UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

TIM NORRIS, and RANDY MAGGARD Plaintiffs, v. KEN DETZNER, Secretary of State, in his official capacity Defendants.	CASE NO. _____ MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs request that this Court issue a preliminary injunction enjoining Defendant, Ken Detzner, in his official capacity as Secretary of State, from enforcing the first clause of Section 20(a) [1] of Article III of the Florida Constitution and the first clause of Section 21(a)[2] of Article III of the Florida Constitution as interpreted by the Florida Supreme Court (the "Challenged Clauses"), and directing that all other state officials be enjoined from enforcing the Challenged Clauses. Because Plaintiffs are likely to prevail on the merits, and the other requirements for preliminary relief are satisfied, this Court

[1] Fla. Const. art. III, § 20(a), provides that **no apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent**; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory. (emphasis added).

[2] Fla. Const. art. III, § 21(a), provides that **no apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent**; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory. (emphasis added).

should preliminarily enjoin the Defendant and all other state officials from enforcing the Challenged Clauses, as set forth herein.

STATEMENT OF FACTS

I. BACKGROUND

The background facts related to the adoption of the Challenged Clauses, and the interpretations of those clauses are laid out in detail in the accompanying verified complaint in this matter at pages 26-53 (Complaint, ECF Docket #1).

II. FLORIDA SUPREME COURT RULING AND ITS AFTERMATH

In February 2012, operating under the new requirements imposed by the Challenged Clauses, the Florida Legislature approved, and the Governor signed, a redistricting plan for congressional districts. *See League of Women Voters of Fla. v. Detzner*, 40 Fla. L. Weekly S432, 2015 Fla. LEXIS 1474 *131 (Fla. July 9, 2015). Upon adoption of the plan, the League of Women Voters and individual citizens (led by Rene Romo) filed a suit challenging the plan in the Second Circuit Court in and for Leon County, Florida ("state trial court"). *Id*. at *15. The Florida Supreme Court affirmed the trial court's holding that congressional districts 5 and 10 were unconstitutional, and also concluded that congressional districts 13, 14, 21, 22, 25, 26, and 27 were drawn with unconstitutional intent to favor or disfavor a political party or incumbent. *See id*. The Florida Supreme Court affirmed the trial court's finding that:

> [A] group of partisan political operatives 'conspire[d] to manipulate and influence the redistricting process' and succeeded in 'infiltrat[ing] and influenc[ing] the Legislature, to obtain the necessary cooperation and collaboration' to 'taint the redistricting process and the resulting map with improper partisan intent.'

Id. at *22-23. Although conceding that "not every meeting held or every communication made was improper, illegal, or even violative of the letter of the Fair Districts Amendment[,]" the Florida Supreme Court affirmed the trial court's ruling that political operatives "managed to taint the redistricting process and the resulting map with improper partisan intent. There is just too much circumstantial evidence of it, too many coincidences, for me to conclude otherwise." *Id*. at *26. The trial court found, and the Florida Supreme Court affirmed, that the Speaker of the House organized a meeting in December 2010 involving "Republican political consultants and legislative staffers, to discuss the upcoming redistricting process" which, among other things, "tainted" the Redistricting Plan. *League of Women Voters*, 40 Fla. L. Weekly S432, 2015 Fla. LEXIS 1474, at *30.

According to the Florida Supreme Court, such "communications of individual legislators or legislative staff members, if part of a broader process to develop portions of the map, *could* directly relate to whether the plan as a whole or any specific districts were drawn with unconstitutional intent" and noted that there is "no *acceptable level* of improper intent." *Id*. at *57-58 (emphasis added). The trial court found that persons associated or identified with the Republican party impacted the drawing of these two districts on the basis of evidence about their suggestions for the map and the manner in which these suggestions appear to have been adopted by the legislature. *See Romo v. Detzner,* 2012-CA-412, 2012-CA-490, slip op. at 31-32 (Fla. Cir. Ct. July 10, 2014).

Under the Florida Supreme Court's interpretation of what the Challenged Clauses require, the First Amendment rights of those who wish to speak with their elected

representatives, and petition those elected representatives on the matter of redistricting, are now chilled. This is especially true where the would-be speakers are engaged in the political process and aligned with a political party, as demonstrated by the Florida Legislature's July 20, 2015, memo titled "Tentative Procedure for Special Session on Congressional Reapportionment. *See* Memorandum from President of the Florida Senate, and Speaker of the Florida House to Members of the Florida Legislature 2-3 (July 20, 2015) (attached to Complaint as Exhibit 1) (hereafter "Legislature's Procedures"). The Legislature's gag order is the direct result of the Florida Supreme Court's interpretation of the Challenged Clauses. The Legislature's Procedures bar certain speakers (such as Plaintiffs) from discussing redistricting with legislators and legislative staff.

The Legislature will convene on August 10, 2015, to attempt to draw a new congressional map that complies with the Challenged Clauses and on October 19, 2015, to draw a state senate map that complies with the Challenged Clauses.

III. THE STATE OF FLORIDA FAILED IN ITS ATTEMPT TO ESTABLISH A STANDARD THAT HAS EVADED THE U.S. SUPREME COURT

The U.S. Supreme Court has clearly and unequivocally rejected the notion that claims of political partisan impact in redistricting cases alleging political gerrymanders are justiciable. *See Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004). The Challenged Clauses, of course, are an effort to control the "intent" behind an "effect" that the U.S. Supreme Court has held presents a non-justiciable question. The Challenged Clauses have resulted in a government attempt to eliminate all speech by persons who might convey an impermissibly "partisan thought" to a legislator or legislative staffer that could subsequently impact the redistricting process. The U.S. Supreme Court has repeatedly

rejected precisely this type of government "thought policing."[3]

The U.S. Supreme Court held that there are no "judicially discernible and manageable standards by which political gerrymander cases are to be decided." *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004); *Davis v. Bandemer*, 478 U.S. 109, 123 (1986). While reconsidering its decision in *Davis v. Bandemer* in 2004, the Court reviewed a progression of lower court decisions and concluded, "[t]o think that this lower court jurisprudence has brought forth judicially discernible and manageable standards would be fantasy." *Vieth*, 541 U.S. at 281. The Court continued:

> [A] person's politics is rarely as readily discernible — and *never* as permanently discernible — as a person's race. Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line. We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold. These facts make it impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy.

Id. at 287. The Florida Supreme Court's answer to the question of partisan gerrymandering is one that infringes the First Amendment rights of individual citizens who wish to petition their elected representatives. Rather than heed the U.S. Supreme

[3] *See*, *e.g.*, *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 790-791 (1988) (the government may not substitute its judgment for that of speakers and listeners); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224 (1987) (criticizing State's claimed interest in protecting the Republican Party on the ground that it viewed a particular expression as unwise or irrational); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791-792, n. 31 (1978) (criticizing the government's paternalistic interest to protect the political process by restricting speech); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 (1977) (criticizing the government's paternalistic interest in maintaining the quality of neighborhoods by restricting speech).

Court when assessing the justiciability of partisan effects, the Challenged Clauses, as interpreted and implemented, are an attempt by the State of Florida to manage effect by assessing and controlling intent through regulation of speech and thought. While the U.S. Supreme Court has, thus far, found it impossible to establish "discernible and manageable" standards to evaluate partisan redistricting effects, the Florida Supreme Court has given meaning to the Challenged Clauses by barring persons presumed to have certain intent from attempting to affect the redistricting process. With this background from the U.S. Supreme Court's jurisprudence about the closely connected matters of intent and effect, the Plaintiffs' claims are properly framed for this Court's evaluation.

IV. STANDARD OF REVIEW

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "To demonstrate entitlement to a preliminary injunction, a litigant must show: (1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable injury if the injunction is not granted; (3) that the balance of equities tips in its favor; and (4) that the public interest would be furthered by the injunction." *Glossip v. Gross*, 135 S. Ct. 2726 (2015); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1265 (11th Cir. 2001); *Affordable Aerial Photography, Inc. v. Nicklaus*, 2013 U.S. Dist. LEXIS 189217 (S.D. Fla. 2013).

V. ARGUMENT

A. Plaintiffs are likely to succeed on the merits

Plaintiffs' probability of success on the merits is the most critical criteria when

considering a motion for preliminary injunction. *Osmose, Inc. v. Viance, LLC*, 612 F.3d 1298, 1307 (11th Cir. 2010); *Norfolk S. Ry. Co. v. Ala. Dep't of Revenue*, 550 F.3d 1306, 1312 (11th Cir. 2008). Here, Plaintiffs claim the Challenged Clauses, as interpreted by the Florida Supreme Court, infringe on their First Amendment rights. As a result, the burden shifts to the government to prove the constitutionality of the Challenged Clauses. *See U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). When First Amendment rights are at stake, the government has the burden of proving the constitutionality of the challenged law regardless of the applicable level of scrutiny. *Broward Coal. of Condos v. Browning,* 2008 U.S. Dist. LEXIS 91591 (N.D. Fla. 2008). Where the government bears the ultimate burden of proof demonstrating the constitutionality of a challenged law, a movant in a preliminary injunction setting must be deemed likely to succeed on the merits unless the government is able to demonstrate the law's constitutionality. *See Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

The government bears a heavy burden when it restricts political speech. As the Supreme Court explained,

> [P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are "subject to strict scrutiny" which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest."

Citizens United v. FEC, 558 U.S. 310, 340 (U.S. 2010) *citing FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 464 (2007) (opinion of Roberts, C. J.); *see also Eu v. San*

Francisco County Democratic Central Comm., 489 US 214, 222 (1989) (holding that laws that burden political parties and their members are subject to strict scrutiny).

B. The Challenged Clauses are Void for Vagueness

1. Statutes and Constitutional Amendments that are Unconstitutionally Void for Vagueness Must be Struck Down

The Challenged Clauses are unconstitutionally vague, and must be struck down because they violate the First Amendment and the fundamental right to due process of law. "The void-for-vagueness doctrine reflects the principle that a statute which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Harris*, 564 F.3d at 1310 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984)) (internal quotation marks omitted). To find a civil statute void for vagueness, the statute must be "so vague and indefinite as really to be no rule or standard at all." *Boutilier v. INS,* 387 U.S. 118, 123 (1967); *Sr. Civ. Lib. Ass'n, Inc. v. Kemp*, 965 F. 2d 1030 (11th Cir. 1992). The U.S. Supreme Court explained,

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. …[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly….[L]aws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972) (internal citations omitted);

see also Harris v. Mexican Specialty Foods, Inc., 564 F.3d 1301, 1311 (11th Cir. 2009) ("Vagueness within statutes is impermissible because such statutes fail to put potential violators on notice that certain conduct is prohibited, inform them of the potential penalties that accompany noncompliance, and provide explicit standards for those who apply the law."). A law violates due process requirements "if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Harris*, 564 F.3d at 1311 (quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (2003)). Vagueness in a content-based speech regulation "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72 (1997). A state constitutional amendment that limits a person's freedom of expression but fails "[t]o give fair notice of what acts will be punished..." violates both due process and free speech rights. *Winters v. New York*, 333 U.S. 507, 509-10 (1948). More recently, the U.S. Supreme Court wrote,

> [T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way….The vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect.

FCC v. Fox TV Stations, Inc., 132 S. Ct. 2307, 2317 (2012). "*Rigorous* adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Id*. (emphasis added); *see also Buckley v. Valeo*, 424 U.S. 1, 41, n.48 (1976) (vague laws

trap the innocent by not providing fair warning, foster arbitrary and discriminatory application, and inhibit protected expression by inducing citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked).

2. Florida's Challenged Clauses are Void for Vagueness Because the Regulated Speakers Cannot Determine Appropriate Conduct and the Judicial Review Lacks Discernible Standards

The Challenged Clauses demonstrate the near impossibility of compliance by a person of ordinary intelligence, and highlight the lack of discernible standards for enforcement. For example, the Florida Supreme Court explained that "[n]ot every meeting held or every communication made was improper, illegal, or even violating of the letter of the Fair Districts Amendment." *League of Women Voters of Fla.*, 40 Fla. L. Weekly S432, 2015 Fla. LEXIS 1471 at *28. Instead, all of the facts recounted in the Court's opinion, *when viewed* "*collectively*" amounted to a violation of the Fair Districts Amendment. *Id*. (emphasis added). No one can know which meetings or communications were impermissible, only that all of them, viewed "collectively," amounted to impermissible actions. The court provides no standard for assessing whether any given meeting or communication is "improper," "illegal," and in violation of the court's standards.

The Florida Supreme Court agrees with the trial court's criticism of Republican consultants for submitting maps through surrogates. *See id.* However, the Court also says that it is acceptable under the Challenged Clauses to submit maps anonymously or through surrogates, yet the Republican consultants were wrong to do so in the context of this case. *Id*. at *12, n.4. Faced with these non-standards, Plaintiffs "must necessarily

guess at [the law's] meaning." *Citizens United*, 558 U.S. at 324 (alterations in the original). No person of ordinary intelligence can discern from the court's opinion what communication with their elected representatives is permissible and can occur without risking entanglement in inevitable post-enactment challenge and judicial evaluation into intent of speakers and participants. Rather than risk creating a violation of the state constitution, Plaintiffs are instead chilled in their ability to speak. Plaintiffs are unable to discern when it is acceptable to submit maps to legislators anonymously or through third-parties and when doing so may cause the Legislature's map to become unconstitutional. Additionally, state legislators have been instructed – in order to comply with the Florida Supreme Court's opinion – to refrain from talking with Plaintiffs about the prohibited subject of the partisan impact of any proposed map or amendments. This chill on speech is precisely what the Supreme Court warned against in *FCC v. Fox Television* when it laid out the standards for evaluating vagueness challenges in the First Amendment context.

Due to the impossibility of a person of ordinary intelligence being able to divine what conduct is permitted by the Challenged Clauses, and because of the lack of any discernible judicial standards by which to enforce these provisions in accordance with guidance from the U.S. Supreme Court in *Veith*, the Challenged Clauses must be declared unconstitutional.

C. The Challenged Clauses are an Impermissible Content-Based Speech Regulation

1. Impermissible Content-Based Speech Restrictions

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). "Content-based laws … target speech based on its communicative content." *Id*. at 2226. As the Court explained,

> This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. *Sorrell*, *supra,* at ___, 131 S. Ct. 2653, 2663, 180 L. Ed. 2d 544 555. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Id. at 2227. A statute or regulation is "content based if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) *citing FCC v. League of Women Voters of California*, 468 U.S. 364, 383, 377 (1984). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226; *See also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) ("For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.").

2. The Challenged Clauses, as interpreted by the Florida

Supreme Court, are an Impermissible Content-Based Speech Restriction

The Challenged Clauses are content-based speech restrictions that ban public debate and discussion on certain subjects – namely partisan issues and concerns and partisan impact of proposed redistricting plans. The occurrence of speech regarding the prohibited subject matters can invalidate an otherwise valid legislative enactment. At the same time, speech before the Legislature, and communications with the Legislature or legislators about other aspects of redistricting such as political subdivision boundaries, equal population issues, and racial and ethnics minority issues are not similarly prohibited, limited or restricted. Thus, the effect of these restrictions is that Plaintiffs, wishing to address matters of public concern about the partisan impact of congressional or legislative districts, are chilled by the Challenged Clauses and will choose to refrain from speaking unless the Challenged Clauses are declared unconstitutional.

The Challenged Clauses restricts Plaintiffs' speech purely on the basis of the message it conveys. The Supreme Court has held that the First Amendment "generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed." *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) (internal citations and quotations omitted). This requirement stands in stark contrast to the Legislative Procedures, which ban discussion of certain topics and operate as a gag order prohibiting certain speakers from discussing the partisan composition of a legislative district with legislators or legislative staff. This speech does not fall into any of the categories in which the Supreme Court has "permitted restrictions on the content of speech." *R.A.V.,* 505 U.S. at 383 (regarding obscenity, defamation and fighting words).

In *Reed v. Town of Gilbert*, the Town of Gilbert created various sign categories, including "ideological," "political," and "temporary directional" signs, and applied different regulatory standards to these different types of signs, based on their content. *See Reed*, 135 S. Ct. at 2224-2225. Here, the Florida Supreme Court created a distinction between speech that discusses partisan impact and speech that discusses any and all other issues. In *Reed*, "[t]he restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign." *Reed*, 135 S. Ct. at 2227. The same is true of the Challenged Clauses – the Florida Supreme Court's restrictions apply based "entirely on the communicative content" of the Plaintiffs' speech before the Florida Legislature.

The U.S. Constitution demands that Plaintiffs be free to communicate with their elected officials, regardless of the content of their speech. However, communicating on issues related to the partisan impact of the redistricting plan is now prohibited because the Florida Supreme Court has declared that the expression of partisan intentions may "infect" a redistricting map. In fact, if the Plaintiffs wish to communicate with those same elected officials on issues related to a partisan impact of the redistricting plan, the Florida Supreme Court suggests that Plaintiffs disguise themselves and submit commentary anonymously or via a third party. *League of Women Voters of Fla.*, 40 Fla. L. Weekly S432, 2015 Fla. LEXIS at *11. Plaintiffs may not be required to make themselves anonymous, or operate under false pretenses, in order to communicate with elected officials on any other topic. If anonymity and disguise is the prescription to the problem the Challenged Clauses seek to remedy, then Plaintiffs' speech is

unconstitutionally regulated on the basis of its content and the speaker's identity. *Reed*, 135 S. Ct. at 2227. The means by which the Challenged Clauses operate, as interpreted by the Florida Supreme Court, to prevent redistricting plans from becoming "tainted" by partisanship is content-based speech regulation. The government's interest, whether compelling or otherwise, is not achieved by the means established, and thus, cannot withstand scrutiny.

Assuming, *arguendo*, that the Florida Supreme Court's speech restrictions serve a compelling interest, their operation as a "gag order" which depends entirely on the Plaintiffs' message goes beyond the limits of any asserted interests and encroaches on protected First Amendment rights. The U.S. Supreme Court requires that the government demonstrate that it attempted to use the least restrictive means by showing that it "seriously undertook to address the problem with less intrusive tools readily available to it." *McCullen v. Coakley,* 134 S. Ct. 2518, 2524 (2014). Here, the Florida Supreme Court's encroachment on First Amendment rights goes far beyond any concerns they attempt to correct. It is one thing for Florida's Constitution to require that elected representatives elected under the banner of a political party create districts that may not "be drawn with the intent to favor or disfavor a political party of an incumbent", however quixotic that requirement may be, but it is another thing altogether to assert that such a requirement can only be enforced by prohibiting certain individuals' *speech about* the possible political consequences of redistricting decisions. The Challenged Clauses, as interpreted by the Florida Supreme Court, are a content-based restriction that is not narrowly tailored to achieve even a legitimate interest (such as administrative

convenience) and cannot be constitutionally applied to Plaintiffs' speech. As such, Plaintiffs are entitled to a preliminary injunction on this count.

D. The Challenged Clauses Violate the Petition Clause of the First Amendment

1. The Right to Petition Under the First Amendment

The right to petition the government for redress of grievances is an integral part of the First Amendment, and indeed, of representative government itself. *See Thomas v. Collins*, 323 U.S. 516, 530 (1945) ("It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable"). In a representative democracy, the government acts on behalf of the people and, to a very large extent, the concept of representation depends upon the ability of the people to make their wishes known to their representatives. *E.R.R. Pres. Conf, v. Noerr Motor Freight, Inc*., 365 U.S. 127, 137 (1961).

"The First Amendment protects the right of the people ... to petition the Government for a redress of grievances and, as we have explained, lobbying is a quintessential form of the exercise of the right to petition." *Autor v. Pritzker*, 740 F.3d 176 (D.C. Cir. 2014). The right to petition includes a prohibition against "retaliation for a citizen's exercise of his First Amendment right to Free Speech, whether that speech takes written, oral, or another form." *Holzemer v. City of Memphis*, 621 F.3d 512, 528 (6th Cir 2010); *See also Jenkins v. Rock Hill Local School Dist.*, 513 F.3d 580, 588 ("the right to criticize public officials is clearly protected by the First Amendment"). There is no question that the right to petition broadly encompasses petitioning, or lobbying, a local

legislature. *See Cal. Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 511 (1972) (affirming *Noerr* and *Pennington and* declaring that the right to petition extends to all departments of the government). The Eleventh Circuit observed that U.S. Supreme Court precedent "hold[s] that the Petition Clause protects people's rights to make their wishes and interests known to government representatives in the legislature, judiciary, and executive branches." *Biddulph v. Mortham*, 89 F.3d 1491 (11th Cir 1996) citing *Noerr Motor Freight, Inc.,* 365 U.S. at 138-41, *Trucking Unlimited,* 404 U.S. at 508-12.

2. Applying the Right to Petition to the Challenged Clauses Demonstrates the Challenged Clauses are Unconstitutional.

The Florida Supreme Court's interpretation of the Challenged Clauses, as confirmed by the Legislature's guidelines, infringes the right of citizens, including Plaintiffs, to petition their elected representatives. By exercising their First Amendment rights, citizens can subject a subsequently enacted law to invalidation. This is prohibited government retaliation. If Plaintiffs dare to speak about their partisan concerns about the map, the exact object of their concerns must be rejected by the Legislature in order to comply with the Challenged Clauses. Put another way, if the Plaintiffs attempt to exercise their right to petition the Legislature about their views on the partisan impact of the map, the Florida Supreme Court requires their views to be disregarded and rejected. A state constitutional provision such as the Challenged Clauses that restricts government officials from even hearing individuals who wish to exercise their right to petition on particular subjects cannot withstand strict or exacting scrutiny under the First Amendment. Pursuant to recent Eleventh Circuit precedent, the Challenged Clauses are subject to strict scrutiny or an intermediate level of scrutiny. *See Wollschlaeger v. Gov't*

of Fla., 2015 U.A. App. LEXIS 13070 (11th Cir. Fla. July 28, 2015) (reviewing the strict and intermediate scrutiny standards). Under strict scrutiny, there is no compelling government interest that can be advanced by the state, and as a result these content based restrictions on the right to petition must fail. Under intermediate scrutiny, even if one accepts that reducing partisanship is a legitimate and justiciable state interest, restricting the right to petition cannot survive even an intermediate level of review. *Id.* As a result, the Challenged Clauses must be declared unconstitutional because they violate the individual right to petition the government for redress of grievances.

E. Intentional Discrimination of a Class of Individuals Based on Identity

1. Intentional Discrimination Against a Class of Individuals

The First Amendment's guarantees of freedom of political belief and association prevent the state, absent a compelling interest, from "penalizing citizens because of their participation in the electoral process, . . . their association with a political party, or their expression of political views." *Vieth,* 541 U.S. at 271 (Kennedy, J., concurring in judgment) (citing *Elrod v. Burns,* 427 U.S. 347 (1976) (plurality opinion). Allowing one group of individuals to exercise their First Amendment rights, while silencing another on account of their political involvement and affiliations is a violation of the First Amendment. *See R.A.V.,* 505 U.S. at 392 ("St. Paul has no such authority to license once side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."). When a law infringes on First Amendment rights, the burden shifts to the government to justify its actions. *See U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. at 816 ("When the Government restricts speech, the Government bears the burden of

proving the constitutionality of its actions."). Unless the government is able to demonstrate the statute's constitutionality, a movant in a preliminary injunction setting must be deemed likely to succeed on the merits. *See Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

2. The Challenged Clauses Violate the First and Fourteenth Amendment of the Constitution by Intentionally Discriminating against a Class of Individuals Based on Identity

The Challenged Clauses violates Plaintiffs' constitutional rights as they operate to require discrimination against persons associated with, or identified with, certain political parties in a personal or professional capacity. In this case, both the Florida Supreme Court and the Florida trial court were distrustful of comments made by individuals associated or identified with the Republican party regarding draft redistricting maps. Although the Florida trial court did not declare unconstitutional Congressional Districts 13 and 14, the Florida Supreme Court reversed. In doing so, the Florida Supreme Court found dispositive an email communication between two individuals associated with or identified with the Republican Party and a Florida Republican Party staffer that considered District 14 "far from perfect." *League of Women Voters*, 40 Fla. L. Weekly S432, 2015 Fla. LEXIS 1474, at 112. This email alone was sufficient for the Florida Supreme Court to overturn the trial court and declare both Congressional Districts 13 and 14 unconstitutional under the Fair Districts Amendment. *Id*. at 111-124. The Florida Supreme Court cited no evidence that this internal email between two consultants was ever read by anyone at the Legislature. By virtue of their simply being consultants who align themselves with the political party holding the legislative majority in the State of

Florida, the consultants' email supposedly "tainted" the districts in violation of the Fair Districts Amendment. The Challenged Clauses, as interpreted by the Florida Supreme Court, would not have had this effect had the consultants aligned themselves with the political party in the minority. Similarly, Plaintiffs are politically engaged individuals who are involved in Republican politics. The Florida Supreme Court's distinction between individuals who align themselves with one party versus another violates the First Amendment. Plaintiffs are silenced simply because they associate with the Republican Party; their speech risks "tainting" the redistricting process. However, if they associate with any other party or no party at all, then they can preserve their First Amendment right of free speech and discuss any and all aspects of the redistricting process with anyone they want – including the legislators that are off limits to the Plaintiffs. The recent memorandum from the Florida Senate President and the Speaker of the Florida House is evidence of this discrimination - it asks members to "avoid all communications that reflect or might be construed to reflect an intent to favor or disfavor a political party or an incumbent." *See* Memo to Members of the Florida Legislature attached as Exhibit 1 of the Complaint (ECF Docket #1). The Challenged Clauses encroach upon Plaintiffs' constitutional rights and therefore, should be declared unconstitutional.

VI. THREAT OF IRREPARABLE HARM

Once likelihood of success on the merits is established in a First Amendment challenge, the other preliminary injunction elements follow as a result. "When a party seeks a preliminary injunction on the basis of a potential First Amendment violation, the likelihood of success on the merits will often be the determinative factor." *Joelner v.*

Village of Washington Park, 378 F.3d 613, 620 (7th Cir. 2004); *see also N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) ("Consideration of the merits is virtually indispensable in the First Amendment context, where the likelihood of success on the merits is the dominant, if not the dispositive, factor."). Injunctive relief is not appropriate unless the party seeking it can demonstrate that "First Amendment interests [are] either threatened or in fact being impaired at the time relief [is] sought." *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976). The Eleventh Circuit has repeatedly held that "harms to speech rights, 'for even minimal periods of time, unquestionably constitute[] irreparable injury' supporting preliminary relief." *Scott v. Roberts,* 612 F. 3d 1279, 1295 (11th Cir. 2010) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The rationale behind these decisions is that plaintiffs cannot be made whole due to the intangible nature of chilled free speech. *Id.* at 1295. Plaintiffs face actual and impending irreparable harm, as the Florida Supreme Court has ordered the Florida Legislature to redraw the congressional map in question within 100 days of its July 9, 2015 Order. Additionally, Plaintiffs now face an October 2015 legislative special session where their state Senate district will be withdrawn. Plaintiffs are irreparably harmed every day that passes during which they are prevented from exercising their constitutional rights.

VII. BALANCE OF HARMS

When evaluating whether a preliminary injunction should issue, courts must determine that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party. *Siegel v. Lepore*, 234 F.3d 1163, 1176 (11th Cir. 2000); *Rubenstein v. Fla. Bar*, 2014 U.S. Dist. LEXIS 170133 (S.D. Fla.

2014); *see also N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (securing First Amendment rights is in the public interest); *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003) (the government does not have an interest in the enforcement of an unconstitutional law). Here, Plaintiffs seek to exercise their First Amendment rights and Defendant has no interest in the enforcement of an unconstitutional law. Accordingly, the balance of harms favors the Plaintiffs.

VIII. PUBLIC INTEREST

The public interest in this case also favors the Plaintiffs. "[T]he public interest always is served when constitutional rights, especially those involving free speech, are vindicated." *Rubenstein v. Fla. Bar*, 2014 U.S. Dist. LEXIS 170133, *49 (S.D. Fla. Dec. 8, 2014); *see also N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) ("securing First Amendment rights is in the public interest"); *Martin–Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982) ("It is in the public interest not to perpetuate the unconstitutional application of a statute."); *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2dd 1155, 1167 (N.D. Fla. 2012) ("The vindication of constitutional rights and the enforcement of a federal statute serve the public interest almost by definition."); *A Choice for Women v. Butterworth*, 54 F. Supp. 2d 1148, 1159 (S.D. Fla. 1998) ("This Court finds that issuing a permanent injunction does not adversely affect the public interest because the public interest is well served when the Court protects the constitutional rights of the public…."). There is no public interest in prohibiting certain speakers from communicating with elected officials regarding certain topics, when other members of the public are not similarly restricted. The public interest

in this matter favors protecting the public's constitutional rights by entering a preliminary injunction.

IX. PLAINTIFFS SATISFY THE REQUIREMENTS OF STANDING

To establish standing, plaintiffs must demonstrate three elements: an injury in fact, a causal connection between the injury and the defendant's conduct, and a likelihood that the injury will be redressed by a decision favorable to the plaintiffs. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An injury in fact is satisfied when plaintiffs make a showing of an "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Id. at 560. (internal quotation marks and citations omitted). Plaintiffs have established an injury in fact capable of relief issued by this court. Moreover, there exists a causal connection between the enforcement of the Challenged Clauses and the Plaintiffs' injuries, and a decision issued by this court will redress those injuries. In the First Amendment context, the Supreme Court has long applied relaxed standing requirements for pre-enforcement challenges.[4]

In the First Amendment context, an actual injury exists when the plaintiffs are chilled from exercising their right to free expression or forgoes expression in order to avoid enforcement consequences. In such an instance, which is what is alleged here, the

[4] *See*, *e.g.*, *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (self-censorship is a harm that can be alleged without actual prosecution); *Dombrowski v. Pfister*, 380 U.S. 479 (1965) (detailing expanded standing principles for pre-enforcement First Amendment challenges); *Chamber of Commerce v. FEC*, 69 F.3d 600, 603-04 (D.C. Cir. 1995) (a party has standing to challenge pre-enforcement and constitutionality of a statute if First Amendment rights are arguably chilled and there is a credible threat of prosecution).

injury is self-censorship. *Pittman v. Cole*, 267 F.3d 1269 (11th Cir. 2001); s*ee also Broadrick v. Oklahoma*, 413 U.S. 601, 612-613 (1973) ("Overbreadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations. Facial overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct, and where such conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights.") (internal citations omitted). Additionally, fear of embroilment in the inevitable litigation to follow each redistricting plan adopted while the challenged clauses are in effect an additional harm suffered by Plaintiffs.[5]

Here, Plaintiffs have alleged an "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed" by the enforcement of the Challenged Clauses. *Babbitt*, 442 U.S. at 298. Specifically, Plaintiffs are individual registered voters in the State of Florida who are engaged in the political process and who, by virtue of aligning themselves with a certain political party, are prevented from

[5] *See e.g. New York Times v. Sullivan*, 376 U.S. 254, 278 (1964) ("the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."); *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 799-800 (9th Cir. 2012) ("there is a danger that men and women will be chilled from exercising their rights to petition the government by fear of the costs and burdens of resulting litigation….Immediate appeal is therefore advanced as necessary to prevent the chilling of the right to petition the government and to discourage potential abusers of litigation."); *Suzuki Motor Corp. v. Consumers Union of United States, Inc*., 330 F.3d 1110, 1142 (9th Cir. 2003) ("As a practical matter, the threat and actual cost of litigation, including attorneys fees, inhibit speech"); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1227 (9th Cir. 1990) ("Civil litigation is a tool for vindicating important rights, but it can also be a bludgeon for striking at political adversaries").

communicating with their legislators and the Legislature as a whole, about the legislative and congressional redistricting process, or risk "infecting" any adopted redistricting plan. Plaintiffs also suffer imminent injuries against their First Amendment rights as the Florida Supreme Court has ordered that a new map be drawn within 100 days of its July 9, 2015 decision. During these 100 days, Plaintiffs must refrain from exercising their speech and associational rights guaranteed by the United States Constitution. In fact, Plaintiffs' injuries will be ongoing until and unless this Court acts to protect those rights. *See, e.g., Virginia Soc'y for Human Life, Inc.*, 263 F.3d at 389 (First Amendment injury is ongoing where it relates to proscribed speech concerning federal elections).

X. REQUEST FOR WAIVER OF NOMINAL BOND UNDER RULE 65(c)

Federal Rule of Civil Procedure 65(c) provides that no preliminary injunction shall issue without the giving of security by the applicant in an amount determined by the court. However, this Court has recognized the Eleventh Circuit's guidance that a district court has discretion to waive the security requirement. *BellSouth Telecomms. Inc. v. MCIMetro Access Trans'n*, 425 F.3d 964 (11th Cir. 2005); *Washington v. DeBeaugrine,* 658 F. Supp. 2d 1332, 1339 (N.D. Fla. 2009). In fact, cases raising constitutional issues are particularly appropriate for a waiver of the bond requirement. *Univ. Books & Videos, Inc. v. Metropolitan Dade County,* 33 F. Supp. 2d 1364, 1374 (S.D. Fla. 1999). Accordingly, Plaintiffs respectfully request the Court waive the bond requirement in the event that it grants Plaintiffs' motion for preliminary injunction.

CONCLUSION

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

Respectfully submitted,

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Dated: August 4, 2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of August 2015, I electronically filed this Motion for Preliminary Injunction, Memorandum in Support of the Motion for Preliminary Injunction and Proposed Order with the document with the Clerk of the Court using the CM/ECF filing system. I also caused to be sent a copy of these documents by First Class Mail and electronic delivery to the following:

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_/s/Jason Torchinsky_____
Jason Torchinsky