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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. **08-21243-CIV-ALTONAGA/BROWN**

LEAGUE OF WOMEN VOTERS OF FLORIDA, FLORIDA AFL-CIO, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 79 (AFSCME), as organizations and as representatives of their members; and MARILYNN WILLS;

Plaintiffs,

v.

KURT S. BROWNING, in his official capacity as Secretary of State for the State of Florida, and DONALD L. PALMER, in his official capacity as Director of the Division of Elections within the Department of State for the State of Florida,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER AND TO SET A BRIEFING AND HEARING SCHEDULE FOR A PRELIMINARY INJUNCTION MOTION AND TO ALLOW LIMITED DISCOVERY

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Plaintiffs, League of Women Voters of Florida (the "**League**"), Florida AFL-CIO (the "**AFL-CIO**"), American Federation of State, County and Municipal Employees, Council 79 ("**AFSCME**" and together with the League and the AFL-CIO, "**Institutional Plaintiffs**"), and Marilynn Wills submit this memorandum in support of their motion for a Temporary Restraining Order pursuant to Federal Rule Civil Procedure 65(d), preventing enforcement of Florida Statutes §§ 97.021(36) and 97.0575.

PRELIMINARY STATEMENT

Plaintiffs are nonprofit organizations and a Florida citizen who have conducted, and wish to continue to conduct, voter registration drives in order to encourage civic participation in government, communicate political messages, and associate with fellow citizens to effect change. Plaintiffs file this emergency motion to prevent Defendants, who are state election officials, from enforcing Florida's third-party voter registration law, Fla. Stat. §§ 97.021(36) and 97.0575, as amended by Laws of Florida, Ch. 2007-30.[1] Although Defendants had previously agreed to refrain from enforcing the reenacted law, they abruptly and unexpectedly terminated that agreement on March 31, 2008, and will begin enforcing the amended law on April 30, 2008. Plaintiffs urge this court to enjoin such enforcement and allow plaintiffs to conduct their constitutionally protected voter registration activities unburdened by the statute's unconstitutionally vague and excessively punitive provisions.

This Court enjoined a previous enactment of this law in 2006, holding that the Plaintiffs' voter registration activities include important political speech and association situated at the core of the First Amendment's protections, and that the original law unconstitutionally burdened the exercise of those rights by, among other things, threatening Plaintiffs' crippling fines on a strict liability. The reenacted law suffers from many of the same flaws as the version enjoined by this Court, and from the additional fatal flaw of being void for vagueness.

As Defendant Browning has acknowledged, the law includes confusing and ambiguous language concerning the circumstances in which volunteers and workers participating in organized voter registration drives, as well as local League chapters and local unions, may be individually subject to fines of up to $1,000 annually. Plaintiffs must assume that the League, its

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[1] Plaintiffs move for injunctive relief based only on Counts I and II.

chapters and its volunteers, including Ms. Wills, and the unions, their locals and workers, could each be subject to fines of up to $1,000 annually for cumulative fines of tens or hundreds of thousands of dollars. Rather than risk such exposure, Plaintiffs have shut down their voter registration activity – marking only the second time the League has done so in its history, the first time being in connection with the original version of this statute. The law's vagueness also raises the very real possibility of arbitrary discriminatory enforcement.

Even if the reenacted law were not fatally vague, which it is, it should be enjoined because it contains many of the same flaws that led this Court to enjoin the prior enactment: escalating fines for failing to meet arbitrary deadlines, nearly strict liability for those fines, and the risk of significant fines for individual volunteers and employees of Plaintiffs' voter registration drives. The law allows the imposition of fines up to $1,000 on volunteers, such as Ms. Wills, who seek exercise their core First Amendment rights and to engage fellow citizens in informed civic participation. The law's ambiguous fine provisions also potentially allow the imposition of crippling fines on organizations such as the League and the unions – even for minor infractions and even for innocent mistakes (with a few very narrow exceptions). The state's interest in enforcing the law are no more compelling than they were in 2006, and the law, despite its purported fixes, is just as burdensome as and no more narrowly tailored than the prior enactment.

Should the law be enforced, Florida would join only a handful of other states that impose fines on voter registration activities. This Court has previously noted the central importance of those activities to the election process and their status as among the core rights protected by the First Amendment. The present action involves the very same protected activities and substantially the same burdens on those activities, which once again have been entirely suspended in anticipation of enforcement of the amended law. For many of the reasons previously articulated by this Court, and for the additional reason that the reenacted statute is void for vagueness, Plaintiffs urge this court to temporarily enjoin Defendants from enforcing the reenacted law.

SUMMARY OF FACTS

Plaintiffs wish to conduct voter registration drives because they want to communicate political messages important to Plaintiffs' organizational missions and associate with their fellow citizens to advance these missions.

On May 18, 2006, Plaintiffs, along with other nonprofit groups, filed a prior action in this Court, No. 06-21265, *League of Women Voters v. Cobb*, to enjoin enforcement of the original version of Florida's third-party voter registration law. That law imposed escalating fines on third-party voter registration organizations for forms returned after an arbitrary ten-day deadline as well as strict liability for failing to comply with its requirement.

On August 28, 2006, this Court found that the law unconstitutionally interfered with Plaintiffs' First Amendment freedoms and preliminarily enjoined the law. Defendants appealed, but while the case was pending in the Eleventh Circuit, the state of Florida enacted an amended version of the law. This new version left in place many of the original law's objectionable features and included new, undefined terms.

The amended law was scheduled to go into effect on January 1, 2008, however, the parties in the previous action entered into a standstill agreement that prevented enforcement of the law. On March 31, 2008, Defendants abruptly and unexpectedly terminated the standstill agreement and, pursuant to the agreement's terms, can begin enforcing the amended law on April 30, 2008. Plaintiffs filed this action at their first opportunity, since they have had less than 30 days to close the previous litigation, seek Institutional Plaintiffs' board approval for a new suit, prepare papers addressing the amended law, including declarations, and obtain new pro bono counsel. Defendants, however, have had notice since July 25, 2007 that Plaintiffs would challenge the amended law before it could be enforced. Plaintiffs-Appellees Opposition to Appellants' Suggestion of Impending Mootness at 13, *League of Women Voters of Fla. v. Sec'y of State of Florida*, No. 06-14836-D (11th Cir. July 25, 2007), *available at* http://www.brennancenter.org/page/-/d/download_file_50120.pdf.

Absent an injunction, April 30, 2008 will be the first time since August 28, 2006, that any version of the third-party voter registration law—a law that continues to unduly burden Plaintiffs' First Amendment rights—will be in force.

A. Plaintiffs' Voter Registration Drives

Voter registration is a uniquely effective way to encourage informed and active participation in government, communicate political messages, and associate with fellow citizens to effect change. In addition to encouraging citizens to vote, voter registration drives promote accountability and participation in government (Declaration of Dianne Wheatley Giliotti, dated

Apr. 28, 2008 ("Giliotti Decl.") ¶¶ 6, 9, 13; Declaration of Marilynn Wills, dated Apr. 28, 2008 ("Wills Decl.") ¶¶ 9-10), empower constituencies (Declaration of Alma Gonzalez, dated Apr. 28, 2008 ("Gonzalez Decl.") ¶¶ 9, 12; Declaration of Cynthia Hall, dated Apr. 28, 2008 ("Hall Decl.") ¶ 11), and encourage political action and the advancement of shared political goals (Gonzalez Decl. ¶ 12; Hall Decl. ¶ 12; Wills Decl. ¶ 9). When Institutional Plaintiffs run voter registration drives, they inevitably trigger conversations concerning the importance of voting, civic engagement and issues of the day. (Giliotti Decl. ¶ 19; *see also* Wills Decl. ¶ 9.)

Plaintiffs register new voters in Florida not only by convincing them that voting is an important civic duty, but also by assisting them to complete applications, collecting and delivering their applications and, at times, verifying that election officials correctly added the new voters to the rolls. (Gonzalez Decl. ¶¶ 14-17; Wills Decl. ¶ 11.) These registration efforts are the most effective means to increase the percentage of Florida citizens who are registered to vote. (Giliotti Decl. ¶ 21; Gonzalez Decl. ¶¶ 13, 17.) They are the best way to motivate new voters and they also serve to assist those voters who may need help filling out their voter registration forms accurately and completely. (Giliotti Decl. ¶¶ 16, 21; Gonzalez Decl. ¶ 16; Hall Decl. ¶ 17.) If Plaintiffs merely distributed and did not collect voter registration applications, their drives would not be as successful, and significantly fewer voters would be added to the rolls. (Giliotti Decl. ¶ 21; Gonzalez Decl. ¶¶ 14-16; Hall Decl. ¶¶ 18-19.)

Third-party voter registration is a significant source of voter registration in the state. As of 2004, according to U.S. census data, over nine percent of Florida's registered voters had registered through registration drives, representing over 750,000 voters. The percentage of new registrants registering through voter registration drives has increased substantially over the past few election cycles. Plaintiffs' voter registration drives have especially benefited senior citizens, people with disabilities, members of rural, low-income, and minority communities and others who find it difficult either to travel to a government office during business hours or to obtain a registration application online. (Giliotti Decl. ¶ 13; Gonzalez Decl. ¶ 15.) These drives are all the more important because Florida is among the worst states in the nation in terms of voter registration rates, and even that rate has declined over the last four years. Project Vote, *Florida Votes: Civic Engagement in the Sunshine State, 2002-2006.* Therefore, the Secretary of State's decision to terminate the standstill agreement, which has caused Plaintiffs to cease their voter

registration activities, arrives at a time when Florida needs to work with its partners in voter registration to reverse this trend and increase the rolls.

B. Florida's Amended Voter Registration Law

Under the current version of the law, "third-party voter registration organization[s]," defined as "any person, entity, or organization soliciting or collecting voter registration applications," Fla. Stat. § 97.021(36), are subject to mandatory, escalating, per-form fines for returning a completed voter registration application more than ten days after receiving it from the voter ($50), or after book-closing, the deadline by which the state must receive a registration form to process it in time for an upcoming election ($100), or for failing to return a completed form ($500). *Id.* § 97.0575(3). These fines are increased for willful violations (to $250, $500, and $1,000 per form, respectively). *Id.*

The law holds all third-party voter registration groups strictly liable for meeting its deadlines, with only two limited exceptions: where the failure to return a form promptly is due to "*force majeure*" or "impossibility of performance." *Id.* Groups or individuals who have failed to comply with the law for other reasons, including family emergencies, remain vulnerable to crippling fines.

Moreover, the law lacks precise definitions for the terms "organization" and "affiliate." Section 97.021(36) defines "organization" as "any person" collecting voter registration applications, leaving unclear whether an individual working in conjunction with a larger organization will be considered part of a larger organization under the law or will be subject to fines as his or her own third-party voter registration organization. The law includes a $1,000 cap on fines assessed against such organizations and their affiliates, Fla. Stat. § 97.0575(3), but does not define "affiliate," leaving it unclear whether a local chapter, unit, or union of a parent organization or an individual working with or for an organization would be considered an "affiliate."

C. The Impact of the Challenged Law on Plaintiffs

Local branches of Institutional Plaintiffs cannot afford the potential fines authorized under the law. (Giliotti Decl. ¶ 28; Gonzalez Decl. ¶ 24; Hall Decl. ¶ 22.) Moreover, Institutional Plaintiffs are financially ill-equipped to handle fines on behalf of those local

chapters. For example, if each of the AFL-CIO's 450 local unions is fined $1,000—a sum they cannot afford to pay, given that many of them have annual budgets of *less than* $1,000—the state organization could face $450,000 in fines that it would have to pay on their behalves. (Hall Decl. ¶ 22.) Similarly, the League of Women Voters could face fines as high as $26,000 on behalf of its local chapters, an amount greater than one-third of its annual budget (Giliotti Decl. ¶ 28), and AFSCME would have to pay the devastating sum of over $90,000 (Gonzalez Decl. ¶ 24).

Because none of these organizations can afford fines of this magnitude, they have ceased all of their voter registration efforts. The League of Women Voters, for instance, has halted all voter registration drives for only the second time in its 70-year history. (Giliotti Decl. ¶ 32.) AFSCME has also ceased its registration activities (Gonzalez Decl. ¶ 23), as has the AFL-CIO, although those activities are critically important to its collective bargaining strategy (Hall Decl. ¶¶ 11, 21).

Plaintiff Marilynn Wills has indicated that she and other volunteers cannot afford these fines. (Wills Decl. ¶¶ 10, 12-13.) They have also stopped participating in voter registration activities. (Wills Decl. ¶ 13.) Moreover, Institutional Plaintiffs have stopped working with individual volunteers out of concern for the risks that this law imposes upon them. (Giliotti Decl. ¶¶ 29-30; Gonzalez Decl. ¶¶ 24-25; Hall Decl. ¶¶ 21-23.) These organizations depend heavily on volunteers. For example, the League relies exclusively on volunteers to register voters in drives organized by its 25 local chapters and 2 member-at-large units across the state; with the equivalent of only 1.5 paid employees, it cannot fully oversee the activities of all its volunteers. (Giliotti Decl. ¶ 35.) The AFL-CIO and AFSCME also depend heavily on volunteers who may now be subject to devastating fines. (Gonzalez Decl. ¶ 11; Hall Decl. ¶¶ 8, 23.) Overall, much third-party voter registration activity in the state of Florida is at a standstill.

ARGUMENT

In 2006, this Court found that Plaintiffs had established a substantial likelihood that the original version of the third-party voter registration law was unconstitutional under the First Amendment. *League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314, 1339 (S.D. Fla. 2006) ("*LWVF*").

This Court first found that voter registration drives characteristically involve core political speech and association and are thus protected by the First Amendment under cases such as *Meyer v. Grant*, 486 U.S. 414 (1988), and *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). *LWVF*, 447 F. Supp. 2d at 1332-33. This Court then found that the original law burdened such core political speech and association and therefore merited exacting First Amendment scrutiny. *Id.* at 1339. Applying the balancing test of *Anderson v. Celebrezze*, 460 U.S. 780 (1983), this Court found that the statute significantly burdened Plaintiffs' First Amendment activities and that the state had not demonstrated the law was necessary to advance its asserted interests. *LWVF*, 447 F. Supp. 2d at 1331, 1339.

The amended law leaves in place most of the offending provisions of the original law. The most important change, the $1,000 annual cap on fines for a voter registration organization and its affiliate organizations, however, is fatally vague. The amended law also makes no change to the definition of an "organization" as a "person." As a result, if Plaintiffs were to continue their voter registrations drives, individual volunteers like Plaintiff Marilynn Wills may face fines of up to $1,000 each. And Institutional Plaintiffs, if the amended law is construed against them, could be completely shut down by cumulative annual fines reaching up to hundreds of thousands of dollars. Because of its vagueness, the amended law unconstitutionally infringes Plaintiffs' First Amendment rights. The law also violates the First Amendment because it continues to create a risk of potentially ruinous fines for engaging in core political speech and association.

Plaintiffs seek a TRO to preserve the status quo created by this Court's prior ruling on the voter registration law. Should enforcement of the amended law commence on April 30 as scheduled, Plaintiffs will be back where they were before initiating the prior case: with their constitutionally protected voter registration activities chilled—indeed, completely shut down—to avoid being subject to enforcement of a statute that, by virtue of its vague terms and its excessively burdensome provisions, imposes an unconstitutional burden upon the exercise of their core political speech and association.

I. THIS COURT SHOULD ISSUE A TRO ENJOINING DEFENDANTS FROM ENFORCING FLORIDA STATUTES §§ 97.021(36) AND 97.0575.

The four factors this Court should consider in determining whether a TRO is appropriate are met here. Plaintiffs can establish: "(1) a substantial likelihood of success on the merits; (2)

that irreparable injury will be suffered if the relief is not granted; (3) that the threatened injury outweighs the harm the relief would inflict on the non-movant; and (4) that entry of the relief would serve the public interest." *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1225-26 (11th Cir. 2005) (per curiam).

A TRO is designed to "protect against irreparable injury and preserve the status quo until the district court renders a meaningful decision on the merits." *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378, 1383 (M.D. Fla. 2005), *aff'd*, 403 F.3d 1223, 1226, 1231 (11th Cir. 2005) (per curiam); *see Fernandez-Roque v. Smith*, 671 F.2d 426, 429 (11th Cir. 1982); 13-65 Moore's Federal Practice—Civil § 65.30 (3d ed. 2008). Plaintiffs seek a TRO to preserve the status quo as it exists before enforcement of the amended law begins, so that they may exercise their First Amendment rights of speech and association free from the chilling effects of the amended law. The loss of these rights "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1271-72 (11th Cir. 2006). Absent injunctive relief, Plaintiffs will therefore suffer irreparable injury if enforcement of the amended law commences on April 30.

A. Plaintiffs Have a Substantial Likelihood of Success on the Merits of Their Claim that the Challenged Law Violates the First Amendment.

Plaintiffs are likely to succeed in demonstrating that the amended law violates the First Amendment on two independent bases. First, the law is unconstitutionally vague. In particular, the law includes confusing and ambiguous language concerning the circumstances in which volunteers and workers participating in organized voter registration drives, as well as local League chapters and local unions, may be individually subject to fines of up to $1,000 annually.

Second, as to the League and Marilynn Wills, the amended law leaves in place the essential features that that led this Court to enjoin the original law in 2006 as an unconstitutional burden on Plaintiffs' speech and association: escalating fines for failing to meet arbitrary deadlines, nearly strict liability for those fines, and the risk of significant fines for individual volunteers and employees of Plaintiffs' voter registration drives. Especially if the fine provisions are interpreted to allow fines of up to $1,000 annually on individuals and on each local League chapter, the resulting burden on Plaintiffs' core political First Amendment activity will be excessive by any measure. Despite its purported fixes, the amended law is just as burdensome

and no more narrowly tailored to meet the state's interests than the original law enjoined by this Court in 2006.

1. The Amended Law Is Unconstitutionally Vague.

"A regulation is void on its face if it is so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Konikov v. Orange County*, 410 F.3d 1317, 1329 (11th Cir. 2005) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)); *see also United States v. Williams*, 444 F.3d 1286, 1305-06 (11th Cir. 2006). A statute is void for vagueness if it either "fails to give fair notice of wrongdoing or . . . lacks enforcement standards such that it might lead to arbitrary or discriminatory enforcement." *Konikov*, 410 F.3d at 1329. Where a vague statute "threatens to inhibit the exercise" of First Amendment rights, the Constitution demands a particularly "high level of clarity." *Id.*

The amended law fails in each of these respects. It does not give sufficient notice to Plaintiffs and others as to how it will be enforced and what their liability may be; it leaves open the very concrete possibility of arbitrary enforcement; and, most importantly, it chills Plaintiffs' speech and association.

a. The Amended Law Fails to Provide Fair Notice of Its Coverage.

The amended law is fatally vague because it fails to define clearly who can be fined, under what circumstances, and in what amounts. In particular, the amended law provides for fines against "third-party voter registration organizations," and establishes an annual cap of $1,000 on fines that can be levied against such an organization "including its affiliates." But it utterly fails to specify which entities and individuals are subject to fines in a particular situation, and which are subject to the annual cap. The language leaves open the possibility that each individual volunteer or worker participating in a voter registration drive could be personally liable for $1,000 in fines, and that each of the dozens of local League chapters and hundreds of local unions could be separately subject to the $1,000 annual cap.

Section 2 of the law provides:

> The aggregate fine pursuant to this subsection which may be assessed against a third-party voter registration organization, including affiliate organizations, for violations committed in a calendar year shall be $1,000.

Fla. Stat. § 97.0575(3). But the law provides no definition of "affiliate," nor any other way to determine when two "third-party voter registration organization[s]" are related closely enough to be subject to the same cap.

While "affiliate" has a reasonably clear meaning in the commercial context, *see Churchville v. GACS Inc.*, 973 So. 2d 1212, 1215 (Fla. Dist. Ct. App. 1st Dist. 2008) (citing Black's Law Dictionary 59 (7th ed. 1999)), that definition is of no help to Plaintiffs, who are labor unions, nonprofit corporations, or individuals operating in a non-commercial context. *Cf.* Merriam-Webster's Collegiate Dictionary 20 (10th ed. 2002) (defining "affiliate" as "a person or organization," and "affiliated" as "closely associated with another typically in a dependent or subordinate position").

The ambiguity is compounded by Section 97.021(36), which defines a "third-party registration organization" as "any *person*, entity, or organization soliciting or collecting voter registration applications." Fla. Stat. § 97.021(36) (emphasis added). Individuals are thus subject to statute's fines. But the amended law nowhere makes clear whether individuals volunteering for entities like the League will be considered registration organizations unto themselves and individually subject to fines, or instead are part of a larger organization that must pay fines for their acts or omissions. Likewise, "affiliates" of third-party voter registration organizations appear to be subject to fines, but there is no basis for determining when, for example, fines will be levied against local unions as opposed to the state-level chapters. Nor is it clear whether individual volunteers, local chapters and the organizations on whose behalves they are working are subject to separate $1,000 caps, or if a single cap applies to all.

For example, in the case of a volunteer collecting registration applications on behalf of the League, the law offers no way to determine whether the volunteer, or the League, or both, are considered third-party voter registration organizations. If both are considered such organizations, the law fails to specify which one is liable, or whether both are liable, for a fine imposed for a violation of Section 97.0575(3). Similarly, a local union that works with the AFL-CIO could be considered not an affiliate and incur fines separate from the Florida AFL-CIO's $1,000 cap.

The potential consequences are devastating. The AFL-CIO, with its 450 separately incorporated local unions, could be potentially liable for up to $450,000 a year, in addition to potential fines for each of its member volunteers. (Hall Decl. ¶ 22.) Similarly, AFSCME could

be liable for $90,000 ($1,000 per local union) or as much as $200,000 ($1,000 per member). (Gonzalez Decl. ¶ 24.) The penalties could reach even higher. For instance, an individual union member who collects her grandmother's form on her own time and incurs a fine could increase the cumulative fines levied on the AFL-CIO, its locals and its members.

The Division of Elections has issued a proposed rule regarding enforcement of the amended law, but the proposed rule does not clarify the law's confusing language. Instead, the Division's proposed rule would impose additional burdens on voter registration. *See infra* pp. 11-12.

b. The Amended Law Risks Arbitrary or Discriminatory Enforcement.

The amended law's fundamental vagueness also raises the specter of arbitrary and discriminatory enforcement, providing an independent basis for temporarily prohibiting its enforcement. *See Konikov*, 410 F.3d at 1330-31 (remanding on the issue of fair notice but reversing grant of summary judgment on the issue of enforcement standards); *see also Kolender v. Lawson*, 461 U.S. 352, 358 (1983) ("[T]he more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'" (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974))). While "[o]rdinarily, vagueness challenges must be evaluated in light of the facts of the case at hand . . . , when a statute implicates First Amendment rights, [the court] may consider the *risk* of arbitrary enforcement." *Konikov*, 410 F.3d at 1330 (emphasis in original). That risk is very real under the amended law.

The law's ambiguity with respect to who can be fined and to whom the annual cap applies could allow election officials to assess more and heavier fines on disfavored groups. For instance, the original statute explicitly exempted political parties, and as such this Court held it unconstitutionally discriminatory. *LWVF*, 447 F. Supp. 2d at 1335. The amended law would allow state election officials to achieve the same (forbidden) ends through disparate enforcement. In connection with registration drives organized by the League or the union Plaintiffs, officials could impose fines on every worker or volunteer collecting applications; on each of the League's 27 local chapters; and on each of the AFL-CIO's 450 and AFSCME's 90 local unions. Applying the same language, the Division could determine that a single cap exists for state-level organizations of political parties, despite the fact that political parties include patchworks of state

and county organizations and local, more autonomous clubs similar to those that exist for Institutional Plaintiffs. In short, the law's vague language would allow state officials to achieve what this Court ruled they could not: imposing tens or hundreds of thousands of dollars against Plaintiff organizations while largely sparing political parties.

The risk of arbitrary enforcement is compounded by the fact that the amended law gives state officials discretion to decide which potential violations to investigate and penalize. Section 97.0575(4)(b) provides that "[t]he division *may* investigate any violation of this section" (emphasis added). Rather than narrowing such discretion, the Secretary's proposed rule would give similar discretion to local supervisors of elections. Under the proposed rule, persons who claim to have been registered by registration organizations but whose names do not appear on the registration roles may file complaints with local supervisors of elections. Proposed Rule 1S-20.42, § (5)(a). Supervisors "*may* report to the Division of Elections any potential violation of Section 97.0575(3)." *Id.* § (5)(b) (emphasis added).

c. The Law's Vagueness Chills Plaintiffs' Protected Speech and Association.

The law's vagueness has already chilled Plaintiffs' protected First Amendment activities. "[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (alterations and internal quotation marks omitted). For this reason, "the Constitution demands a high level of clarity from a law if it threatens to inhibit the exercise a constitutionally protected right such as the right of free speech." *Konikov*, 410 F.3d at 1329.

The voter registration drives conducted by Plaintiffs are protected by the First Amendment. *LWVF*, 447 F. Supp. 2d at 1333-34. Yet the amended law's vagueness and lack of enforcement standards leave Plaintiffs subject to potentially crippling fines. Plaintiffs simply cannot afford the risk of exposing each of their volunteers and members who participate in their voter registration drives to $1,000 in fines, nor can they afford the cumulative fines if each of their related entities was potentially liable for up to $1,000 annually. (Giliotti Decl. ¶¶ 28, 30; Gonzalez Decl. ¶¶ 23-24; Hall Decl. ¶¶ 22-23.)

The risks are particularly intolerable because they exist for even minor violations and innocent mistakes that do not fall within the narrow exceptions to strict liability. Plaintiffs expect that the lingering strict liability in the amended statute—imposing fines for any deviation

from the 10-day deadline regardless of intent or excuse—would inevitably and routinely lead to annual fines up to the amount of the cap. (Giliotti Decl. ¶¶ 35, 36; Gonzalez Decl. ¶ 26; Hall Decl. ¶ 23.) Not surprisingly, Plaintiffs have shut down their registration operations across the state, just as they did when confronted with the original statute, at least until the statute is enjoined or their risk otherwise substantially reduced. It is precisely to avoid such chilling effects that the void-for-vagueness doctrine is applied with particular rigor in these cases.

2. The Law Severely Burdens the League Plaintiffs' Core Political Speech and Association.

Plaintiffs believe it is beyond dispute that the amended law is unconstitutionally vague and therefore void. However, even if the law were to be definitively interpreted to allow the imposition of fines of up to $1,000 annually on each individual chapter of the League, or on individual League member or volunteer, it would create an unconstitutional burden on those Plaintiffs' (that is, the League's and Marilynn Wills') core political speech and association.[2]

The amended law suffers from the same fatal defects as the original law and should be temporarily enjoined from taking effect under the same reasoning this Court applied in the earlier litigation. The balancing test established in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), is applicable here for the same reason the Court followed it in *LWVF*, and leads to the same result. Under that analysis, courts first consider "character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments." *Anderson*, 460 U.S. at 789. The state must then identify its precise interests in the statute and "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.*

Where, as here, an election law severely burdens core political speech and association, *Anderson* requires the law to survive "strict" or "exacting" scrutiny. *Burdick v. Takushui*, 504 U.S. 428, 434 (1992); *see Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (a state election scheme that imposes "severe burdens" on constitutional rights survives only if it is "narrowly tailored and advance[s] a compelling state interest"); *Swanson v. Worley,* 490 F.3d

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[2] While Plaintiffs believe that the law would still be unconstitutional if it were definitively interpreted to allow a maximum of $1,000 in fines for all individuals and related entities working with them on voter registration drives, Plaintiffs do not challenge a cumulative $1,000 tax on speech and association in this motion.

894, 902 (11th Cir. 2007); *Green v. Mortham*, 155 F.3d 1332, 1336 (11th Cir. 1998); *LWVF*, 447 F. Supp. 2d at 1331 n.21 (rejecting Defendants' argument for rational basis review).

a. The Law Would Impose a Severe Burden on Core First Amendment Activities.

In considering the "character and magnitude" of the injury to Plaintiffs' rights in the prior case, this Court properly held that restrictions on voter registration drives implicate core First Amendment rights to speech and association. *See id.* at 1332-34. Since then, district courts in two other states have reached the same conclusion. *See Ass'n of Cmty. Orgs. for Reform Now v. Cox*, No. 06-CV-1981, slip op. at 16 (N.D. Ga. Sept. 27, 2006); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 700 (N.D. Ohio 2006).

Plaintiffs are likely to succeed in demonstrating that the amended law severely hampers protected First Amendment activity for almost precisely the same reasons applied by this Court in *LWVF*. The present case involves the very same conduct—voter registration drives—that this Court found to be "intertwined with speech and association" and thus protected by the First Amendment. *LWVF*, 447 F. Supp. 2d at 1334. Here, as in the prior case, the record shows that when Plaintiffs conduct voter registration drives they engage potential voters in face-to-face conversations at community events, shopping malls, workplaces, and other locations in the community. (Giliotti Decl. ¶ 15; Gonzalez Decl. ¶ 12; Hall Decl. ¶ 10; Wills Decl. ¶ 6.) They encourage citizens to register to vote, discussing the importance of civic participation. (Giliotti Decl. ¶¶ 18-19; Hall Decl. ¶¶ 11, 13; Wills Decl. ¶ 9.) And they encourage citizens to exercise their right to vote to advance shared political, economic, and social positions. (Gonzalez Decl. ¶ 12; Hall Decl. ¶¶ 11-12.) This Court's prior decision is fully consistent with the Supreme Court's repeated recognition that this kind of "interactive communication concerning political change" is at the heart of the First Amendment's protections. *Meyer v. Grant*, 486 U.S. 414, 422 (1988); *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 186 (1999).

As with the original law, the amended law has "reduce[d] the total quantum of speech," *LWVF*, 447 F. Supp. 2d at 1332, by causing Plaintiffs to shut down their voter registration activities. The Supreme Court's decisions in *Meyer* and *Buckley* make it clear that an election law that limits core political speech in this manner or imposes a "severe burden[]" on First Amendment rights is subject to close scrutiny. *Buckley*, 525 U.S. at 208 (Thomas, J., concurring in the judgment); *see Meyer*, 486 U.S. at 420.

There can be no factual dispute about the amended law's burden on protected conduct. If the statute's "affiliate" language is construed to apply a separate $1,000 cap on the League and on each of the local League chapters, the potential cumulative total of $28,000 in fines would comprise over one-third of the League's annual budget—surely a severe burden. And if Marilynn Wills were to face up to $1,000 in fines for her voter registration work for the League, that, too, would constitute a severe burden.

Just as in the earlier litigation, the prospect of such crippling fines has caused the League and its volunteers, including Marilynn Wills, for good reason, to completely cease their voter registration efforts. *See LWVF*, 447 F. Supp. 2d at 1338-39 ("[T]he threat of fines has rationally chilled Plaintiffs' exercise of free speech and association, as well as that of Plaintiffs' volunteers" and caused them to "completely or nearly completely cease[]" their "constitutionally protected activities.").

b. The State's Interests

The next step in the *Anderson* test is to "identify and evaluate the precise interests put forward by the state as justifications for the" challenged law. *Anderson*, 460 U.S. at 789. In the earlier litigation, the state claimed that the original law served the state's interest in "ensur[ing] that Florida citizens have the right to vote" because it "(1) protect[ed] Florida's interest in ensuring that all voter registrations are properly and timely submitted; (2) [held] organizations accountable for the applications they collect; and (3) prevent[ed] fraud." 447 F. Supp. 2d at 1337.

c. The Law Is Not Necessary to Advance the State's Interests.

Under *Anderson*'s final step, the Court must "consider the extent to which [the state's] interests make it necessary to burden the plaintiff's rights." *Anderson,* 460 U.S. at 789. Because the voter registration law, as a restriction on First Amendment expression, "so closely touch[es] our most precious freedoms," it must be "precisely drawn" to meet a "compelling" state interest. *Id.* at 805, 806; *see also Meyer*, 486 U.S. at 420.

This Court found in *LWVF* that the state had not met its burden of demonstrating that its system of imposing heavy fines was justified by its claimed interests in timely submission, accountability, or preventing fraud. *See* 447 F. Supp. 2d at 1337, 1338. The state failed to meet

its burden particularly given the "*de minimis* nature of the problems arising from third party voter registration organizations," *id.* at 1339, and given that the state can still prosecute those who "knowingly . . . obstruct or delay the delivery of a voter registration form" under a third-degree felony charge, carrying a prison sentence, *id.* at 1338.[3] Although the state has amended the original law to reduce somewhat the applicable fines, the state has failed to address these important criticisms regarding the tailoring of the statute. As a result, the amended law remains unconstitutionally burdensome on Plaintiffs' First Amendment speech and association rights and should be temporarily restrained by this Court while its constitutionality is more completely assessed.

B. Without a TRO, Plaintiffs Will Suffer Irreparable Injury.

The amended law undoubtedly would cause irreparable harm to Plaintiffs. Burdens on First Amendment freedoms by their nature cannot be cured after the fact by payment of monetary damages, and are thus irreparable. *See KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006). In other words, as this Court has recognized, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *KH Outdoor, LLC*, 458 F.3d at 1271-72; *LWVF*, 447 F. Supp. 2d at 1339; *see also Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005) (denial of "franchise-related rights" constitutes irreparable harm).

The mere termination of the standstill agreement has already caused all Plaintiffs to cease their voter registration efforts. (Giliotti Decl. ¶ 32; Gonzalez Decl. ¶ 23; Hall Decl. ¶ 21; Wills Decl. ¶ 10.) Lingering ambiguities in the amended law continue to place Institutional Plaintiffs and their volunteers, such as Marilynn Wills, at risk for potentially crippling fines and have prevented Plaintiffs from engaging with their fellow citizens, encouraging them to vote and facilitating their registration to do so.

The harm is particularly severe because, when Defendants terminated the standstill agreement, Plaintiffs were forced abruptly to halt ongoing planning of voter registration drives for the 2008 presidential election. (Giliotti Decl. ¶ 34; Gonzalez Decl. ¶¶ 21-22; Hall Decl.

[3] A person who violates Florida Statute § 104.0615 may be punished by up to five years in jail, a $5,000 fine, or both. Fla. Stat. §§ 775.082(3)(d), 775.083(1)(c).

¶ 27.) The negative impact of such a delay this close to the election is already well-known to both Plaintiffs and Defendants. In 2006, even though Plaintiffs won injunctive relief in August, some were unable to mount significant drives because of the loss of valuable time for preparation and planning. What is more, they were completely unable to engage in voter registration before the book closing date for the primary elections. Plaintiffs will be unable to conduct voter registration drives on a scale or level of quality proportionate to the importance of this presidential election year unless they can be assured, as soon as possible, that they can proceed without facing fines that would stop them in their tracks (and, for Institutional Plaintiffs, substantially drain their overall budgets) for minor violations or innocent mistakes.

C. The Balance of Harms Favors Plaintiffs.

Without a TRO, Plaintiffs cannot proceed with their voter registration efforts—activities which lie at the "core" of the First Amendment's protections and for which timely planning and execution are critical. In contrast, a TRO would simply require Defendants to refrain from enforcing a law that cannot fairly or effectively be enforced.

The burden on the state of a TRO would be almost nonexistent. They have not yet enforced the statute and are not at present facing a deluge of voter registration applications as to which enforcement would be important. Nor would the state incur any costs by waiting for a ruling on the law's constitutionality or clarification of its terms. Indeed, enforcement of a vague law on potentially hundreds of volunteers and voter registration groups will almost surely be more complex and costly for the state, not less, than enforcement of a properly tailored statute.

Preserving the status quo during the pendency of the case will also afford Plaintiffs greater time to plan voter registration drives in a year in which unprecedented numbers of citizens have demonstrated their desire to vote for the first time. If the purpose of the law is to ensure that voter registration applications are received by the state in a timely manner, then allowing for such preparation while the amended law is clarified surely is in the state's interest.

Finally, if enforcing the amended law as written were of paramount importance, Defendants would never have agreed to the standstill agreement and abstained from enforcing it for three months after the Department of Justice granted pre-clearance under the Voting Rights Act.

D. The Entry of a TRO Would Serve the Public Interest.

"The public has no legitimate interest in enforcing an unconstitutional" law. *KH Outdoor, LLC*, 458 F.3d at 1272. The public interest is therefore served by ensuring the amended law's constitutionality prior to its enforcement. Moreover, safeguarding speech and association rights is undoubtedly in the public interest. *See Sammartano v. First Jud. Dist. Court, County of Carson City*, 303 F.3d 959, 974 (9th Cir. 2002) (there is traditionally a "significant public interest in upholding First Amendment principles"); *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 363 (6th Cir. 1998) (noting the "public's interest in protecting First Amendment rights in order to allow the free flow of ideas").

Without the full-scale efforts of third-party voter registration groups, thousands of individuals will not register to vote and will be unable to participate in this year's election. Protecting an individual's right to vote is "without question in the public interest," *Charles H. Wesley Educ. Found.*, 408 F.3d at 1355, as is "removing the undue burdens on that right imposed by" the state, *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1376 (N.D. Ga. 2005). The public interest is served by a TRO here because absent this Court's prevention of enforcement of the amended law, groups and individuals will be hindered from communicating important political messages, the public will be exposed to less political dialogue, and thousands of individuals who experience barriers to voter registration will not be registered to vote.

This Court should issue a TRO in the next two days, before Defendants begin to enforce the amended law on April 30, 2008. Plaintiffs bring this action two days before enforcement will begin, but Defendants have been on notice that Plaintiffs intended to challenge the amended law before its enforcement since briefs regarding mootness were filed in the Eleventh Circuit last summer. *See supra* p. 3. Plaintiffs filed this action at their first opportunity, since they have had less than 30 days to close the previous litigation, seek Institutional Plaintiffs' board approval for a new suit, prepare papers addressing the amended law, including declarations, and obtain new pro bono counsel.

II. PLAINTIFFS ALSO MOVE THIS COURT TO SET A BRIEFING SCHEDULE AND SCHEDULE A HEARING ON A PRELIMINARY INJUNCTION AND ALLOW LIMITED DISCOVERY.

As Federal Rule of Civil Procedure 65(b)(2) provides that a TRO expires after, at most, ten days, subject to extension, Plaintiffs plan to move swiftly for more lasting injunctive relief, and would propose the following briefing and hearing schedule. They would also ask this Court to order limited discovery to allow them to depose a small number of state and county officials regarding the state's interest in the third-party voter registration law.

Proposed Schedule:

April 30, 2008	TRO Issues
May 14, 2008	Plaintiffs' Motion to Extend TRO and for Preliminary Injunction Due
May 21, 2008	Defendants' Response Due
May 23, 26, 27, or 28	Plaintiffs' Reply Due; Preliminary Injunction Hearing

CONCLUSION

For the foregoing reasons, Plaintiffs request this Court to preserve the status quo by imposing a temporary restraining order preventing Defendants from enforcing Florida Statutes §§ 97.021(36) and 97.0575, to enter Plaintiffs' proposed briefing and hearing schedule, and to permit Plaintiffs limited discovery as set forth above.

Dated: April 28, 2008
Miami, Florida

Respectfully submitted,

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