UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

LEAGUE OF WOMEN VOTERS OF FLORIDA, FLORIDA PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, and ROCK THE VOTE,

Plaintiffs,

v.

KURT S. BROWNING, in his official capacity as Secretary of State for the State of Florida, PAMELA J. BONDI, in her official capacity as Attorney General for the State of Florida, and GISELA SALAS, in her official capacity as Director of the Division of Elections within the Department of State for the State of Florida,

Defendants.

Civil No. 4:11-cv-00628-RH-WCS

PLAINTIFFS' MOTION FOR LEAVE TO FILE A MEMORANDUM OF LAW IN EXCESS OF TWENTY-FIVE PAGES

Plaintiffs League of Women Voters of Florida ("LWVF"), Florida Public Interest Research Group Education Fund ("FL PIRG"), and Rock the Vote ("RTV" and, together with LWVF and FL PIRG, "Plaintiffs") move this Court, pursuant to Local Rule 7.1(A), for entry of an order granting them leave to file a memorandum of law in support of their Motion for Preliminary Injunction that exceeds twenty-five (25) pages. In support of this motion, Plaintiffs state as follows:

1. On December 15, 2011, Plaintiffs filed this action to prevent enforcement of a new Florida law—2011 Fla. Laws 40 § 4, codified at Fla. Stat. §§ 97.021(37) and 97.0575, and its implementing regulations, Fla. Admin. Code Ann. R. 1S-2.042 (collectively, the "Law")—that unconstitutionally and unlawfully burdens their efforts, and the efforts of other individuals and community-based groups, to encourage civic

engagement and democratic participation by assisting Florida citizens in registering to vote and exercising their fundamental right to vote. The Law does this by placing onerous new requirements and restrictions on "third-party voter registration organizations" who engage in voter registration activity in the State of Florida.

2. Because of the ongoing irreparable injuries associated with the Law, Plaintiffs have filed today a motion for a preliminary injunction to halt enforcement of the Law (the "PI Motion"), with a request for a March 1, 2012 hearing date on the PI Motion.

3. The PI Motion raises several complex and multifaceted arguments under the First and Fourteenth Amendments to the U.S. Constitution and the National Voter Registration Act of 1993 ("NVRA"). Specifically, Plaintiffs argue that the Law (a) severely burdens and chills their rights to free speech and association, in violation of the First and Fourteenth Amendments; (b) is void under the Due Process Clause of the Fourteenth Amendment because its terms risk arbitrary and discriminatory enforcement and fail to adequately warn Plaintiffs of the conduct they prohibit or the liability that they impose on violators; and (c) conflicts with the text, structure, and central purpose of the NVRA, and thus violates and is preempted by the NVRA.

4. In addition, in order to adequately set forth the grounds for PI Motion, each of the three Plaintiffs—LWVF, FL PIRG, and RTV— must detail their voter registration practices, which are uniquely affected and burdened by the various offending provisions of the Law. The voter registration practices of each Plaintiff are detailed in the accompanying affidavits, which combine a total of 78 pages.

5. Plaintiffs have drafted a 40-page memorandum of law in support of their PI Motion (the "Memorandum"), and a copy of the Memorandum is attached hereto as

Exhibit A. Although Plaintiffs have endeavored, in good faith, to be as concise as possible in their presentation, Plaintiffs submit that they cannot present, in the manner they believe will be most helpful to the Court, all of their arguments in the 25 pages allowed by Local Rule 7.1(A). Plaintiffs thus respectfully request that the Court grant them leave to file the attached 40-page Memorandum.

6. For the foregoing reasons, Plaintiffs submit that, as required by Local Rule 7.1(A), good cause has been shown to grant them the relief requested. *See* N.D. Fla. Loc. R. 7.1(A).

WHEREFORE, Plaintiffs respectfully request that this Court grant them leave to file a 40-page memorandum of law in support of their PI Motion, in the form attached hereto as Exhibit A. A proposed order granting Plaintiffs' motion is also attached hereto.

N.D. FLA. LOC. R. 7.1 CERTIFICATION

Pursuant to N.D. Fla. Loc. R. 7.1(B), undersigned counsel states that Plaintiffs' counsel requested counsel for Defendants on December 15, 2011 for their consent to Plaintiffs' Motion for Leave to File a Memorandum of Law in Excess of Twenty-Five Pages. On December 19, 2011, counsel for Defendants responded that while Defendants did not consent at this time, they reserved their right to do so after the Motion is filed.

Dated: December 19, 2011

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**Pro Hac Vice* application to be filed

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that copies of of the foregoing *Motion for Leave to File a Memorandum in Excess of Twenty-Five Pages* and Exhibits A and B thereto were served via HAND DELIVERY this 19th day of December, 2011 upon the following:

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Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

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Defendants.

Civil No. 4:11-cv-00628-RH-WCS

PLAINTIFFS' [PROPOSED] MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

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Plaintiffs respectfully submit this memorandum of law in support of their motion, pursuant to Fed. R. Civ. P. 65, for a preliminary injunction enjoining defendants from enforcing the provisions of Fla. Stat. §§ 97.021(37) and 97.0575 regulating voter registration activities of "third-party voter registration organizations," and Fla. Admin. Code Ann. R. 1S-2.042 and any rules promulgated by the State of Florida implementing these provisions (collectively, "the Law").

PRELIMINARY STATEMENT

The Law should be enjoined because it was enacted for the avowed and unlawful purpose of making it more difficult for the citizens of Florida to vote. One of the Law's legislative supporters candidly declared that voting in Florida "should not be easy." The Law succeeds at that pernicious objective by intimidating and threatening to penalize voter registration volunteers and community groups, including Plaintiffs, in violation of their First Amendment rights. Suppressing freedom of speech in service of suppressing the franchise to vote is abhorrent to the Constitution and should not be permitted to continue.

The Law is the third and most heavy-handed set of rules and penalties enacted by the State in the past six years to regulate the voluntary voter registration activities of individuals and organizations who advocate for greater voter participation and who help their fellow citizens register to vote.[1] The Law's newly enhanced and tightened restrictions on those constitutionally protected efforts were adopted with barely the

[1] *See League of Women Voters of Fla.* v. *Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006) ("*LWVF I*") (enjoining 2006 law on constitutional grounds); *League of Women Voters of Fla.* v. *Browning*, 575 F. Supp. 2d 1314 (S.D. Fla. 2008) ("*LWVF II*") (declining to enjoin amended 2008 law on constitutional challenge).

pretense of justification, other than to erect additional and unwarranted barriers to registration and voting. Because of the intolerable burdens imposed by the Law, the League of Women Voters of Florida has been forced to suspend its more than 70-year tradition of assisting Floridians to register to vote.

The Law's restrictions, which went into final administrative effect just last month, violate Plaintiffs' core First Amendment rights to engage in political speech and activity, as well as the plain language and central purposes of the National Voter Registration Act of 1993 (the "NVRA"). And because it has a chilling effect on Plaintiffs' voter registration activity, the Law will effectively derail thousands of Floridians from fulfilling a necessary prerequisite to exercising their fundamental right to vote. Outside of an immediate injunction, there is no other available remedy for the deprivation of rights so vital to American democracy.

The Law makes assisting others to register to vote an exceedingly complex and highly risky activity. For example, the Law imposes, under threat of severe financial penalties and potential criminal prosecution, a requirement on any person (not just on organizations) to pre-register with the State in order to "solicit" or "collect" voter registration applications, and requires such persons or organizations to track and report on every single voter registration application that they handle, including applications that are never completed or collected. Fla. Stat. §§ 97.021(37), 97.0575; Fla. Admin. Code Ann. R. 1S-2.042. The Law also requires that every completed voter registration application be delivered to the State within an arbitrarily narrow and unnecessarily prohibitive 48-hour window, under the penalty of strict monetary fines. Fla. Stat.

§ 97.0575(3)(a). Moreover, the Law sets forth vague but ominous penalties, including potential criminal liability, for even a minor, unintentional act of noncompliance with any provisions of the Law. *Id.* §§ 97.0575(4), 104.41.

Despite the devastating impact the Law would have on voter participation, this latest step in Florida's serial effort to repress the voter registration activities of Plaintiffs and similar community-based groups sped through the legislative process in 2011. The Florida Legislature considered no evidence demonstrating that such grave restrictions were necessary for preventing voter registration fraud or preserving the integrity of the election process. Nor did the Law's proponents offer any basis at all to conclude that the existing legal regime, including the voter registration law passed just three years ago, has been inadequate to address whatever dangers may exist.

Though it has been effective for only a short time, the onerous burdens of the Law are already clear. Plaintiffs, whose charitable missions revolve around protecting and expanding the franchise, have ceased or significantly curtailed their registration activities throughout the State out of fear that they will be unable to comply with the Law's requirements and thus be subject to fines, crippling civil and criminal penalties, and devastating reputational harm. Thus, if not enjoined, the Law's severe restrictions will effectively preclude Plaintiffs from freely communicating their missions and associating with their fellow citizens to advance a shared belief in the importance of participatory democracy and widespread civic engagement.

If allowed to stand, the Law will have a crippling effect on voter participation. Plaintiffs, and similar grassroots groups, are responsible for registering substantial

numbers of Florida voters. In November 2010, for example, 7.3% of all Floridians who were registered to vote—585,004 citizens—had registered through such citizen voter registration groups, including 16.2% of all registered African-American voters and 15.5% of all registered Hispanic voters. U.S. Census Bureau, *Current Population Survey* (2010). Data also shows that since the Legislature began its assault on voting by enacting the first of these restrictive laws, the voter registration rate in Florida has declined, from 71.7% of all voting age citizens in 2004 to 63% in 2010. Unless the Law is enjoined, this downward trend will inevitably continue.

STATEMENT OF FACTS[2]

A. Plaintiffs and Their Voter Registration Efforts in Florida

Plaintiffs are three volunteer-driven, non-profit organizations that seek to encourage widespread civic participation. Plaintiffs agree that voter registration is a uniquely effective way of communicating their missions and associating with fellow citizens to advance a shared belief in the importance of participatory democracy. (Ashwell Aff. ¶ 10; Macnab Aff. ¶¶ 17-18; Smith Aff. ¶ 25.) Inevitably, Plaintiffs' registration activity entails conversations with these citizens about civic engagement, creating a responsive government, and—when pertinent—current issues such as ballot initiatives. (Macnab Aff. ¶¶ 22, 27, 31; Smith Aff. ¶¶ 22-23, 36-37.)

[2] The facts summarized herein are set forth more fully in the First Amended Complaint and in the accompanying affidavits of Deirdre Macnab, President of the State Board of Directors of League of Women Voters of Florida ("Macnab Aff."); Pamela Goodman, First Vice President for the League of Women Voters of Florida ("Goodman Aff."); Ben Wilcox, Board Member of the Tallahassee League of Women Voters and Governmental Consultant of the League of Women Voters of Florida ("Wilcox Aff."); Heather Smith, President of Rock the Vote ("Smith Aff."); and Brad Ashwell, Advocate at Florida Public Interest Research Group Education Fund ("Ashwell Aff.").

Plaintiff League of Women Voters of Florida ("LWVF") is the Florida affiliate of the national League of Women Voters. Central to the group's mission is encouraging the informed, active participation of citizens in government, including voter registration. LWVF has approximately 2,800 current dues-paying members, and a list of about 9,000 members, supporters, and volunteers who receive regular communications. LWVF conducts voter registration drives via 29 local chapters throughout Florida. These local voter registration efforts are wholly volunteer-run and are central to LWVF's ability to engage with its membership and volunteers. (Macnab Aff. ¶¶ 5, 7, 12, 17.)

Plaintiff Rock the Vote ("RTV") is a national organization whose fundamental mission is to build political power for young people by increasing their registration and voter turnout rates. Critical to that mission are the organization's efforts to register young people to vote and to encourage them to vote on election days. RTV has approximately 1.5 million members in its national database, including approximately 82,000 members in Florida. RTV makes voter registration forms and instructions available on its website and conducts in-person registration drives staffed by volunteers at college campuses and in other locations. In addition, it offers a "Democracy Class" curriculum for local educators that teaches students about the importance of voting and offers registration opportunities. (Smith Aff. ¶¶ 3-5, 9-12, 21, 34-36.)

Plaintiff Florida Public Interest Research Group's Education Fund ("FL PIRG"), an affiliate of the national Public Interest Research Group, strives to ensure equal access to the political process by, among other things, registering voters. FL PIRG focuses its voter registration efforts on student populations within Florida, and since the 2004

election cycle, it has registered approximately 23,000 Floridians. FL PIRG hires and trains campus organizers, often recent college graduates, to plan and organize voter registration drives at college campuses around the country. FL PIRG also conducts door-to-door registration drives. (*See* Ashwell Aff. ¶¶ 3, 6, 12, 18-20, 26.)

In the past, Plaintiffs have helped to register new voters in Florida and update the registrations of existing voters by assisting them with completing registration forms, by delivering completed forms to election officials, and, for Plaintiff RTV, by verifying that election officials correctly add the new voters to the rolls. (Ashwell Aff. ¶¶ 23, 34-38; Macnab Aff. ¶¶ 7, 20-25, 35-36; Smith Aff. ¶¶ 4, 12, 15, 25, 43-44.) For each of the Plaintiffs, in-person, hands-on registration efforts are the most effective means to motivate new voters and to assist those who need help filling out their voter registration forms accurately and completely. If Plaintiffs merely distributed and did not collect voter registration forms, significantly fewer voters would be added to the rolls. (Ashwell Aff. ¶ 38; Macnab Aff. ¶ 33; Smith Aff. ¶ 25.)

Every aspect of Plaintiffs' registration efforts signals that it is important to be a registered and active voter. Indeed, Plaintiffs' voter registration efforts inevitably incorporate discussions with fellow citizens about the importance of voting and civic engagement, as well as myriad political issues. (Macnab Aff. ¶¶ 7, 22, 31; Smith Aff.¶¶ 22-23, 36-37.) Plaintiffs also use voter registration events to recruit new volunteers and members. (Ashwell Aff. ¶ 25-25; Macnab Aff. ¶¶ 21, 53; Smith Aff. ¶ 18.)

Plaintiffs' voter registration drives have particularly benefited senior citizens, people with disabilities, low-income and minority voters, and others disproportionately excluded from political participation. (Ashwell Aff. ¶ 14; Goodman Aff. ¶¶ 5, 12; Macnab Aff. ¶¶ 26-27, 72.) Community-based voter registration efforts like Plaintiffs' have been a significant source of voter registration in the State of Florida, especially for African-American and Hispanic voters. *See* U.S. Census Bureau, *Current Population Survey* (2004-2010). Unfortunately, as a direct result of the Law, Plaintiffs have now ceased or plan to curtail critical voter registration efforts in the State. (Ashwell Aff. ¶¶ 9, 16, 47; Macnab Aff. ¶ 65; Smith Aff. ¶ 50.)

B. The Challenged Florida Voter Registration Law and Its Impact on Plaintiffs

The legislative record reveals that the Law was motivated by a desire to make it more difficult for Floridians to exercise their right to vote. As Senator Michael Bennett, President Pro Tempore of the Senate and a chief supporter of the Law, stated: "I want the people in the State of Florida to want to vote as badly as that person in Africa who is willing to walk 200 miles for an opportunity he's never had in his life. This should not be easy." 2011 Fla. Senate Deb., Reg. Sess., at 35:40-38:24 (May 5, 2011).[3]

In this effort to make voting in Florida "not . . . easy," the Law, among other things, improperly requires all "third-party voter registration organizations"—broadly defined as "any person, entity, or organization" that "solicit[s] or collect[s] voter

[3] Plaintiffs have obtained publicly available audio recordings of these legislative debates from the State of Florida. If it would assist the Court, copies of these recordings can be filed in this action and/or delivered to Chambers.

registration applications," Fla. Stat. § 97.021(37)—to abide by the following new and highly burdensome mandates:

- The Law requires every "third-party voter registration organization," including Plaintiffs, to register with the State *prior to* engaging in voter registration activities. An organization's "affiliate organization[s]" must separately register with the State as well. The Law also requires all volunteers and employees of these organizations, deemed "registration agents," to publicly register as agents of the organizations that they represent and sign a sworn affidavit that warns of felony criminal punishments for "false registration." Fla. Stat. § 97.0575(1); Fla. Admin. Code Ann. R. 1S-2.042(3)(a), (3)(c). These pre-registration requirements will make it significantly harder to conduct voter registration, and will severely chill the volunteerism that is essential for Plaintiffs' activities.
- The Law requires officials to affix a unique "identification number" to all voter registration forms provided to voter registration organizations, Fla. Admin. Code Ann. R. 1S-2.042(3)(b), 4(a), creating the potential for constant liability for forms outside of the organization's immediate control and publicly disclosing which organization assisted each voter with registering.
- The Law mandates that each organization has an ongoing duty to update its registration form every time there is any change to its previously submitted information. *Id.* R. 1S-2.042(3)(e). If a registered organization adds a new "registration agent," that agent must sign a sworn statement *before* engaging in any voter registration activity, affirming that the agent will obey all state laws regarding voter registration. *Id.* R. 1S-

2.042(3)(c). The organization must then submit each sworn statement, along with the organization's own updated registration form, within 10 days. *Id.* Every time a registered organization "terminate[s]" its relationship with any member or volunteer listed as a "registration agent," it must promptly notify the Division of Elections. *Id.* R. 1S-2.042(6)(b). These requirements are not only burdensome, they interfere with Plaintiffs' relationships with their volunteers.

- The Law requires each organization to track all voter registration forms that it handles, requiring monthly reports detailing the number of forms provided to and received from its "registration agents," even when the organization neither provides nor receives any forms directly, and even if these forms are never completed by a registrant. Fla. Stat. § 97.0575(5); Fla. Admin. Code Ann. R. 1S-2.042(5). This is a significant burden that will divert Plaintiffs' scarce resources from registering, checking applications for accuracy and completeness, and following up with voters.

- The Law requires organizations to turn in a voter registration application, either in person or by mail, "within 48 hours after the applicant completes it." Late delivery can result in up to a $1,000 fine. Fla. Stat. § 97.0575(3)(a). Fines may be assessed even where delay is due to events outside the organizations' control, such as "impossibility of performance," or an "unclear" postmark. *Id.* § 97.0575(3)(b); Fla. Admin. Code Ann. R. 1S-2.042(7)(a). The operation of this delivery requirement is both vague and arbitrarily strict, and the potential for large fines against organizations like Plaintiffs would entail devastating financial and reputational damage.

- The Law requires organizations to submit all mandated forms—including pre-registration forms (Form DS-DE 119), sworn statement forms (Form DS-DE 120), and monthly tracking forms (Form DS-DE 123)—electronically, either as PDF attachments to e-mails or via facsimile. Fla. Stat. § 97.0575(1); Fla. Admin. Code Ann. R. 1S-2.042(3)(a), (3)(f). This requirement imposes a discriminatory burden on those, like Plaintiffs' members and volunteers, who lack access to such resources.
- The Law grants sweeping and undefined enforcement powers to the Attorney General to institute any "action for relief" for a violation of the Law, which can include injunction, criminal prosecution, or "any other appropriate order." Fla. Stat. § 97.0575(4); *see id.* § 104.41.

In sum, the cumulative impact of the Law's onerous, vague, and confusing requirements and penalties severely burdens—to the point of stopping—Plaintiffs' citizen voter registration activities. We discuss this impact, and how it unlawfully infringes upon Plaintiffs' rights under both the Constitution and the NVRA, in detail below.[4]

ARGUMENT

A party seeking a preliminary injunction under Fed. R. Civ. P. 65 must show that: "(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Forsyth Cnty.* v. *U.S.*

[4] Plaintiffs have also brought a claim against Defendants under the Voting Rights Act (Count IV). Plaintiffs do not now move for relief on that claim. They move here only on their claims under the Constitution (Counts I-II) and the NVRA (Count III).

Army Corps of Eng'rs, 633 F.3d 1032, 1039 (11th Cir. 2011) (quoting *Siegel* v. *LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (*en banc*)) (internal quotation marks omitted). Plaintiffs here have satisfied each of these requirements—both as to their constitutional claims, and as to their claims under the NVRA. A preliminary injunction enjoining Defendants from enforcing the Law is thus fully warranted.

I.
PLAINTIFFS HAVE A STRONG LIKELIHOOD OF SUCCESS ON THEIR CONSTITUTIONAL CLAIMS

The Law violates Plaintiffs' constitutional rights in two ways. *First*, the Law's unworkable and unyielding restrictions on community-based voter registration activities impose extreme burdens, without any justification, on Plaintiffs' political speech and association in violation of the First and Fourteenth Amendments. *Second*, the Law's confusing and undefined prohibitions and penalties fail to give Plaintiffs fair notice of what conduct is prohibited while granting officials broad discretion to enforce its nebulous mandates, in violation of the Due Process Clause of the Fourteenth Amendment. Each of these legal infirmities provides an independent basis for preliminary injunctive relief.

A. The Law Unconstitutionally Burdens Plaintiffs' Core Political Speech and Association

Plaintiffs exercise core political speech and associational rights when they help other citizens register to vote. Voter registration events foster discussions 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. (Ashwell Aff. ¶¶ 10, 24; Macnab Aff. ¶¶ 7, 31; Smith Aff. ¶¶ 22-23.) Florida

federal courts agree that Plaintiffs' activity is a form of political action at the very core of the First Amendment's protections. *See LWVF II*, 575 F. Supp. 2d at 1320-21 (holding that "Plaintiffs' interactions with prospective voters in connection with their solicitation of voter registration applications constitutes constitutionally protected activity"); *LWVF I*, 447 F. Supp. 2d at 1332-33 (finding that voter registration groups "persuade others to vote, educate potential voters about upcoming political issues, communicate their political support for particular issues, and otherwise enlist like-minded citizens in promoting shared political, economic, and social positions").[5]

Under controlling Supreme Court precedent, when state restrictions on elections implicate the First Amendment, they are evaluated under the sliding-scale test first articulated in *Anderson* v. *Celebrezze*, 460 U.S. 780, 788-90 (1983), and recently reaffirmed in *Crawford* v. *Marion County Election Board*, 553 U.S. 181, 190 (2008). Every court to review regulation of constitutionally protected, community-based voter registration efforts has analyzed them under *Anderson*. *See LWVF I*, 447 F. Supp. 2d. at 1331-32; *Project Vote* v. *Blackwell*, 455 F. Supp. 2d 694, 701 (N.D. Ohio 2006); *LWVF II*, 575 F. Supp. 2d at 1319-20; *Am. Ass'n of People with Disabilities* v. *Herrera,* 690 F. Supp. 2d 1183, 1214 (D.N.M. 2010).

Applying *Anderson*, a reviewing court must:

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[5] Indeed, voter registration is akin to petition circulation, which has been repeatedly protected from undue regulation by the Supreme Court. Like petition circulations, asking someone to register to vote is far from a "fleeting encounter"—volunteers must persuade potential registrants of the merits of voting and civic engagement. *See Buckley* v. *Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 199 (1999); *Meyer* v. *Grant*, 486 U.S. 414, 421-22 (1988). The process inevitably involves "the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer*, 486 U.S. at 422 (footnote omitted).

> [F]irst consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications . . . . [and] consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Anderson, 460 U.S. at 789. As the severity of the burden increases, the level of scrutiny rises. "[S]evere restriction[s]" must be justified by "a narrowly drawn state interest of compelling importance." *Crawford*, 553 U.S. at 190 (citation and internal quotation marks omitted). *Anderson* thus mandates a close consideration of the specific burdens imposed and requires the State to justify the relationship between those burdens and the particular state interests asserted. *See LWVF II*, 575 F. Supp. 2d at 1319-20, 1323; *LWVF I*, 447 F. Supp. 2d at 1332-33, 1335-36.

Here, the Law's provisions severely burden Plaintiffs' voter registration efforts and substantially diminish protected speech and association. *See infra* Part I.A.1. Further, the Law's broad sweep—restricting even the solicitation of registration forms—directly regulates pure political speech. *See infra* Part I.A.2. The State cannot demonstrate that such draconian burdens on core political speech and association are "sufficiently weighty to justify the limitation," let alone "narrowly drawn" to advance compelling state interests. *See infra* Part I.A.3. In sum, Plaintiffs are likely to succeed on their First Amendment claim, so the Law must be enjoined.

1. The Law Imposes Severe Burdens Upon Plaintiffs' Political Speech and Association Rights

"[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). With blatant disregard for this stalwart principle,

the Law presents a laundry list of restrictions on voter registration efforts that, as detailed below, impede speech and association. Indeed, such restrictions—such as registration prior to engaging in expressive activities, complex and burdensome reporting and disclosure requirements, and formalization of relationships with members and volunteers, all under pain of civil and criminal penalties—are all of the type that the Supreme Court has consistently recognized as creating First Amendment injury in a variety of related contexts. *See, e.g., Watchtower Bible & Tract Soc'y of N.Y.* v. *Vill. of Stratton*, 536 U.S. 150, 167-68 (2002) (holding requirement for permission *before* engaging in protected speech activity constitutes burden on speech);[6] *Fed. Election Comm'n* v. *Mass. Citizens for Life*, 479 U.S. 238, 254 (1986) ("*MCFL*") (striking down complex requirements that "create a disincentive for . . . organizations to engage in political speech"); *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622 (1984) (finding law that "interfere[d] with the internal organization or affairs of . . . group[s]" engaged in "various protected activities" impinged on associational freedoms); *Brandenburg* v. *Ohio*, 395 U.S. 444, 449 (1969) (striking down law that "forbid[s], on pain of criminal punishment, assembly with others merely to advocate").[7] While each is unconstitutional standing alone, together, these restrictions impose acute constitutional harm.

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[6] Notably, the permit system invalidated in *Watchtower Bible*, like the pre-registration process challenged here, granted permits free of charge that were "issued routinely after an applicant fills out a fairly detailed" application. 536 U.S. at 154-55.

[7] *See also Vill. of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 632-33 (1980) (holding regulation of mere solicitation of forms burdened pure political speech); *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 277-78 (1964) (recognizing chilling effect of law punishing certain types of speech with civil liability); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 462-63, 466 (1958) (holding it constitutionally impermissible to force volunteers and voters to publicly identify their associations).

Moreover, the Law creates a distinctly new framework for restricting community-based voter registration groups that is considerably more burdensome than what previously existed[8] and drastically more burdensome than any similar scheme upheld by any other federal court.[9] When such extreme constitutional injuries are considered against Florida's inability to justify the Law's necessity, *see infra* Part I.A.3, it is clear that the Law must be invalidated.

a. *Pre-Registration & Registration Agent Requirements*

Groups and individuals may no longer engage in *any* voter registration activities without first registering with the State and providing extensive information, including

[8] Before the instant Law, the State imposed a less burdensome regulatory scheme that was upheld in *LWVF II*. This scheme mandated a ten-day delivery deadline for completed forms to be submitted to election officials; its pre-registration and quarterly reporting provisions were optional. *See LWVF II*, 575 F. Supp. 2d at 1304, 1322. The ten-day return requirement was upheld, but only after the district court found that such a provision did not "place any direct restrictions or preconditions" on First Amendment activity. *Id.* at 1322. By contrast, Florida's first set of restrictions on registration efforts—enacted in 2005 and struck down in 2006—implemented a ten-day deadline punishable by substantial fines for which plaintiffs and their members could be held jointly and severally liable. *See LWVF I*, 447 F. Supp. 2d at 1322-23. The district court found that these requirements created an unconstitutional chilling effect on protected activities, which, in turn, "reduced the total quantum of speech" in Florida. *Id.*

[9] *See supra* note 8 (discussing *LWVF I* and *LWVF II*). In addition, Florida's new Law is also more burdensome than the New Mexico regulatory scheme examined in *Herrera.* There, in denying the plaintiffs' preliminary injunction motion, the district court acknowledged that the challenged regulations had an "arguable negative impact on voter registration," but concluded that the factual record of constitutional burden was not compelling. *Am. Ass'n of People with Disabilities* v. *Herrera*, 580 F. Supp. 2d 1195, 1242 (D.N.M. 2008); *see also Herrera*, 690 F. Supp. 2d at 1220 (denying defendants' motion to dismiss constitutional claims for lack of proof that burdens were justified by important state interests). In this case, by contrast, Plaintiffs offer evidence that the Law severely burdens community-based voter registration and thus, if not enjoined, will have a starkly negative effect on the number of Floridians who register to vote. (*See, e.g.*, Macnab Aff. ¶ 71; Smith Aff. ¶ 50; Ashwell Aff. ¶¶ 9, 16). Moreover, the *Herrera* court appeared to assume, at the preliminary injunction phase, that the New Mexico law would "protect the process of voter registration from fraud and error" and that "compliance with it helps to insure that voter registration forms are properly completed, turned in, and recorded." 580 F. Supp. 2d at 1242. Here, as discussed below, *infra* Part I.A.3, the Florida Legislature did not—and cannot—establish that the Law would further its goals of preventing fraud or mistakes in voter registration.

sworn statements from each of their "registration agents." Fla. Stat. § 97.0575(1). Moreover, each affiliate organization of a registered entity must register separately, and all submission must be made electronically. *See* Fla. Admin. Code Ann. R. 1S-2.042(3)(a), (3)(f). The registration requirement is a significant change from the prior law, which imposed no preconditions to constitutionally protected activity because its pre-registration process was entirely optional. *See LWVF II*, 575 F. Supp. 2d at 1305; *see also Blackwell*, 455 F. Supp. 2d at 703 (finding that pre-registration requirements "have a chilling effect on a variety of voter registration efforts").

As an initial matter, requiring such extensive registration information—and demanding it from each organizational affiliate—places a huge burden on volunteer-run, non-profit operations. For example, many LWVF volunteers and affiliates lack ready access to computers, scanners, or fax machines. (Macnab Aff. ¶ 14.) Not only is it unclear how these groups will be able to make repeated electronic filings as mandated by the Law, one federal court has held that such electronic submission requirements discriminate against Plaintiffs and others "who do not have access to . . . the Internet . . . [or] the ability to use the Internet." *Blackwell*, 455 F. Supp. 2d at 703.

The pre-registration requirement also completely eliminates the ability of individual Floridians to spontaneously assist fellow citizens with voter registration. *See Watchtower Bible*, 536 U.S. at 167. Previously, Plaintiffs' individual members and volunteers routinely helped others register to vote of their own accord. (Goodman Aff. ¶ 14; Macnab Aff. ¶ 37-38.) Now, unless they first individually register with the State—

either on their own or as "registration agents" of a registered organization—Ms. Macnab and Ms. Goodman cannot submit registration forms for friends or extended family.

Second, the requirement that a registered organization identify and document every possible "registration agent," Fla. Stat. § 97.0575(1)(c), drastically burdens Plaintiffs' association with their volunteers. Contrary to their inclusive missions, Plaintiffs would be forced to require their volunteers to sign a formal, legal, public document *before* being engaging together in First Amendment activities.[10] *See U.S. Jaycees*, 468 U.S. at 622.

These requirements are deeply intimidating and directly at odds with Plaintiffs' model of volunteerism. For instance, Plaintiff LWVF's president and former president both have extensive experience recruiting and motivating volunteers, and affirm that many potential volunteers—particularly risk-averse, elderly ones—would be dissuaded from helping at registration drives, events that were previously LWVF's best hook for fostering long-term relationships with new volunteers. (Macnab Aff. ¶¶ 21, 52; Goodman Aff. ¶¶ 7, 9.) Similarly, RTV's President Heather Smith is deeply concerned that the form will intimidate volunteers, reducing the number willing to work with RTV. In addition to the threat of fines and criminal penalties that will surely deter young

[10] A volunteer who wishes to assist a citizen group with voter registration must swear under penalty of perjury to form DS-DE-120 before they can assist a single voter. Fla. Admin. Code Ann. R. 1S-2.042(3)(c). The form includes an affirmation and in bold face notes that falsely swearing to the form is a separate felony penalty. It lists several felony criminal penalties for "false registration" but does not explain that "false registration" requires intentional fraud.

volunteers, Ms. Smith believes that some will be afraid of publicly documenting their association with RTV due to possible harassment.[11] (Smith Aff. ¶ 52.)

Ms. Smith also reasonably worries that requiring a sworn statement would substantially, if not wholly, deter teachers interested in Democracy Class. Previously, RTV could effectively offer a helping, but not controlling, hand to busy teachers who needed logistical support and encouragement to help their students register to vote. Under the new Law, this is no longer possible; RTV would have to ask teachers to execute a sworn statement as formal agents of RTV. The registration agent requirements thus seriously undermine RTV's ability to associate with teachers and draw them into volunteering for Democracy Class. (Smith Aff. ¶¶ 64-65; *see also* Ashwell Aff. ¶¶ 51-53 (describing chill on student volunteers).)[12]

Third, even if Plaintiffs were willing and able to convince their volunteers to sign the sworn statement, Plaintiffs would remain unable to comply with the Law's requirement to report each registration agent's termination date. Fla. Admin. Code Ann. R. 1S-2.042(4)(b). Beyond the confusion as to how the Law intends this requirement to apply to volunteers, *see infra* Part I.B, it is unworkable. Plaintiffs currently have no

[11] In the past, RTV has been scrutinized by certain political factions, and some volunteers might be reasonably skittish about memorializing their association with the group. Undoubtedly, such "compelled disclosure . . . has a direct impact on the associational rights of the plaintiffs and the [registration agent]." *Blackwell*, 455 F. Supp. 2d at 706 (citing *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958)).

[12] The chilling atmosphere on teachers is also aggravated by highly publicized enforcement actions against Florida teachers for violations of the new Law. *See, e.g.*, Adam Cohen, *When Voter Registration Is a Crime*, Time (Nov. 7, 2011), *available at* http://ideas.time.com/2011/11/07/when-voter-registration-is-a-crime/; Ashley Lopez, *Another Teacher May Be in Trouble with Controversial Elections Law*, Fla. Independent (Oct. 31, 2011), *available at* http://floridaindependent.com/54690/kurt-browning-pam-bondi-elections-law.

means of determining when any particular volunteer has "terminated" his or her volunteerism. Plaintiffs broadly advertise upcoming voter registration opportunities to their members and supporters. (Macnab Aff. ¶¶ 28-29; Smith Aff. ¶¶ 18-19; Ashwell Aff. ¶ 25.) They pointedly do *not* force volunteers to commit to a definite end date for their volunteerism. Indeed, because many individuals volunteer for events on a spontaneous, as-available basis, Plaintiffs rarely know whether any particular individual intends to volunteer again. (*See, e.g.*, Ashwell Aff. ¶ 53.) While a termination date may be clear in the employment context, among volunteer organizations it is bewildering.

In these ways, the various pre-registration requirements directly impact speech and associational rights, and completely box out those who cannot comply with these extensive administrative mandates. In so doing, the Law impermissibly restricts the "methods" and the "means" of how Plaintiffs organize their voter registration efforts. *Cf. LWVF II*, 575 F.Supp.2d at 1321-22 (explaining, in upholding prior law, that it "does not place any direct restrictions or preconditions" on plaintiffs' "interactions with prospective voters in connection with their solicitation of voter registration applications").

b. *Tracking and Reporting Requirements*

The burdens of the Law only increase once an organization becomes a registered "3PVRO" and incurs the duty to track and report every voter registration form provided to, and received from, its registration agents on a monthly basis. Fla. Stat. § 97.0575(5); Fla. Admin. Code. Ann. R. 1S-2.042(5). Equally problematic, because of the Law's confusing and vague language, this requirement appears to capture even publicly available voter registration forms obtained by registration agents. *See infra* Part I.B.

These tracking and reporting requirements place constant burdens on the shoulders of registered organizations and their agents. For organizations such as Plaintiffs, who engage in voter registration activity through a disperse network of local volunteers, these mandates would require constant communication between hundreds of individuals and one centralized administrator in order to accurately collate form counts. Perfect compliance would be next to impossible. For instance, LWVF has only two already overextended staff members, but its 29 local Leagues organize hundreds of volunteers throughout the State. Keeping track of every single blank application form that each volunteer obtains and distributes is not possible with Plaintiffs' current staff and organizational structure. (Macnab Aff. ¶ 56; Smith Aff. ¶ 54); *cf. MCFL*, 479 U.S. at 254-55 (striking down extensive recordkeeping and reporting obligations imposed on non-profit corporations as "requir[ing] a far more complex and formalized organization than many small groups could manage").

Even if it were possible for Plaintiffs to comply with the reporting requirements, doing so would drain valuable time and resources from the expressive and associational activities of Plaintiffs and their volunteers. (Macnab Aff. ¶ 57; Smith Aff. ¶ 50; Ashwell Aff. ¶¶ 16, 57.) This would make their registration efforts substantially less effective—a sacrifice the Constitution does not permit. *See Am. Constitutional Law Found.*, 525 U.S. at 194-95; *Meyer*, 486 U.S. at 424 ("The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing."); *LWVF I*, 447 F. Supp. 2d at 1334 (same).

c. *48-Hour Delivery Deadline*

Yet another way in which the Law imposes a much heavier burden than prior laws is by dramatically shortening the window of time for submitting completed registration forms. Previously, the return time was ten days; now it is a mere 48 hours. This deadline allows no room for error, and groups can be held strictly liable for any forms submitted even a minute late. Fla. Stat. § 97.0575(3)(a). The fear of repercussions for innocently running afoul of this unreasonable timetable places a massive and unjustified burden on Plaintiffs' rights to free speech and association.

There are good reasons why Plaintiffs frequently need more than 48 hours to return forms. Under Plaintiffs' standard procedures, which have resulted in the successful registration of tens of thousands of Florida voters without incident or complaint, the submission of completed voter registration forms takes anywhere from two to eight days after receipt. (Macnab Aff. ¶¶ 36, 41; Smith Aff. ¶¶ 30-32; Ashwell Aff. ¶¶ 8, 12, 34, 37.) Complying with a 48-hour deadline for every single form collected would take volunteers away from voter registration activities to submit forms on a rolling basis, undermining the consistency of submission procedures and compromising security. (Goodman Aff. ¶ 12; Ashwell Aff. ¶ 46.) This accelerated process would also eliminate Plaintiffs' ability to check for errors on completed forms and to follow up with registrants regarding necessary corrections, ultimately reducing the effectiveness of Plaintiffs' efforts to get new voters onto Florida's rolls. (Smith Aff. ¶ 61; Ashwell Aff. ¶¶ 36-37.)

The reduced deadline places dramatic burdens on the ability of many individual Floridians—including busy student volunteers, teachers, and anyone with full-time

employment or familial responsibilities—to participate in registration drives. (*See*, *e.g.*, Macnab Aff. ¶ 36; Smith Aff. ¶¶ 59, 67.) For example, many of Plaintiff RTV's volunteers are students who do not have their own cars, and many college campuses—where RTV's tabling events are generally held—are far from county offices. In such circumstances, it may be nearly impossible for RTV to obtain completed forms and submit them within 48 hours. (Smith Aff. ¶ 60.) Moreover, any short delay—due to traffic, weather, ill health, an unexpected family emergency, or countless other contingencies—could lead to automatic fines. (Macnab Aff. ¶¶ 42, 46.) Added to the Law's numerous other burdens on Plaintiffs' volunteers, the 48-hour rule will deter and chill the willingness of volunteers to participate in the voter registration process.

d. ***Fines and Penalties***

The cumulative impact of the obstacles created by each of the provisions described above is exacerbated by the Law's highly chilling penalty provisions. The Law imposes strict liability financial penalties, grants the Florida Attorney General broad and undefined powers to remedy or prevent any violation of the Law, and is subject to a catch-all election statute making it a criminal misdemeanor to violate any provision of the Law where a penalty is not otherwise provided. Fla. Stat. §§ 97.0575(3)-(4), 104.41. The Law's numerous and detailed requirements, paired with a strict liability for failure to submit forms in 48 hours, virtually guarantees that those engaged in citizen voter registration will—at some point—face fines or other legal action. This is true even if failure to comply is due to mere inadvertence and causes no negative consequence for

any voter.[13] As non-profit organizations that rely on their sterling records of voter registration to ensure ongoing support and credibility in the community, Plaintiffs are unable to accept the threat of such unjustified blows to their resources and reputations.

Moreover, the Law's requirement that State officials pre-mark forms with a 3PVRO identifier creates the risk of liability for any registered organization if marked forms move outside of their control. *See* Fla. Stat. § 97.0575(2); Fla. Admin. Code. Ann. R. 1S-2.042(4)(a). Under the Law, Plaintiffs could be held responsible for every pre-marked form's timely submission even if never collected by Plaintiffs. This is a very real threat to Plaintiffs, who conduct large-scale voter registration drives on college campuses and other busy public places where potential registrants are apt to leave suddenly with a half-completed form. (Macnab Aff. ¶ 62; Smith Aff. ¶ 27; Ashwell Aff. ¶ 28.) If such a form bearing Plaintiffs' 3PVRO identifier is later submitted by an applicant more than 48 hours after signature, Plaintiffs would apparently be held strictly liable.

The Law's penal provisions chill not only the Plaintiffs themselves, but also their individual volunteers. A State "factsheet" indicates that registration agents must return all completed forms to their "controlling" organization for submission to election officials, or otherwise personally register as a "3PVRO."[14] Thus, according to the State,

[13] Fines can be imposed even where a natural emergency or other force majeure causes a form to be delivered beyond 48 hours. While the Law *permits* (rather than requires) the excusing of fines for such extenuating circumstances, any argument for such a waiver can be made only as an affirmative defense, which means that a group or individual has already been subject to a formal civil fine collection process that would require extensive time and resources to contest. *See* Fla. Stat. § 97.0575(3)(b).

[14] *See* Florida Division of Elections, *Factsheet about Third-Party Voter Registration* (2011), http://election.dos.state.fl.us/pdf/TPVRFinalFactSheet.pdf.

every time individual volunteers submit completed forms directly, they risk strict liability. But Plaintiffs have testified that such centralized collection would be impossible given their current volunteer-focused procedures. (Macnab Aff. ¶ 51; Smith Aff. ¶ 57; Ashwell Aff. ¶ 45.) Undoubtedly, the possibility of being held personally liable for fines, particularly when these fines can be imposed due to circumstances beyond the volunteer's control, deters volunteerism. *See LWVF I*, 447 F. Supp. 2d at 1338-39 (finding "the threat of fines has rationally chilled Plaintiffs' exercise of free speech and association, as well as that of Plaintiffs' volunteers"); (Goodman Aff. ¶¶ 6, 18; Ashwell Aff. ¶ 51).

Unable to navigate the complex maze of administrative requirements, unwilling to artificially stigmatize and intimidate their own volunteers, and worried that an inevitable mishap would result in legal penalties and reputational damage, Plaintiffs are, understandably, hesitant to risk the grave consequences of noncompliance. *Cf. N.Y. Times Co.* v. *Sullivan*, 376 U.S. at 277-78 (1964) (recognizing chilling effect of civil liability); *Wieman* v. *Updegraff*, 344 U.S. 183, 190-91 (1952) (recognizing chilling effect of threatened reputational damage). Plaintiffs are even less willing to place these burdens upon the shoulders of their unpaid volunteers. The result is that Plaintiffs have already stopped or will dramatically reduce their longstanding voter registration activity, thereby "reduc[ing] the quantum of political speech and association" in Florida. *LWVF I*, 447 F. Supp. 2d at 1333 (citing *Meyer,* 486 U.S. at 422-23).

2. The Law Directly Regulates Core Political Speech

In addition to the extensive burdens the Law imposes on Plaintiffs' voter

registration activities, the Law's broad scope encompasses speech in the absence of any actual voter registration form collection by the speaker.[15] The implementing regulations define "voter registration activities" to encompass "*soliciting for collection* or collecting voter registration applications." Fla. Admin. Code Ann. R. 1S-2.042(2)(b) (emphasis added). In other words, before anyone in Florida can even *offer* to assist another with submitting his or her registration form, that person must register with the State and assume the corresponding regulatory burdens and liabilities.

Offering to help someone submit a voter registration form sends a message that registering to vote is important. In analogous circumstances, federal courts have been extremely suspicious of governmental attempts to limit solicitation. For instance, in striking down a Connecticut law prohibiting government contractors and lobbyists from soliciting campaign contributions on behalf of state political candidates, the Second Circuit stressed the First Amendment interests implicated:

> Unlike laws limiting contributions, . . . a limit on the solicitation of otherwise permissible contributions prohibits exactly the kind of expressive activity that lies at the First Amendment's "core." That is because the solicitation of contributions involves *speech*—to solicit contributions on behalf of a candidate is to make a statement. . . . Speech "'uttered during a campaign for political office,'" moreover, requires the "'fullest and most urgent application'" of the protections set forth in the First Amendment.

Green Party of Conn. v. *Garfield*, 616 F.3d 189, 207 (2d Cir. 2010) (citations omitted) (emphasis in original); *see also Vill. of Schaumburg*, 444 U.S. at 633 (affirming that "our

[15] The statutory text broadly designates anyone who is "soliciting or collecting voter registration applications" as a "third-party registration organization," without expressly tying solicitation to collection. Fla. Stat. § 97.021(37).

cases long have protected speech even though it is in the form of . . . a solicitation to pay or contribute money") (citation omitted).

The Second Circuit's logic applies here in full force. Solicitation for collection of registration forms, like solicitation of contributions, constitutes pure political speech that may not be penalized or restricted unless doing so is necessary to advance a compelling state interest.[16] But the State cannot show any reason, let alone a compelling reason, to prohibit unregistered entities from even volunteering to collect voter registration forms.

3. The State Cannot Justify the Severe Burdens Imposed by the Law

Under *Anderson*, after the Court has weighed the severity of the particular burdens imposed by the Law, it 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. Thus, Florida carries the burden of demonstrating that, in light of the multiple, onerous burdens described above, the challenged provisions are necessary to promote sufficiently weighty governmental interests. This it cannot do.

There is no doubt 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 rolls. But, under *Anderson*, the State must show that the combination of restrictions is appropriately tailored to advance those interests. *See*

[16] Numerous cases support the applicability of strict scrutiny when a law directly regulates political speech. *See Weaver* v. *Bonner*, 309 F.3d 1312, 1322 (11th Cir. 2002) (invalidating canon prohibiting judicial candidates from personally soliciting campaign contributions); *Green Party*, 616 F.3d at 210 (invalidating law banning solicitation of campaign contributions by government contractors and lobbyists); *Republican Party of Minn.* v. *White*, 416 F.3d 738 (8th Cir. 2005) (invalidating canon barring judicial candidates from soliciting campaign contributions from certain groups).

LWVF II, 575 F. Supp. 2d at 1320; *LWVF I*, 447 F. Supp. 2d at 1335-36. Particularly in light of existing laws, the State cannot show that the Law furthers those interests, let alone that the Law is necessary to achieve them. *See NAACP* v. *Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect.").

The legislative record provides no insight as to why the Law's strict pre-registration, registration agent, and reporting requirements are appropriately tailored to promote the integrity of the registration process. Indeed, it is hard to imagine any sufficient justification for the Law in light of the previously existing laws addressing registration integrity—including the criminal penalties for "false registration information" as a third-degree felony, punishable with up to five years in jail, a $5,000 fine, or both. Fla. Stat. § 104.0615(4); *see LWVF I*, 447 F. Supp. 2d at 1338 ("The criminal law allows for both jail and monetary fines, and addresses Defendant's core concerns of holding organizations accountable and preventing fraud."). Likewise, nothing in the legislative record indicates why the prior ten-day submission deadline was inadequate, or why the exceedingly short 48-hour deadline is necessary.[17]

Moreover, there are indications that non-legitimate interests infected the passage of this Law. For example, one Senate leader and a chief supporter of the Law acknowledged that the new Law would impose significant burdens on voters, but argued that these burdens were a valid goal of the legislation:

[17] As Representative Thompson observed, election supervisors "have not identified a problem with fraud." 2011 Fla. House Deb., Reg. Sess., at 02:00:18 (May 5, 2011). Senator Rich pointed out that the bill's supporters were unable to "provide any proof that the integrity of our election process has been compromised." 2011 Fla. Senate Deb., Reg. Sess., at 47:49 (May 5, 2011).

> Did you ever read the stories about people in Africa? The people in the desert who literally walk 200-300 miles so they could have an opportunity to do what we do? And we want to make it more convenient? How much more convenient do you want to make it? Do we want to go to their house? Take the polling booth with us? This is a hard fought privilege. This is something people died for. And you want to make it convenient? To the guy who died to give you that right, it was not convenient. *Why would we make it any easier? I want 'em to fight for it. I want 'em to know what it's like. I want 'em to go down there and have to walk across town to go over and vote.* I want 'em to at least know the date they're supposed to vote. I'd like to have them actually know where they're supposed to vote. Is that too much to ask? I don't think so. . . . This is Florida. *We do make it convenient for people to vote, but I gotta tell ya I wouldn't even have any problem making it harder.* I would want them to really want to be informed. I would want them to really want to vote as badly as I want to vote. I *want the people in the State of Florida to want to vote as badly as that person in Africa who is willing to walk 200 miles for that opportunity he's never had before in his life. This should not be easy.* This should be something you feel with a passion.

2011 Fla. Senate Deb., Reg. Sess., at 35:40 (May 5, 2011) (statement of Sen. Bennett) (emphases added).

Whatever its purported purpose may be, the Law cannot stand under *Anderson* because it severely burdens community-based voter registration efforts, yet the State has not and cannot demonstrate a state interest, let alone a compelling one, in imposing these additional restrictions.

B. <u>The Law Is Unconstitutionally Vague</u>

The vagueness of the Law dramatically increases the extent to which Plaintiffs' First Amendment rights are chilled by forcing Plaintiffs to guess at the Law's meaning before engaging in protected activity. To avoid such chill, the vagueness doctrine is applied with particular rigor where a law "abut[s] upon sensitive areas of basic First Amendment freedoms." *Grayned* v. *City of Rockford*, 408 U.S. 104, 109 (1972) (quoting

Baggett v. *Bullitt*, 377 U.S. 360, 372 (1964)). Moreover, "[i]f the line drawn by the decree between [] permitted and prohibited activities . . . is an ambiguous one, we will not presume that the statute curtails constitutionally protected activity as little as possible." *Button*, 371 U.S. at 432.[18] "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id*. at 438; *see also Konikov* v. *Orange Cnty.*, 410 F.3d 1317, 1329 (11th Cir. 2005) (holding that Constitution demands a particularly "high level of clarity" where First Amendment rights are at stake); *see also Vill. of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (same).

Vague laws offend due process in two ways. First, they can trap the innocent by failing to provide fair warning of prohibited conduct. *Hill* v. *Colorado*, 530 U.S. 703, 732 (2000); *Konikov*, 410 F.3d at 1329. Second, they can fail to provide "explicit standards for those who apply them," which can result in arbitrary and discriminatory enforcement. *Grayned*, 408 U.S. at 108; *see also Hill*, 530 U.S. at 732; *Konikov*, 410 F.3d at 1329 (stressing that courts "may consider the *risk* of arbitrary enforcement"). The Law fails in each of these respects.

1. The Law Fails to Provide Notice of Prohibited Conduct

The vagueness in the Law permeates the statutory scheme as a whole, as well as its applicable regulations, improperly placing the burden of determining prohibited conduct on the Plaintiffs. For example, the regulations governing the submission of

[18] Notably, in upholding the prior version of the Law, the *LWVF II* court rejected the vagueness claims presented by assuming that challenged provisions would be enforced in the least restrictive manner possible. *See LWVF II*, 575 F. Supp. 2d at 1318-19. This approach cannot be reconciled with Supreme Court precedent. *See Bullitt*, 371 U.S. at 432.

completed forms, the rules governing tracking and reporting of registration forms, and the requirement that organizations report the termination of registration agents are all so vague that they give a reasonable person no clear guidance about how to comply. Prior opinions examining vagueness challenges to voter registration laws have analyzed vagueness claims of a dramatically more limited nature.[19] Here, by contrast, the Law includes both vague terms and an ambiguous overall regulatory scheme that fails to provide notice of key provisions, and then assigns undefined and unlimited penalties for violations of its unclear mandates. As a result, it leaves undefined "what the ordinance as a whole prohibits." *Grayned*, 408 U.S. at 110.

First, the Law imposes a range of mandatory fines on organizations if they do not deliver completed forms to election officials "within 48 hours . . . or the next business day if the appropriate office is closed for that 48-hour period." Fla. Stat. § 97.0575(3)(a). Measuring time in terms of both hours and a "business day," creates confusion about the interaction of the two. It provides no indication as to whether an office must be closed for an entire 48-hour period to trigger a grace period. Moreover, where the grace period applies, the Law fails to state whether the due date shifts to the same hour and minute on a different day, or through the end of the next "business day."

Second, the Law's requirement that organizations track and report every voter registration form "provided to" their registration agents on a monthly basis, regardless of whether those forms are actually used, provides no guidance as to which forms qualify as

[19] Unlike the instant case, prior decisions focused on Plaintiffs' claims that only a particular word or phrase was vague. *See LWVF II*, 575 F. Supp. 2d at 1314 ("affiliate organizations"); *Herrera*, 690 F. Supp. 2d at 1222-23 ("assist").

"provided." Fla. Admin. Code. Ann. R. 1S-2.042(5)(a). It is unclear, for instance, whether the mandate requires reporting of forms obtained by registration agents at government agencies, printed from online sources, or copied from existing blank forms—all common means employed by Plaintiffs' volunteers. (Smith Aff. ¶¶ 43, 53-54; Ashwell Aff. ¶¶ 27, 57.)

Third, the Law's requirement that groups report the termination of any registration agent creates additional confusion in the context of Plaintiffs' volunteer-based structures. *See* Fla. Admin. Code. Ann. R. 1S-2.042(6)(b). None of the Plaintiffs have ever formalized their relationships with volunteers, nor have means of determining that any particular volunteer has "terminated" his or her volunteerism. The Law's undefined "termination" requirement, as applied to Plaintiffs' volunteers, creates confusion, legal uncertainty, and potential liability.

In sum, the 48-hour delivery deadline, the method of tracking forms, and the reporting requirements of the Law are all undefined burdens that go far beyond lack of clarity within a single word or phrase. The Law's key mandates are obscure and fail to contemplate the specific burdens they place on Plaintiffs, particularly in the volunteer context. The vagueness that permeates the Law prevents Plaintiffs from reasonably determining what conduct the Law allows and prohibits, chilling their exercise of protected rights. This chilling effect is compounded by the fact that any violation gives rise to a set of undefined and unbounded penalties.

2. The Law's Lack of Clear Enforcement Standards Encourages Arbitrary Enforcement and Chills Plaintiffs' Protected Speech

The Law also suffers from fatal vagueness infirmities because it delegates

undefined and seemingly limitless powers to the Attorney General and permits the Secretary of State to waive fines with completely unfettered discretion. First, the Florida Attorney General may "institute a civil action for a violation of [Fla. Stat. § 97.0575] or to prevent a violation of this section." Fla. Stat. § 97.0575(4). Such action "may include a permanent or temporary injunction, a restraining order, or *any other appropriate order*." *Id.* (emphasis added). These unbounded statutory penalties are contrary to the concept of fair enforcement. As the Eleventh Circuit has made clear, a law which fails to disclose penalties for noncompliance cannot survive constitutional scrutiny on vagueness grounds. *Harris* v. *Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1311 (11th Cir. 2009); *see also, e.g.*, *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 (1996) (holding that due process requires notice "of the severity of the penalty that a State may impose"). Finally, Florida's law includes a catch-all criminal penalty for violations of the Election Code, which includes provisions of the Law, further chilling Plaintiffs' willingness to engage in protected activity regulated by the Law. *See* Fla. Stat. § 104.41. The threat of arbitrary and discretionary penalties is especially pernicious given the First Amendment interests at stake in this case. *See, e.g.*, *Konikov*, 410 F.3d at 1329.

The Law also fails to provide any guidance for when fines will be waived. If a group asserts an affirmative defense that it failed to meet the 48-hour deadline due to "force majeure or impossibility of performance," the Secretary of State "may" waive fines. Fla. Stat. § 97.0575(3)(b). Neither the challenged statute nor its administrative rules offer any warning to citizen groups as to when fines should, and should not, be

waived for such purely innocent violations. Instead, the Florida law grants Defendant Browning "unfettered discretion" to decide. *See Harris*, 564 F.3d at 1312.

In short, the Law lacks any "standards governing the exercise of the discretion granted," and thus improperly "permits and encourages an arbitrary and discriminatory enforcement of the law." *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 170 (1972); *see also Kolender* v. *Lawson*, 461 U.S. 352, 357-58 (1983); *City of Chicago* v. *Morales*, 527 U.S. 41, 60-64 (1999); *Grayned*, 408 U.S. at 108 (requiring "explicit standards" to govern enforcement). Under settled authority, this sort of standardless regulation of conduct violates the requirements of due process and chills protected First Amendment activity. Plaintiffs are therefore likely to succeed on their claim that the Law is unconstitutionally vague, and injunctive relief is thus appropriate.

II.
PLAINTIFFS HAVE A STRONG LIKELIHOOD OF SUCCESS ON THEIR NVRA CLAIM

Plaintiffs are also likely to succeed on their claim that the Law violates and is preempted by the NVRA, 42 U.S.C. § 1973gg *et seq.*, which provides another, independent basis for the requested preliminary injunctive relief.

The applicable law here is well-settled. "Under the Supremacy Clause, state laws that 'interfere with, or are contrary to the laws of congress, made in pursuance of the constitution' are invalid." *Wis. Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 604 (1991) (quoting *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat) 1, 211 (1824)) (citation omitted). As the Eleventh Circuit has explained, such "[p]reemption may be either express or implied, and is compelled whether Congress's command is explicitly stated in the statute's language or

implicitly contained in its structure and purpose." *Koutsouradis* v. *Delta Air Lines, Inc.*, 427 F.3d 1339, 1343 (11th Cir. 2005); *accord Pace* v. *CSX Transp., Inc.*, 613 F.3d 1066, 1068 (11th Cir. 2010). This is particularly true in the area of election law, where the Elections Clause "explicitly gives Congress the final say" in matters related to federal election administration. *Foster* v. *Love*, 522 U.S. 67, 72 (1997); *see Gonzalez* v. *Arizona*, 624 F.3d 1162, 1171-75 (9th Cir. 2010) (holding, in majority opinion joined by retired Supreme Court Justice Sandra Day O'Connor, sitting by designation, that NVRA has especially broad preemptive force under the Elections Clause), *reh'g en banc granted by* 649 F.3d 953 (9th Cir. 2011).[20]

Based on this governing authority, it is clear that "[i]f [state] law is inconsistent with the NVRA, the former must give way to the latter." *Charles H. Wesley Educ. Found., Inc.* v. *Cox*, 324 F. Supp. 2d 1358, 1366 (N.D. Ga. 2004), *aff'd*, 408 F.3d 1349 (11th Cir. 2005); *see also* 408 F.3d at 1354 (holding that the NVRA "overrides state law inconsistent with its mandates"). The NVRA expressly provides that its provisions control "notwithstanding any other Federal or State law." 42 U.S.C. § 1973gg-2(a).

Here, the onerous new requirements that the Law imposes on Plaintiffs and other community-based voter registration groups are flatly inconsistent with the NVRA's text, its structure, and its overriding purpose to "increase the number of eligible citizens who register to vote in elections" and "enhance[] the participation of eligible citizens as

[20] As the Ninth Circuit explained in *Gonzalez*, under the Elections Clause, "all conflicts" are resolved "in favor of the federal government," and "the 'presumption against preemption' and 'plain statement rule' that guide courts' analysis of preemption under the Supremacy Clause" are not applicable. *Id.* at 1174-75. While, pending *en banc* review, *Gonzalez* may not be cited as precedent in the Ninth Circuit, 649 F.3d at 954-55, its well-reasoned analysis of this issue remains persuasive.

voters." *Id.* § 1973gg(b). More specifically, the Law conflicts with and violates the NVRA in at least four respects.

First, the Law's burdensome mandates are inconsistent with Florida's duty under the NVRA to make registration forms widely available. They clearly frustrate the NVRA's overall goal of facilitating voter registration, as well as the congressional intent that community-based groups like Plaintiffs play an active role in this effort.

As the Eleventh Circuit has recognized, by "impliedly encourag[ing]" third-party voter registration drives, the NVRA protects the rights of Plaintiffs and similar groups to conduct such drives and to actively participate in the voter registration process. *Wesley Educ. Found.*, 408 F.3d at 1353. Indeed, the NVRA specifically requires states to make voter registration forms "available for distribution through governmental and private entities, *with particular emphasis on making them available for organized voter registration programs*." 42 U.S.C. § 1973gg-4(b) (emphasis added). By mandating that the Division of Elections distribute voter registration forms only to pre-registered groups, the Law defies Florida's duty under the NVRA and is thus "inconsistent with [the NVRA's] mandates." *Wesley Educ. Found.*, 408 F.3d at 1354.

More broadly, the Law's onerous pre-registration and ongoing reporting requirements severely restrict third-party voter registration and curtail Plaintiffs' ability to reach citizens and help add them to the voting rolls. As the Supreme Court recently reaffirmed, under such circumstances—*i.e.*, where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"—the state law is preempted by the conflicting federal statute. *AT&T Mobility LLC* v.

Concepcion, 131 S. Ct. 1740, 1753 (2011) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)); *see also Gonzalez*, 624 F.3d at 1180 ("[A]s every court to have considered the act has concluded, the NVRA's central purpose is to increase voter registration by streamlining voter registration procedures.") (citing cases).

Second, as another district court found in enjoining a similar provision enacted by the Ohio legislature, the Law's electronic submission requirements impose a discriminatory barrier on Plaintiffs and many other community-based voter registration groups "who do not have access to, or the financial wherewithal to have access to, not only the Internet, but the ability to use the Internet," in violation of "the very spirit of the NVRA." *Blackwell*, 455 F. Supp. 2d at 703.

Third, by impeding voter registration by mail through its 48-hour delivery deadline, the Law conflicts with the NVRA's protection of "Plaintiffs' right[] to . . . submit voter registration forms by mail." *Wesley Educ. Found,* 408 F.3d. at 1354. Although the Law, by its terms, permits submission by mail, it expressly provides that "delivery" occurs on the date of mailing *only if* the mailing envelope bears a "clear postmark." Fla. Admin. Code Ann. R. 1S 2.042(7)(a). "If a postmark is not present or unclear, the date of delivery to the Division or a supervisor of elections is the actual date of receipt." *Id.* Since Plaintiffs have no way of ensuring that the postal service properly postmarks every package containing applications, that the postmark is not damaged in transit, and that the Division of Elections reasonably assesses whether each postmark is "clear," Plaintiffs cannot exercise their NVRA-protected right to submit registration

forms by mail without risking strict liability for forms that, although properly mailed within 48 hours of completion, arrive at the Division after that deadline.[21]

Finally, the Law's requirement that organizations include their identification number and other information on all voter registration forms, including federal ones, *see* Fla. Admin. Code Ann. R. 1S-2.042(4), violates the NVRA's directives regarding the acceptable content of mail-in registration forms, as well as its efforts to facilitate registration by protecting registrants' privacy. Specifically, the NVRA requires states to "accept and use the mail voter registration form prescribed by the Federal Election Commission," 42 U.S.C. § 1973gg-4(a)(1), and further mandates that state-developed mail-in registration forms must "require only such identifying information . . . and other information . . . as is *necessary* to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process," 42 U.S.C. § 1973gg-7(b)(1) (emphasis added). The Law's requirements that a 3PVRO number and the "date and time" of completion be added to every form that Plaintiffs collect is inconsistent with these commands. *Cf. Gonzalez*, 624 F.3d at 1181; *Diaz* v. *Cobb*, 435 F. Supp. 2d 1206, 1215-16 (S.D. Fla. 2006).

Moreover, because this additional information is visible to the public, *see, e.g.*, Fla. Stat. § 97.0585, the Law's requirement that it be provided also stands as an obstacle

[21] Under prior Florida law, Plaintiffs could mail completed forms so that they would be received well within the ten-day deadline. (*E.g.*, Macnab Aff. ¶ 50.) By drastically reducing this timeframe, the Law now eliminates this safeguard—and, as a practical matter, eliminates Plaintiffs' NVRA-protected right to regularly submit registration forms by mail. *Herrera*, in which the New Mexico district court refused to enjoin under the NVRA that state's similar 48-hour deadline for submitting completed registration forms, does not counsel a contrary result. The court there failed to analyze the real-world effect that the deadline would have on an organization's ability to submit registration forms by mail. *See* 580 F. Supp. 2d at 1242-43.

to the NVRA's goal of facilitating registration by protecting registrants' privacy. *See* 42 U.S.C. § 1973gg-6(i)(1) (prohibiting states from making public records that disclose "the identity of a voter registration agency through which any particular voter is registered"); *id.* § 1973gg-7(b)(4)(iii).[22]

For all these reasons, Plaintiffs have a strong likelihood of success on their NVRA claim against Defendants. Thus, preliminary injunctive relief is fully warranted.[23]

III.
PLAINTIFFS ALSO MEET ALL OF THE OTHER REQUIREMENTS FOR A PRELIMINARY INJUNCTION

A. Plaintiffs Will Suffer Irreparable Harm Absent an Injunction

As described above, Plaintiffs will suffer irreparable harm unless the Court grants an injunction. Plaintiffs have been forced to severely curtail or entirely cease their voter registration activity, foregoing a vital means of furthering their organizational missions. Harms to First Amendment freedoms, "'for even minimal periods of time, unquestionably constitute[] irreparable injury' supporting preliminary relief." *Scott* v. *Roberts*, 612 F.3d 1279, 1295 (11th Cir. 2010) (quoting *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). This is because "chilled free speech . . . because of [its] intangible nature, [can]not be compensated for by monetary damages; in

[22] While these directives refer expressly to governmental registration agencies, the purpose of them—to protect voters from publicly disclosing irrelevant information about their associations—equally applies to, and thus should equally protect, information about a voter's association with Plaintiffs or other citizen groups.

[23] In accordance with 42 U.S.C. § 1973gg-9, on July 20, 2011, Plaintiffs notified Florida's chief election officer, Defendant Browning, that the Law violates the NVRA. In any event, notice is not required where, as here, Plaintiffs also bring a claim under 42 U.S.C. § 1983. *See Ass'n of Cmty. Orgs. for Reform Now* v. *Miller*, 912 F. Supp. 976, 983 (W.D. Mich. 1995), *aff'd* 129 F. 3d 833 (6th Cir. 1997).

other words, plaintiffs could not be made whole." *Ne. Fla. Chapt. of Ass'n of Gen. Contractors of Am.* v. *City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). Enforcement of Florida's challenged law subjects Plaintiffs to the potential for severe and undefined penalties simply for exercising their rights under the Constitution and the NVRA.

B. The Balance of the Hardships Clearly Falls in Plaintiffs' Favor

Because "even a temporary infringement of First Amendment rights constitutes a serious and substantial injury, and [a government] has no legitimate interest in enforcing an unconstitutional [law]," the balance of hardships associated with a preliminary injunction in this case strongly favors the Plaintiffs. *See KH Outdoor, LLC* v. *City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006). Moreover, timely planning and execution are critical to the success of voter registration events; unless this Law is enjoined, Plaintiffs will be unable to organize and conduct effective registration drives in the critical months leading up to Florida's primary and general elections. By contrast, the burden of a preliminary injunction to the Defendants would be virtually non-existent,[24] as there is no evidence that this Law properly furthers any State interests.

[24] Furthermore, because these challenged provisions of Florida law have not, as of December 19, 2011, received preclearance as required by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, they have not been implemented in the five Florida counties covered by that section. In those counties, a preliminary injunction would maintain the status quo. If an injunction were granted, Florida could return to implementing uniform third-party voter registration rules statewide, reducing the costs, administrative burdens, and confusion associated with its current approach, which applies different sets of rules for counties covered by Section 5 and the rest of Florida's counties.

C. The Public Interest Mandates a Grant of Injunctive Relief

"The public has no interest in enforcing an unconstitutional" law, *KH Outdoor*, 458 F.3d at 1272, and there is a "strong public interest in protecting First Amendment values" like those burdened here. *Cate* v. *Oldham*, 707 F.2d 1176, 1190 (11th Cir. 1983). Moreover, without the full-scale efforts of community-based voter registration groups in Florida, thousands of individuals will not register to vote and will be unable to participate in upcoming elections. As the Eleventh Circuit has made clear, "[c]autious protection of [such] franchise-related rights is without question in the public interest." *Wesley Educ. Found.,* 408 F.3d at 1355.[25]

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be granted.

Dated: December __, 2011

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[25] Because Defendants will not suffer material monetary loss due to the entry of a preliminary injunction, a bond is not required under Fed. R. Civ. P. 65(c). *See Carillion Importers, Ltd.* v. *Frank Pesce Int'l Grp., Ltd.*,112 F.3d 1125, 1127 (11th Cir. 1997) (citing *Corrigan Dispatch Co.* v. *Casa Guzman, S.A.*, 569 F.2d 300, 302-03 (5th Cir. 1978)) (affirming no security bond where there is no monetary loss to Defendants).

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**Pro Hac Vice* application to be filed

Exhibit B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

LEAGUE OF WOMEN VOTERS OF FLORIDA, FLORIDA PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, and ROCK THE VOTE,

Plaintiffs,

v.

KURT S. BROWNING, in his official capacity as Secretary of State for the State of Florida, PAMELA J. BONDI, in her official capacity as Attorney General for the State of Florida, and GISELA SALAS, in her official capacity as Director of the Division of Elections within the Department of State for the State of Florida,

Defendants.

Civil No. 4:11-cv-00628-RH-WCS

[*PROPOSED*] ORDER GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE A MEMORANDUM OF LAW IN EXCESS OF TWENTY-FIVE PAGES

THIS CAUSE comes before the Court upon Plaintiffs' *Motion for Leave to File a Memorandum of Law in Excess of Twenty-Five Pages* (the "Motion"), filed December 19, 2011.

Pursuant to Local Rule 7.1(A), the Court finds that there is good cause for granting the Motion and permitting the additional pages to be filed.

Accordingly, it is

ORDERED AND ADJUDGED that:

1. The Motion is granted; and

2. Plaintiffs are hereby granted leave to file a 40-page memorandum of law in support of their motion for a preliminary injunction, in the form attached as Exhibit A to the Motion.

DONE AND ORDERED, in Chambers at Tallahassee, Florida, this ___ day of _____, 2011

_____
ROBERT L. HINKLE
UNITED STATES DISTRICT JUDGE

Copies to Counsel of Record.