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

THE BROWARD COALITION, et al.
Plaintiffs,

v.

Civil Action No.
4:08cv445-SPM/WCS

KURT S. BROWNING, et al.
Defendants.

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs ask this Court to enjoin enforcement of Florida's electioneering communications laws—both as applied to Plaintiffs and on their face—before October 30, but sooner, if possible. Unless the Court does so, Plaintiffs and many others will lose forever the opportunity to engage in core political speech before the November election. The First Amendment cannot tolerate such a result. Neither should this Court.

Plaintiffs are four groups and their leaders who want to speak to Floridians about candidates and issues on the November ballot. But, in order to do so, they must ask permission from the State and submit to burdensome and intrusive regulations designed to apply to political committees manned by professional political operatives. If Plaintiffs do not submit, they are subject to both civil and criminal penalties.

With its electioneering communications laws, Florida has moved well beyond the regulation of the "financing" of "campaigns" and is now regulating virtually the full scope of political discussion. The Supreme Court has never upheld such a broad

regulation of political speech and has struck down numerous regulations that were less broad. And as the Court has recently made clear, governments cannot regulate speech that, like Plaintiffs', does not amount to express advocacy. Accordingly, for this and the other reasons offered below, this Court should enjoin the enforcement of Florida's electioneering communications laws. Plaintiffs ask that the injunction operate both as applied to them and facially—i .e ., to all groups and individuals that are subject to those laws. If the Court declines to enjoin the enforcement of the laws on their face, Plaintiffs still request an injunction against the application of the law to them.

STATEMENT OF FACTS

Before Plaintiffs describe how Florida's electioneering communications laws impact them, it will be helpful to discuss the scope of the speech that is regulated, as well as the specific regulations the laws impose on groups and individuals who are subject to them. Plaintiffs will then discuss the specific political speech they wish to engage in before the election, the manner in which the law has chilled their speech, and the need for an injunction to be granted in time for them to have at least some opportunity to speak before November 4.

I. "Electioneering Communications" and "Electioneering Communications Organizations."

Florida has created a new category of regulation for speech that goes far beyond anything previously approved by the Supreme Court. Its "electioneering communications" laws, found in Chapter 106 of the Florida Statutes, regulate speech that merely mentions candidates or ballot issues. This regulation encompasses much more speech than do the federal restrictions on communications about candidates in the

Bipartisan Campaign Reform Act of 2002 (BCRA—often referred to as McCain-Feingold). Quite simply, Florida's electioneering communications laws are the broadest regulation of political speech in the country.[1]

A. Electioneering Communications.

Under Florida law, anyone who engages in ordinary political speech about ballot issues and candidates must register with the government and comply with burdensome campaign finance requirements. An "electioneering communication" includes "a paid expression in any communications media" other than the spoken word in direct conversation that "[r]efers to or depicts a clearly identified candidate for office or contains a clear reference indicating that an issue is to be voted on at an election, without expressly advocating the election or defeat of a candidate or the passage or defeat of an issue." Fla. Stat. § 106.011(18)(a). Certain narrow exceptions apply; excluded from the definition are statements or depictions in a pre-existing organization's newsletter that is distributed *only* to members of that organization; statements in various news media; and communications that constitute a public debate or forum that include at least two

[1] As of July 2006, 14 states placed restrictions on electioneering communications, according to a study by Common Cause Massachusetts. Common Cause Massachusetts, *Hidden Money: The Use of Electioneering Communications in Massachusetts* 7-11 (July 2006), http://www.commoncause.org/atf/cf/%7B8A2D1D15-C65A-46D4-8CBB-2073440751B5%7D/Electioneering%20Communications%20Report.PW4.pdf. These states, besides Florida, are Alaska, California, Colorado, Connecticut, Hawaii, Idaho, Illinois, North Carolina, Ohio, Oklahoma, Vermont, Washington and West Virginia. Florida's law is the most restrictive of free speech because it regulates a much greater range of speech than other states' laws. Among other things, Florida's law (1) covers speech about candidates *and* ballot issues (most other states just regulate speech about candidates), (2) covers virtually every kind of paid communication (as opposed to just television and/or radio, as in some states), and (3) regulates speech over a longer period of time before an election than most other laws.

opposing candidates or one advocate and one opponent of an issue. § 106.011(18)(b). Moreover, for speech about candidates, the communication must be targeted to reach the relevant electorate—that is, to reach 1,000 or more people—to be captured by the law. § 106.011(18)(a)2. "Communications media" means "broadcasting stations, newspapers, magazines, outdoor advertising facilities, printers, direct mail, advertising agencies, the Internet, and telephone companies." § 106.011(13).

B. Regulation of Groups and Individuals Who Make "Electioneering Communications."

Under the statutory scheme, all "electioneering communications" in Florida, by both groups and individuals (except those for which an individual spends less than $100), are regulated. *See* Fla. Stat. §§ 106.011(1)(b)3 & 106.071.

1. Groups: "Electioneering Communications Organizations."

A group that makes an electioneering communication must register as an "electioneering communications organization" (or an ECO, for short). An ECO is any group not otherwise registered under Florida's campaign financing law "whose activities are limited to making expenditures for electioneering communications or accepting contributions for the purpose of making electioneering communications." § 106.011(19). The Secretary of State—through the Division of Elections—interprets this provision to include any group whose *election-related* activities are limited to electioneering communications. *See* Exhibit B attached to Declaration of Robert W. Gall, *Electioneering Communications Organizations; Political Committees*, DE 08-08, Op. Dept. of State, Div. of Elections (June 18, 2008). This reading makes sense, given that

the definition is found within Chapter 106, which regulates only election-related activities.[2]

2. Specific Requirements for "Electioneering Communications Organizations."

Electioneering communications organizations are "required to register with and report expenditures and contributions . . . to the Division of Elections in the same manner, at the same time, and subject to the same penalties as a political committee supporting or opposing an issue or a legislative candidate, except as otherwise specifically provided in [Chapter 106]." § 106.011(1)(b)3. Thus, any group that is an electioneering communications organization is subject to a wide array of burdensome requirements, including:

- Registering with the government within 24 hours of its organization or receiving information that causes it to anticipate receiving or expending funds for an electioneering communication, Fla. Stat. § 106.03(1)(b)
- Appointing a campaign treasurer (or custodian of the books), § 106.03(2)(d)
- Designating a depository, § 106.03(2)(k)
- Making regular reports, § 106.07(1)
- Recording expenditures, § 106.07(4)(a)
- Disclosing *all* donors—even those who never intended their gift to go towards political speech, § 106.07(4)(a)1 and Gall Decl., Ex. A at 3

[2] Any other reading of the statute would allow all groups to avoid registration as an ECO by engaging in *de minimis* additional activity, such hosting an annual bake-sale for charity or distributing one annual newsletter containing no regulated speech. It would also create the absurd situation in which an individual must register her electioneering communications no matter what her other "activities" are—and all individuals, by definition, have other activities such as eating, breathing, and sleeping—but could escape registration if she creates or belong to a group that, like virtually every group, can truthfully state that it has more than just one activity.

- Restricting expenditures and contributions, including not spending money raised in the five days before the election, refusing contributions by 527s or 501(c)(4)s that are not—themselves—registered, and refusing all cash contributions over $50, § 106.08(4)(b), § 106.08(5)(d), & § 106.09
- Including a prominent "disclaimer" on each communication that reads "Paid electioneering communication paid for by (Name and address of person paying for communication)." § 106.1439
- Allowing random audits by the government, § 106.22(10).

According to the Commission, there are almost 100 separate violations possible under the campaign finance code. *See* Florida Elections Commission, Jurisdiction, http://www.fec.state.fl.us/juris/index.html. The Secretary of State and "any person" may file a sworn complaint with the Florida Elections Commission. Fla. Stat. § 106.26(1). All violations are subject to civil penalties, Fla. Stat. §§ 106.265(1) & 106.07(8), and many are subject to additional criminal penalties and jail time. *See, e.g.*, §§ 106.08(7), 106.09(2), 106.19, & 106.1439(2). Information from reports filed with the Secretary is made available on the Secretary's website. *See* Fla. Stat. § 106.0706.

3. Individuals and Requirements That Apply to Them.

Under § 106.071, "each individual who makes an expenditure for an electioneering communication which is not otherwise reported pursuant to [Chapter 106]"—i.e., is not reported by a group that is an ECO, a political committee, or a committee of continuous existence—and spends $100 or more to do so has to "file periodic reports of such expenditures in the same manner, at the same time, subject to the same penalties, and with the same officer as a political committee supporting or opposing such candidate or issue." Thus, the only way that an electioneering communication does

not have to be regulated is (1) if it is made by an individual and (2) the individual spends less than $100 on the communication.

II. Plaintiffs Desire to Engage in Speech That Will Subject Them to Florida's Electioneering Communications Laws

All of the Plaintiffs wish to engage in core political speech leading up to November's election, but Florida's electioneering communications laws are chilling their speech. Unless an injunction is granted, all of them will lose the opportunity to speak before the election. The specific situation of each Plaintiff is discussed below.

A. The Broward Coalition of Condominiums, Homeowners Associations and Community Organizations, Inc. and its President, Charlotte Greenbarg

Plaintiff the Broward Coalition is an all-volunteer, not-for-profit 501(c)(4) corporation that has been serving the Broward County, Fla., community for over 25 years. Decl. of Charlotte Greenbarg in Supp. of Pls.' Mot. for Prelim. Inj. ¶ 3. A coalition of condominium associations, homeowners associations, and community organizations, the Coalition is dedicated to helping its members as well as the larger community make decisions about issues that affect them—locally, statewide, and nationally. *Id.* at ¶ 2. The Coalition normally presents information of interest in its monthly newsletter, on its website—www.browardcoalition.org—or through other forums. *Id.* at ¶ 3. As the November election draws near, the Coalition wants to inform its community about various issues on the ballot. *Id.* at ¶ 4. Charlotte Greenbarg, the Coalition's president, has drafted a page about those issues—listing them and offering comments about some—to include in November's newsletter, which is distributed in October. *Id.* at ¶ 5 & Ex. A. This page does not contain express advocacy, but its

mention of ballot issues will constitute an electioneering communication because it will be distributed in the newsletter, which is distributed to both members and non-members and on the website. Thus, the page contains speech that is regulated under Florida's electioneering communications laws, and the Coalition and Charlotte must comply with the laws' requirements. This means registering with the state as an electioneering communications organization, filing regular and detailed reports on contributions and expenditures, submitting to funding and spending restrictions, and having to place a disclaimer in its newsletter. *See id.* at ¶¶ 9-10. As a volunteer organization with limited resources and time to devote to its mission, the Coalition cannot undertake these burdens and restrictions. *Id.* at ¶ 11. And it cannot risk punishment for failure to comply with them. *Id.* at ¶ 11. Thus, the electioneering communications law is chilling the Coalition's speech and preventing it and its members from speaking. *See id.* at ¶¶ 6-8, 13. But if this Court issues an injunction by October 31, 2008, the Coalition and Charlotte will speak about the November ballot issues. *Id.* at ¶ 5.

B. The University of Florida College Libertarians and its President, Neal Conner

The University of Florida College Libertarians is a student-run campus club that seeks to spread the ideals of liberty and self-ownership. Decl. of Neal Conner in Supp. of Pls.' Mot. for Prelim. Inj. ¶ 3. Neal Conner serves as the club's president. *Id.* at ¶ 2. The club would like to get the word out about pro-liberty local and state candidates in a manner that is targeted to reach 1,000 or more persons in the geographic area the candidate would represent; the purpose of this is to advertise meetings in which the club will host pro-liberty candidates for local office. *Id.* at ¶¶ 6-8. One of these meetings is

planned for October 29, 2008. In order to be effective, the advertisement must mention the name of the candidate: Lorraine Sherman, who is running for a county judgeship in Alachua County. *Id.* at ¶ 13. Also, the club has prepared a flier about November's pending ballot issues. *Id.* at ¶ 13 & Ex. A. The club's president, Neal Conner, intends to pay for the cost of printing the publication—at least $100—so that he will have enough copies to distribute it to approximately 3,000 people. *Id.* at ¶ 14. Both the advertisement and the publication will constitute electioneering communications if they are distributed, so the club is not doing so because of burdens that the electioneering communications law will impose on the club. *Id.* at ¶ 16. But if this Court issues an injunction by October 28, 2008, the club will be able to both advertise for its October 29, 2008, meeting and circulate its ballot issue flier on campus before the election. *Id.* at ¶¶ 12, 14. If the Court issues an injunction by October 30, 2008, the club will at least be able to circulate the ballot issue flier before the election. *Id.* at ¶ 14.

C. The National Taxpayers Union, the National Taxpayers Union Foundation, and Their President, Duane Parde

The National Taxpayers Union (NTU) is a 501(c)(4) nonprofit, nonpartisan organization founded almost forty years ago to promote lower taxes and smaller government at all political levels. Decl. of Duane Parde in Supp. of Pls.' Mot. for Prelim. Inj. ¶ 2. NTU usually publishes an analysis of state ballot issues each election cycle. *Id.* at 5; Decl. of Kristina Rasmussen in Supp. of Pls.' Mot. for Prelim. Inj. ¶ 3. While NTU collected and drafted information regarding several of Florida's ballot issues, it did not include that information in this year's ballot guide because of concerns that the State's electioneering communications laws will be applied to its speech and force it to submit to

burdensome registration, reporting, and disclosure requirements for electioneering communications organizations. Parde Decl. at ¶ 5; Rasmussen Decl. at ¶¶ 7-8. NTU is particularly concerned about being compelled to reveal the identity of its donors, some who prefer to remain anonymous because they are concerned about retaliation from the government should their identities become known. Parde Decl. at ¶¶ 7-9. The National Taxpayers Union Foundation, NTU's 501(c)(3) affiliate, would also like to provide information regarding ballot issues to Floridians that is based on NTU's guide, but will not do so for the same reasons. *See* Rasmussen Decl. at ¶ 3. But if this Court grants an injunction by November 3, NTU will, at the direction of Duane Parde, its president, immediately update its ballot guide on its website and notify Floridians about that update. *Id.* at ¶ 14 & Ex. A; Parde Decl. ¶ 13.

ARGUMENT

Plaintiffs are entitled to injunctive relief if they can demonstrate (1) a substantial likelihood of success on the merits; (2) irreparable injury; (3) that their injury outweighs the harm to the State; and (4) that granting an injunction will not adversely impact the public interest. *Statewide Detective Agency v. Miller*, 115 F.3d 904, 905 (11th Cir. 1997). As demonstrated below, each of these factors weighs in favor of the Plaintiffs.

I. Plaintiffs are substantially likely to succeed on the merits.

The First Amendment protects the right to free speech on political matters, including candidates and ballot issues; it also protects the right of citizens to associate with one another as part of political discourse. When government infringes upon these rights, it must demonstrate a compelling interest and then narrowly tailor the restrictions

that purportedly serve that interest. Florida's electioneering communications laws regulate virtually *all* political speech about ballot issues and candidates; the Supreme Court has never recognized a compelling interest that allows such a wide-open regulation. Thus, Plaintiffs are substantially likely to succeed on their claims that Florida's electioneering communications laws are unconstitutional, both as applied to them and on their face.

A. Restrictions on the Plaintiffs' First Amendment rights are subject to strict scrutiny.

Political speech is at the core of the First Amendment. As the Supreme Court has noted, the First Amendment "was fashioned to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484 (1957), and expresses "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). These principles "extend equally to issue-based elections . . . ." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). The First Amendment also protects political association. As the U.S. Supreme Court noted in *NAACP v. Alabama*, "[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." 357 U.S. 449, 460 (1958); *see also Buckley v. Valeo*, 424 U.S. 1, 15 (1976) ("The First Amendment protects political association as well as political expression.").

Groups swept up by Florida's electioneering communications laws, however, are subject to numerous burdens on their First Amendment rights. ECOs must register with

the state before they may legally mention the name of a candidate or ballot measure in their public communications, a prior restraint on their speech. *See Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1251 (11th Cir. 2004) (content-based prior restraints "are presumptively unconstitutional and face strict scrutiny"). ECOs are subject to reporting and disclosure requirements that "impose well-documented and onerous burdens, particularly on small nonprofits." *FEC v. Wisc. Right to Life* (*WRTL II*), 127 S. Ct. 2657, 2671 n.9 (2007); *see also NAACP*, 357 U.S. at 463 (noting the "deterrent effect which [compelled] disclosures may well have on the free exercise [of the] constitutionally protected right of association"). ECOs are required to include disclaimers in their communications, a form of compelled speech that the Supreme Court has recognized violates the right to anonymous speech. *McIntyre*, 514 U.S. 334, 355 (1995) (law requiring "compelled self-identification on all election-related writings" was "particularly intrusive"). Finally, ECOs are prohibited from spending on their communications any money raised in the last five days before an election, a limit on expenditures that "heavily burdens core First Amendment expression." *Buckley*, 424 U.S. at 48.

Because the statute "burdens political speech, it is subject to strict scrutiny." *WRTL II*, 127 S. Ct. at 2664. Moreover, it is the State that must demonstrate that the law will likely be upheld because the burden of proof at the preliminary injunction stage tracks the burden of proof at trial. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). To prevail in this case, then, Defendants must demonstrate a compelling state interest for each of the challenged laws, and they must

show that the laws are narrowly tailored to achieve that interest. *See id.* at 429; *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Defendants must also demonstrate that the application of the laws to the Plaintiffs satisfies strict scrutiny as well. *See WRTL II*, 127 S. Ct. at 2671. For the reasons below, Defendants cannot meet their burden of demonstrating a compelling interest for regulating most of the speech captured by its electioneering communications laws; thus, there is no need to discuss whether those laws are narrowly tailored.

B. The State Has No Compelling Interest in Regulating Speech That is Neither Express Advocacy nor its Functional Equivalent

As noted above, the rights to speak and associate freely regarding issues of public concern are jealously guarded by the First Amendment. Unfettered and unregulated speech is the rule, not the exception. Just because a restriction is labeled as a restriction on campaign finance does not mean that it faces an easier path to constitutionality than a restriction outside that context. Indeed, as the Supreme Court made clear in its seminal decision on campaign finance law, *Buckley v. Valeo*, governments may regulate only those narrow categories of political speech that are "unambiguously related to the campaign of a particular . . . candidate." 424 U.S. at 80.

The Court has recognized only two narrowly drawn categories that fall within that exception. The first of these categories includes "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44. This category includes what have come to be known as "magic words" – phrases such as "vote for" or "vote against" in reference to candidates. *See McConnell v. FEC*, 540 U.S. 93, 126 (2003); *see also Buckley*, 424 U.S. at 44 n.52.

The second category includes communications that constitute "the functional equivalent of express advocacy." *McConnell*, 540 U.S. at 206. In order to fall into this very narrowly drawn category, speech must satisfy two requirements. *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 282 (4th Cir. 2008). First, the speech must be "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* (quoting *WRTL II*, 127 S. Ct. at 2667). Second, because the Court has never held that the regulation of "electioneering communications" beyond how that term is defined in BCRA is permissible, the outer limit of regulation tracks BCRA's definition: a "broadcast, cable, or satellite communication that refers to a clearly identified candidate within sixty days of a general election or thirty days of a primary election." *Leake*, 525 F.3d at 282 (citing *WRTL II*, 127 S. Ct. at 2669 n.7). This two-pronged analysis is consistent with the First Amendment's command that "when it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to . . . a ban . . .we give the benefit of the doubt to speech, not censorship." *WRTL II*, 127 S. Ct. at 2674.

As the Court noted in *WRTL II*, it "has never recognized a compelling interest in regulating ads . . . that are neither express advocacy nor its functional equivalent." 127 S. Ct. at 2671. But Florida is attempting to regulate much more speech than is contained in those two narrow categories.

1. Florida's Electioneering Communications Law is Unconstitutional as Applied to Plaintiffs Because Their Speech is Neither Express Advocacy Nor its Functional Equivalent.

As described above, none of the speech in which Plaintiffs wish to engage is express advocacy. Indeed, that is one of the reasons that the Plaintiffs' speech qualifies

as "electioneering communications"; if Plaintiffs' speech *were* express advocacy, the plaintiff groups would be regulated as "political committees" rather than as "electioneering communications organizations." Fla. Stat. § 106.011(1)(a)1. Nor is it the functional equivalent of express advocacy because, for several reasons, the Plaintiffs' speech does not satisfy the two-pronged test from *WRTL II*, discussed earlier. First, none of the Plaintiffs are issuing a communication via broadcast, cable, or satellite. Second, with regard to the University of Florida College Libertarians' speech about candidates, all they want to do is host a candidate for a county judgeship for a meeting and advertise that meeting in advance using posters, fliers (that would go to over 1,000 people in the relevant electorate), their paid website, and their Facebook page. Connor Decl. ¶ 8. Simply mentioning that a candidate will be a guest at a meeting is certainly susceptible of a reasonable interpretation other than as an appeal to vote for or against that candidate. Third, the Plaintiffs' speech relating to ballot issues cannot, by definition, be express advocacy because it has nothing to do with candidates. The Supreme Court has never equated advocacy about ballot issues to express advocacy for or against a candidate; indeed, it has repeatedly recognized that advocacy about ballot issues enjoys even stronger protection than express advocacy for candidates because it raises absolutely no danger of corruption or its appearance. *See McIntyre*, 514 U.S. at 356 ("Not only is the Ohio statute's infringement on [ballot-issue related] speech more intrusive than the *Buckley* disclosure requirement, but it rests on different and less powerful state interests."); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular

vote on a public issue."); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 297-98 (1981) (same).

Thus, Defendants cannot demonstrate a compelling interest in regulating Plaintiffs' speech. And because Plaintiffs' speech cannot be regulated, it necessarily follows that the State has no interest in requiring Plaintiffs to submit to a prior restraint on their speech; to restructure their organizations and comply with onerous registration, reporting, and disclosure requirements requiring, among other things, information regarding all of their donors; to surrender their ability to speak and associate anonymously; and to accept burdensome restrictions on Plaintiffs' right to make expenditures in the crucial five days before an election. Thus, at the very least, Plaintiffs have a substantial likelihood of succeeding on the merits in regard to their *as-applied* challenge to the definition of "electioneering communications" and all the regulations that the State imposes on those who make those communications.

2. Florida's Electioneering Communications Laws are Unconstitutional on Their Face Because the Definition of "Electioneering Communication" is Overbroad and Vague.

Furthermore, Plaintiffs have a substantial likelihood of succeeding on the merits in regard to their facial challenge to Florida's definition of electioneering communications and its attendant regulation of speech. For that reason, the injunction should extend not just to them, but also to all speakers who make electioneering communications. The definition of electioneering communication does not regulate express advocacy; thus, in order to avoid being unconstitutional on its face, it must,

regulate the functional equivalent of express advocacy in a manner that is neither overbroad nor vague.

On both counts, the definition fails. In the context of the First Amendment, a regulation is overbroad "if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep." *City of Chi. v. Morales*, 527 U.S. 41, 52 (1999) (internal quotation marks omitted). That is clearly the case here. First, Florida's definition of "electioneering communication" is much broader than BCRA's in several respects. While BCRA's definition is limited to speech about candidates, Florida's includes speech about ballot issues. While BCRA's definition includes only a narrow scope of media (a "broadcast, cable, or satellite communication"), Florida's includes virtually every kind of media ("broadcasting stations, newspapers, magazines, outdoor advertising facilities, printers, direct mail, advertising agencies, the Internet, and telephone companies . . ."). And while BCRA's definition limits its temporal scope to communications within sixty days of an election or thirty days of a primary, Florida's definition applies as soon as a candidate starts receiving contributions or making expenditures with a view toward being nominated or elected. § 106.011(16)(c) (definition of "candidate"); 106.011(18)(a) (definition of "electioneering communication").

Second, it is clear that the definition of "electioneering communication" includes a tremendous amount of speech that is clearly susceptible to a reasonable interpretation other than as an appeal to vote for or against a specific candidate. As noted above, it is simply impossible for speech about ballot issues to fall into that category. And although

the definition does encompass at least some speech about candidates that can be considered the functional equivalent of express advocacy, it also sweeps up any discussion about policy before an election in which a candidate's name is mentioned. For example, a group blog discussion about state insurance law would be captured by the definition if a participant mentions an insurance bill named after a legislator who is running for reelection. Indeed, any discussion of public policy is very likely to include mention of a candidate's name, especially if he is already an elected politician—after all, politicians are responsible for making public policy. But as the Supreme Court has recognized, "[d]iscussion of issues cannot be suppressed simply because the issues may also be pertinent in an election." *WRTL II*, 127 S. Ct. at 2669.

The definition of electioneering communication is also vague on its face because it is impossible to know—in advance—whether the law will apply to a particular communication about candidates. In regard to communications mentioning candidates, the definition of "electioneering communication" states that a paid communication about a candidate will become an electioneering communication if the speech is targeted towards the relevant electorate, that is, if the communication will be received by 1,000 or more persons in the geographic area the candidate hopes to represent. In today's Internet age, it is impossible to know—in advance—whether any particular Internet communication will fall within that definition. A website that is linked to by a popular blog could overnight quadruple its hits. And an organization would have no way of knowing whether each hit represents a separate recipient or even whether the recipient is located in the targeted area. Low-tech advertising may raise problems as well. For

instance, if the University of Florida College Libertarians put up posters and fliers advertising their events in the University student center and dining hall—as they have regularly done in the past—it is impossible for them to know how many people would actually look at the posters and fliers.

This vagueness cannot be be squared with the requirement that government regulate in the area of the First Amendment "only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). As the Supreme Court has recognized, "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotation marks omitted). A law that fails to satisfy this standard and that is "so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, *on its face*, as contrary to the Fourteenth Amendment." *Winters v. New York*, 333 U.S. 507, 509 (1948) (emphasis added). Applying these principles, the Eleventh Circuit does not hesitate to find vague laws that burden First Amendment rights facially unconstitutional. *See, e.g., Solomon v. Gainesville*, 763 F.2d 1212, 1215 (11th Cir. 1985) (invalidating vague sign ordinance).

3. The Definition of Electioneering Communications Organization is Overbroad Both Facially and As Applied to Plaintiffs.

A finding that the definition of electioneering communication is unconstitutional (whether just as applied to Plaintiffs or both as applied to them and facially) is a sufficient ground to grant an injunction because, as noted above, the regulatory scheme regarding "electioneering communications" can stand only if "electioneering

communications" can be regulated. But there is an another reason Plaintiffs are substantially likely to prevail on the merits: Florida's electioneering communications laws reach organizations and individuals, like the plaintiffs in this case, that the government has no compelling interest in regulating.

The Supreme Court has made absolutely clear that the burdensome structural and reporting requirements that apply to PACS may *only* be visited upon groups "the major purpose of which is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79; *see also FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262. Even if we assume that these burdens are permissible outside of the candidate context and that groups who speak about ballot measure may sometimes be subject to PAC-like burdens, the Supreme Court has never endorsed a law as broad as Florida's, under which groups and individuals may be subject to all of the burdens that apply to fully regulated PACs merely for *mentioning* the names of candidates or ballot issues in their public communications.

The Fourth Circuit's recent decision in *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008), is instructive. In *Leake*, the Fourth Circuit struck down North Carolina's definition of "political committee," which extended PAC-like burdens to any group having merely "*a* major purpose" of influencing elections. *Leake*, 525 F.3d at 289. The court held that definition was too broad, going well beyond what *Buckley*'s test—*the* major purpose—would permit. As that court recognized, "[p]ermitting the regulation of organizations as political committees when the goal of influencing elections is merely one of multiple 'major purposes' threatens the regulation of too much ordinary political speech to be constitutional." *Id.* at 288-89. Accordingly,

because North Carolina's law "[ran] the risk of burdening a substantial amount of constitutionally protected political speech," it was facially unconstitutional. *Id.* at 289-90.

But North Carolina's law, while unconstitutionally overbroad, was a model of narrow tailoring compared to Florida's. Florida's electioneering communications laws are not limited to groups with "a major purpose" of influencing elections. Indeed, under Florida's law, groups are subject to the full panoply of PAC-like registration and reporting requirements if they engage in *any* amount of speech related to elections, regardless of how minor a part of their overall activity that speech might be. And for each of the plaintiffs in this case, electioneering communications represent a tiny fraction of their overall activity. *See* Conner Decl. ¶¶ 3, 4, 6, 7 (describing group's election- and non-election-related activities); Greenbarg Decl. ¶¶ 3, 4, 5, 7 (same); Parde Decl. ¶¶ 2, 3, 5 (same).

Buckley's application to the facts of this case is clear. None of the Plaintiffs has "the major purpose" of influencing elections. Because they are, nevertheless, swept within the definition of "electioneering communications organizations," Florida's electioneering communications laws are unconstitutionally overbroad, both as applied to Plaintiffs and on their face.

C. The Expenditure Restriction in Florida's Electioneering Communications Law is Clearly Unconstitutional.

Finally, although the preceding discussion has, for the sake of brevity, discussed together all the burdens and restrictions that flow from the regulation of speech about ballot issues and candidates under Florida's electioneering communications laws, those

laws' expenditure restriction deserves special attention because it is blatantly unconstitutional. This restriction prevents an electioneering communications organization from spending any contribution that it receives on the day of an election or less than five days prior to that election until after the date of the election. *See* Fla. Stat. § 106.08(4)(b). In other words, this restriction burdens core political speech at the time when it is most effective: immediately before the election.

Expenditures for political speech, however, may not be prohibited merely because they occur close to an election, as the Supreme Court recognized over 40 years ago in *Mills v. Alabama*, 384 U.S. 214 (1966). In that case, the Supreme Court invalidated a ban on election-day electioneering. *Mills*, 384 U.S. at 220. A decade later, the Court applied the *Mills* reasoning to campaign-finance regulations when it invalidated a limit on independent political spending in federal elections. *Buckley*, 424 U.S. at 50. As recognized in both *Mills* and *Buckley*, "'no test of reasonableness can save [such] a state law from invalidation as a violation of the First Amendment.'" *Id.* (quoting *Mills*, 384 U.S. at 220). Accordingly, Florida's limits on political expenditures in the five days preceding an election are unconstitutional.

II. Plaintiffs Will Be Irreparably Injured Without an Injunction, But the State and the Public Interest Will Not Be Harmed.

In addition to having a high likelihood of success on the merits, Plaintiffs can easily satisfy elements necessary to secure injunctive relief. First, "[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) (emphasis added); *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983) (same). Second, the balance of interests

favors the Plaintiffs because the Supreme Court has made clear that in any conflict between First Amendment rights and regulation, courts "must give the benefit of any doubt to protecting rather than stifling speech." *WRTL II*, 127 S.Ct. at 2667; *see also id.* at 2669 ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor."). Finally, granting an injunction is entirely consistent with the public interest. "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . includ[ing] discussions of candidates . . . ." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Thus "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

III. The Court Should Waive the Bond Requirement Under F.R.C.P. 65(c).

Federal Rule of Civil Procedure 65(c) provides that a preliminary injunction be issued only if the applicant gives security in an amount determined by the court. The district court, however, has discretion to waive this requirement. *See Baldree v. Cargill, Inc.*, 758 F. Supp. 704, 707 (M.D. Fla. 1990), *aff'd*, 925 F.2d 1474 (11th Cir. 1991); *Caterpillar, Inc. v. Nationwide Equip.*, 877 F. Supp. 611, 617 (M.D. Fla. 1994) (waiving bond requirement in trademark infringement case). Cases raising constitutional issues are particularly appropriate for a waiver of the bond requirement. *See, e.g., Johnston v. Tampa Sports Authority*, No. 8:05CV2191T-27MAP, 2006 WL 2970431, at *1 (M.D. Fla. Oct. 16, 2006); *Ogden v. Marendt*, 264 F. Supp. 2d 785, 795 (S.D. Ill. 2003); *Smith v. Bd. of Election Comm'rs*, 591 F. Supp. 70, 71 (N.D. Ill. 1984). Accordingly, Plaintiffs

respectfully request that the court waive the bond requirement in the event that it grants Plaintiffs' motion for preliminary injunction.

REQUEST FOR RELIEF

For the foregoing reasons, the Court should grant Plaintiffs' motion for preliminary injunction and enjoin the enforcement of Florida's electioneering communications laws, both facially and as applied to the Plaintiffs. If the Court declines to enjoin those laws on their face, Plaintiffs still request that the Court enjoin those laws as they apply to Plaintiffs. Plaintiffs respectfully request that the Court waive the bond requirement under Federal Rule of Civil Procedure 65(c).

Dated: October 10, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of October, 2008, a true and correct copy of the PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION was electronically filed using the Court's ECF system and sent via the ECF electronic notification system to:

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