STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SENATOR ARTHENIA L. JOYNER,
AMERICAN CIVIL LIBERTIES UNION
OF FLORIDA, AND NATIONAL
COUNCIL OF LA RAZA,

Petitioners,

Case No. _____

vs.

SECRETARY OF STATE OF FLORIDA,

Respondent.

PETITION TO DETERMINE VALIDITY OF EXISTING RULES

The Florida Secretary of State has, by rule, established an unlawful dual system for enforcement of certain of the state's election laws. One system applies to the five counties subject to the preclearance requirements of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. §§ 1973c) ("Section 5" of the "VRA"), while another system governs elections in the remaining 62 counties in Florida. Pursuant to Florida Statutes §§ 120.56 and 120.569, Petitioners Senator Arthenia L. Joyner, the American Civil Liberties Union of Florida, and the National Council of La Raza, request a formal administrative hearing and seek a final order declaring that the Secretary of State's rules, which establish and implement this dual system, and which also implement restrictions on early voting and on voters who move between counties, constitute an invalid exercise of delegated legislative authority. An expedient administrative solution is imperative given the impending primary election on August 14, 2012.

PARTIES

1. Petitioner Arthenia L. Joyner is a resident of Hillsborough County, a registered voter, and the elected representative for Florida's Senate District 18, which comprises parts of Hillsborough, Pinellas, and Manatee counties.

2. Petitioner the American Civil Liberties Union of Florida, Inc. ("ACLU") is a Florida non-profit corporation with its principal place of business at 4500 Biscayne Boulevard, Suite 340, Miami, FL 33137. It is a membership organization with approximately 15,000 members in Florida, eighteen chapters throughout the state, and is the Florida affiliate of the American Civil Liberties Union, a nonpartisan, nationwide organization with approximately 500,000 members.

3. Petitioner the National Council of La Raza ("NCLR") is a non-profit corporation and the largest national Hispanic civil rights and advocacy organization in the United States. Its nonpartisan civic engagement and voter education arm, previously known as Democracia USA and now part of NCLR's Civic Engagement Team, has two field offices in Florida at 3915 Biscayne Boulevard, Suite 10, Miami, FL 33157 and 5449 Semoran Boulevard, Suite 233, Orlando, FL 32822.

4. Respondent the Secretary of State of Florida ("the Secretary") is the chief elections officer for the State of Florida, with independent statutory responsibility to obtain and maintain uniformity in the interpretation and implementation of the election laws.[1] The Secretary's address is 500 South Bronough Street, Tallahassee, Florida 32399.

[1] The rules that are the subject of this Petition were issued by then Secretary of State Kurt S. Browning. Mr. Browning resigned his position as Secretary of State effective February 17, 2012, and was succeeded by Ken Detzner. Secretary Detzner has

IDENTIFICATION OF THE CHALLENGED RULES

5. Petitioners are challenging two unadopted rules as defined in Florida Statutes § 120.52(16) and (20). They are:

(a) the largely unwritten policy by which the Secretary has established and enforced a dual system of election laws (the "Dual System Rule") in violation of Florida Statutes § 97.012(1) (the "Uniformity Statute")[2]; and

(b) Directive 2011-01, issued by the Secretary (without following rulemaking procedures) on May 19, 2011 (the "Directive"), as it relates to early voting and to the ability of a voter simultaneously to change his or her address at the polling place and vote a regular ballot. A copy of the Directive is attached as Exhibit C.

HISTORY OF THE CHALLENGED RULES

6. In 2011, the Florida Legislature passed, and the Governor signed the following omnibus bill revising the Florida Election Code: Committee Substitute for

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not withdrawn the unadopted rules at issue, nor has he promulgated any superseding rules. Accordingly, the incumbent Secretary continues to act in contravention of Florida law and is the proper respondent in this action.

[2] *A Compilation of the Election Laws of the State of Florida* published by the Florida Department of State, Division of Elections, contains a notice that certain provisions of the election laws do not apply in five of Florida's 67 counties, thereby indicating that a dual system of election laws is in effect. The relevant excerpt is attached to this Petition as Exhibit A. The Division of Elections Index of Adopted Rules also shows that a different form of rule for the Polling Place Procedures Manual (Rule 1S-2.034) applies in the five covered counties than in the other 62 counties. An excerpt containing the Index cover page and the page listing two versions of Rule 1S-2.034 is attached as Exhibit B (emphasis in original).

Committee Substitute for House Bill No. 1355, codified at Chapter 2011-40, Laws of Florida (the "Act").

7. Florida is a "partially covered" state under the VRA because five of Florida's 67 counties (Collier, Hardee, Hendry, Hillsborough, and Monroe) are covered by Section 5 of the Act. 28 C.F.R. Pt. 51 App. (2012). Under Section 5, whenever a covered jurisdiction "shall enact or seek to administer" a change in a voting practice or procedure, those changes must be precleared by either the U.S. Attorney General (via an administrative proceeding) or by the U.S. District Court for the District of Columbia (via a declaratory judgment action). 42 U.S.C. § 1973c(a). In order to be precleared, the jurisdiction must demonstrate that the change at issue "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group]." *Id*. Preclearance must be obtained before any state-wide voting law change may be implemented in the five covered counties in Florida. *Lopez v. Monterey County*, 525 U.S. 266, 278 (1999) (holding that covered counties in a non-covered state must obtain preclearance for all state laws that effect voting changes in those counties).

8. Florida initially sought preclearance of the voting changes in the Act from the Attorney General, who cleared all but four sets of provisions of the law. Prior to the Attorney General rendering any decision on the remaining provisions, Florida voluntarily withdrew them from administrative consideration and instead filed suit in the U.S. District Court for the District of Columbia seeking a declaratory judgment under the VRA (D.D.C. Case No. 1:11-cv-01428-CKK-MG-ESH). After its suit was filed, the Attorney General precleared one of the four sets of provisions, relating to the initiative

process for constitutional amendments, and those changes were dismissed from Florida's case. The other three sets of election law changes in the Act remain at issue in that preclearance litigation, except as noted below. They are:

- reducing the days and creating new discretion in the hours during which voters may cast a ballot pursuant to early, in-person voting (Act § 39).
- the elimination of the right of registered voters in Florida who change residence from one Florida county to another prior to an election, and who do not notify the supervisor of elections in their new county of their new residence prior to seeking to vote, to cast a regular election ballot at an early, in-person voting site or at the polling place on election day rather than a provisional ballot (Act § 26); and
- the imposition of onerous new burdens and restrictions on third-party voter registration organizations ("3PVRO") (Act § 4)[3];

The Secretary has implemented these laws in all non-covered counties, contrary to prior practice.

[3] On May 31, 2012, in Case No. 4:11cv628-RH/WCS, the U.S. District Court for the Northern District of Florida issued a preliminary injunction barring enforcement of much of § 4 of the Act (codified at Fla. Stat. § 97.0575) and its implementing rule, Florida Administrative Code Rule 1S-2.042. Thereafter Florida indicated that it may pursue one or more of several possible options, including moving to withdraw a portion of the 3PVRO voting changes from the preclearance litigation underway in the D.C. District Court and making a new submission to the Attorney General for preclearance of some subset of the 3PVRO voting changes. When, or in what form, Florida would pursue such an option in turn depends on the timing and form of a final resolution of the Northern District of Florida case. In view of these fluid circumstances, Petitioners do not challenge the 3PVRO Rule, 1S-2.042, in this proceeding, at this time, but reserve the right to amend if necessary.

SUBSTANTIAL INTERESTS AFFECTED

9. Senator Joyner challenges the Secretary's rules, initially, as a registered voter in Hillsborough County, Florida. The statutory duty imposed on the Secretary under the Uniformity Statute to obtain and maintain a system of election laws that is uniform across the state conveys a corresponding right to citizens to register, vote, and have their votes properly counted according to such a uniform system. The Secretary's breach of this duty infringes Senator Joyner's rights as a voter.

10. Senator Joyner also brings this action as an elected member of the Florida Senate. District 18, which she represents, is composed of parts of a county that is covered under the VRA (Hillsborough) and two counties (Pinellas and Manatee) that are not covered.[4] She and her constituents are therefore subject to different election laws under the Secretary's Dual System Rule, depending on their county of residence within District 18. Because of this dual system, Senator Joyner is subject to extra burdens of expense and effort in informing and assisting her constituents in conforming to differing requirements with regard to early voting, and casting a regular (rather than provisional) ballot at the same time as effecting a county-to-county voter registration address change in her district. In addition, Senator Joyner has a reasonable concern that some of her constituents in non-covered counties may be denied an opportunity to vote for her because of changes in early voting and restrictions on voting by voters moving between counties, as provided in the Secretary's Directive.

11. The ACLU challenges the Secretary's rules on behalf of those among its approximately 15,000 Florida members, who are eligible to vote and whose rights to vote

[4] Under Florida's new redistricting plan, Senator Joyner will represent District 19 if she is reelected, but the district will comprise parts of the same three counties.

are greater or lesser depending on their county of residence and on the set of election laws to which they are subject. Such disparate treatment results directly from the Secretary's invalid exercise of delegated legislative authority.

12. The ACLU also brings this action in its own right as an organization dedicated to the principles of liberty and equality embodied in the Constitution and in the nation's civil rights laws. As part of that commitment, the ACLU conducts litigation and advocacy activities before Florida courts, legislative bodies, and administrative agencies to secure fair treatment and non-discrimination for all voters, and to eliminate unlawful impediments to voting. The dual system of election law enforcement implemented by the Secretary is manifestly unfair, discriminatory, and contrary to law. It is within the express purposes of the ACLU to challenge such measures, as evidenced by the organization's long record of activities aimed at defending the right to vote.

13. Moreover, the ACLU conducts voter education projects in Florida in both VRA-covered and non-covered counties. The ability of the ACLU to accurately educate its members and others voters is undermined by the confusion and inconsistency created by the dual implementation, which harms the rights of voters to exercise their right to vote.

14. NCLR is active in Florida in advocating for the rights of Hispanic citizens. Its Civic Engagement Team, active in Florida, is specifically concerned with securing the rights of Hispanic voters and encouraging the participation of Hispanic citizens in the electoral process. In order to accomplish this, NCLR engages in extensive outreach efforts to educate Hispanic voters about early voting and voting by registered voters who change their residence within Florida, and has a robust Get-Out-The-Vote

("GOTV") program. The organization canvasses neighborhoods door-to-door and contacts voters by telephone to educate Hispanic voters regarding the early voting process and to encourage use of early voting. By reducing the number of early voting days, the Secretary's Directive will decrease NCLR's ability to notify voters about early voting and get voters to the early-voting sites, since these efforts largely occur during the early voting period. The organization also deploys monitors at polling places in Florida on Election Day who provide information and support to voters who encounter problems at the polls, including problems relating to a change of address. The monitors' work will be substantially affected by the Secretary's Directive, which will require advising some voters who have moved to vote a provisional ballot, while advising other similarly situated voters within the same Legislative or Congressional voting district, but in a different county, that they may vote a regular ballot.

ALLEGATIONS OF INVALIDITY

15. Florida Statutes § 120.52(8), known as the Administrative Procedure Act ("APA"), describes an "invalid exercise of delegated legislative authority" as follows:

> A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or
>
> (f) The rule imposes regulatory costs on the regulated person, county or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

A. <u>Section 120.52(8)(c): The Secretary's Rule Establishing a Dual System and His Directive Contravene Provisions Of The Law Implemented.</u>

16. Florida Statutes § 120.54(3)(a)(1) requires that any rule being issued contain "a reference to the section or subsection of the Florida Statutes … being implemented or interpreted." For authority to adopt and enforce the rules at issue here, the Secretary has expressly relied on Florida Statutes § 97.012(1), the Uniformity Statute, which states:

> **97.012 Secretary of State as chief election officer.—**The Secretary of State is the chief election officer of the state, and it is his or her responsibility to:
>
> (1) Obtain and maintain uniformity in the interpretation and implementation of the election laws. In order to obtain and maintain uniformity in the interpretation and implementation of the election laws, the Department of State may, pursuant to ss. 120.536(1) and 120.54, adopt by rule uniform standards for the proper and equitable interpretation and implementation of the requirements of chapters 97-102 and chapter 105 of the Election Code.

17. By establishing and enforcing a patently non-uniform system of election laws with respect to limitations on early voting and casting ballots by persons who move between counties, the Secretary directly contravened this purported statutory authority.

His obligation is to assure that the same election laws are applied to all of Florida's counties, but as a result of his actions, the residents of 62 counties must observe these provisions as they were changed in 2011, while the residents of the other five counties follow the less restrictive provisions of the pre-2011 laws. These are not trivial changes of laws or practices that might be applied differently to allow for local idiosyncrasies; they bear directly on rights that are central to the electoral process. The establishment of this dual regulatory system by the Secretary is the antithesis of uniformity. On its face, the agency action unlawfully contravenes the very Uniformity Statute that it purports to implement and must, therefore, be rejected. *A. Duda and Sons, Inc. v. St. Johns River Water Mgmt. Dist.*, 17 So.3d 738, 745 (Fla. 5th DCA 2009) ("If an agency rule contravenes a statute, it must be rejected as an invalid exercise of delegated legislative authority."), *rev'd in part on other grounds*, 22 So.3d 622 (Fla. 5th DCA 2009).

18. The Secretary's present contravention of the Uniformity Statute contrasts with directly applicable historical precedents showing adherence to the law. In 1998, the Secretary faced a situation that was identical in all material respects to that presented in 2011. Newly enacted election law provisions were submitted to the Attorney General for preclearance (the same five counties were then subject to Section 5 as are today). With an election impending and the preclearance application unresolved, the Secretary requested an advisory opinion from the Division of Elections (the "Division") concerning enforcement of the new election laws. The Division advised that, based on the mandate of the Uniformity Statute, Supervisors of Elections in all 67 counties should be instructed to conduct the election under the pre-existing laws, and not to enforce the 1998 election law changes until they were precleared as to the five covered

counties. Fla. Div. of Elections Op. 98-12 (Aug. 6, 1998) *rescinded in part on other grounds by Op. 98-13*, attached as Exhibit D.

19. Soon thereafter, the General Counsel of the Florida State Association of Supervisors of Elections requested a follow-up opinion. In the interim, the Attorney General approved certain sections of the 1998 amendments while reserving others for further deliberation. The Division advised once again that all 67 Florida counties must enforce the Election Code without implementing the 1998 changes that had not been precleared, stating:

> To do otherwise, in our opinion, has the potential to cause widespread voter confusion, affect the integrity of the elections process, impair uniform application of the election laws and could violate Federal and State laws and both the Florida and United States Constitutions.

Fla. Div. of Elections Op. 98-13 (Aug. 19, 1998) at 2, attached as Exhibit E.

20. The Division went on to analyze the treatment to be given different sections of the 1998 amendments, depending on the Attorney General's decision as to each, and reiterated its initial conclusion:

> Finally, we have already noted in DE 98-12 that the Secretary of State has a legal duty to maintain uniformity and consistency with regard to the application and operation of the state's election law. Therefore, the Secretary cannot sanction such a dual voting system for both federal and state law reasons.

Id. at 7.

21. The precedent thus established – prohibiting a dual voting system in the context of a VRA preclearance review – was followed again in 2007. All but four sections of a new 2007 elections bill had been precleared by the Attorney General, and the question was whether the remaining four sections could be implemented in the non-

covered counties. The Division's answer was unequivocal and emphatic: **"[T]he changes in those four sections relating to voter registration and voting cannot be implemented in any county until DOJ pre-clears them."** Memorandum from Maria Matthews, Asst. Gen. Counsel for Fla. Dept. of State, to Supervisors of Elections (Dec. 24, 2007) (all emphasis in original), attached as Exhibit F.

22. Most recently, and after the passage of the Act, an Issue Brief prepared by the Florida Senate Subcommittee on Ethics and Elections acknowledged the Division's interpretation of the Uniformity Statute as precluding a dual system of election law enforcement. After describing the Section 5 preclearance process and its application to five Florida counties, the Senate publication noted: "Historically, such laws [affecting election administration practices or procedures] have not taken effect in *any* Florida county until after preclearance or approval, since election laws must be implemented uniformly throughout the state." (citing the Uniformity Statute). Florida Senate Rules Subcommittee on Ethics and Elections, *Issue Brief 2012-222: Florida Election Case Law and Federal Preclearance Update*, Sept. 2011, p.2 (emphasis in original; attached as Exhibit G).

23. The Secretary's duty under the Uniformity Statute "to obtain and maintain uniformity in the … implementation of the election laws" has remained unchanged since the beginning of this series of directly applicable precedents. The Dual System Rule of implementation the Secretary has put in place, however, is plainly non-uniform and contravenes this statute. It should be declared invalid.

B. Section 120.52(8)(e): The Secretary's Rules Are Arbitrary.

24. An arbitrary rule is described in Section 120.52(8)(e) as one "not supported by logic or the necessary facts." The differential enforcement of election laws resulting from the Dual System Rule established by the Secretary defies logic, as is manifested, *inter alia*, in election districts that overlap both covered and non-covered counties.

25. Following recent redistricting, constituents in six of the 40 Senate Districts are affected by the disparities imposed by the Dual System Rule adopted by the Secretary.[5] Similarly, five of Florida's 120 House Districts,[6] and eight of the state's 27 Congressional Districts,[7] include counties or portions of counties in which the election laws are not uniform. To posit just one example from many, as previously described, Senator Joyner's current District 18 encompasses parts of Hillsborough, Pinellas, and Manatee Counties. Since Hillsborough is one of the five VRA-covered counties, her constituents there remain subject to the pre-2011 election laws, while those who live in Manatee County, or just across the bridge in Pinellas County, must abide by the new laws passed in 2011. As a consequence, voters in Senate District 18 who reside in the covered county (Hillsborough) have rights as to early voting, and as to their ability to cast a regular ballot at the polling place if they have moved between counties, that are quite different and more extensive than constituents of the same district who are subject to a

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[5] Under Florida's new redistricting plan, the Senate Districts that include at least portions of both covered and non-covered counties are 17, 19, 22, 23, 26, and 39.

[6] Under Florida's new redistricting plan, the House Districts that include at least portions of both covered and non-covered counties are 56, 64, 70, 105, and 120.

[7] Under Florida's new redistricting plan, the Congressional Districts that include at least portions of both covered and non-covered counties are 12, 14, 15, 17, 19, 20, 25, and 26.

different regulatory regime in the other two counties (Manatee and Pinellas). Meanwhile, Senator Joyner (among others) will be expected to explain these irrational differences to her constituents.

26. The illogic that permeates these inconsistencies is apparent (as is the potential for confusion), but the arbitrariness of the dual system arises also from the Secretary's choice to ignore necessary facts in the form of a viable alternative to the dual system. No claim of necessity can justify his policy of implementing different election laws for different counties. The pending VRA compliance issue does not create a dilemma for the Secretary – the choice whether to enforce the law uniformly or differently is not between equally unsatisfactory alternatives.

27. As demonstrated in the discussion of the Uniformity Statute (¶¶ 20-24, *supra),* ample historical precedents support the logical choice of suspending enforcement of the election law changes introduced by the Act until after preclearance. Enforcing the pre-Act election laws statewide will assure compliance with the Secretary's statutory obligation to maintain uniformity, as well as provide equal treatment for all voters and others engaged in election-related activities in Florida. It is the choice that the Secretary should have made; the choice of a dual system that he did make should be declared invalid.

C. Section 120.52(8)(a): The Secretary Materially Failed to Follow Applicable Rulemaking Procedures or Requirements.

28. The Secretary ignored the rulemaking requirements of the APA in two respects: first, in the unpromulgated decision to enforce the election laws differently in some counties than in others and, second, by issuing a Directive rather than a rule to implement the changes regarding early voting and voting after moving between counties.

The APA states in Section 120.54(1)(a):

> Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by S.120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.[8]

29. Florida Statutes § 120.52(16) includes within the definition of a rule "each agency statement of general applicability that implements, interprets, or prescribes law or policy…." This is complemented by the definition in Section 120.52(20) of an unadopted rule: "'Unadopted rule' means an agency statement that meets the definition of the term 'rule', but that has not been adopted pursuant to the requirements of s. 120.54."

30. There is no "statement," as such, of the Secretary's policy in his unadopted rule establishing a dual system of election law implementation,[9] but it is beyond dispute that this policy was in place for the January 31, 2012 presidential

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[8] While certain exemptions to mandatory rulemaking are provided, none is applicable here. In particular the Secretary cannot rely on the exemption allowed when "[r]elated matters are not sufficiently resolved to enable the agency to address a statement by rulemaking." APA Section 120.54(1)(a)1.b. It is the pendency of Florida's preclearance request that occasioned the Secretary's unpromulgated dual election system rule, not the unresolved merits of it. Nothing impedes issuance of a rule prescribing uniform enforcement of the pre-Act election laws.

[9] Policy "statements" that go unwritten are equally subject to the rulemaking mandate of Section 120.54(1)(a) as those reduced to writing. *See Dept. of Highway Safety and Motor Vehicles v. Schluter, et al.*, 705 So.2d 81, 84 (Fla. 1st DCA 1977).

preference primary election, and that it remains of general applicability throughout the state.

31. The Directive issued by the Secretary is of the same character. It is of general applicability and, by its terms, "interpreted and implemented" changes effected by the Act with respect to early voting and voters who move from one county to another without updating their address prior to seeking to vote.

32. These statements of policy by the Secretary fall squarely within the statutory definition of a rule. They also meet the standard adopted by numerous court decisions in deciding whether particular agency actions constitute rules:

> An agency statement or policy is a rule if its effect requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law.

Jenkins v. State, 855 So.2d 1219, 1225 (Fla. 1st DCA 2003) (citations omitted).

33. The rule by which the dual enforcement system was established plainly has the "effect of law" by determining which law should be applied in one set of counties and which in another set, and requiring compliance with its determination. *See id*. It thereby "creates rights" by implementing the pre-Act less restrictive voting provisions in the five covered counties, and "adversely affect[s]" voters and election participants in the remaining 62 counties by subjecting them to the more stringent requirements of the Act. *See id*. The Directive has the same effect as to the changes included in the Act that it addresses.

34. Both of these agency actions were taken in deliberate defiance of the rulemaking mandate of Section 120.54(1)(a), and were done many months in advance of the next statewide election – there were no exigent circumstances. They are, accordingly,

of no effect, and should be declared as such. *See Dept. of Rev. v. Vanjaria Enter. Inc.*, 675 So.2d 252, 255 (Fla. 5th DCA 1996) (citing *Dept. of Natural Resources v. Wingfield Dev. Co.*, 581 So.2d 193, 196 (Fla. 1st DCA 1991) ("An unpromulgated agency rule constitutes an invalid exercise of delegated agency legislative authority and, therefore, is unenforceable")).

D. Section 120.52(8)(b): The Secretary Exceeded The Grant Of Rulemaking Authority.

35. Following subparagraphs (a) through (f) of Section 120.52(8), listing the grounds for finding agency rules invalid (quoted in ¶ 15, *supra*), there is an unlabeled provision commonly referred to as the "flush left" paragraph, which imposes strict limitations on agency rulemaking, as follows:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statue. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

36. According to this provision, generic rulemaking authority is insufficient to justify an agency's adoption of rules on a particular subject. The power to issue such rules must derive from a specific grant of authority in the enabling statute intended to be implemented by the agency's rulemaking

37. Measured against this requirement of specific authority, the Secretary's unadopted (but nonetheless effective) Dual System Rule to apply different election laws in different counties obviously falls short. There being no reliance on any statutory source, there can be no specific basis of the kind required by the flush left paragraph.

38. Neither does the Secretary's Directive document a source of authority for its differential application. The Directive cites as its authority the sections of the Act being implemented, specifically, those pertaining to (i) early voting (Act § 39, amending Fla. Stat. § 101.657), and (ii) voters who move their residences from one county to another (Act § 26, amending Fla. Stat. § 101.045).[10] There is no authority to be found in these enactments for the Secretary's dual system of election laws.

39. It is beyond dispute that the Secretary is mandating two different, non-uniform sets of election laws. There is no grant of rulemaking authority to permit this.

DEMAND FOR RELIEF

Based on the foregoing, the Petitioners request the following relief:

A. That this matter be assigned to an Administrative Law Judge to conduct a formal administrative hearing in accordance with the provisions of Chapter 120;

B. That the Secretary's rule establishing a dual system of election laws be declared an invalid exercise of delegated legislative authority;

[10] The Secretary also purported to issue the Directive "pursuant to my authority in section 97.012 Florida Statutes," the Uniformity Statute. Ex. C. Reliance on such generalized rulemaking authority appears to be precisely the practice that the flush left paragraph was intended to preclude. Moreover, it is clearly inappropriate to claim authority for a rule creating differences in election laws from a statute that mandates uniformity.

C. That Directive 2011-01 be declared an invalid exercise of delegated legislative authority; and

D. That Petitioners be awarded reasonable costs and attorney's fees pursuant to Florida Statutes § 120.595.

Respectfully submitted on this 29th day of June, 2012, by:

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A Compilation of

THE ELECTION LAWS

of the
State of Florida

September 2011

FLORIDA DEPARTMENT OF STATE
Division of Elections

2011-40, Laws of Florida – Sections Awaiting Preclearance

NOTE: Those counties who are required to have election laws precleared (Collier, Hardee, Hendry, Hillsborough, and Monroe counties) will need to adhere to the 2010 Laws until the below sections (which have also been highlighted in this document) have been precleared:

Section 4 – Relating to 3rd Party Voter Registration Organizations – s. 97.0575

Section 23 – Relating to Petition Signature Verification – s. 100.371

Section 26 – Relating to Out-of-County Address Changes at the Polling Place – s. 101.045

Section 39 – Relating to Early Voting – s. 101.657

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Division of Elections

Division of Elections Rules

Rule Categories:

- Adopted Rules
- Emergency Rules
- Proposed Rules
- Repealed Rules

Index of Adopted Rules

The Division of Elections rules are available in Adobe's Acrobat PDF format for viewing or printing at your site. Accessing documents in PDF format requires use of Adobe's Acrobat Reader, which may be installed free.

1S-2.0001 - Designation of Division of Elections as Filing Office for Department of State (eff. 9-07-11) (pdf,27kb)

Form DS-DE 09 - Appointment of Campaign Treasurer
Form DS-DE 24 - Candidate Oath With Party Affiliation
Form DS-DE 24A - Candidate Oath Write-In Candidate
Form DS-DE 24B - Candidate Oath Candidate With No Party Affiliation
Form DS-DE 25 - Candidate Oath Nonpartisan Office
Form DS-DE 26 - Judicial Office Candidate Oath
Form DS-DE 26A - Judicial Office Candidate Oath Write-In Candidate
Form DS-DE 27 - Federal Candidate Oath Candidate With Party Affiliation
Form DS-DE 27A - Federal Candidate Oath Write-In Candidate
Form DS-DE 27B - Federal Candidate Oath Candidate With No Party Affiliation
Form DS-DE 85 - Oath Of Candidate Write-In For President And Vice President

Exhibit B

DS-DE 47 (pdf,137KB)

DS-DE 64 (pdf,241KB)

DS-DE 65 (pdf,336KB)

DS-DE 78 (pdf,311KB)

DS-DE 79 (pdf,499KB)

1S-2.033 - Standards for Nonpartisan Voter Education (eff. 9-13-09) (pdf,68kb)

1S-2.034 - Polling Place Procedures Manual (rev. 08-25-10) (pdf,54kb) This version of Rule 1S-2.034 applies only to Collier, Hardee, Hendry, Hillsborough, and Monroe counties.

DS-DE 11 - Polling Place Procedures Manual (pdf,1010kb)

1S-2.034 - Polling Place Procedures Manual (eff. 01/2012) (pdf,14kb) This version of Rule 1S-2.034 applies in all counties, except Collier, Hardee, Hendry, Hillsborough, and Monroe counties.

DS-DE 11 - Polling Place Procedures Manual (pdf,905kb)

1S-2.035 - Polling Place Accessibility Survey (pdf,75kb)

ADA Polling Place Survey Checklist (pdf,423kb)

1S-2.036 - Complaint Process for Violations of NVRA & Florida Election Code*(eff.01-29-06) (pdf,13kb)

DS-DE 18: NVRA Complaint Form (pdf,97kb)

1S-2.037 - Provisional Ballot (eff. 5-19-10) (pdf,60kb)

DS-DE 49 OS (pdf,29KB)

DS-DE 49 TS (pdf,29KB)

DS-DE 49 OS/TS (pdf,30KB)

FLORIDA DEPARTMENT of STATE

RICK SCOTT
Governor

KURT S. BROWNING
Secretary of State

MEMORANDUM

FROM: **Kurt S. Browning**
Florida Secretary of State

TO: **Supervisors of Elections**

DATE: **May 19, 2011**

SUBJECT: **Directive 2011-01**

On May 19, 2011, House Bill 1355, amending the Florida Election Code (chapters 97-106, Florida Statutes), became law (hereinafter chapter 2011-40, Laws of Florida). Most changes take effect immediately upon becoming law. The timing of certain provisions may impact the conduct of elections already in progress. Therefore, in my capacity as the Chief Elections Official of the State of Florida and pursuant to my authority in section 97.012, Florida Statutes, I hereby issue this directive for the purpose of ensuring that specific new changes are uniformly interpreted and implemented and that the elections are conducted in a fair and impartial manner so that no voter is disenfranchised.

- Early voting is now required only in elections containing state or federal races. *See* ch. 2011-40, § 39, Laws of Fla., amending § 101.657, Fla. Stat. For elections in which early voting is required, the early voting period begins 10 days before an election and ends on the 3rd day before an election. The hours in which the early voting is offered is extended to a maximum of 12 hours per day with a minimum of 6 hours per day. The hours are determined at the discretion of the Supervisor of Elections. However, a Supervisor must now provide the hours and the addresses of the early voting sites to my office no less than 30 days before the election. In the event there is an election in which early voting is required for which there is less than 30 days since the effective date of this law, I direct the Supervisor of Elections to provide me with such information immediately if not previously submitted.

- Voters who move from one Florida county to another county are generally no longer able to make the address change at the polls on the day of an election and vote a regular ballot. *See* ch. 2011-40, § 26, Laws of Fla., amending § 101.045, Fla. Stat., although an exception exists for active military voters and their family members who execute an affirmation or complete a voter registration application update.

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Although these out-of-county voters who do not fall within the active military exception will have to vote a provisional ballot, the same standard that would apply for counting a regular ballot applies for counting their ballots. That is, the provisional ballot shall count unless the canvassing board determines more likely than not that the person was not entitled to vote. That would occur only if the voter was not registered or the voter voted in a precinct other than the one that corresponds to his or her new address as written under penalty of law on the ballot certificate and affirmation, or if evidence was available before the board that either the voter had already voted or that the voter was committing fraud. The Florida Legislature did not impose any additional requirements of proof for this category of provisional ballot voters; therefore, it is very important that the poll worker ensure that the voter is in the proper precinct before casting a provisional ballot.

- Address confirmation or verification at the polls at the time of presenting a photo and signature identification has also changed. *See* ch. 2010-40, § 25, Laws of Fla., amending § 101.043, Fla. Stat. A poll worker cannot ask a voter whose address on the presented identification is the same as the address on record to recite his or her residence address or to provide any other address-related information. For all other voters, a poll worker can no longer use the address on the identification to make a voter confirm or verify his or legal residence or to challenge the person's eligibility to vote.

Despite the above, I do not read the new law to keep a poll worker from being able to recite the address on record to the voter and asking the voter whether that address has changed. It is the voter's prerogative to respond if at all and to ask questions or volunteer further information. These provisions are consistent with voter intake provisions relating to photo and signature identification already contained in the Polling Place Procedures Manual (DS-DE 11, eff. 08-2010/Rule 1S-2.034, Fla. Admin. Code).

The new law simply makes it clearer that the address listed on record is deemed to be the valid legal address for the voter until the voter volunteers otherwise.

This directive remains in effect until such time as it is superseded or revoked by subsequent directive, law, or final court order.

Rescinded in part, see 98-13

DE 98-12 - August 6, 1998

Duties of the Secretary of State
§ 98.012, Fla. Stat.

TO: Honorable Sandra B. Mortham, Secretary of State, The Capitol, Tallahassee, Florida

Prepared by: Division of Elections

This is in response to your request for an advisory opinion regarding chapter 98-129, Laws of Florida, and recent action taken by the United States Department of Justice with respect thereto. You are the Secretary of State and Florida's chief election officer. Therefore, pursuant to section 106.23(2), Florida Statutes, the Division of Elections has authority to render this opinion to you.

You have asked for an opinion and recommendations based upon recent notice from the United States Department of Justice that the antifraud provisions of chapter 98-129, Laws of Florida, have yet to receive preclearance from that agency. This notice was received via a copy of a letter to Florida Attorney General Robert A. Butterworth, dated July 27, 1998 and received by the Division of Elections on July 31, 1998. The letter contains an admonishment that the antifraud provisions of state law at issue are unenforceable until preclearance is forthcoming from the Justice Department.

On or about May 28, 1998, the relevant legislation was forwarded to the Justice Department by the Florida Attorney General's office as has been the procedure in Florida for many years. The submission included a copy of the law, a summary of the law, and a copy of the Third District Court of Appeals decision in *In Re: The Matter of the Protest of Election Returns, Case No. 98-507 (Fla. 3d DCA 1998)*. This case upheld and chronicled the invalidation of the 1997 City of Miami Mayoral election due to rampant fraud with respect to the absentee balloting which occurred during this election. These abuses were the subject of a grand jury investigation, an investigation by the Florida Department of Law Enforcement, and widespread media coverage, including a segment on CBS's *60 Minutes*. Further investigation by a select committee of the Florida Senate ensued resulting in the law at issue now.

Sixty days have elapsed since this material was presented to the Justice Department and during that time your staff in the Division of Elections has had numerous workshops and meetings with county supervisors of elections to acquaint them with the new provisions. During this same time period, neither you, the Florida Attorney General, nor the Division f Elections, received any indication, not even a phone call, indicating that there were questions about the bill until late July, whereupon representatives of the Justice Department spent approximately 4 hours on the telephone with division attorneys, in two separate conversations, discussing the provisions and intent of this new law. After this telephone conversation, the division provided the Justice Department with additional background information on the law in the form of newspaper articles and a legislative staff analysis of the law. Subsequent phone calls to the Justice Department as late as August 5, 1998, have yielded no response in terms of whether they can complete their review. In the meantime, plans have been made, a major

statewide election looms in less than 27 days, and you now have on your hands a potential crisis which endangers the integrity of the election.

Based on the foregoing you have essentially asked what your options are with respect to this dilemma.

You are the State's chief election officer and it is your responsibility to maintain uniformity in the application, operation, and interpretation of the election laws, and provide for the equitable implementation of such laws. *§ 97.012, Fla. Stat.*

With regard to Florida's election process, the Florida Supreme Court has stated that it is certainly the intent of the constitution and the legislature that elections are to be efficiently, honestly and promptly ascertained by election officials to whom some latitude of judgment is accorded. *Boardman v. Esteva, 323 So.2d 259 (Fla. 1975)*. More importantto the situation at hand, the court also stated that the electorate is the real party at interest in an election;

> p>They are possessed of the ultimate interest and it is they to whom we must give primary consideration. ...Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly it is the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. ...By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.

Id at, 263.

While *Boardman* does not deal with the precise issues you are confronted with at present, it was an elections case and the principles and guidance it offers with respect to the right to vote is nevertheless a sound counsel in the face of adversity and you are now called upon to act in the face of adversity.

Accordingly, the Division recommends that under your authority as the State's chief elections officer, the following actions be taken.

Supervisors of elections should be advised that until further notice the provisions of chapter 98-129, Laws of Florida, as identified in the July 27, 1998 notice from the Justice Department are unenforceable and that all elections are to be conducted under the election laws of the state as existed prior to chapter 98-129 becoming a law. However, if preclearance is received no later than August 10, 1998, a date which we believe to be the point of no return in terms of election preparation, ballots received by voters on that date and thereafter should comply with the new law.

SUMMARY

The provisions of chapter 98-129, Laws of Florida are unenforceable until precleared by the United

States Department of Justice. Until preclearance occurs, elections must be conducted pursuant to the law as it existed prior to the amendments in chapter 98-129, Laws of Florida. If preclearance is not obtained by August 10th, a date which we believe to be the point of no return in terms of election preparation, you have the authority to conduct the elections under the old law.

DE 98-13 - August 19, 1998

Absentee Voting
Art. I, §§ 1 and 2, Fla. Const., Art III, § 11, Fla. Const., Ch. 98-129, Laws of Fla., Voting Rights Act of 1965

TO: Mr. Ronald A. Labasky, Attorney At Law, Skelding and Labasky, Post Office Box 669, Tallahassee, Florida 32302

Prepared by: Division of Elections

This is in response to your request for an advisory opinion regarding chapter 98-129, Laws of Florida, on behalf of the Florida State Association of Supervisors of Elections. Chapter 98-129 made numerous revisions to Florida voter registration and absentee voting laws which, as late as August 14, 1998, were the subject of preclearance review at the United States Department of Justice. Critical matters regarding the impending election are understandably causing some concern on the part of the association and are in need of some clarification. As the association's general counsel, and pursuant to section 106.23(2), Florida Statutes, the division has authority to render this opinion to you as their representative in this matter. Specifically you ask:

> 1. As of this date, immediately prior to the first primary election for 1998, which sections of the law are not precleared or are otherwise unenforceable for this election; and,
>
> 2. Should sections of the law that the Justice Department failed to preclear be implemented for the first primary election?

As a preliminary matter, the division issued an opinion relating to these issues on August 6, 1998. *Op. Div. Elect. 98-12, August 6, 1998* (DE 98-12). In that opinion, we advised the Secretary of State that:

> **[U]ntil further notice** the provisions of chapter 98-129, Laws of Florida, as identified in the July 27, 1998, notice from the Justice Department are unenforceable and that all elections are to be conducted under the election laws of the state as existed prior to chapter 98-129 becoming a law. However, if preclearance is received no later than August 10, 1998, a date we believe to be the point of no return in terms of election preparation, ballots received by voters on that date and thereafter should comply with the new law.

Id.

Therefore, to the extent this opinion conflicts with DE 98-12, we recede from the latter. DE 98-12 was promulgated under exigent circumstances resulting from the Justice Department's dilatory review of chapter 98-129, Laws of Florida. An opinion of the Division of Elections is legally binding on the person or persons who request it until amended or revoked by the division or a court of competent jurisdiction. *Smith v. Crawford, 645 So.2d 513, 521 (Fla. 1st DCA 1994).*

As to your first question, the division received three separate notices from the Department of Justice on July 27, 1998, August 10, 1998, and a final response on August 14, 1998, identifying the sections of chapter 98-129, Laws of Florida, that either have, or have not, been precleared. As of August 14, 1998, the Justice Department has failed to preclear or has raised final objections to sections 9, 10, 14, 16 and parts of sections 20 and 26 of the new law. Section 14 provides additional requirements for the absentee voter certificate. Section 16 provides the corresponding instructions for completing the certificate. The portion of section 20 which has not been precleared provides that an absentee ballot is "illegal" if the voter does not include the last four digits of his or her social security number and comply with the witness requirements. The portion of section 20 which creates the supervisor's notice requirement with respect to ballots rejected by the canvassing board because of signature discrepancies was precleared. Subsection (3) of section 26 containing criminal penalties for persons, other than notaries, who witness more than five absentee ballots was not precleared. However, the Justice Department raised no objection to the remaining penalties provided in subsections (1), (2), (4), and (5) of section 26.

The Justice Department seemed to indicate in its August 10, 1998, letter to us that it had no objection to sections 9 and 10 of the new law, which impose identification requirements for voters appearing at the polls. However, at a later point in the letter, the Justice Department explained that, because each of the counties subject to preclearance may establish its own list of identification cards which are acceptable, each county's list will have to be separately precleared before the new identification requirements can be implemented. Thus, while the Justice Department raised no specific objection, the new identification requirements cannot be regarded as having been precleared.

Thus, to again summarize, sections 9, 10, 14, 16, the portion of section 20 which provides that an absentee ballot is illegal if it does not include the social security number information and correct witness information, and subsection (3) of section 26 have been finally determined by the United States Attorney General to be unenforceable with respect to the five preclearance counties of Collier, Hardee, Hendry, Hillsborough, and Monroe. *Letter to Florida Attorney General Robert A. Butterworth from Elizabeth Johnson, Chief, Voting Section, Civil Rights Division, United States Department of Justice, August 10, 1998.*[1] Application of new election laws are contingent upon preclearance by the Justice Department pursuant to the Voting Rights Act of 1965. Thus, the effective date of any such laws are delayed until such preclearance is obtained.

As a result, with respect to your second question and for the reasons set forth below, it is the opinion of the Division of Elections that all 67 Florida counties should instruct absentee voters, issue absentee ballots, count voted absentee ballots, canvass absentee ballots, and require polling place identifications pursuant to the 1997 Florida Election Code, and not penalize persons who are determined to have witnessed more than five absentee ballots as provided in subsection (3) of section 26, chapter 98-129 Laws of Florida, for the entire 1998 election cycle. To do otherwise, in our opinion, has the potential to cause widespread voter confusion, affect the integrity of the elections process, impair uniform application of the election laws and could violate Federal and State laws and both the Florida and United States Constitutions. *See, U.S. Const. amend XIV and XV, Art. I, §§ 1 and 2, Fla. Const., Art. III, § 11(a), Fla. Const., 42 U.S.C. § 1973c (1982), 42 U.S.C. 1973(a), (b) (1982), § 97.012(1), Fla.*

Stat.

DISCUSSION OF SECTIONS WHICH CAN BE IMPLEMENTED IMMEDIATELY

We begin with a chronological summary of what is now a law in effect in the State of Florida, and the 67 counties therein. Chapter 98-129, Laws of Florida, section 1 provides that the Secretary of State can establish a voter fraud hotline and election-fraud education to the public.

Section 2 requires the supervisors of elections to provide certain homestead address information to the county property appraiser as disclosed to the supervisor on the uniform statewide voter registration application as provided in section 4 of chapter 98-129. However, since section 4 does not require homestead information on the voter registration application until 1999, supervisors are not required to comply with this section at this time. *See, Johnson v. Presbyterian Homes of the Synod of Florida, Inc., 239 So.2d 256 (Fla. 1970). City of Boca Raton v. Gidman, 440 So.2d 1277 (Fla. 1983).* (Statutes need not be interpreted to lead to an unreasonable or ridiculous conclusion.)

Section 3 defines absentee elector. However, as stated above, essentially the same definition appearing on the absentee ballot certificate in section 14 is unenforceable, which results in this definition being of no practical value, with respect to the five counties. Sections 4, 5 and 6 do not take effect this election cycle. Therefore, there is no need to discuss these provisions.

Section 7 imposes additional requirements for use in conjunction with list maintenance activities employed by the supervisors of elections. The mailing of a voter ID card is a method of notifying a registrant that the supervisor has approved the voter's registration application and allows for a notice of denial. *§ 97.073(1), Fla. Stat.* New section 97.071, Florida Statutes, merely says that if the voter ID card mailed out by a supervisor is returned as undeliverable, and the applicant has indicated a different mailing address on the application, the supervisor must send a notice to that mailing address advising that the voter must appear in person to pick up the card. If the applicant appears in person to pick up the card, he must produce certain identification or execute the affidavit provided in section 101.49, Florida Statutes, in order to receive the card. If the applicant does not appear in person to pick up the voter ID card, the applicant is still to be considered a registered voter. However, because the voter failed to respond to the notice, the voter's name should be placed on the inactive list. Because these procedures constitute mere list maintenance activity, immediate implementation of this provision will not impact the voting process in any negative way. Therefore, this provision should be implemented immediately.

Section 8 relates to the central voter file which is a list maintenance tool. The central voter file has been a work in progress for two and one half months in all the counties and does not directly affect the administration of the election. Moreover, if the supervisor has reason to believe that someone should not be removed from the list of eligible voters, we recommend that the person be allowed to remain a registered voter until his status can be verified. Therefore, we believe this section should immediately be implemented on a statewide basis.

Section 11 related to the terms of office for county commissioners is not critical to the present election

cycle; therefore, there is no need to address this provision.

Section 12 provides for a voter fraud poster at each polling place. This provision should be implemented immediately.

Section 13 provides procedures for requesting absentee ballots and mandates that electors, or a person making a request for an absentee ballot on behalf of an elector, must provide certain identifying information such as social security numbers and voter ID numbers. This provision should be implemented immediately. However, absentee ballot requests received prior to August 14, 1998, and requests from overseas voters pursuant to *42 U.S.C. 1973 ff*, should be treated under 1997 Florida Law. *See §§ 101.62, 101.694, Fla. Stat.*

Section 15 limits the number of absentee ballots that can be returned on behalf of an elector by a person designated by the elector to two. This provision should be implemented immediately.

Section 17 allows a person to appear at the supervisor's office and vote an absentee ballot, notwithstanding the definition of absent elector in section 97.021, Florida Statutes, as amended by chapter 98-129, Laws of Florida, if they are unable to appear at the polls on election day. We see no reason this cannot be done for all election cycles, notwithstanding DE 98-12.

Section 18 provides for certain assistance to absentee voters with certain disabilities. This provision should be implemented immediately.

Section 19 allows persons designated by the supervisor to administer oaths. This provision can be implemented immediately.

Section 21 allows each political party to designate absentee ballot coordinators who can witness an unlimited number of absentee ballots. In order to qualify as an absentee ballot coordinator, a person must submit to a criminal background check conducted by the Division of Elections. Since ballot coordinators do not have to be appointed until 28 days prior to the general election, this law should be implemented immediately.

Section 22 allows persons who are preregistered voters to serve on election boards. This provision should be implemented immediately.

Sections 23, 24, and 25 provide for enhanced penalties for certain criminal activity. These provisions should be implemented immediately.

Sections 27 through 37 deal with additional or enhanced penalties and the jurisdiction of the Florida Elections Commission. These provisions should be implemented immediately.

Section 38 relating to activity by the property appraiser has been withdrawn from preclearance. Moreover, this provision relates back to the above discussion regarding section 2 which points out that homestead information is not available on the voter registration application until 1999.

Sections 39 and 40 are in effect and require no discussion.

DISCUSSION OF SECTIONS WHICH SHOULD NOT BE ENFORCED IN ANY COUNTY UNTIL PRECLEARED FOR USE IN ALL COUNTIES

Sections 9 and 10 of the new law require voters to produce a Florida Driver's License or other form of picture ID at the polling place. The division has addressed these sections in workshops and informal communications with supervisors. As stated in our workshops and other communications, the division has not established an all inclusive list of acceptable ID and we believe that supervisors should be allowed some latitude to develop their own lists of acceptable identification. In addition to drivers licenses, we have suggested passports, employee badges, and club cards as acceptable forms of picture ID cards. In some cases picture ID cards may not have a signature which may mean that the voter will have to produce another card or document of some type that bears the voter's signature.

We have also reminded supervisors that the voter has a right to substitute an affidavit for the ID. We have also informally approved the use of a "blanket affidavit" in conjunction with the precinct register. Of course, use of a blanket affidavit requires that poll workers be trained to direct voters' attention to the blanket affidavit and inform voters that by signing the register they are attesting to their identity. Because of these fail-safe measures we see no risk to the integrity of the election process from the implementation of these provisions.

However, as previously noted, while the Justice Department has not raised any specific objection to sections 9 and 10 of the new law, it has indicated that because those counties subject to the Voting Rights Act are free to establish their own lists of identification, each of those counties' lists must be separately precleared. The Justice Department's review is limited to an examination of whether the provisions in question have a discriminatory motive or effect. Thus, we can only deduce that the Justice Department still considers that such a determination may be made based on the nature of the lists developed in individual counties. Because that is the case, and because the State of Florida cannot maintain a dual voting system and because of the potential for adverse litigation, see *discussion infra*, these provisions should not be implemented in any county at this time. However, we will continue our discussions with the Justice Department. If preclearance is granted at some future time, we will evaluate the impact on any remaining elections at that time and consider whether these provisions can be safely implemented.

As previously noted, the Justice Department has raised specific objections to sections 14, 16, the portion of section 20 which provides that an absentee ballot is illegal if it does not include the social security number information and correct witness information, and subsection (3) of section 26. These provisions have been finally determined by the United States Attorney General to be unenforceable with respect to the five preclearance counties of Collier, Hardee, Hendry, Hillsborough, and Monroe. While the Justice Department's determination does not directly control the application of these provisions to the 62 counties that are not subject to section 5 preclearance, we note that the Justice Department's refusal to grant preclearance was based on a determination that these provisions may

have a discriminatory effect. We do not believe that it would be appropriate to apply these provisions to any voter in the State of Florida in the face of this determination. While most Florida counties are not subject to the preclearance requirement, all counties are subject to the other laws relating to elections and discrimination. Any county that moved to implement these provisions could be subject to a legal action by the Justice Department or others. Similarly, the State could conceivably be subject to suit for allowing that implementation.

Without considering any potential discriminatory effect, disparate implementation may cause voter confusion, affect the integrity of the election, and may violate both the United States and Florida Constitutions. Under Florida's Constitution "all political power is inherent in the people" and "all natural persons are equal before the law" regardless of which county they live in. *Art. 1, §§ 1 and 2, Fla. Const.* We also note that, except for charter counties, the Florida Constitution prohibits the enactment of any general law of local application with regard to elections. *Art. III, § 11(a), Fla. Const.*

Section 14 prescribes a voter certificate to be used for the absentee mailing envelope. When the voter signs the certificate, he or she is attesting that he or she meets the definition of absent elector. In addition, the voter is required to include the last four digits of their social security number. The ballot must then be witnessed by either a notary or any witness who is a registered voter in this state. Such witness must also include his voter registration number, county of registration, and address. Section 16 repeats these same requirements in the form of instructions to the voter and warns the voter that the ballot will not be counted if the social security information is missing or if the ballot is not properly witnessed. The unprecleared portion of section 20 requires that absentee ballots not containing the social security information or meeting the witness requirements must be declared illegal by the county canvassing board. The unprecleared portion of section 26 provides a criminal penalty for witnessing more than five absentee ballots.

The previous law only required the voter's signature and the signature and address of one witness 18 years of age or older on an absentee ballot and the instructions were consistent with this requirement. A ballot could only be declared illegal if it failed to include a voter's signature and the signature and address of an attesting witness. There was no criminal penalty for witnessing more than five absentee ballots. Thus, if the new provisions of sections 14, 16, 20, and 26 are applied in 62 counties, but not in the five covered counties, the state will be applying a double standard with regard to its absentee voting procedures.

The net result of the application of this double standard is that the state will have made it easier to vote absentee in some counties than in others, and easier to gather absentee ballots in some counties than in others. This situation is further exacerbated by the fact that elections for state office, congressional elections and all statewide elections involve voters from more than a single county.

For example, State Senate District 29 includes the covered counties of Collier and Hendry and the uncovered counties of Broward and Palm Beach. If the provisions to which the Justice Department has objected were applied in nonpreclearance counties, the voters in Broward and Palm Beach -- where witness requirements would be applied under the new law -- would be less likely to have their absentee ballots counted than in Collier and Hendry where the more liberal standards of prior law

would be in force. Similarly, a person who witnesses more than five absentee ballots in Collier County would not be subject to criminal penalties, while a person who witnesses more than five ballots in Broward County would be subject to criminal penalties. According to our records, when one considers just state senate districts which include both covered and noncovered counties, the differing voting standards and penalties affect voters in 16 counties, and voters in 21 counties would be subjected to disparate treatment in congressional elections.

This differing treatment would no doubt disenfranchise some voters simply based on where they live in violation of federal[1] and state law. Additionally, disparate implementation may deny persons equal protection of the law under both our state and federal constitutions.

Needless to say, under such a dual system of voting, a person could show that it was far easier to vote an absentee ballot in Collier County than in Broward or Palm Beach, thus, making it easier for voters located in one county to elect the representative of their choice than voters located in another county -- even though both are voting in the same election. Finally, we have already noted in DE 98-12 that the Secretary of State has a legal duty to maintain uniformity and consistency with regard to the application and operation of the state's election law. Therefore, the Secretary cannot sanction such a dual voting system for both federal and state law reasons.

For the foregoing reasons, it is the opinion of the Division of Elections that sections 9, 10, 14, 16, that portion of section 20 which provides that an absentee ballot is illegal if it does not include the last four digits of a social security number and certain witness requirements, and that portion of section 26 of chapter 98-129, Laws of Florida, which impose a criminal penalty for persons who witness more than five absentee ballots, **should not be enforced in any county in the state until preclearance has been granted by the Justice Department or the courts**. To enforce these provisions in some counties but not others would, in our opinion, violate both state and federal law and possibly violate the Florida and federal Constitutions.

SUMMARY

Sections 9, 10, 14, 16, that portion of section 20 which provides that an absentee ballot is illegal if it does not include the last four digits of a social security number and certain witness requirements, and that portion of section 26 which imposes a criminal penalty for witnessing more than five absentee ballots, of chapter 98-129, Laws of Florida, should not be enforced in any county until precleared by the Department of Justice or the courts. All other sections can be enforced.

[1] Interestingly, in a letter to General Butterworth, Acting Assistant United States Attorney General Bill Lann Lee, without mentioning the 5 counties, simply states that "sections 14, 16, ... 20..., and 26 are unenforceable." *Letter to Florida Attorney General Robert A. Butterworth from Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division, August 14, 1998.*

[2] Preclearance of chapter 98-129, Laws of Florida, involves application of section 5 of the voting rights act of 1965. Section 5 of the act requires states with covered jurisdictions (counties) to preclear any changes to their election laws through the United States Departmenbt of Justice. *42 U.S.C. 1973c (1982).* Section 2 prohibits any state or political subdivision from imposing a voting practice which

results in the denial of the right to vote. *42 U.S.C. 1973 (a) (1982).* A person can prove a violation of section 2 if they can show that they did not have an equal opportunity to participate in the political process and elect representatves of their choice. *42 U.S.C. 1973 (b) (1982).*

Department of State
Memorandum

Office of the General Counsel

TO: Supervisors of Elections

FROM: Maria Matthews, Assistant General Counsel

DATE: December 24, 2007

RE: Pending DOJ Pre-clearance/Court Action on Chapter law 2007-30

On October 26, 2007, the U.S. Department of Justice (DOJ) pre-cleared all but four sections of the 2007 Elections legislation (ch. 2007-30, Laws of Florida/DOJ File No. 3844). DOJ requested extensive supplemental information as to those four sections. Under federal law, that request triggered another 60-day review from the date the response was received (November 26, 2007). That means DOJ could take until January 25, 2008, to issue its determination. **Therefore, the changes in those four sections relating to voter registration and voting cannot be implemented in any county until DOJ pre-clears them.**

For the upcoming Presidential Preference Primary Election, please advise your staff and poll workers regarding the following appropriate action to take as to those four provisions. If you have any questions regarding compliance with state and federal law, please call us at 850-245-6536.

1. Third-Party Voter Registration Organizations. (s. 97.0575, Fla. Stat.)

Background: Chapter law 2007-30 revised the 2005 Third Party Voter Registration law (under court challenge) to reduce the personal liability of persons and fines associated with third-party voter registration groups and their activities. The 2005 law was never implemented due to a federal court injunction entered in League of Women Voters v. Browning which is still under appeal. Prospective enforcement of the 2007 Third Party Voter Registration law has likewise been suspended by stipulation of the parties pending notice by the Department of State.

> **Action to be taken: The 2007 Third-Party Voter Registration law cannot be implemented until DOJ pre-clears this provision and the Department of State gives notice of its intent to enforce the 2007 Third Party Voter Registration law.**

2. Acceptance and Processing of Voter Registration Applications (s. 97.053(6), Fla. Stat.)

Background: Chapter 2007-30 codified the 'override' feature and process (first implemented in June 2006) that allowed voter registration officials to override the Florida Voter Registration System (FVRS) in certain cases. With the override feature, the supervisor of elections could make an applicant a registered voter if he or she brought in before an election evidence sufficient to authenticate his or her driver's license number, state identification number or social security number even though the number as provided on the completed application could not be verified

by the Department of Highway Safety and Motor Vehicle or the Social Security Administration. This meant that the person would not have to vote a provisional ballot at the polls.

However, a federal court injunction issued on December 18, 2007, in the case of Florida NAACP v. Browning has changed the scope of this override as practiced and as codified. The injunction bars the verification process under section 97.053(6), Fla. Stat., from being applied in a way that keeps an applicant with a completed application from becoming a registered voter. **The net result is that no voter registration applicant with a completed application may be kept from becoming a registered voter simply because his or her personal identifying number cannot be verified.** The court has not yet ruled on the Department of State's Motion to Stay filed December 20, 2007.

> Action to be taken: **To comply with this preliminary court injunction, the FVRS voter registration process and local registration application entry procedures will be revised to register applicants with completed applications, whether or not their personal identifying number is verified. For specific details, see the Division of Elections' December 21, 2007 e-mailed Memo to the Supervisors of Elections, entitled "Procedures to Comply with NAACP Injunction." Regardless of DOJ preclearance, this process must be followed until the court rules otherwise and you are notified by the Florida Department of State. Note: The law still requires all fields on the application to be completed. Therefore, an applicant must still complete field #6 by providing a DL number, state ID number or SSN, or writing "none" if no number has been issued.**

3. Identification at the polls (s. 101.043, Fla. Stat.):

Background: Chapter law 2007-30 eliminated two forms of photo identification that a voter could present at the polls: the employee's badge and the buyer's club card. A legislative oversight did not make the same change to a provision for certain first-time registrants.

> Action to be taken: **Until DOJ preclears this change, a voter may still present an employee badge or a buyer's club card as an acceptable form of photo identification at the polls.**

4. Provisional Ballots (s. 101.048, Fla. Stat.)

Background: Chapter law 2007-30 revised the timeframe from 3 to 2 days after Election Day in which a provisional ballot voter can bring in evidence of eligibility in order for his or her provisional ballot to be counted. This change was made to accommodate and conform to a legislative change to another section in the law. Section 102.141, Fla. Stat., was amended to: 1) shorten the period for submitting first unofficial election results, and 2) count provisional ballots as part of the first unofficial election results for purposes of a potential recount.

> Action to be taken: **Until DOJ preclears this change, a provisional ballot voter will still have up to 3 days to submit evidence of eligibility in order for his or her provisional ballot to count. (Remember, persons who voted provisionally because they did not provide identification at the polls do not have to provide evidence of eligibility. All that is required is for the canvassing board to compare the signature on the voter certificate with the signature on the voter registration record. (see s. 101.048(2), Fla. Stat.)). This also means that the canvassing boards will have less than a half day to canvass provisional ballots before submitting the count as part of the first unofficial election results.**

The Florida Senate

Issue Brief 2012-222 *September 2011*

Rules Subcommittee on Ethics and Elections

FLORIDA ELECTION CASE LAW AND FEDERAL PRECLEARANCE UPDATE

Statement of the Issue

Since 2000, state and federal courts have stricken or modified a number of state election statutes on free speech and other constitutional grounds. Therefore, the Florida Statutes do not always reflect the current state of the law on particular election subjects. Additionally, provisions enacted by the Florida Legislature affecting voting practices or procedures are subject to preclearance by the U.S. Department of Justice and/or the courts. Thus, some new legislation may not be effective until the preclearance process has been completed.

There are four components to this issue brief: 1) an explanation of the federal election law preclearance process and an update on the current preclearance status of last session's major election bill; 2) a brief report on implementation of the bill to date; 3) a review of case law decisions holding current provisions of Florida's Election Code unconstitutional or narrowing their scope; and, 4) an update on major pending election law cases.

Discussion

I. FEDERAL PRECLEARANCE OF ELECTION ADMINISTRATION LAWS[1]

Generally

Section 5 of the Voting Rights Act freezes election practices or procedures in covered jurisdictions until the new practices or procedures have been reviewed by either the U.S. Department of Justice or via a declaratory judgment action in the U.S. District Court for the District of Columbia. Under Section 5, any change with respect to voting in a covered jurisdiction cannot be legally enforced until the provision is approved by the Court or the U.S. Department of Justice.

To obtain preclearance, covered jurisdictions must prove that the new law does not "deny or abridge the right to vote on account of race, color, or membership in a language minority group." If the jurisdiction is unable to prove the absence of such discrimination, the Court will deny the requested judgment or the Attorney General will object. In either case, the law remains unenforceable.

Whether a jurisdiction is a covered jurisdiction is determined according to a formula in Section 4 of the Voting Rights Act. Initially, the formula consisted of a determination as to: 1) whether there was a "test or device" restricting the opportunity to register and vote; and, 2) whether less than 50% of people of voting age were registered to vote on November 1, 1968, or if less than 50% of people of voting age voted in the presidential election of 1964. In 1965, no part of the State of Florida was a covered jurisdiction subject to preclearance.

In 1975, Congress broadened Section 5 to address discrimination against members of "language minority groups." Among other changes, Congress also amended the definition of "test or device." Under the new definition, a "test or device" included the practice of providing election information, including ballots, only in English in states or political subdivisions where members of a single language minority constituted more than 5% of the citizens of voting age. These changes had the effect of covering Alaska, Arizona, and Texas in their entirety, and parts of California, Florida, Michigan, New York, North Carolina, and South Dakota." The parts of Florida which were

[1] Excerpted in part from the U.S. Department of Justice website which is located at: http://www.justice.gov/crt/about/vot/sec_5/about.php.

determined to be subject to Section 5 are: Collier County, Hardee County, Hendry County, Hillsborough County, and Monroe County.[2]

As a result of the amendment in 1975, any statewide Florida law affecting election administration practices or procedures must either be precleared by the U.S. Department of Justice or approved by the U.S. District Court for the District of Columbia, since implementation of such a law would necessarily affect Florida's five preclearance counties. Historically, such laws have not taken effect in *any* Florida county until after preclearance or approval, since election laws must be implemented uniformly throughout the state.[3]

Preclearance of Chapter 2011-40, Laws of Florida

During the 2011 Legislative Session, the Florida Legislature passed House Bill 1355, an omnibus elections act which was signed into law by Governor Scott.[4] The law contains numerous changes to various elections practices and procedures and, therefore, is subject to preclearance under Section 5 of the Voting Rights Act.

On May 19, 2011, the Secretary of State issued a binding directive to the supervisors of elections "for the purpose of ensuring that specific new changes are uniformly interpreted and implemented and that the elections are conducted in a fair and impartial manner so that no voter is disenfranchised."[5] The first portion of the directive advises the supervisors of the changes made to the early voting periods and to require that notice of the early voting hours be posted and sent to the Secretary. The second portion of the directive informs the supervisors about the changes with respect to out-of-county voters who seek to change addresses on Election Day; they must now vote a provisional ballot instead of a regular ballot, unless they are active military or family members of an active member of the military. The third portion of the directive addresses changes made to the process that poll workers use to verify a voter's address or identity at the polls.

On June 9, 2011, the Secretary of State submitted the provisions of the new law to the U.S. Department of Justice for preclearance. While preclearance was pending, by letter dated July 29, 2011, the Secretary withdrew four sections of the law from consideration by the U.S. Department of Justice.[6] On August 1, 2011, the Secretary filed suit seeking a declaratory judgment in the U.S. District Court for the District of Columbia in which the Secretary seeks a judgment from the Court that those four provisions do not deny or abridge the right to vote on account of race, color, or membership in a language minority group.[7] The U.S. Department of Justice did not object to any of the remaining changes. Thus, 76 of 80 sections of Chapter 2011-40 are now enforceable law in Florida.

While it is uncertain how long the litigation will be pending, it is anticipated that it will be handled expeditiously.

II. IMPLEMENTATION OF FLORIDA'S 2011 ELECTION LAW[8]

The Florida State Association of Supervisors of Elections updated committee staff on the implementation of the new election law.[9] Presently, counties not subject to the preclearance requirement have been working on implementing all of the changes made in that law. The counties subject to preclearance have begun implementing the 76 provisions of the law that were precleared by the Justice Department. Concerning the remaining four provisions, implementation will be impacted by several factors such as the date of the presidential preference

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[2] The determinations for Collier and Hendry County are recorded in the Federal Register at 41 FR 34329 (August 13, 1976). The determinations for the remaining counties are recorded in the Federal Register at 40 FR 43746 (September 23, 1975).

[3] Section 97.012, F.S.

[4] HB 1355 became Chapter 2011-40, LAWS OF FLA., upon the Governor's signature.

[5] Directive 2011-01.

[6] The four sections withdrawn from the Attorney General's consideration are: Section 4 (amending the procedures for third party voter registration organizations' registration and conduct of voter registration drives in s. 97.0575, F.S.); Section 23 (amending the initiative petition procedures in s. 100.371, F.S.); Section 26 (providing that most out-of-county voters changing their addresses on voting day must vote a provisional ballot in s. 101.45, F.S.); and Section 39 (amending the early voting provisions in s. 101.657, F.S.).

[7] The litigation is styled *Florida v. Holder*, D.C. Cir. Case No. 11-1428.

[8] Ch. 2011-40, LAWS OF FLA.

[9] Via telephone conversations on August 11, 2011 and August 18, 2011 with David Stafford, President of the Association.

primary; whether the Court grants the declaratory judgment in *Florida v. Holder*; the date that the declaratory judgment, if granted, becomes final; and, the amount of time between the date the order is final and the date of the presidential preference primary.

III. CASE LAW REVIEW FINDINGS

The scope of this case law review is limited to significant cases that found current provisions of Florida's Election Code unconstitutional or applied a narrowing construction to save the provisions from constitutional infirmity. Within those parameters, courts have addressed a wide variety of issues over the past decade, including advertising sponsorship disclaimers and the excess spending subsidy for publicly-financed candidates. The most recent court decision on Florida's 2010 electioneering laws is also included for general informational purposes.

Political Advertising

***Doe v. Mortham,* 708 So. 2d 929 (Fla. 1998)**

Issues: Anonymous Political Advertising; Sponsorship Identification Disclaimers
Florida Statutes affected: Sections 106.071, 106.143, and 106.144, F.S.
Impact: Affirmed the constitutionality of Florida's political advertising disclaimer laws, while attempting to carve out a narrow exemption for *individuals* acting *independently* using only *their own modest resources.*

Discussion:
In *Doe v. Mortham,*[10] the Florida Supreme Court was faced with a challenge to the constitutionality of two sections of Florida Statutes involving sponsorship identification in political advertisements[11] and independent expenditures,[12] and another section requiring the filing of a detailed statement by groups endorsing candidates or issues.[13] The Court upheld the facial constitutionality of the State's laws while creating a narrow, as-applied exemption to the sponsorship identification requirement for personal pamphleteering by an *individual* who acts *independently* and who funds the political messages exclusively with his or her *own modest resources*.

The *Doe* plaintiffs were individuals seeking to engage in anonymous political advocacy. They sought to make independent expenditures supporting and opposing candidates and referendums during the 1996 election cycle, either individually, in association with each other, or in association with other individuals or groups. They planned to publish their ads in several different communications mediums, including billboards, direct mail, radio, television, newspapers and periodicals. The specific independent expenditures were to exceed $100 in the aggregate for each individual election.

After initially disposing of the plaintiff's facial overbreadth challenge,[14] the Court determined that the statutes could be narrowed to exclude personal pamphleteering of *individuals* who act *independently* and expend only

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[10] 708 So. 2d. 929 (Fla. 1998).

[11] § 106.143, F.S. (1997). Section 106.011(17), F.S., defines the term "political advertisement" to mean:
> [A] paid expression in any communications media... or by means other than the spoken word in direct conversation, which shall support or oppose any candidate, elected public official, or issue.

[12] § 106.071, F.S. (1997). Section 106.011(5)(a), F.S., defines "independent expenditure" to mean:
> [A]n expenditure...for the purpose of advocating the election or defeat of a candidate or...issue, which... is not controlled by, coordinated with, or made upon consultation with, any candidate, political committee, or agent of such candidate or committee.

[13] The Legislature repealed the other challenged statute, section 106.144, F.S., in 2005. See Ch. 2005-277, LAWS OF FLA., § 77, at 2690 (repealing statute relating to candidate and issue endorsements).

[14] A statute is overbroad if, in addition to proscribing activities which may be constitutionally forbidden, it also sweeps within its coverage speech or conduct which is protected by the guarantees of free speech and association. *Thornhill v. Alabama,* 310 U.S. 88 (1940). To uphold a facial challenge, the overbreadth of the statute must not only be real, but also *substantial,*

their own *modest resources* (the *McIntyre* exemption).[15] So read, the Court found that the disclaimer statutes at issue were not overbroad, and that "any alleged infirmity left uncured by our construction...is insubstantial and can be dealt with on an 'as applied' basis."[16] That ruling was clear and is probably where the *Doe* Court should have stopped; instead, it chose to re-write and strike language from the statutes. The *Doe* Court specifically held that s. 106.143(1)(b), F.S., requiring sponsors of *political advertisements* to identify themselves, does not apply to:

> ...the *personal pamphleteering of individuals* acting *independently* and using only *their own modest resources*. As for section 106.071, only to the extent that the last sentence in this section requires identification of *independent advertisements* made by individuals does it run afoul of the First Amendment, ... The generic requirement in both section 106.071 and 106.143 that all communications be marked with the phrase "paid political advertisement" in no way violates the anonymity concerns underlying *McIntyre*.[17]

The Court proceeded to strike and re-write the last sentence of s. 106.071, F.S., to eliminate the need for a sponsorship disclaimer on independent expenditures by ALL individuals, not just those who fit the *McIntyre* exemption: "Any political advertisement paid for by an independent expenditure shall prominently state 'Paid political advertisement.'"[18] As a result, a wealthy individual can run *anonymous* independent expenditure advertisements in Florida.

Public Campaign Financing; Excess Spending Subsidy Provision

***Scott v. Roberts*, 612 F.3d 1279 (11th Cir. 2010)**

Issue: Excess spending subsidy for publicly-financed campaigns
Florida Statute affected: 106.355, F.S.
Impact: Though the Court did not rule on the constitutionality of Section 106.355, F.S., by granting the preliminary injunction the Court hinted that the statute may be unconstitutional.

Discussion:
In 2010, Rick Scott campaigned for the Republican Party nomination for Governor of the State of Florida. As a candidate, Mr. Scott opted not to participate in the public campaign financing system.[19] His most competitive opponent, Bill McCollum, opted to participate in the public campaign financing system.

"In 1986, the Legislature found that the costs of running an effective campaign for statewide office had reached a level tending to discourage persons from running for office. Public financing laws were enacted to encourage qualified persons to seek statewide office who may not otherwise do so and to protect the effective competition by candidates using public funding."[20] Public financing is available to a candidate who is not running unopposed and agrees to certain limits on making expenditures, receiving contributions, and agrees to certain reporting and audit

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when judged in relation to the statute's plainly legitimate sweep. *Doe*, 708 So. 2d at 931 (Fla. 1998), quoting *Broadrick v. United States*, 93 S.Ct. 2908, 2915-18 (1973).

[15] The *Doe* Court also rejected a vagueness challenge to the statutes. A statute will be held *void for vagueness* if it fails to clearly define the conduct prohibited, such that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385 (1926). However, the Court did find vague the phrase "with respect to any candidate or issue" in s. 106.071, F.S., governing reporting requirements for independent expenditure ads exceeding $100. The Court cured this vagueness problem by requiring the reporting of only those independent expenditures exceeding $100 which "*expressly advocate* the election or defeat of a clearly identified candidate or referendum issue." *Doe*, 708 So.2d at 933.

[16] *Doe*, 708 So. 2d at 931-32.

[17] *Id.* at 934-35.

[18] *Id.* at 934-35.

[19] The Florida Election Campaign Financing Act is found in ss. 106.30-106.36, F.S.

[20] 2010 Public Campaign Financing Handbook, located on the website for the Division of Elections at: http://election.dos.state.fl.us/publications/pdf/2010/PublicCampaignFinancingHB2.pdf.

requirements.[21] In order to qualify for public financing, the candidate must raise a certain amount of contributions and submit documentation to the Division that the candidate meets the threshold to receive public financing.[22] When a candidate who has chosen not to participate in public financing exceeds the expenditure limit in Section 106.34, F.S., all opposing participating candidates receive a dollar-for-dollar match from the State for every dollar over the limit up to two times the expenditure limit. [23]

In early July 2010, Mr. Scott had almost spent enough funds to trigger the excess spending subsidy. Prior to reaching the threshold to trigger the subsidy, Mr. Scott filed suit against the Secretary of State asking the U.S. District Court for the Northern District of Florida to declare the statute unconstitutional and to preliminarily enjoin the Secretary from enforcing it. Scott alleged that the subsidy chilled his right to free speech by imposing a substantial burden on his own well-established right to spend his own funds in support of his candidacy in violation of the First and Fourteenth Amendments of the U.S. Constitution.[24]

The U.S. District Court for the Northern District of Florida denied Mr. Scott's request for a preliminary injunction finding that the Governor did not demonstrate that he was likely to prevail on the merits. The Eleventh Circuit reversed and granted the preliminary injunction because, in its view, there was a substantial likelihood that the excess spending provisions are unconstitutional. The Court found that the excess spending subsidy imposes a burden on nonparticipating candidates by making the nonparticipating candidate's campaign more costly.[25] This burden, the Court concluded, was not outweighed by the State's interest in reducing corruption or the appearance of corruption.[26] While the Court did not expressly rule the subsidy to be unconstitutional, it granted the preliminary injunction to Mr. Scott because "Florida has not...proved that the excess spending subsidy furthers the anticorruption interest in the least restrictive manner.[27]

Author's Note: In June 2011, the U.S. Supreme Court ruled that a similar Arizona excess spending subsidy was unconstitutional.[28] In overturning that statute, the Court held that the Arizona excess spending subsidy was a substantial burden on political speech which was not justified by the state's interest in preventing corruption.

Electioneering

***National Organization for Marriage, Inc. v. Roberts,* Case No. 1:10-cv-00192-SPM/GRJ (August 8, 2011, N.D. Fla. 2011)**

Issues: Electioneering communication, electioneering communications organizations
Florida Statutes affected: Sections 106.011(18)(a) and 106.011(19), F.S.

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[21] Section 106.33, F.S.

[22] Section 106.35, F.S.

[23] Section 106.355, F.S., provides:

> **Nonparticipating candidate exceeding limits.**—Whenever a candidate for the office of Governor or member of the Cabinet who has elected not to participate in election campaign financing under the provisions of ss. 106.30-106.36 exceeds the applicable expenditure limit provided in s. 106.34, all opposing candidates participating in such election campaign financing are, notwithstanding the provisions of s. 106.33 or any other provision requiring adherence to such limit, released from such expenditure limit to the extent the nonparticipating candidate exceeded the limit, are still eligible for matching contributions up to such limit, and shall not be required to reimburse any matching funds provided pursuant thereto. In addition, the Department of State shall, within 7 days after a request by a participating candidate, provide such candidate with funds from the Election Campaign Financing Trust Fund equal to the amount by which the nonparticipating candidate exceeded the expenditure limit, not to exceed twice the amount of the maximum expenditure limits specified in s. 106.34(1)(a) and (b), which funds shall not be considered matching funds.

[24] Gov. Scott also alleged that the system violated the Equal Protection Clause. However, as with other similar cases, the Court declined to address the equal protection argument.

[25] *Scott v. Roberts*, 612 F.3d 1279, 1290-91 (11th Cir., 2010).

[26] *Id.* at p. 1293.

[27] *Id.* at p. 1294.

[28] *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

Impact: Though still subject to appellate review, the Northern District's ruling affirms the constitutionality of the changes the Legislature made to Florida's electioneering laws in Chapter 2010-167, L.O.F.

Discussion:
The National Organization for Marriage, Inc., ("NOM"), a nonprofit organization, planned to disseminate radio and TV communications, along with direct mail pieces, just prior to the 2010 election. The targeted communications would identify specific candidates and the offices they were running for, state their views on same-sex marriage, state whether the candidates were good or bad for Floridians, and exhort constituents to call the candidate and ask whether the candidate "supports marriage only between one man and one woman."[29]

Under Florida law, advertisements are "electioneering communications" if they are publicly distributed by television, radio, cable television, satellite system, newspaper, magazine, direct mail, or telephone, refer to or depict a candidate without advocating for or against him or her within 30 days before a primary election or 60 days before any other election, and are targeted toward the people the candidate would represent.[30] Thus, the Court ruled that NOM's communications would squarely fit within the definition of "electioneering communications" in s. 106.011(18)(a), F.S.

In Chapter 2010-167, L.O.F., the Legislature amended the electioneering provisions to incorporate "disclosure and reporting requirements for organizations that receive more than $5,000 for communications if those communications are publicly distributed (by television, radio, newspaper, magazine, mail, or telephone) shortly before an election (30 days for primaries, 60 days for general elections) identify a candidate, target the geographic area the candidate would represent if elected, and are 'susceptible of no reasonable interpretation other than an appeal to vote for or against the specific candidate.'"[31]

NOM argued that three provisions[32] of Florida's new electioneering law "violated the First Amendment because they were unconstitutionally vague or overbroad, because "they are driven by the 'appeal to vote' test."[33] The

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[29] *National Organization for Marriage, Inc. v. Roberts*, Slip Opinion at p. 2.

[30] Section 106.011(18)(a), F.S. (2010), defined "electioneering communication" to mean:

> [A]ny communication that is publicly distributed by a television station, radio station, cable television system, satellite system, newspaper, magazine, direct mail, or telephone and that:
>
> 1. Refers to or depicts a clearly identified candidate for office without expressly advocating the election or defeat of a candidate but that is susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate;
> 2. Is made within 30 days before a primary or special primary election or 60 days before any other election for the office sought by the candidate; and,
> 3. Is targeted to the relevant electorate in the geographic area the candidate would represent if elected.

[31] *National Organization for Marriage, Inc. v. Roberts*, Slip Opinion at pp. 3-4.

[32] Specifically, NOM challenged ss. 106.011(18)(a) (*see, supra* note 20), 106.011(19), and 106.03(1)(b), F.S. (2010).
Section 106.011(19), F.S., provided:

> "Electioneering communications organization" means any group, other than a political party, affiliated party committee, political committee, or committee of continuous existence, whose election-related activities are limited to making expenditures for electioneering communications or accepting contributions for the purpose of making electioneering communications and whose activities would not otherwise require the group to register as a political party, political committee, or committee of continuous existence under this chapter.

Section 106.03(1)(b)1., F.S. (2010), provided in relevant part:

> Each electioneering communications organization that receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding $5,000 shall file a statement of organization as provided in subparagraph 2. by expedited delivery within 24 hours after its organization or, if later, within 24 hours after the date on which it receives contributions or makes expenditures for an electioneering communication in excess of $5,000.

appeal to vote test is in the definition of "electioneering communication" and narrows the scope of that term to include only communications that are "susceptible of no reasonable interpretation other than an **appeal to vote** for or against a specific candidate."[34]

As the *NOM* Court stated,

> The 'appeal to vote' language was specifically incorporated into the statute to ensure that regulations would only affect organizations engaged in electioneering communications for or against a particular candidate, which the Government has a compelling interest to regulate.[35]

The Court ruled that the "appeal to vote" test had been met by the communications and that the communications were unambiguously campaign-related. The Court stated that the government has a compelling interest in regulating election communications that are unambiguously campaign-related and concluded that there is no vagueness concerning the application of the statutes to NOM's communications.

The Court also rejected NOM's claim that the "appeal to vote" test was facially vague. In order for such a claim to proceed, the plaintiff has to prove that the law can *never* be applied in a valid manner and that every application creates an impermissible risk of suppression of ideas. The Court stated:

> The "appeal to vote" test adopted by Florida is not facially vague. It provides an objective standard that was created and applied by the U.S. Supreme Court.[36]

Finally, the Court rejected NOM's argument that the statute is unconstitutionally overbroad. The Court stated that the test was specifically designed to avoid restriction of protected speech by erring on the side of the speaker in close calls. Therefore, the "appeal to vote" test does not substantially restrict protected speech and is not facially overbroad.

IV. PENDING ELECTION LAW LITIGATION

In addition to *Florida v. Holder*, there are approximately 12 other suits pending concerning the Florida Election Code. Some of those suits are pending mandate from the court, others are still in the early stages of litigation. The following is a brief description of a few of the more significant suits pending:

- *Sullivan v. Browning*: The Secretary of State issued Directive 2011-01, which addresses implementation of the provisions of Chapter 2011-40, L.O.F.[37] The plaintiffs are suing to obtain a declaratory judgment alleging that the supervisors of election are implementing the provisions of Chapter 2011-40 prior to receiving the required preclearance. They allege that the provisions cannot, therefore, be implemented. The plaintiffs seek an order from the Court stating that the Governor and Secretary of State failed to seek preclearance prior to enforcing Chapter 2011-40 in violation of the Voting Rights Act. They also seek an injunction delaying implementation of Chapter 2011-40, L.O.F., until preclearance occurs. The suit is pending in the Southern District of Florida. The plaintiffs have filed a motion for preliminary injunction while the defendants have filed a motion to dismiss. At this time, no hearing has been requested or ordered. The parties await a ruling on the pending motions.[38]
- *Bray v. Browning*: Several judges from the Sixth Judicial Circuit of Florida are seeking a declaratory judgment and reimbursement of qualifying fees and elections assessments they paid for the 2008 election. Each of the plaintiffs ran in the 2008 election without opposition. They allege that because they ran

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[33] *National Organization for Marriage, Inc. v. Roberts*, Slip Opinion at pp. 4-5.
[34] *Id.* at p. 3 (citing, s. 106.11(18)(a), F.S. (2010)).
[35] *Id.* (citing, *McConnell v. FEC*, 540 U.S. 93, 190 (2003)).
[36] *Id.* at p. 6.
[37] *See, supra* note 5 and accompanying text (discussing the Directive).
[38] *Sullivan v. Browning*, U.S. District Court, Southern District of Florida, Case No.: 4:11-cv-10047 KMM.

without opposition the supervisors of election did not have to place them on the ballot and, therefore, incurred no expense for those races. The plaintiffs further allege that appellate judges and those who withdraw their candidacy do not have to pay qualifying fees and elections assessments. The plaintiffs claim that since they were not put on the ballot they should not be required to pay the fees and assessments. The crux of their argument is that the collection of those monies violates their constitutional right to equal protection under Article I, Section 2, Florida Constitution. The Court heard the Secretary's Motion to Dismiss on August 18, 2011, but has not yet ruled.[39]

- *Worley v. Roberts*: A group of individuals who would like to join together to run political ads that would constitute independent expenditures have filed a declaratory judgment action seeking to strike the Election Code provisions concerning political committees as unconstitutional.[40] They allege that the reporting, registration, and disclosure requirements applicable to political committees violate their First Amendment rights because they are a prior restraint that burdens protected speech. The plaintiffs also argue that the funding restrictions, expenditure restrictions, and required disclaimers violate their First Amendment speech and association rights. Finally, the plaintiffs allege that the laws treat them differently than other corporations in violation of their right to equal protection under the Fourteenth Amendment. On July 27, 2011, the Court heard motions for summary judgment from both the plaintiffs and the defendants. The parties are waiting for a ruling on the motions.[41]

If any of these cases results in an adverse ruling, staff will bring it to the subcommittee's attention.

[39] *Bray v. Browning*, Second Judicial Circuit of Florida, Case No.: 2011-CA-00071.
[40] Because the individuals would like to join together to engage in political advertising, they would be required to register and report as a political committee. *See,* Section 106.011(1)(a), F.S.
[41] *Worley v. Roberts*, U.S. District Court, Northern District of Florida, Case No.: 4:10-cv-00423-RH-WCS.