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## PRELIMINARY STATEMENT

Plaintiffs move for a preliminary injunction staying the implementation and enforcement of the government-issued photo identification requirement contained in the Missouri Voter Protection Act, Section 115.427 of the Missouri Revised Statutes, as amended in 2006 (the "MVPA"). The MVPA should be preliminarily enjoined because it: (a) imposes an unauthorized, unnecessary and undue burden on the fundamental right to vote in violation of the Fourteenth Amendment to the United States Constitution; (b) is a poll tax in contravention of the Fourteenth and Twenty-Fourth Amendments to the United States Constitution; (c) violates the Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(A); and (d) violates the Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(B).<sup>1</sup>

## STATEMENT OF FACTS

In support of this Motion, Plaintiffs respectfully refer the Court to the facts as alleged in the Complaint in this action, and the Findings of Fact and Conclusions of Law in *Weinschenk v. Missouri*, No. 06AC-CC00656, and *Jackson County v. Missouri*, No. 06AC-CC00587 (Circuit Court, Cole County, September 14, 2006) (hereinafter referred to as the "State Court Actions").<sup>2</sup> The Complaint, the Findings of Fact and Conclusions of Law, and the Judgment in the State Court Actions are attached to this Memorandum as Exhibits A, B, and C, and Plaintiffs incorporate those by reference herein.

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<sup>1</sup> Plaintiffs also claim that the MVPA violates Section 2 of the Voting Rights Act of 1965, and intend to prove that claim at the full trial on the merits.

<sup>2</sup> In its decision, the State Court found the MVPA unconstitutional on state law grounds after a full hearing on the merits. Assuming that the Missouri Supreme Court affirms the trial court's decision on appeal, Plaintiffs will reconsider the need for relief from this Court since Plaintiffs have no desire to consume this Court's time or resources if the matter is rendered moot.

## ARGUMENT

### PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION

In ruling on Plaintiffs' request for a preliminary injunction, this Court must consider:

(1) the probability the plaintiffs will succeed on the merits, (2) the threat of irreparable harm to plaintiffs, (3) the balance between that harm and the injury an injunction would cause the defendants, and (4) the public interest. No single factor is determinative, rather, the “question is whether the balance of equities so favors [plaintiff] that justice requires the court to intervene to preserve the status quo until the merits are resolved.” *Dataphase Systems, Inc. v. CL Systems, Inc.*, 640 F.2d 109, 113-14 (8th Cir. 1981). As explained below, each of these factors weighs heavily in favor of granting a preliminary injunction in this case.

I. IT IS HIGHLY PROBABLE THAT THE PLAINTIFFS WILL BE SUCCESSFUL ON THE MERITS OF ONE OR MORE OF THEIR CLAIMS

The 2006 Missouri Voter Protection Act is unconstitutional, unlawful, and should be preliminarily enjoined because it:

- Places an unauthorized, unnecessary, and undue burden on the fundamental right to vote in violation of the Fourteenth Amendment to the United States Constitution (Count I);
- Constitutes a poll tax in violation of the Fourteenth and Twenty-Fourth Amendments to the United States Constitution (Count II);
- Violates the Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(A) (Count III); and
- Violates the Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(B) (Count IV).

The probability that Plaintiffs will ultimately succeed on one or more of these claims is high.

A. The MVPA Places an Undue Burden on the Fundamental Right to Vote in Violation of the Equal Protection Clause of the Fourteenth Amendment

The Supreme Court has made it clear that voting is a fundamental right under the Equal Protection Clause of the Fourteenth Amendment. *See Burdick v. Takushi*, 504 U.S. 428, 433

(1992); *see also Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 629 (1969). In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court stated:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

376 U.S. at 17-18.

In analyzing voting restriction claims under the Fourteenth Amendment, the Court has set forth certain standards, namely that:

A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the [Constitution] that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by the rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.

*Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) and *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 213-14 (1986)). A “severe” restriction on the right to vote must pass a strict scrutiny test, and can only survive constitutional challenges if it is “narrowly drawn” and necessary to achieve a compelling state interest. *Id.* at 434; *see also Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). Further, any restrictions on the right to vote must be reasonable and non-discriminatory. *Id.* at 434.

The Eighth Circuit, in *Republican Party of Arkansas v. Faulkner County*, 49 F.3d 1289, 1297 (8th Cir. 1995), noted that although *Burdick* appears to apply a sliding scale of scrutiny, other Supreme Court cases hold that a restriction need not be classified as “severe,” and that strict scrutiny should be applied to “any appreciable burden.” *Id.* (citing *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989)) (emphasis in original). As set forth below, the voter identification requirement enacted by the State is not only an “appreciable”

burden, it is in fact a severe burden on the rights of eligible voters, and therefore the strict scrutiny standard applies and is easily met.<sup>3</sup> However, because the law is so unreasonable and discriminatory, and fails to advance any legitimate interest, the MVPA fails even to satisfy any more lenient standard the Court could apply.

1. The Photo ID Requirement Unduly Burdens the Rights of Missouri Voters

The Photo ID requirement is a severe restriction on hundreds of thousands of Missouri citizens' rights to vote, and as such, Plaintiffs have a substantial likelihood of succeeding on the merits of their Equal Protection claim. (*See* the State Court's Findings of Fact and Conclusions of Law at ¶ 21, hereinafter referred to as "Find. of Fact" or "Conc. of Law.") Specifically, "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" outweighs "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 433-34.

The burden created by the MVPA, simply stated, is this: Between 170,000 and 240,000 Missouri voters who would otherwise be eligible to vote but do not have an acceptable Photo ID under the MVPA, will be denied their fundamental right to cast a regular ballot if they are unable to obtain a Photo ID prior to the November 7 elections. (Cplt. ¶ 24; Find. of Fact ¶ 21.) In the State Court Actions, the State stipulated to Defendant Carnahan's analysis that approximately 240,000 registered voters may not have acceptable Photo ID under the MPVA, and to the

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<sup>3</sup> Under the MVPA, the only acceptable forms of voter identification are:  
 (1) a nonexpired Missouri driver's license;  
 (2) a nonexpired or nonexpiring Missouri nondriver's license;  
 (3) a military-issued photo ID without an expiration date; or  
 (4) a document that: a) contains the name of the individual, which must substantially conform to the most recent signature in the voter registration record; b) includes a photo of the individual; c) includes an expiration date and did not expire prior to the most recent general election; d) was issued by the United States or the State of Missouri (a "Photo ID"). (*See* Complaint at ¶ 16, hereinafter referred to as "Cplt.")

Department of Revenue's determination that approximately 170,000 are without acceptable Photo ID. (Find. of Fact ¶ 21.) This burden will fall most heavily on the poor, the elderly, the disabled, women, and minorities (Cplt ¶ 37; Conc. of Law ¶ 21), and would have a significant impact on the integrity of future elections.<sup>4</sup> For example, the 2002 race for the United States Senate in Missouri was decided by fewer than 22,000 votes.<sup>5</sup> The number of citizens who are effectively disenfranchised by the MVPA is approximately eight to ten times that amount.

In order for these currently registered voters to obtain a Photo ID and not lose their right to vote by regular ballot, they are required by statute to present proof of lawful presence, proof of lawful identity, proof of lawful residence, and proof of any name changes. (Cplt. ¶¶ 27-34; Find. of Fact ¶¶ 22, 34.) To obtain these documents, voters will be required to take time out of their day, often taking time off work, to make trips to governmental offices, stand in long lines, and pay the multiple fees to get the birth certificates, passports, proofs of social security numbers, marriage licenses, divorce decrees, court orders, adoption papers, social security cards, and other documentation necessary to satisfy the requirements to get a non-driver's license.<sup>6</sup> (Find. of Fact ¶¶ 24-39; Conc. of Law ¶ 36.) Unfortunately, the people who need to obtain the non-driver's

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<sup>4</sup> The State vowed to help alleviate the burdens of the MVPA by creating "mobile units" to send to the elderly and the disabled, and by waiving the \$11 fee to obtain a non-driver's license for the purpose of voting. (Cplt. ¶ 23.) However, those efforts have been proven grossly inadequate. To date, the Department of Revenue has issued only 2,074 Photo IDs. (*See Missouri Stops Free ID Effort*, KANSAS CITY STAR, Sept. 19, 2006, at B1, attached as Exhibit D). Moreover, the mobile van units were not being sent to low-income neighborhoods, whose residents are less likely to have driver's licenses or available transportation to get to the Department of Revenue. (Cplt. ¶ 23.)

Further, because the Photo ID requirement has been enjoined by the Missouri Circuit Court, the State is no longer issuing free non-driver's licenses, sending mobile van units, or performing any other functions in an attempt to alleviate the burdens of the Act. *Id.* Therefore, if there was virtually no chance that the State could meet the constitutional demands of its citizens needing Photo IDs before the state court injunction, now that it has stopped even its minimal efforts, it is impossible that this law can be applied constitutionally.

<sup>5</sup> See Secretary of State's Election Night Results, Election Archives, available at <http://www.sos.mo.gov/enrweb/raceresults.asp?eid=87&oid=24756&arc=1>.

<sup>6</sup> The State Court found the burdens and costs associated with obtaining these underlying documents particularly troublesome. For example, a would-be voter may have to travel to multiple different agencies, and would be required to pay for a birth certificate (the cost is \$15 for a Missouri birth certificate, and ranges from \$5 to \$30 for out-of-state certificates), a United States passport (between \$97 and \$236), a certificate of citizenship (\$255), and/or marriage certificates (between \$5 and \$30). (Find. of Fact ¶ 27-38.)

license do not drive. These citizens are the least mobile citizens in Missouri, and the burdens placed on them will be acute.

The requirements of the MVPA are particularly burdensome on significant categories of voters: the elderly, many of whom no longer drive, and who because of the passage of time or the circumstances of their birth may not have access to their birth records;<sup>7</sup> the disabled, who may not be able to drive; low income and minority voters, who are less likely to own vehicles and therefore have driver's licenses; married women, who are likely to have changed their name; and Missouri residents born in other states and who do not have acceptable Photo ID.<sup>8</sup> (Cplt. ¶¶ 37; Find. of Fact ¶¶ 23, 25, 34, 35; Conc. of Law ¶ 47.) These citizens, who wish to go and exercise their right to vote a regular ballot, will be denied that fundamental constitutional right.

Furthermore, as the State Court noted, African-Americans, as a group, own fewer cars, have a higher poverty rate, and are less educated than white Missouri residents. (Find. of Fact ¶¶ 40-45; Conc. of Law ¶ 46.) These factors make the burdens of the MVPA even greater on African-American citizens, and it is more likely their fundamental rights to vote will be abridged or denied.

2. The Photo ID Requirement is Not Narrowly Tailored to Advance the State's Asserted Interest In Preventing Voter Fraud

The statute in this case has not been "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 433-34; *Republican Party of Arkansas*, 49 F.3d at 1299.

<sup>7</sup> See Mo. Dept. of Rev. Info. Sys. Bureau, Total Drivers By Class, Gender and Age, available at [http://www.dorx.mo.gov/publicreports/drivers\\_class\\_sex\\_age\\_report.txt](http://www.dorx.mo.gov/publicreports/drivers_class_sex_age_report.txt); see also U.S. Bureau of the Census, 2004 American Community Survey, tbl. S0201 (Selected Population Profile: Missouri), available at <http://factfinder.census.gov>.

<sup>8</sup> Over 1.6 million residents of Missouri were born in another state, and it will be virtually impossible for many of these citizens to get a Photo ID prior to the November 7 elections, as found in the State Court Actions. (Find. of Fact ¶¶ 26-30.)

According to Governor Blunt, the MVPA was passed to prevent election fraud and restore the integrity of the election process. However, there is absolutely no evidence of any in-person voting fraud in the 2002 and 2004 elections.<sup>9</sup> (Find. of Fact ¶¶ 48, 54, 56-58.) In 2004 Governor Blunt himself declared the 2002 and 2004 elections "fraud-free," and stated that they were the "cleanest" and most "problem-free elections in recent history." *Id.* at ¶¶ 57-58. The 2004 election occurred after the State had implemented a stringent voter identification qualification. In light of Governor Blunt's statement, there is no indication that the existing voter identification laws are inadequate. Accordingly, there are existing laws which address voter fraud, and there is no evidence that these laws were ineffective in preventing the types of fraud the State is purportedly addressing with the Photo ID requirement. *Id.* at ¶¶ 46-48, 57. Further, the MVPA does not extend to absentee voting, an area where even voter identification advocates agree fraud is most likely to exist. *Id.* at ¶¶ 54, 56. Thus Secretary of State Carnahan, one of the Defendants herein and the State official charged with overseeing elections and electoral fairness, has publicly stated that there is no legitimate need for the Photo ID requirement, and the requirement itself jeopardizes the integrity of the system by denying people the right to vote. *Id.* at ¶¶ 57-58.

In short, the State has not sufficiently explained how and why the Photo ID requirement is necessary to meet the particular interests of ensuring the integrity of the election process. To the contrary, the MVPA burdens hundreds of thousands of voters in an attempt to eliminate a fraud that does not exist, and which has already been fully and adequately addressed by prior legislation already in place. (Find. of Fact ¶ 21; Conc. of Law ¶¶ 37-38.) In light of the

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<sup>9</sup> Missouri, prior to the passage of the MVPA, already had one of the strictest voter identification laws in the nation. However, pursuant to the 2002 law, voters were allowed to show any number of valid identifications to vote, including: a utility bill; a bank statement; a government check; a paycheck; a voter identification card; any identification issued by the United States government, the State of Missouri, an agency of the State, or a local election authority. (Find. of Fact ¶ 20.)

appreciable burdens imposed on Missouri citizens without a Photo ID, and the confusion experienced by Plaintiffs and their members when they will be denied the right to vote in the November 7 elections, the MVPA produces, if anything, disorder, unfairness, and a lack of integrity in the election process.

B. The MVPA is an Unconstitutional Poll Tax in Violation of Both the Fourteenth and the Twenty-Fourth Amendments to the United States Constitution

The Photo ID requirement is unconstitutional as it imposes a poll tax on Missouri voters. Although voters do not have to pay for the Photo ID itself, they cannot obtain the Photo ID without incurring the costs for the statutorily required underlying documents to show proof of lawful presence, proof of identity, and proof of residence. The expense of these documents can be significant, such as \$15 for a Missouri-issued birth certificate, and between \$97 and \$236 for a United States passport. (Find. of Fact ¶¶ 24-34.)

The Twenty-Fourth Amendment to the United States Constitution provides:

The right of citizens of the United States to vote in any primary or general election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay a poll tax or other tax.

The Supreme Court has made clear that this Amendment prohibits both the denial, as well as the abridgment, of the right to vote: “the Twenty-fourth nullifies sophisticated as well as simple-minded modes of impairing the right to vote.” *Harman v. Fossenius*, 380 U.S. 528, 540-41 (1965). The injustice of a law which imposes a poll tax, such as the Photo ID requirement, has been stated by the Court as: the “disenfranchisement of the poor occasioned by failure to pay the tax,” as well as disenfranchisement of “a substantial number of voters who did not plan [ ] far [enough] ahead.” *Id.* at 539-40. Moreover, as the Court stated in *Harper v. Virginia Board of Elections*, “Voter qualifications have no relation to wealth nor to paying or not paying this or any

other tax...[W]e must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process.” 383 U.S. at 666-68.

By conditioning the right to vote on the possession of an acceptable Photo ID, which requires the production of documents that cost fees to obtain, the State has conditioned the right to vote on a citizen's affluence. Moreover, the costs involved are significantly greater than the \$1.50 fee that was held unconstitutional in *Harper*. 383 U.S. at 666-68. (Conc. of Law ¶ 27.) For example, Plaintiff Bethany Dean would have to pay \$14 to get a certified copy of her birth certificate from California. (Cplt. ¶ 8.) Plaintiff Emma Maria Frencher, if she had all the information necessary to even obtain her birth certificate, would have to pay \$26 to obtain a certified copy from Michigan. (Cplt. ¶ 7.) Therefore, the State has created a poll tax in violation of the Fourteenth and Twenty-Fourth Amendments. (Conc. of Law ¶¶ 27-28.)

C. The MVPA Violates the Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(A)

Missouri's Photo ID requirement violates the Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(A), by applying different standards in determining whether individuals within the same county or other political subdivision are qualified to vote. Section 1971(a)(2)(A) provides that:

No person acting under color of law shall ... in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote...

The Photo ID requirement violates 42 U.S.C. § 1971(a)(2)(A) by applying different standards for identification requirements to individuals within the same county who are born on or before January 1, 1941, or who are mentally or physically disabled, as compared to those who

do not fit either description. Voters who meet the requirement for an exemption are able to cast provisional ballots that may be counted whereas, after November 1, 2008, other voters are not eligible to cast a provisional ballot. (Find. of Fact ¶ 17.) Additionally, because no Photo ID is required to cast an absentee ballot, different standards are applied to those eligible voters who vote absentee, as compared to those who vote in person at the polls. This differential treatment is a violation of the plain language of the Civil Rights Act.

Because the MVPA allows only some validly registered voters who lack the specified government-issued photo identification to cast ballots that may count, but not other voters, and allows people without Photo ID to cast absentee ballots, but not in-person ballots, the MVPA violates 42 U.S.C. § 1971(a)(2)(A).

D. The MVPA Violates the Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(B)

Missouri's Photo ID requirement violates the Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(B), which provides that:

No person acting under color of law shall ... deny the right of an individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election...

The MVPA violates Section 1971(a)(2)(B) by denying citizens who are lawfully registered and fully qualified to vote, the right to exercise that vote in person at a polling place based solely on whether they have the requisite identifying documents, regardless of whether their identity may be established by other legitimate means. As set forth above, there is no evidence that the law enacted in 2002, which allows voters to present several forms of identification, was insufficient for voters to establish their identity. Additionally, because the

Photo ID requirement does not apply to absentee ballots, a Photo ID cannot be "material" in determining whether an individual is qualified to vote.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE PRELIMINARY INJUNCTION IS NOT GRANTED

The Supreme Court and this Circuit hold that violations of constitutional rights constitute irreparable injury. *See Heartland Academy Community Church v. Waddle*, 317 F. Supp. 2d 984, 1107 (E.D. Mo. 2004) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Kirkeby v. Furness*, 52 F.3d 772, 775 (8th Cir. 1995); *Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action*, 558 F.2d 861, 867 (8th Cir. 1977) ("interference with the exercise of constitutional rights will support a finding of irreparable injury"). Further, an interference with the right to vote clearly constitutes irreparable harm. *U.S. v. Berks County, Pennsylvania*, 277 F. Supp. 2d 570, 582 (E.D. Pa. 2003).

Elections held under the MVPA will begin with the Congressional and statewide elections scheduled for November 7, 2006. The individual Plaintiffs, and members and constituents of the organizational Plaintiffs, who do not have one of the forms of Photo ID, will be irreparably harmed if they are forced, between now and the next election, to either (a) obtain new identification, (b) vote a provisional ballot that more likely than not will not be counted;<sup>10</sup> or (c) forfeit their rights as Missouri citizens qualified to register and vote in the next and subsequent elections. This is an injury for which they cannot be adequately compensated in an action at law for money damages. Additionally, the organizational Plaintiffs with members who lack the government-issued Photo ID will be required to divert limited resources away from existing programs and apply those resources to helping members comply with the MVPA's identification requirements.

<sup>10</sup> In November 2004, the State of Missouri only counted approximately 40 percent of all provisional ballots cast. EAC Election Day Survey, available at [http://www.eac.gov/election\\_survey\\_2004/toc.htm](http://www.eac.gov/election_survey_2004/toc.htm).

III. THE BALANCE BETWEEN THE HARM TO THE PLAINTIFFS IF AN INJUNCTION IS NOT ISSUED, AND THE HARM, IF ANY, CAUSED TO DEFENDANTS BY AN INJUNCTION, TIPS STRONGLY IN FAVOR OF ISSUING THE INJUNCTION

Plaintiffs will be deprived of their constitutional rights guaranteed by the Fourteenth and Twenty-Fourth Amendments to the United States Constitution if the Photo ID requirement of the MVPA is not enjoined. These harms are irreparable. Any harms the State may incur, if at all, would be minimal in the face of stripping Missouri citizens of their rights to vote. Issuance of the preliminary injunction will simply maintain the current voting system – a system which has been tested and proven efficient and declared "fraud-free" by Governor Blunt. Since no evidence of voter identification fraud exists under the current system in Missouri, the Defendants will suffer no harm from this injunction.

In weighing the interests on a motion for preliminary injunction, where one arm of the scale is weighed down with the hundreds of thousands of Missouri citizens who will have their constitutionally protected right to vote unduly burdened, and on the other arm is the return to a system which was proven effective and reasonable, the balance is clearly tipped in favor of the Plaintiffs.

IV. ISSUING A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

For the reasons outlined above, a preliminary injunction is in the public interest. (Conc. of Law ¶ 50.) Between 170,000 and 240,000 qualified and otherwise eligible Missouri voters will have their constitutional right to vote unduly burdened. Although preventing voter fraud is also within the public interest, this goal is already achieved through the existing system. Further, the MVPA is not narrowly tailored to address any fraud which may actually exist. The public interest can only be served by protecting the constitutional rights of the citizens of Missouri. An injunction would not be adverse to the public interest. *See, e.g., Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980) ("the public interest...requires obedience to the Constitution.").

**CONCLUSION**

For the reasons set forth above, Plaintiffs request this Court grant their Motion for a Preliminary Injunction.

Dated: September 22, 2006

Respectfully Submitted,

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I hereby certify that a copy of the above and foregoing was served via the Court's electronic filing system this 22 day of September, 2006, on:

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