintiffs completely overlook that, under Rule 1S-2.042, registration is required only if an organization is soliciting *for collection* or is *actually* collecting voter registration applications. Thus, they ignore that they need not register as 3PVROs at all in order to assist voters in registering, and therefore miss the key point that their First Amendment rights to engage in speech and associations are completely unimpeded. *See* Salas Aff. at ¶ 5.

Monitoring and reporting provisions. Florida has a legitimate interest in requiring that 3PVROs register, because 3PVROs take on fiduciary duties vis-à-vis those voters whose applications are entrusted to 3PVROs – and Plaintiffs conspicuously fail to acknowledge their duties. 3PVROs have no constitutional right to undertake such responsibilities, which arise by legislative grace (as distinguished from Plaintiffs' speech and associational rights, which arise

constitutionally and which Plaintiffs remain fully free to exercise). As a consequence, conditions placed upon 3PVROs that enable the Division of Elections to keep track of outstanding applications provided to 3PVROs – including the tracking and reporting provisions complained of by Plaintiffs – are entirely appropriate and lawful.[13] The same is true of provisions designed to underscore to persons acting as agents of 3PVROs the seriousness of their undertaking, including the requirement that agents sign sworn statements acknowledging that they "will obey all state law and rules regarding the registration of voters" and notifying them of the penalties for falsely registering a person. *See* Dr. Salas Aff. at ¶ 10.

As for applicants who would object to having their names associated with a 3PVRO through the tracking requirements, while that would not raise more than minimal free speech considerations if any,[14] an objecting applicant is free to register to vote through any of various other means.[15] Or, the applicant could fill out an unnumbered application obtained from any source – including the Internet and numerous other sources – and still receive assistance in completing it from the 3PVRO, provided that the applicant delivers it to an elections official. Plaintiffs' contention that volunteerism will be chilled because registration agents must "publicly register as agents," Doc. 9-1 at 17, is similarly flawed. Volunteers who do not take custody or solicit custody of voter registration applications have no obligation under the 2011 Florida Law

---

[13] *See Herrera,* 580 F. Supp. 2d at 1237 ("This tracing ability is a valuable means of assuring that those engaged in third-party voter registration are held accountable for mistakes or more serious misfeasance.").

[14] Plaintiffs lack standing to assert such claims on applicants' behalf. *See, e.g., Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 974 (11th Cir. 2005).

[15] *See Diaz v. Cobb*, 541 F. Supp. 2d at 1325-26 (noting that voter registration "can be accomplished in a number of different ways by anyone desiring to vote[,]" including registering at the local Supervisor of Elections, the Department of Motor Vehicles and Highway Safety, various other state agencies, public welfare offices, public libraries, and local community businesses; the registration process "takes approximately 10 minutes").

either to register or to submit sworn statements identifying themselves. That a volunteer handling applications containing sensitive information about applicants would balk at agreeing to follow the law or object to being associated with the very organization for which the volunteer is acting seems counterintuitive, but is of no legal significance.[16]

48-hour delivery requirement. Plaintiffs complain at length about having to deliver voter registration applications within 48 hours of collection. But while they would prefer to have a longer holding time, they fail to show that it is beyond the authority of the Florida Legislature to set the time limit as it has. As Dr. Salas's Affidavit indicates, the more quickly a 3PVRO delivers collected applications, the more quickly elections officials can fulfill their statutory duties to verify and register applicants before book closing. *See* Dr. Salas Aff. at ¶¶ 22-25. It is the *elections officials* – not 3PVROs – who are under statutory deadlines for verifying and registering applicants so that they "have an opportunity to complete the application form to vote in the next election[,]" which opportunity runs "up until the book closing for that next election." § 97.052(6), Fla. Stat. (2011); *see* Dr. Salas Aff. at ¶¶ 22-25. Significantly, the vast majority of duly-registered 3PVROs manage to comply with the applicable deadlines: *207 3PVROs* have both registered and *timely* submitted *8,954* collected voter registration applications under the 2011 Florida Law. *See id.* at ¶ 35. Moreover, the district court in *Herrera* has assessed and rejected similar complaints about the 48-hour deadline applicable to 3PVROs in New Mexico.[17]

Fines. Plaintiffs make much ado of the so-called chilling effect of what they characterize as 'strict liability" fines for failing to deliver or mail collected applications in timely fashion.

---

[16] Voter registration applications generally are public records. *See* § 97.0585, Fla. Stat. (2011) (exempting particular information, like the applicant's social security number). The same is true of registration agents' sworn statements and 3PVROs' registrations.

[17] *See Herrera*, 580 F. Supp. 2d at 1234-36 (rejecting as constitutionally groundless plaintiffs' claims that the 48-hour deadline is too severe, burdensome, and intimidating to volunteers, and that it interferes in 3PVROs' ability to enter applicants' names and addresses in their databases).

But their fears ring hollow, both because of the low annual limits on total fines assessable against a 3PVRO (including its affiliates), and because there are no fine provisions applicable to the agents of 3PVROs. Thus, any fears of Plaintiffs' volunteers that they will be fined are baseless.[18] *See* Dr. Salas Aff. at ¶¶ 26-31. Moreover, a 3PVRO will not be fined unless *both* the Secretary and the Attorney General independently determine that a fine is warranted.

At bottom, Plaintiffs seek to enlist the Court to force the State to change its laws to suit Plaintiffs' preferred manner of handling collected voter registration applications, and attempt to strengthen the inference of significant harm to themselves by their self-imposed moratoriums. But the fact that Plaintiffs wish to conduct their missions in their own ways, and to have ongoing relationships with applicants, is of no moment here; nor is their decision to forgo such relationships in Florida if they cannot conduct their affairs as they see fit, rather than as the Florida Legislature decrees. This very argument was rejected head-on by the district court in *Herrera*, 580 F. Supp. 2d at 1230-31 ("The law does not give the Plaintiffs so much control over the outcome of a constitutional analysis. Rather, the Plaintiffs must demonstrate that it is reasonable, in light of the challenged law, to so alter their behavior. They are unable to do so.").

The instant Plaintiffs, like those in *Herrera*, have failed to show any First Amendment basis, whether by reference to speech or to association, for enjoining the Florida Law.

---

[18] Plaintiffs ignore that the significantly reduced fines under the 2007 version of section 97.0575, Florida Statutes, passed constitutional muster in *LWVF II*. *See id.*, 575 F. Supp. 2d at 1322-25 (noting the reduction in fine levels and rejecting objections that the fines amount to strict liability and are redundant of criminal penalties). The current fines are not significantly changed (the $1,000 annual cap remains). Comparable fine levels also were upheld in *Herrera*, 580 F. Supp. 2d at 1235-36, and plaintiffs' claims of injury were dismissed as "constitutionally insignificant[,]" *id.* at 1239.

B. The 2011 Florida Law Is Not Unconstitutionally Vague

Plaintiffs broadly contend that "t[h]e vagueness in the [2011 Florida] Law permeates the statutory scheme as a whole, including its applicable regulations, improperly placing the burden of determining prohibited conduct on the Plaintiffs." Doc. 9-1 at 38. Plaintiffs then identify specific concerns with (1) the 48-hour deadline for delivering collected voter registration applications; (2) the tracking and reporting requirements for 3PVROs; (3) the obligation for a 3PVRO to report the termination of any registration agent to the Division of Elections; (4) the statute's penalty provisions; (5) the provision for referral of violations to the Attorney General; and (6) provisions allowing for waiver of fines and defenses. However, when these claims are assessed against the constitutional standard for vagueness, it is clear that Plaintiffs have no cause of action, and therefore cannot demonstrate the requisite likelihood of prevailing on the merits of their vagueness claims.

1. Legal Standard for Assessing Claims of Unconstitutional Vagueness

In *LWVF II*, the district court enunciated the standard for evaluating claims that a statute is unconstitutionally vague:

> A statute is unconstitutionally vague if citizens "of common intelligence must necessarily guess at its meaning." *Connally v. Gen. Constr. Co.*, [269 U.S. 385, 391 (1926)]. The void-for-vagueness doctrine rests upon basic principles of due process. *See Grayned v. City of Rockford*, [408 U.S. 104, 108 (1972)]. The doctrine "incorporates notions of fair notice or warning," *Smith v. Goguen*, [415 U.S. 566, 572 (1974)], designed to prevent the innocent from being trapped "by failing to give fair notice of what is prohibited." *Konikov v. Orange County, Fla.*, 410 F.3d 1317, 1329 (11th Cir. 2005). The doctrine also requires lawmakers to "set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement." *Smith*, [415 U.S. at 572]; *see also Kolender v. Lawson*, [461 U.S. 352, 358 (1983)] (suggesting the most important aspect of the vagueness doctrine may be the requirement that legislatures establish minimal guidelines to govern law enforcement).

LWVF II, 575 F. Supp. 2d at 1314-15.

The district court then articulated plaintiffs' burden for obtaining a preliminary injunction against Florida's 2007 version of its 3PVRO law on the basis of their vagueness claims:

> On each of their vagueness claims, to be entitled to a preliminary injunction, Plaintiffs must persuade the Court that (1) the Amended Law fails to provide fair notice of the prohibited conduct; and (2) the Amended Law fails to provide reasonably clear guidelines to law enforcement and triers of fact so as to deter arbitrary and discriminatory enforcement. *See Kolender*, 461 U.S. at 357-58....

LWVF II, 575 F. Supp. 2d at 1315.

Predictably, plaintiffs in *LWVF II* contended that the "higher standard of certainty" should be applied to Florida's 2007 3PVRO law, on the basis that it reached a substantial amount of constitutionally protected conduct. The district court rejected that contention, noting: "As discussed in this Order, the Amended Law regulates Plaintiffs' handling of voter registration applications after their collection, only indirectly impacting Plaintiffs' protected activities." *Id.*

Nevertheless, "in an abundance of caution," *id.*,the court gave plaintiffs the benefit of the doubt for their vagueness claims, as it did for their speech and associational rights claims. *Id.* Even so, the court had no difficulty in rejecting plaintiffs' claims and denying preliminary injunctive relief.

2.Pl aintiffs' Vagueness Contentions Lack Merit

In *LWVF II*, the court expressly held that provisions subjecting all parties involved in collecting voter registration applications for 3PVROs to fines for failure to submit the applications in timely fashion are not ambiguous. Rather, they "clearly put [all parties] on notice that their conduct ... is regulated by Florida law[,]" and "there is no ambiguity as to precisely what conduct is prohibited by the legislature: failing to timely submit collected voter registration applications to the supervisor of elections within the time periods or before the deadlines specified by the Florida legislature." *Id.* at 1316.

The district court went on to note that the deadline provisions for submission of applications were abundantly clear, and that any redundancy if anything gave individuals "heightened notice" of proscribed activities. *Id.* at 1316-17. The court stated:

> Although Plaintiffs may dispute the equity or wisdom of holding individuals as well as organizations liable, the clarity of the Amended Law concerning who is a third-party voter registration organization and who is liable for fines is sufficient to alleviate concerns regarding arbitrary or discriminatory application of the law.

Id. at 17.[19]

In concluding that plaintiffs' ambiguity claims could not predicate temporary injunctive relief, the court stated:

> Measured against the standards of "common intelligence" and an "ordinary person exercising ordinary common sense," the Amended Law provides fair notice to those who would engage in voter registration activities in the State of Florida and establishes clear guidelines for enforcement sufficient to avoid arbitrary and discriminatory application. For these reasons, Plaintiffs have not demonstrated a likelihood of success on their claim of facial vagueness.

Id. at 1319.

Notably, in *Herrera*, the district court, in denying preliminary injunctive relief, rejected plaintiffs' claims that New Mexico's 3PVRO law, which (as noted) is quite similar to the 2011 Florida Law, is unconstitutionally vague. *See id.*, 580 F. Supp. 2d at 1220-21, 1241. The court went on to dismiss all of plaintiffs' claims of facial unconstitutionality for failure to state a claim, *Am. Ass'n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183 (D.N.M. 2010). Thereafter, in denying plaintiffs' motion to alter or amend the ruling as to their vagueness claims, the court further articulated the governing legal standard, stating in pertinent part:

> The Supreme Court of the United States has noted that "perfect clarity and precise guidance have never been required even of regulations that restrict expressive

[19] The court also rejected plaintiffs' contention that the term "affiliate," as used in the law, was ambiguous. *See id.* at 1317-18.

> activity." *United States v. Williams*, 553 U.S. [285, 304 (2008)] (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)).
>
> ... In evaluating the constitutional validity of state statutes, the Supreme Court has stated that "every presumption is to be indulged in favor of the validity of a statute[.]" *Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

Am. Ass'n of People with Disabilities v. Herrera, 2010 WL 3834049 at *4 (D.N.M. 2010). The New Mexico law having met that standard, the court denied plaintiffs' motion. *Id.* at *14.

In the instant case, none of Plaintiffs' claims of vagueness has merit.

48-hour delivery requirement. The district court in *Herrera*, in all three decisions cited above, rejected plaintiffs' argument that the 48-hour provision under New Mexico law, which is substantially like that in the 2011 Florida Law, is unconstitutionally vague. In the latest of those decisions, the court stated:

> The Court disagrees that the forty-eight hour requirement is unconstitutionally vague. The plain language of the statute is clear. Once a voter-registration form is complete, the organization that takes possession of that form has forty-eight hours to return it. The Plaintiffs' argument that the statute does not indicate when the clock begins to run, demonstrated by the inconsistent answers of officials regarding the requirement, does not make the statute unconstitutionally vague. Common sense indicates that if the organization has made an effort to deliver or mail the registration form within forty-eight hours of receiving a completed form from a prospective voter, the statute has accomplished its purpose of preventing disenfranchisement. Regardless what different officials may have told the Plaintiffs in depositions, the statute leaves room for only one reasonable reading – and a reading a person of ordinary intelligence can discern. The statute is not vague in its requirement.

Id., 2010 WL 3834049 at *14. There is no basis for treating the instant claim that Florida's 48-hour provision is vague any differently.

A 3PVRO is responsible for "promptly" submitting voter registration applications that it collects, whether complete or not, to an elections official. § 97.0575(3)(a), Fla. Stat. (2011). This requirement has not changed. An application collected by a 3PVRO must be either hand-delivered within 48 hours "or the next business day if the appropriate office is closed for that 48-

hour period," or bear a clear postmark within two days after the 3PVRO collected it from the applicant. § 97.0575(3)(a), Fla. Stat. (2011); Rule 1S-2.042(7)(a), F.A.C.; *see* Dr. Salas Aff. at ¶ 18. The date of the applicant's signature is presumed to be the date that the 3PVRO collected the application, unless the date and time that the registration agent or 3PVRO listed on the back, bottom-portion of the collected application indicates otherwise. §97.0575(6), Fla. Stat. (2011); Rule 1S-2.042(4)(b), F.A.C.; *see* Dr. Salas Aff. at ¶ 18. The mail and hand-delivery deadlines are calculated from the date and time indicated on the back of the collected application. Rule 1S-2.042(4)(b), F.A.C.; *see* Dr. Salas Aff. at ¶ 18.

If the 3PVRO chooses to hand-deliver, rather than mail, applications that it collects, then the 48-hour deadline applies instead of the postmark deadline. *See* Dr. Salas Aff. at ¶ 19. The 48-hour deadline is interpreted to mean that if the Elections Official's office is closed when the 48 hour period *ends*, then the application must be delivered on the next business day. *See* § 97.0575(3)(a), Fla. Stat. (2011); *see also* Dr. Salas Aff. at ¶ 19. Thus, there should be no confusion as to whether the office "must be closed for an entire 48-hour period, or just some portion of that period." Doc. 9-1 at 30; *see also* Doc. 13 at ¶¶ 47-48 (expressing confusion).

If the 3PVRO chooses to mail-deliver applications that it collects, then the applications must be clearly postmarked within two days. *See* Dr. Salas Aff. at ¶ 20. If there is no postmark, or it is unclear, then the date of delivery is the actual date of receipt. Rule 1S-2.042(7)(a), F.A.C. The delivery deadlines for 3PVRO applications received by mail are calculated the same way as the registration date for all applications received by mail. *See* §97.053(4), Fla. Stat. (2011) (pinning the registration date on a clear postmark or actual receipt).

Delay caused by waiting until the day after collecting applications to hand-deliver them to an Elections Official, but then encountering "traffic, weather, ill health, or unexpected family

emergencies" that result in untimely delivery, can be avoided by dropping the applications in a mailbox. *See* Doc. 13 at ¶ 42.

Tracking and reporting requirements. Likewise, the 2011 Florida Law's tracking and reporting provisions – spelled out in the statute and accompanying rule – are more than sufficiently clear to give 3PVROs in Florida ample notice of the requirements they must meet. Plaintiffs do not object to the purpose and nature of the tracking and reporting requirements under the 2011 Florida Law – *viz.*, to ensure that 3PVROs comply with their fiduciary duties, and to be able to ascertain which if any 3PVRO has failed to do so. Indeed, prior to the 2011 changes, there was no way to identify whether a particular voter registration application had been submitted by a 3PVRO at all, let alone that it had been submitted by a particular 3PVRO. *See* Dr. Salas Aff. t ¶ 15. Plaintiffs' complaint is simply that it is too hard for them to supervise the persons collecting applications on the 3PVRO's behalf. *See* Doc. 9-1 at 28-29, 39-40.

Registration, updates, and reporting are made using a few short forms eliciting basic identifying information. *See* Dr. Salas Aff. at ¶¶ 6-16. All updates must be made within the same 10-day deadline, and accommodations for the transient nature of volunteers have been made. *Id.* at ¶ 12. Monthly reporting of forms is of the number of voter registration forms that *the 3PVRO* provided to its registration agents and the number of voter registration forms that *the 3PVRO* received from its registration agents in the preceding month. *See* Dr. Salas Aff. at ¶ 16; Rule 1S-2.042(5)(a), F.A.C.; *cf.* Doc. 9-1 at 39-40; *see also* Doc. 13 at ¶ 58 (incorrectly inferring that forms received by agents from sources other than the 3PVRO must be reported).

Fine provisions. The 2011 Florida Law's provisions concerning fines are eminently clear, and none of the changes from the 2007 version are vague or ambiguous. In rejecting the broad-based vagueness attack on the 2007 version in *LWVF II*, the district court stated that "there

is no ambiguity as to precisely what conduct is proscribed by the legislation: failing to timely submit collected voter registration applications to the supervisor of elections within the time periods or before the deadlines specified by the Florida legislature." *Id.*, 575 F. Supp. 2d at 1316-17; *see also Herrera*, 580 F. Supp. 2d at 1239 (recounting the basic steps that a 3PVRO must undertake to avoid penalties, including, *inter alia*, that they "ensure that their third-party voter-registration agent number appears on every completed voter-registration form that they submit to either the Secretary of State or a County Clerk" and that they comply with the 48-hour delivery or mailing requirement).

The 2011 Florida Law makes some modifications to the treatment of force majeure and impossibility, making them defenses to claims of violations, while continuing to provide prosecutorial discretion to state officials. These provisions, also fleshed out in more detail in Rule 1S-2.042(1)(c) & (d), are clear. Amid the hyperbole, at bottom, Plaintiffs object to prosecutorial discretion, but without basis.

Plaintiffs incorrectly infer that a fine might be assessed where delay was caused by impossibility of performance. Doc. 9-1 at 18; Doc. 13 at ¶ 62 (hypothesizing that the 3PVRO would be fined if an individual took or "r[a]n off" with forms stamped with the 3PVRO's identifying number, only to turn them in after the deadline); Doc. 13 at ¶ 63 (calling "inadvertently displaced" forms a "walking liability"). An untimely delivery will not be referred for assessment of a fine if delay is caused by impossibility of performance or force majeure. Fines are not "automatic," as Plaintiffs allege either. Doc. 13 at ¶ 42. As explained by Dr. Salas (*see* Aff. at ¶¶ 26-32), failure promptly to deliver collected applications because of force majeure or impossibility of performance is an affirmative defense to a fine and, if shown, the Secretary

will not refer the untimely delivery to the Attorney General for enforcement, so long as no other aggravating circumstances exist. § 97.0575(3)(a), Fla. Stat. (2011).

Plaintiffs also incorrectly infer that "[l]ate delivery" of "a voter registration application" "can result in up to a $1,000 fine." Doc. 9-1 at 18; *see* Dr. Salas Aff. at ¶ 28. The largest fine possible for late delivery of a single voter registration application is $500 and *only* if the 3PVRO collected it before book closing and willfully delivered the application after book closing; the $1,000 fine is for applications willfully not delivered. *See id.*; § 97.0575(3)(a)2. & 3., Fla. Stat. (2011). Plaintiffs further incorrectly allege that "[f]ines may be assessed" if there is "an 'unclear' postmark." Doc. 9-1 at 18; *see* Dr. Salas Aff. at ¶ 29. An unclear postmark necessitates a different way of calculating the deadline for delivery of mailed applications. Since delivery cannot be determined based on a postmark, it is based on actual receipt by the elections official. *See* Rule 1S-2.042(7)(a), F.A.C.; *see also* §97.053(4), Fla. Stat. (2011) (pinning the registration date to the date actually received if the postmark is unclear or missing).

The 2011 Florida Law is clear that, while fines may be assessed for violations committed by 3PVROs' agents, the fines are assessable only against the 3PVROs and not against their agents. *See* Dr. Salas Aff. at ¶ 27. A 3PVRO's registration agents are not liable for any fines; "the [3PVRO] is liable for the … fines." §97.0575(3)(a), Fla. Stat. (2011). Moreover, the violations of the 3PVRO's affiliates are included in the maximum yearly aggregate fine of $1,000. §97.0575(3)(a), Fla. Stat. (2011); *see* Dr. Salas Aff. at ¶ 27.

Provision for referral of violations to the Attorney General. Section 97.0575(4), Florida Statutes (2011), provides that the Secretary of State may refer violations of the 2011 Florida Law to the Attorney General for enforcement. There is nothing vague or improper in this provision. It simply allows for the exercise of discretion by the Secretary in making the referral,

and by the Attorney General in deciding whether to pursue legal action and the appropriate remedy to seek. A similar challenge to a comparable referral provision to the Attorney General under New Mexico's 3PVRO law was rejected in *Herrera*, where the court noted: "To the extent that there is any discretion involved in the enforcement of [New Mexico's 3PVRO law], it is prosecutorial discretion, which is legitimate. *See Borderkircher v. Hayes*, [434 U.S. 357, 364 (1978)]." *Herrera*, 580 F. Supp. 2d at 1236 (internal quotation omitted).

If the Secretary "reasonably believes that a person has committed a violation of [§97.0575]," which includes (among other things) failure to register as a 3PVRO and untimely delivery of applications, then the Secretary "may refer the matter to the Attorney General for [civil] enforcement." §97.0575(4), Fla. Stat. (2011) (permitting a civil action); *see* Dr. Salas Aff. at ¶¶ 33-34. Violations of section 97.0575 do not trigger criminal penalties as Plaintiffs allege. Doc. 9-1 at 14 (arguing that failure to register or report is "under pain of … criminal penalties").

As explained by Dr. Salas (*see* Dr. Salas Aff. at ¶ 33), in making the determination of whether to refer a violation to the Attorney General, the Secretary's principal concern will be for the protection of applicants who have entrusted their voter registration applications to a 3PVRO. The Secretary will carefully consider the facts and circumstances of each incident before determining whether a matter will be referred. Some of the criteria that would lead the Secretary to refer a violation of section 97.0575 to the Attorney General include:

> a) Voter harm: Any evidence reasonably suggesting that an applicant or registered voter has been directly harmed by the violation, e.g., evidence that a voter registration application was collected by a 3PVRO before a book-closing deadline but was not delivered to an elections official until after the applicable deadline, thereby depriving the applicant of the right to cast a ballot at that election.

b) History: Any evidence reasonably suggesting that the 3PVRO at issue has violated section 97.0575, Florida Statutes (2011), on more than one separate occasion, particularly if the 3PVRO has been notified of the prior violations by an elections official.

c) Other Violations of the Election Code: Any evidence reasonably suggesting that the 3PVRO at issue has violated additional provisions of the Election Code regarding voter registration, e.g., altering the voter registration application of another person without the other person's knowledge and consent.

Dr. Salas Aff. at ¶ 33.

In contrast, some of the criteria that would lead the Secretary *not* to refer a violation of section 97.0575 to the Attorney General, or to waive the statutory fines, include:

a) Force majeure or impossibility of performance: Any evidence reasonably suggesting that the failure to timely deliver collected voter registration applications was a result of an unexpected or uncontrollable incident outside the control of the 3PVRO at issue or the result of an incident that could not have reasonably been anticipated or controlled.

b) Lack of knowledge: Any evidence reasonably suggesting that the first-time failure of a 3PVRO to timely deliver collected voter registration applications resulted from a genuine and sincere lack of knowledge regarding the applicable legal requirements.

Id.

The Secretary has referred only two cases to the Attorney General for enforcement under the 2011 Florida Law. *See* Dr. Salas Aff. at ¶ 34. One of those involved a repeat offender, the other visibly altered voter registration applications. *See id.*

Because Plaintiffs have no plausible basis for claiming that their First Amendment speech and associational rights are at stake from the 2011 Florida Law, their vagueness claims necessarily depend on a showing that the challenged law is "impermissibly vague...." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). In this, their failure is complete. Accordingly, Plaintiffs' probability of prevailing on the merits of their

vagueness claims, as with their First Amendment claims, is essentially zero, warranting denial of preliminary injunctive relief.

C. The 2011 Florida Law Does Not Violate the National Voter Registration Act of 1993

Next, Plaintiffs contend that the 2011 Florida Law is preempted by the federal NVRA, or that it is in conflict with the NVRA, and thus is in violation of the Supremacy Clause of the United States Constitution. In both respects, Plaintiffs are wrong, as a matter of law.

At the outset, it is necessary, once again, to distinguish between organizations' voter registration drives, which the NRVA encourages, 42 U.S.C. § 1973gg-4(b), and the taking into custody of voter registration applications, as to which the NVRA is silent. This distinction is critical, and underscores why the district court in *Herrera* rejected precisely the arguments now advanced by Plaintiffs, as should this Court.

The *Herrera* court, after discussing the nature and purposes of the NVRA and its goal of increasing the number of voter registrations, *id.* at 580 F. Supp. 2d at 1222-23, stated:

> The Plaintiffs argue that the NVRA preempts [New Mexico's 3PVRO law]. Although they cite several provisions of the federal act, upon closer scrutiny, none is at odds with the New Mexico law either in letter or in spirit. In other words, the NVRA neither explicitly nor implicitly preempts [New Mexico's 3PVRO law]. Rather, the two sets of laws are fully compatible.
>
> The Plaintiffs contend that the New Mexico law impedes the NVRA's stated purpose of increasing voter registration and encouraging third-party voter registration. That conclusion, however, is based on only a partial reading of the NVRA. While it is true that the NVRA expresses a generalized purpose of increasing voter participation and expresses approval of third-party voter registration, it also outlines other purposes. *See* 42 U.S.C. § 1973gg(b). Namely, it is concerned with protecting the overall integrity of the electoral process and the accuracy of voter registration rolls. *Id.* The New Mexico law is compatible with those stated interests, given that the laws are born out of a desire to protect the process of voter registration from fraud and error. The prevention of voter fraud and voter registration fraud is indispensable to the integrity of the electoral process and the accuracy of voter registration rolls. Nothing in the federal act

> suggests that those interests must be subordinated to the interest of increasing voter turnout.
>
> Moreover, [the New Mexico's law's] arguable negative impact on voter registration is debatable, considering the fact that compliance with it helps to insure that voter registration forms are properly completed, turned in, and recorded. The effect of compliance is to prevent the loss of voters whose forms were mishandled. [The New Mexico's law's] intent is to make certain every registered voter is able to vote, not to depress voter turnout.
>
> Finally, the New Mexico law does not purport to discourage third-party voter registration. Rather, New Mexico law allows it under certain conditions. No provision of the NVRA suggests that organizations engaged in third-party voting registration must be allowed to proceed unfettered. In fact, such a situation would arguably be at odds with the NVRA, because the Act expresses a concern for preserving the integrity of the voter-registration process. Thus, with respect to their purposes, the NVRA and [New Mexico's 3PVRO law] are compatible.

Id. at 1241-42.

The points made by the *Herrera* court apply fully to the relationship between the NVRA and the 2011 Florida Law, and thus are equally dispositive of Plaintiffs' NVRA arguments in the case at bar. The NVRA does not preempt the field with respect to 3PVROs under state law, nor is there any conflict preemption. Indeed, not only are the NVRA and the 2011 Florida Law not in conflict, they serve to advance the important and mutually-shared constitutional goals of encouraging registration of eligible voters while guarding against the registration of ineligible voters. Hence, regardless of whether Plaintiffs assert field preemption, conflict preemption, or express preemption,[20] they state no legally cognizable claim, and hence cannot carry their burden of demonstrating likelihood of prevailing on the merits.

Plaintiffs' arguments to the contrary, Doc. 9-1 at 42-47, miss the mark. First, it is simply untrue that only registered 3PVROs can obtain voter registration application forms in Florida.

---

[20] For a discussion of the three theories of preemption, *see This That and Other Tobacco, Inc. v. Cobb County*, 285 F.3d 1319, 1321 (11th Cir. 2002); *see also Crosby v. Nat'l Trade Council*, 530 U.S. 363, 372 n.6 (2000) (noting that preemption theories are not "rigidly distinct").

The forms are available to anyone from a wide variety of sources. It is only where an organization seeks to take custody of applications that Florida's 3PVRO regulations apply. *Charles H. Wesley Educ. Found. v.* Cox, 408 F.3d 1349 (11th Cir. 2005), relied on by Plaintiffs, is not to the contrary. Indeed, there, the Eleventh Circuit noted that the NVRA's provisions "regulate the [voter registration] forms' final content and method of delivery, but *do not regulate their dissemination or their collection.*" *Id.* at 1353 (emphasis added).[21]

Second, the NRVA does not conflict with the 2011 Florida Law with respect to electronic submissions and monitoring of 3PVROs. *Project Vote v. Blackwell*, 455 F. Supp. 2d 694 (N.D. Ohio 2006), cited on by Plaintiffs, relates to preregistration, training, and affirmation requirements that discriminated between paid and unpaid voter registration workers – features wholly distinct from Florida's tracking and reporting requirements for 3PVROs, which concern their conduct upon collecting applications, an area outside the purview of the NVRA.

Third, the 2011 Florida Law's 48-hour requirement for delivering collected applications does not interfere in the NVRA's provisions regarding the mailing of applications. The 48-hour delivery deadline does not even apply to mailed applications. The 2011 Florida Law permits mail delivery within a two-day deadline. *See* Rule 1S-2.042(7)(a), F.A.C.; Dr. Salas Aff. at ¶ 20.

---

[21] Thus, in *Ass'n of Cmty. Orgs. For Reform Now v. Cox*, 2006 WL 6866680 (N.D. Ga. 2006), in which a state law requiring that voter registration applications be sealed prior to submission to election officials was challenged, the court enjoined the law on First Amendment grounds for interfering in political speech, but refused to grant relief under the NVRA, stating: "Although the NVRA 'impliedly encourages' voter registration drives, it does not regulate how private entities may collect registration applications [citing *Wesley Found.*]. … Rather, the provisions of the NVRA *only* regulate the voter registration form's final content and the method for its delivery. Regulating voter registration has traditionally been the responsibility of the states. … [N]either the NVRA nor the Eleventh Circuit's holding in [*Wesley Found.*] prohibit a state from enacting regulations on the manner in which private groups conduct voter registration drives." 2006 WL 6866680 at *4-5 (emphasis in original). Unlike the situation in *Wesley Found.*, the 2011 Florida Law does not disqualify voter registration applications, even if delivered improperly by an organization; and unlike *Cox*, the 2011 Florida Law does not require that applications be sealed.

The NVRA does not grant a right to register by mail within larger deadlines, or grant any such right to 3PVROs. *See* 42 U.S.C. §1973gg-2(a)(2) (directing only that "each State shall establish procedures to register to vote … by mail application"); *id.* at §1973gg-4(3)(b) (stating that States shall just make voter registration forms "available" to 3PVROs in particular). The delivery deadline facilitates voter registration, the foremost goal of the NVRA.

Fourth, the NVRA is not violated by the 2011 Florida Law's requirement that 3PVROs affix their unique identification numbers to applications they collect; 42 U.S.C. § 1973gg-7(b)(1) specifically allows information "to enable the appropriate State election official to … administer voter registration and other parts of the election process" to be added.

Lastly, any registering voter who wishes not to have his or her name associated with a 3PVRO has numerous other avenues by which to register, as noted, rendering any privacy concerns (as to which Plaintiffs lack standing) baseless.

In sum, Plaintiffs fail to meet their heavy burden of showing that they are likely to prevail on *any* of their claims. For this reason alone, their motion for a preliminary injunction must be denied. As in *LWVF II*, the Court need not even consider Plaintiffs' failures to meet the remaining three requisites for that extraordinary relief. *See LWVF II*, 575 F. Supp. 2d at 1325 ("Because Plaintiffs do not satisfy the first prong of the injunctive relief standard, the Court need not address the remaining three prongs necessary to the grant of preliminary injunctive relief).

II. PLAINTIFFS DO NOT STAND TO SUFFER IRREPARABLE INJURY IN THE ABSENCE OF A PRELIMINARY INJUNCTION

Plaintiffs likewise fail to show any credible threat of harm to themselves if their motion is denied, much less the required showing of *irreparable* injury.

In *Herrera*, the district court, having opted to reach the irreparable injury requisite, ruled that plaintiffs "cannot demonstrate that they have lost any First Amendment freedoms, for a

minimal – if any – period of time" and that "[a]t worst, the Plaintiffs must fulfill some simple administrative requirements and monitor the performance of their volunteers to carry out voter-registration activities." *Id.*, 580 F. Supp. 2d at 1245-46. The Court went on to state:

> To the extent that the Plaintiffs have curbed or, in some cases, halted altogether their voter registration efforts, they have done so by choice, not because the challenged law forces them to give up their activities. The Plaintiffs are free to continue voter registration activities so long as they do so competently.

Id. at 1246.

Once again, the *Herrera* court's reasoning applies fully to the case at bar. As noted previously, the instant Plaintiffs would remain free, without even bothering to register as 3PRVOs in Florida, to engage in the sorts of voter registration drives and related activities that they claim to be so important to themselves. Plaintiffs can engage in all forms of political speech and association, help individuals obtain blank registration forms (readily available from numerous sources), and explain how to complete the forms. It is only where an organization seeks to interpose itself into the formal registration process by collecting applications that any such registration requirement arises. But if an organization opts to become a 3PVRO and take such custody of applications, then by law it assumes a *fiduciary obligation* to the applicants, and the Division of Elections has every right – and responsibility – to control that process. Because Plaintiffs alternatively can operate as they wish in Florida if they opt not to take possession of voter registration applications, no threat of irreparable injury to plaintiffs arises. *See, e.g., Christian Civic League v. FEC*, 433 F. Supp. 2d 81, 89 (D.D.C. May 9, 2006) (per curiam) (three-judge panel) (preliminary injunction denied where irreparable harm lacking because plaintiff could make alternative arrangements); *Mendelsohn v. Meese*, 686 F. Supp. 75, 79 (S.D.N.Y. 1988) ("If the Act creates inconvenience in his pleas for private funding, this would not justify the grant of the extraordinary relief [the plaintiff] is requesting.").

The instant Plaintiffs' failure to demonstrate the threat of irreparable harm to themselves is fatal to their request for a preliminary injunction.

III. THE BALANCE OF HARDSHIPS FAVORS DENYING INJUNCTIVE RELIEF

In *Herrera*, the district court opted to address, and to reject, plaintiffs' claim that the balance of hardships tipped in their favor, stating:

> The State's interest in protecting the elective franchise is paramount. *See Crawford v. Marion County Election Bd.*, 128 S. Ct. at 1617. Weighing this harm against the fact that Plaintiffs are free to engage in the behavior of their choice would be inappropriate in this case.

Herrera, 580 F. Supp. 2d at 1247.

Here, as in *Herrera*, the balance tips completely against Plaintiffs and in favor of Defendants. Florida has a duty to protect the integrity of the voter-registration process, and in that regard has placed enormous burdens on its officials at the Division of Elections to register voters properly and in timely fashion. The extensive showing in Defendants' favor, by way of affidavit and findings and conclusions of the federal district courts in *LWVF II* and *Diaz v. Cobb*, underscore the need for orderly processes to control 3PVROs and their agents. Perhaps some 3PVROs are pleased to obtain veritable truckloads of applications and dump them on the Division at or near to book-closing deadlines, but the strain on Florida's election system created by such circumstances amply justifies the 2011 Florida Law. Enjoining the Defendants from enforcing the challenged law at this time would substantially injure Florida and harm the public. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers … injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.,* 434 U.S. 1345, 1351 (1997) (Rehnquist, J., in chambers). A "presumption of constitutionality" attaches to every legislative act, and that presumption is "an equity to be considered in favor of ... [the

government] in balancing hardships." *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers).

Thus, as in *Herrera*, Plaintiffs fail to meet this requisite for a preliminary injunction, affording yet another and independent basis for denying their motion.

IV. A PRELIMINARY INJUNCTION WOULD BE CONTRARY TO THE PUBLIC INTEREST

Lastly, Plaintiffs fail to meet the public interest requirement for a preliminary injunction.

In *Herrera*, the court also reached this issue, and once again for good reason ruled against the plaintiffs, stating:

> The public interest in this case is aligned with the State's interest – ensuring the integrity of the electoral process and making sure that all registration forms are timely recorded. Past incidents demonstrate that, absent [the New Mexico 3PVRO law], voter-registration fraud and the disenfranchisement of New Mexico citizens are not only possible, but likely. An injunction from the Court prohibiting the enforcement of [the New Mexico law] is thus adverse to the public interest.

Herrera, 580 F. Supp. 2d at 1247.

The reasoning of the *Herrera* court is dispositive here, as well. The granting of the instant motion in favor of Plaintiffs would be contrary to the Florida's interests in protecting the integrity of the voting and voter-registration processes, and in avoiding the disenfranchisement of Florida citizens. Again, Plaintiffs' failure to establish this requisite must result in denial of preliminary injunctive relief.

Conclusion

For all of the reasons stated above, because Plaintiffs have failed to establish even a single one of the four requisites for a preliminary injunction, their motion to enjoin enforcement of the duly-enacted legislation and rules governing third-party voter organizations in Florida should be denied.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL OF FLORIDA

/s/ Blaine H. Winship
Blaine H. Winship
Special Counsel
Florida Bar No. 356913
Office of the Attorney General of Florida
The Capitol, Suite PL-01
Tallahassee, Florida 32399-1050
Telephone: (850) 414-3300
Facsimile: (850) 488-4872
Email: blaine.winship@myfloridalegal.com
Attorneys for All Defendants

FLORIDA DEPARTMENT OF STATE
Daniel E. Nordby
General Counsel
Florida Bar No. 014588
Ashley E. Davis
Assistant General Counsel
Florida Bar No. 48032
Florida Department of State
R.A. Gray Building
500 S. Bronough Street
Tallahassee, Florida 32399-0250
Tel. 850-245-6536
Fax 850-245-6127
Counsel for Defendants
Secretary of State Kurt S. Browning and
Director of the Division of Elections Gisela Salas

CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of January, 2012, a copy of the foregoing Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction was served on counsel of record through the Court's Notice of Electronic Filing system.

/s/ Blaine H. Winship
Blaine H. Winship
Special Counsel
Office of the Attorney General of Florida