**IN THE UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF FLORIDA**
**TALLAHASSEE DIVISION**

**FLORIDA RISING TOGETHER, et al.,**

***Plaintiffs*,**

**v.** **Case No.: 4:21cv201-MW/MJF**

**LAUREL M. LEE,**
**in her official capacity as the**
**Secretary of State of Florida,**
**et al.,**

***Defendants*,**

**and**

**NATIONAL REPUBLICAN**
**SENATORIAL COMMITTEE and**
**REPUBLICAN NATIONAL**
**COMMITTEE,**

***Intervenor-Defendants.***

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**ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

This is a voting case. This Court has considered, without hearing, the parties' cross-motions for summary judgment. This Order addresses the motion filed by Defendants Lee, Doyle, and Hays and Plaintiffs' motion for partial summary judgment. ECF Nos. 241 and 245. This Court addresses Defendants Latimer and White's motion for summary judgment by separate order.

Plaintiffs have challenged several new laws enacted or amended by the Florida Legislature in SB 90. Defendants have moved for summary judgment, asserting Plaintiffs lack standing to challenge these laws, and in the alternative, that no dispute of material fact exists as to each claim. Plaintiffs have moved for partial summary judgment as to certain claims. This Order addresses each point, starting with whether Plaintiffs have demonstrated standing at the summary-judgment stage.[1]

I

To establish standing, Plaintiffs must show (1) that they have suffered an injury-in-fact that is (2) traceable to Defendants and that (3) can likely be redressed by a favorable ruling. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). And they must do so for each statutory provision they challenge. *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1273 (11th Cir. 2006) (emphasizing that courts have an "independent obligation . . . to ensure a case or controversy exists as to each challenged provision even in a case where the plaintiffs established harm under one provision of the statute"). Plaintiffs proceed under two theories of standing, organizational standing and associational standing. This Court discusses each in turn.

[1] The parties are well aware of this case's underlying facts and procedural history, and thus this Court will not restate them here.

An organization may have standing to assert claims based on injuries to itself if that organization is affected in a tangible way. *See Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1079 (N.D. Fla. 2004) ("An organization has standing to challenge conduct that impedes its ability to attract members, to raise revenues, or to fulfill its purposes." (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982))). Here, Plaintiffs proceed under a diversion-of-resources theory. "Under the diversion-of-resources theory, an organization has standing to sue when a defendant's illegal acts impair the organization's ability to engage in its own projects by forcing the organization to divert resources in response." *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014).

In addition to organizational standing, an organization may sue "on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Greater Birmingham Ministries v. Sec'y of State of Ala.*, 992 F.3d 1299, 1316 (11th Cir. 2021) ("*GBM*"). As discussed below, Plaintiffs' members have standing as to the challenged provisions of SB 90. Additionally, this lawsuit is germane to Plaintiffs, whose core purposes involve registering voters, voter education, encouraging electoral participation, and advocating for accessibility for Florida voters. Finally, neither the claims asserted,

nor the relief requested requires the participation of the individual members in this lawsuit. *See Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1244 (11th Cir. 2003); *GBM*, 992 F.3d at 1316 n.29 ("[P]rospective relief weigh[s] in favor of finding that associational standing exists.").

"The party invoking federal jurisdiction bears the burden of proving standing." *Bischoff v. Osceola Cnty., Fla.*, 222 F.3d 874, 878 (11th Cir. 2000). Critically, "each element of standing 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.' " *Id.* (quoting *Lujan*, 504 U.S. at 561). Accordingly, "when standing is raised at the summary judgment stage, the plaintiff must 'set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken as true.' " *Id.* (quoting *Lujan*, 504 U.S. 561).

As to standing, Defendants Lee, Doyle, and Hays assert that Plaintiffs have failed to demonstrate injuries sufficient to confer standing at the summary-judgment stage. ECF No. 245-1 at 7–23. Defendants limit their discussion to whether Plaintiffs have demonstrated either that any member is injured and therefore has standing to sue or whether Plaintiffs have demonstrated a diversion-of-resources injury. *Id*. at 7 (citing *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1248–50 (11th Cir. 2020).

This Court recognized Plaintiffs' cognizable injuries at the pleading stage, ECF No. 201 at 14–23, and now Plaintiffs have put meat on the bones to show that their injuries, both organizational and associational, are grounded in fact. *See, e.g.*, ECF No. 241-1 at 27–28; ECF No. 280 at 43–48. For example, Plaintiff Hispanic Federation ("HF") asserts it will have to shift "funds and staff time from other election activities to creating a strategy to maintain an effective voter assistance program despite SB90 and then implement those programmatic changes in training curriculums and additional education activities." ECF No. 240-2 ¶ 13. In addition, "HF anticipates longer lines resulting from SB90 and will make upward adjustments to its budget for refreshments to accommodate the additional voters requiring voter assistance." *Id*. HF is also assessing changes to its voter assistance program as a result of the new restrictions inside the no-solicitation zone, including increasing resources for its voter assistance hotline and additional canvassers and additional training time to educate canvassers on their new compliance strategy. *Id*. ¶ 14. Likewise, Plaintiff Florida Rising is diverting staff time to planning how the new "line warming" restrictions will impact its volunteer program and developing new strategies and technologies to encourage voters to stay in line at their polling places. *See* ECF No. 244-19 at 78–81. *See also* ECF No. 244-24 at 31–32, 37–38, 42; ECF No. 271-48 at 28–30, 33–34, 38. Plaintiffs' evidence demonstrates that, because of the challenged laws, they have had to "divert personnel and time from other activities

to educating volunteers and voters on compliance with the requirement." *Jacobson*, 974 F.3d at 1250 (internal quotation marks omitted) (quoting *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008)). Plaintiffs have demonstrated an injury-in-fact based on a diversion of resources at the summary judgment stage.

In addition, Plaintiffs identify record evidence demonstrating individual injuries and associational injuries with respect to each of the challenged provisions. *See, e.g.*, ECF No. 280 at 45–48; ECF No. 271-44 at 12–13; ECF No. 271-48 at 11, 14–15, 28–29, 37–38; ECF No. 271-49 at 16–20; ECF No. 271-54.

Lastly, Defendants do not raise any infirmities with respect to traceability or redressability. Moreover, upon review of the record, nothing has changed that would affect this Court's conclusions as to both standing requirements from the pleading stage. *See* ECF No. 201 at 23–32. Accordingly, the facts and all reasonable inferences drawn therefrom demonstrate that Plaintiffs have standing to proceed at the summary judgment stage.[2]

[2] Standing jurisprudence in the Eleventh Circuit is evolving. This Court reiterates that Plaintiffs must establish standing at each stage of the case, including trial. The facts and all reasonable inferences in favor of Plaintiffs at this stage demonstrate that Plaintiffs have standing, but more granular facts may be required at trial to establish the same. *See Jacobson*, 974 F.3d at 1250 (noting that Plaintiffs' evidence failed to establish a diversion-of-resources injuries because it did not identify which activities resources were *diverted from* to combat the issues presented in that case). Plaintiffs' counsel should be prepared to introduce evidence with specificity as to the diversion of resources necessitated by the challenged laws and the identifiable burdens the challenged provisions impose upon their members, if any.

II

The parties already know the standard this Court applies in addressing a summary-judgment motion. On cross-motions, that standard remains the same. This Court evaluates the cross-motions separately, viewing the evidence in the light most favorable to the non-movant.

A

Starting with the claims on which only Defendants move for judgment, this Court takes Defendants' arguments in the order Defendants make them. First, Defendants move for summary judgment on Counts I through III of Plaintiffs' amended complaint, which allege that all of the challenged provisions violate section 2 of the Voting Rights Act ("VRA"), the Fourteenth Amendment, and the Fifteenth Amendment because the Legislature passed them with discriminatory intent. ECF No. 59 ¶¶ 165–82.[3]

[3] Plaintiffs do not, as Defendants suggest, need to challenge SB 90 in its entirety to succeed on their intentional discrimination claims. This is because Plaintiffs need not prove that the Legislature passed SB 90 with discriminatory purpose *only*. Rather, Plaintiffs must show that race was a "motivating factor." *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265–66 (1977). Moreover, Defendants suggest that Plaintiffs declined to challenge the entire bill "because they know that many provisions of SB90 make it easier to vote." ECF No. 245-1 at 35. Why, Defendants ask, would a biased legislature make it easier to vote? As one example of SB 90's laudable provisions, Defendants argue that SB 90 "allows *anyone* to return up to two absentee ballots on behalf of other voters (and allows anyone to return an unlimited number for their immediate family members)." *Id.* (emphasis in original). But before SB 90, a third party could return an unlimited number of ballots from non-family members so long as the third party was not compensated for returning the ballot. Thus, far from magnanimously easing the burdens of voting, this provision drastically constrains who can return vote-by-mail ballots. In short, Defendants' argument is disingenuous.

Because a discriminatory legislative motive is rarely overt, "discriminatory intent need not be proved by direct evidence." *Rogers v. Lodge*, 458 U.S. 613, 618 (1982). Rather, this Court must apply a two-prong analysis to Plaintiffs' claims. *GBM*, 992 F.3d at 1321. On the first prong, Plaintiffs must show that the law has both "a discriminatory purpose and effect." *Id.* (quoting *Burton v. City of Belle Glade,* 187 F.3d 1175, 1188–89 (11th Cir. 1999)). Once Plaintiffs satisfy the first prong, the burden shifts to the Defendants to satisfy the second prong by showing that the Legislature would have passed the law even absent any discriminatory intent. *Id.*

Defendants' argument focuses on the first prong, which requires Plaintiffs to show discriminatory intent using the multi-factor test set out in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). *See GBM*, 992 F.3d at 1321.[4] Defendants argue that Plaintiffs have come forward with insufficient evidence under *Arlington Heights* to survive summary judgment. There are several flaws in Defendants' argument.

Foremost, Defendants misapply *Arlington Heights* by arguing that Plaintiffs' evidence on many factors—standing alone—is insufficient to defeat Defendants'

[4] The *Arlington Heights* factors are (1) the challenged law's impact (2) the law's historical background; (3) "the specific sequence of events leading up" to the law's passage, which includes "(4) procedural and substantive departure; and (5) the contemporary statements and actions of key legislators." *GBM*, 992 F.3d at 1322. This "list has been supplemented" with an additional three factors: "(6) the foreseeability of the disparate impact; (7) knowledge of that impact, and (8) the availability of less discriminatory alternatives." *Id.*

motion for summary judgment. *See* ECF No 245-1 at 26 ("Disparate impacts alone are typically insufficient . . . ."), 28 ("[P]rocedural deviations . . . alone cannot support a finding of intent . . . ."), 33 ("[D]isparate impact and foreseeable consequences, without more, do not constitute a constitutional violation."). *Arlington Heights*, however, is a *totality* of circumstances test; this Court must weigh Plaintiffs' evidence as a whole. Thus, Defendants' argument invites this Court to err, as other district courts have, by "miss[ing] the forest in carefully surveying the many trees." *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

Plus, Plaintiffs' discriminatory intent claims, which "require a fact intensive examination of the record," are particularly unsuited for resolution at the summary judgment stage. *GBM*, 992 F.3d at 1322 n.33. This is because "[t]he legislature's motivation is itself a factual question." *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999). And discerning that motivation often involves weighing competing reasonable inferences that can be drawn from the record and crediting some over others. *See id.* at 552–53. But on a motion for summary judgment, this Court may not "weigh conflicting evidence or make credibility determinations." *Alves v. Bd. of Regents of the Univ. Sys. of Ga.*, 804 F.3d 1149, 1159 (11th Cir. 2015).

This case is no outlier. Plaintiffs offer enough evidence—at this stage—to support their claims under *Arlington Heights*. *See, e.g.*, ECF No. 271-27 ¶¶ 89 ("SB 90's exact-match restrictions for requesting a VBM ballot will directly affect all

587,207 registered voters identified by the Division of Elections, and when assessing the impact of those who have registered most recently, disparately affects voters of color.") 92 "(Of those who cast ballots in 2016 but do not have a valid ID on file with the Division of Elections that would allow them to obtain a VBM ballot under SB 90, 30.3 percent were Black, 21.5 percent were Hispanic, 34.6 percent were of Other or unknown race/ethnicity, and just 13.7 percent were white."). *See also, e.g.*, ECF No. 271-26 ¶ 52 (explaining that "Republicans were – until 2020 – more likely than Democrats to make use of absentee ballots. And the Republican-majority legislature . . . took few actions to regulate the use of absentee ballots" until "Democrats, especially Blacks, suddenly voted by mail in larger proportions than Republicans in the 2020 election"); *cf. Cooper v. Harris*, 137 S. Ct. 1455, 1473 n.7 (2017) (explaining that the use of race as a "proxy" for partisanship "still triggers strict scrutiny"). Defendants, in turn, offer ample reasons not to credit Plaintiffs' evidence. *See, e.g.*, ECF No. 244-33 at 147 (testimony by Lee County Supervisor of Elections that "nothing in Senate Bill 90 that would prevent voters in Lee County from registering and voting); ECF No. 244-9 at 137–38 (testimony by Plaintiffs' expert that she could not "predict approximately how many people would be impacted" by SB 90 and that "I think regardless of whether it's a large number or small number, it's irrelevant, even if only one person is impacted, that is a problem").

In short, Defendants' motion asks this Court to weigh the competing evidence and make a factual finding about the Florida Legislature's intent in passing SB 90. That, this Court cannot do. Defendants' motion is therefore **DENIED** as to Count I through III of Plaintiffs' amended complaint.

B

Next, Defendants move for summary judgment on Plaintiffs' section 2 discriminatory results claim. As this Court previously explained, Plaintiffs' section 2 results claim requires this Court to ask whether "minority voters are denied 'meaningful access to the political process[.]' " *Osburn v. Cox*, 369 F.3d 1283, 1289 (11th Cir. 2004) (quoting *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994)). Put another way, the ultimate question is whether a "certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black [or other minority voters] and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

In answering that question, this Court may consult "certain guideposts" articulated by the Supreme Court in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021).[5] As *Brnovich* carefully explained, these guideposts are not

[5] These "guideposts" are (1) "the size of the burden imposed by a challenged voting rule," (2) "the degree to which a voting rule departs" from standard practice in 1982, (3) "[t]he size of any disparities in a rule's impact on members of different racial or ethnic groups," (4) "the opportunities provided by a State's entire system of voting," and (5) "the strength of the state interest served by the challenged rule." *Brnovich*, 141 S. Ct. at 2338–40.

exclusive, nor do they comprise an all-governing test under which courts are to evaluate section 2 claims. *Id.* at 2336, 2338. Instead, "any circumstance that has a logical bearing on whether voting is 'equally open' and affords equal 'opportunity' may be considered." *Id.* at 2338.

Contrary to that instruction, Defendants argue that Plaintiffs' discriminatory results claim *must* fail because Plaintiffs have not come forward with sufficient evidence to satisfy each of *Brnovich*'s "guideposts." Even accepting Defendants' premise that Plaintiffs have not come forward with evidence under each *Brnovich* consideration, Defendants are not automatically entitled to summary judgment. Because this Court must consider any relevant evidence in weighing the totality of circumstances, the absence of evidence on some, but not all, of *Brnovich*'s considerations does not entitle Defendants to summary judgment.

Still, Plaintiffs must come forward with some evidence. And they have. *See, e.g.*, ECF No. 271-26 ¶¶ 26–50 (describing post-reconstruction voting restrictions, tying those restrictions to discrimination from 1900 to the present, and concluding that racial discrimination in Florida politics is most decidedly not, "in the deliciously redundant phrase, 'past history' "); ECF No. 271-27 ¶¶ 135 ("Rejected VBM ballots are disproportionately higher among minority voters than white voters in Florida), 137 ("[T]here is . . . good reason to believe, all else equal that voters of color . . . will be disparately negatively impacted by the limits placed on VBM drop boxes);

ECF No. 271-25 at 62–63 (explaining that the non-solicitation provision is far more restrictive than anything on the books in 1982).

It may well be that this evidence falls short at trial, but "a bench trial, with the benefit of live testimony and cross examination, offers more than can be elucidated simply from discovery." *Ga. State Conf. of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336, 1348 (11th Cir. 2015). Accordingly, Defendants' motion for summary judgment is **DENIED** as to Plaintiffs' disparate results theory in Count I of their amended complaint.

C

Defendants also move for summary judgment on Plaintiffs' undue burden claims under the First and Fourteenth Amendment. This Court must evaluate these claims using the standard set out in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992), which requires this Court to weigh Florida's interest in promulgating the challenged provisions against the burdens those provisions impose on Florida's electorate.

In moving for summary judgment, Defendants try to reformulate *Anderson–Burdick* to suit their needs. Having already tackled the issue at the motion to dismiss stage, this Court will address these arguments only briefly.

*First*, regarding Defendants' "broader point" that "burdens that do not affect voters generally are never relevant under" *Anderson–Burdick*, ECF No. 245-1 at 53,

Defendants point to no authority suggesting that this Court should reevaluate its prior ruling, and this Court has found none. To the contrary, only weeks ago the Eleventh Circuit applied *Anderson–Burdick* to evaluate the burdens a law placed on a *specific* group. *Libertarian Party of Ala. v. Merrill*, No. 20-13356, 2021 WL 5407456, at *4 (11th Cir. Nov. 19, 2021) (evaluating the burden a law placed on "minor political parties"). *See also Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009) (weighing "the burden imposed on Georgia voters who lack photo identification").

*Second*, Defendants' "narrow" point—that because Plaintiffs bring a facial challenge, they must do more than show that SB 90 imposes an unjustified burden on *some* voters—misapprehends the standard that applies to facial challenges. This is because Defendants' "focus on . . . electors who are unaffected by [the challenged] provisions overlooks the Supreme Court's instruction that when reviewing a facial challenge we do not consider instances in which a statute 'do[es] no work.' " *Ga. Muslim Voter Project v. Kemp*, 918 F.3d 1262, 1270 (11th Cir. 2019) (Jill Pryor, J., concurring) (quoting *City of L.A., Calif. v. Patel*, 576 U.S. 409, 419 (2015)). The relevant question is whether, looking to the voters the challenged provisions do burden, SB 90 is constitutional.[6]

[6] Defendants' citation to *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008) is unavailing. There, the Court did not, as Defendants suggest, hold that "an unjustified burden on *some* voters cannot justify invalidating [an] entire provision." ECF No. 285-1 at 46 (emphasis in

With these points in mind, this Court's task is to balance Defendants' proffered justifications for the challenged provisions against the burdens, if any, those provisions place on those voters for whom the provisions present an impediment to voting. On this point, Defendants need not come forward with evidence supporting their stated interests. *See Billups*, 554 F.3d at 1353. Nonetheless, this Court must evaluate "the extent to which [Defendants'] justifications *require* the burden to plaintiffs' rights." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019) (emphasis added). *See also Anderson*, 460 U.S. at 789 (explaining that "the Court must not only determine the legitimacy and strength of each of [the state's] interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights"). This inquiry "emphasizes the relevance of context and specific circumstances." *Cowen v. Ga. Sec'y of State*, 960 F.3d 1339, 1346 (11th Cir. 2020).

As detailed above, Plaintiffs have come forward with evidence suggesting that the challenged provisions impose at least some burdens on Florida's electorate. The size of that burden is a question of fact, as is the extent to which Florida's legitimate

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original) (quotation omitted). Rather, it held that it could not "conclude that the [challenged] statute imposes 'excessively burdensome requirements' on *any* class of voters." *Crawford*, 553 U.S. at 202 (emphasis added) (quoting *Storer v. Brown*, 415 U.S. 724, 738 (1974)). *See also id.* at 204 (Scalia, J., concurring) (criticizing "[t]he lead opinion" because it "assumes . . . that the voter-identification law 'may have imposed a special burden on' some voters, . . . but holds that petitioners have not assembled evidence to show that the special burden is severe enough to warrant strict scrutiny").

interests require that it impose the burden. Both sides have submitted substantial evidence in support of their positions, which this Court cannot, at this stage, weigh. Accordingly, because material factual disputes abound, Defendants' motion for summary judgment is **DENIED** as to Count IV of Plaintiffs' amended complaint.

D

That brings this Court to the first claim on which both sides move for judgment; namely, Plaintiffs' claim that section 208 of the VRA preempts the non-solicitation provision. Section 208 provides that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508. In urging this Court to dismiss Plaintiffs' claims under this section, Defendants make a two-part argument. First, Defendants argue that private parties cannot enforce section 208. But, Defendants say, even if private parties could enforce section 208, section 208 does not preempt Florida law. Unsurprisingly, on both points, Plaintiffs argue the opposite. This Court considers each issue in turn.

1

On the first point, Defendants argue the following. The Supreme Court has warned courts to exercise caution in finding that a statute implies a right of action. And "Plaintiffs provide no affirmative evidence of congressional intent to create a

private remedy under Section 208." ECF No. 245-1 at 61. To the contrary, Defendants say, the VRA's structure suggests that Congress did not intend to create a right of action under section 208. Thus, "inferring a right of action . . . would fly in the face of the Supreme Court's admonition to exercise restraint in implying a private right of action." *Id.* at 59. There are several issues with Defendants' argument.

First, concluding that private parties may enforce Section 208 is not as fanciful as Defendants suggest. Apparently ignoring its own "admonition," the Supreme Court has permitted private suits under sections 2, 5, and 10 of the VRA even though those sections "provide[] no right to sue on [their] face." *Morse v. Republican Party of Va.*, 517 U.S. 186, 232 (1996). Plus, every court to consider the issue has found that section 208 *does* implicitly allow private enforcement. *See OCA-Greater Hous. v. Texas*, 867 F.3d 604, 609–614 (5th Cir. 2017); *Ark. United v. Thurston*, 517 F. Supp. 3d 777, 790, 798 (W.D. Ark. 2021); *New Ga. Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1301 (N.D. Ga. 2020); *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 233–36 (M.D.N.C. 2020). The Attorney General also takes the position that section 208 permits private enforcement. *See* ECF No. 304 at 3 n.1, 20, *in* Case No. 4:21cv187.

And even if this Court were writing on a blank slate, it would still conclude that private parties may enforce section 208. Of course, Defendants are correct that

a private right of action exists only when "Congress intended to create one." ECF No. 245-1 at 60. But here all evidence points to the same conclusion: Congress intended for private parties to enforce section 208.

On this issue, this Court's inquiry is "straightforward." *In re Wild*, 994 F.3d 1244, 1255 (11th Cir. 2021) (en banc). It must "interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

Here, that intent is clear. Congress " 'recognized that private rights of action' were available under the VRA when it 'reenacted and extended the life of the Voting Rights Act in 1975.' " *Ala. State Conf. of NAACP v. Alabama*, 949 F.3d 647, 652 (11th Cir. 2020) (quoting *Morse*, 517 U.S. at 233), *vacated sub nom. as moot by Alabama v. Ala. State Conf. of NAACP*, 141 S. Ct. 2618 (2021). Specifically, in 1975 Congress "amended § 3 . . . to make what was once implied now explicit: private parties can sue to enforce the VRA." *Id.* at 651. Now, "[s]ection 3 . . . provides the general enforcement mechanisms of the Act." *Id.* Under section 3, "an aggrieved person" may "institute[] a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. § 10302(a).[7]

[7] In addition to section 3, other provisions indicate that Congress intended to permit private suits under section 208. For example, elsewhere the VRA provides that, "[i]n any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, *other than the United States*, a reasonable attorney's fee." 52 U.S.C. § 10310(e) (emphasis added). "Obviously, a private litigant is not the United States, and the Attorney General does not collect attorney's fees." *Morse*, 517 U.S. at 234.

Perhaps anticipating this line of reasoning, Defendants argue that section 3's "aggrieved person" language actually suggests that Congress *did not* intend for private parties to enforce section 208. This is so, they say, because Congress included a remedial scheme in section 3 but not section 208—thus demonstrating that Congress intended for private enforcement of one but not the other.

But that does not follow. Section 3 does not speak of actions to enforce *this section*; section 3 speaks of actions under "*any statute* to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. § 10302(a) (emphasis added). Accordingly, the Supreme Court has explained, when a statute "by its terms" is "designed for enforcement of the guarantees of the Fourteenth and Fifteenth Amendments, . . . Congress must have intended it to provide private remedies." *Morse*, 517 U.S. at 233–34.

Congress clearly designed section 208 to enforce the Fourteenth Amendment's guarantees. *See Tennessee v. Lane*, 541 U.S. 509, 525 (2004) (explaining that Title II of the ADA validly abrogated state sovereign immunity under the Fourteenth Amendment, in part, because it targeted discrimination against disabled persons in voting); S. Rep. No. 97-417, at 64 (1982) (explaining that section 208 "implements an existing right"). *See also McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969) ("[B]ecause of the overriding importance of voting rights, classifications 'which might invade or restrain them must be closely

scrutinized and carefully confined' where those rights are asserted under the Equal Protection Clause."). Because section 208, by its terms, enforces disabled voters' Fourteenth Amendment rights, "Congress must have intended it to provide private remedies." *Morse*, 517 U.S. at 233–34. *See also Ala. State Conf. of NAACP*, 949 F.3d at 652 (explaining that section 3 allows private suits to "enforce § 2 *or other provisions* of the VRA" (emphasis added)). Thus, far from suggesting that Congress intended to preclude private parties from enforcing section 208, section 3 evinces Congress's intent to authorize such suits.

In sum, every court that has considered the issue—and the Attorney General of the United States—agree that private parties may enforce section 208. And even setting that consensus aside, the VRA's plain text provides that private parties may enforce section 208. This Court therefore finds that private parties may enforce section 208.[8]

2

That brings this Court to the second issue; namely, whether section 208 preempts Florida law. "Preemption is a question of law." *MetroPCS Cal., LLC v. Picker*, 970 F.3d 1106, 1117 (9th Cir. 2020) (quotation omitted). Thus, no issue of

[8] Because this Court determines that Plaintiffs may sue under section 3 of the VRA, it does not address Plaintiffs' alternative argument that they can sue to enforce section 208 through 42 U.S.C. § 1983. *See generally Schwier v. Cox*, 340 F.3d 1284, 1294–97 (11th Cir. 2003) (holding that private parties may enforce section 1971 of the Voting Rights Act of 1870 through 42 U.S.C. § 1983)

fact necessarily prevents this Court from addressing the parties' motions for summary judgment. That said, even in the absence of a factual dispute, this Court "may . . . deny summary judgment . . . where there is reason to believe that the better course would be to proceed to a full trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). *See also Lind v. United Parcel Serv., Inc.*, 254 F.3d 1281, 1285 (11th Cir. 2001) (same). Such situations are few and far between. For two reasons, however, such restraint is warranted here.

*First*, questions of preemption implicate delicate federalism concerns. Elsewhere, Defendants correctly point out that the Constitution tasks states with enacting laws governing their elections. *See* U.S. Const. art. I, § 4, cl. 1 (authorizing state legislatures, in the absence of a contrary federal law, to set "[t]he Times, Places and Manner of holding Elections for Senators and Representatives"). That does not mean the Constitution grants the states *carte blanche* to do whatever they want, *see, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 566 (1964) ("[T]he Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators."), but it does mean that courts should be careful to displace only those state election laws that run afoul of federal law. In this case, the need for such caution weighs in favor of proceeding to trial.

*Second*, even in the "absence of a genuine issue as to a material fact," the need for a more detailed "factual basis" on which to decide a complicated legal issue may

"warrant[] denial of [a] summary judgment motion." *Bingham, Ltd. v. United States*, 724 F.2d 921, 926 (11th Cir. 1984). If Defendants are right that preemption turns on whether the challenged provision unduly burdens the voting rights of disabled voters, it would be nigh impossible to decide whether section 208 preempts Florida law without developing a factual record at trial.

In sum, before resolving the complex legal issues that Plaintiffs' section 208 claim raises, this Court finds that it would benefit from further factual development and argument at trial. Accordingly, the parties' motions for summary judgment are **DENIED** as it pertains to Count VI of Plaintiffs' amended complaint.

E

Next, this Court turns to Plaintiffs' First Amendment speech and Fourteenth Amendment vagueness and overbreadth claims against SB 90's non-solicitation provision. It appears to this Court, to the extent such claims are extricable from Plaintiffs' First Amendment claim, that Plaintiffs move for judgment only on their vagueness and overbreadth theories.[9] Defendants, on the other hand, move for judgment on all theories. In support, Defendants argue (1) that "the non-solicitation

[9] While Plaintiffs characterize their overbreadth claim as a First Amendment claim, they appear to—correctly—recognize elsewhere that vagueness claims arise under the Fourteenth Amendment's Due Process Clause. ECF No. 59 ¶ 203. *See also Giaccio v. Pennsylvania*, 382 U.S. 399, 402–403 (1966) ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. . . ."). That said, the standard for vagueness is "strict in the area of free expression." *NAACP v. Button*, 371 U.S. 415, 432 (1963).

provision does not implicate the First Amendment because it regulates only non-expressive conduct," ECF No. 245-1 at 64, (2) that, even if the non-solicitation provision implicated the First Amendment, it survives constitutional scrutiny, *id.* at 67, and (3) that the non-solicitation provision is neither vague nor overbroad, *id.* at 70. Plaintiffs, for their part, argue that the non-solicitation provision does implicate expressive conduct, ECF No. 280 at 78, that the provision does not survive constitutional scrutiny, *id.* at 81, and that the provision is both vague and overbroad, *id.* at 83–85. This Court addresses each issue in turn.

1

First, Defendants argue that the non-solicitation provision does not implicate the First Amendment because it regulates only conduct. But "[c]onstitutional protection for freedom of speech 'does not end at the spoken or written word.' " *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1240 (11th Cir. 2018) (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)). Rather, the First Amendment also encompasses a right to engage in "expressive conduct." *Id.* (quoting *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004)).

To determine whether conduct is expressive—and thus entitled to First Amendment protection—this Court must ask two questions. *See Spence v. Washington*, 418 U.S. 405, 410–411 (1974). These are "(1) whether an intent to

convey a particularized message was present, and (2) whether the likelihood was great that the message would be understood by those who viewed it." *Burns v. Town of Palm Beach*, 999 F.3d 1317, 1336 (11th Cir. 2021) (cleaned up) (quoting *Johnson*, 491 U.S. at 404). While the first question is self-explanatory, the second is more nuanced. It requires this Court to ask "whether the reasonable person would interpret" the conduct as conveying "*some* sort of message, not whether an observer would necessarily infer a *specific* message." *Food Not Bombs*, 901 F.3d at 1240 (quoting *Holloman*, 370 F.3d at 1270) (emphasis in original) (cleaned up).

Here, there is extensive testimony that Plaintiffs distribute food and water to voters waiting in line to vote. ECF No. 271-51 at 24; ECF No. 271-53 ¶ 5; ECF No. 271-55 ¶ 17. Plaintiffs contend that distributing food and water to those waiting to vote is "an expressive manifestation of Plaintiffs' central message concerning the importance of voting." ECF No. 59 ¶ 195. Though Defendants quibble over whether the non-solicitation provision actually reaches Plaintiffs' activities, they do not contest that Plaintiffs actually distribute food, water, and other relief to those waiting to vote.

Nor do Defendants contest that the Plaintiffs intend to convey a particular message when it distributes food, water, and other relief. Instead, they question whether a reasonable person would interpret the Plaintiffs' activity as conveying a message. Moreover, Defendants say, because it is highly dependent on individual

facts, the issue of whether the distribution of food and water conveys a message may only be adjudicated on an as-applied challenge.

Explaining that "context matters," *Food Not Bombs*, 901 F.3d at 1237, the Eleventh Circuit has agreed, *id.* at 1241 ("Whether food distribution [or sharing] can be expressive activity protected by the First Amendment under particular circumstances is a question to be decided in an as-applied challenge[.]" (alterations in original) (quoting *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1032 (9th Cir. 2006)). Thus, to the extent Plaintiffs mount a facial challenge to the non-solicitation provision under the First Amendment, Defendants' motion for summary judgment is **GRANTED in part**.[10]

This Court says "to the extent Plaintiffs mount a facial challenge" because their amended complaint does not make clear whether Plaintiffs mount an as-applied or facial challenge. On the one hand, Plaintiffs claim that their " 'line warming' activities fall squarely within the protections of the First Amendment." ECF No. 59 ¶ 196. Such language is indicative of an as-applied challenge. On the other hand,

[10] This Court recognizes that Plaintiffs' overbreadth challenge is also, necessarily, a facial challenge under the First Amendment. But there, Plaintiffs' claim does not necessarily rise or fall depending on whether the First Amendment reaches Plaintiffs' activity. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981) ("Because appellants' claims are rooted in the First Amendment, they are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own."). Likewise, whether a law implicates the First Amendment or not, "[w]hen vagueness permeates the text of such a law, it is subject to facial attack." *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999). Accordingly, this Court makes clear that it *does not* grant summary judgment on Plaintiffs' overbreadth or vagueness claims.

Plaintiffs request broad relief, demanding that this Court "[p]reliminarily and permanently enjoin Defendants . . . from enforcing . . . the Line Warming Restriction." *Id.* at 119–20. This language is more indicative of a facial challenge.

But this imprecision is not surprising. "[T]he distinction between facial and as-applied challenges" is fluid. *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). And the difference between the two turns not on what the parties have pleaded but rather on the relief the court grants. *Doe #6 v. Miami-Dade Cnty.*, 974 F.3d 1333, 1338 (11th Cir. 2020). Accordingly, the Eleventh Circuit has expressed a willingness to permit parties to change their focus from a facial to an as-applied challenge "at the summary judgment stage." *Id.* (citing *Am. Fed'n of State, Cnty. & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851 (11th Cir. 2013)). This Court, therefore, cannot grant Defendants' motion for summary judgment on the ground that Plaintiffs seek only facial relief.

Nonetheless, Defendants argue that, even if Plaintiffs bring an as-applied claim, "[t]he contextual factors in [*Food Not Bombs*] are simply not met in this context." ECF No. 245-1 at 67. While it is hard to see how a "contextual" test can be reduced to five factors that apply in every instance, the Eleventh Circuit has since applied *Food Not Bombs* as a five-factor test. *See Burns*, 999 F.3d at 1343–44; *see also id.* at 1373 (Marcus, J., dissenting) ("The circumstances in Fort Lauderdale -- which my colleagues read as factors -- were relevant to determining whether a

political nonprofit's food sharing in a public park was expressive conduct -- nothing more and nothing less.").

In *Burns*, the Court distilled *Food Not Bombs* into the following factors: (1) whether the plaintiff intends to distribute literature or hang banners in connection with the expressive activity, (2) whether the activity will be open to all, (3) whether the activity takes place in a traditional public forum, (4) whether the activity addresses an issue of public concern, and (5) whether the activity "has been understood to convey a message over the millennia." *Id.* at 1344–45.

While Defendants argue that factors 3 and 4 are not met here, they address no other factor and point to nothing in the record supporting their argument. *See* ECF No. 285-1 at 62 (arguing that, "[f]acts aside," Plaintiffs' conduct is not expressive). But this Court cannot set the facts aside; given Defendants limited argument, and the fact-intensive nature of the inquiry this Court must undertake, summary judgment is inappropriate. This Court must determine whether Plaintiffs' conduct implicates the First Amendment after hearing all the evidence at trial.

2

Even if this Court were to determine that Plaintiffs' conduct implicates the First Amendment, Defendants argue, this Court should still grant summary judgment. Just as with Plaintiffs' preemption claims, however, this Court finds it imprudent to address this issue now. In similar cases, "[c]ourts . . . have reserved

their ruling on a motion for summary judgment until after the trial of a separate issue." 10A Charles A. Wright et al., *Federal Practice & Procedure* § 2728 (4th ed.). Thus, where "a determination at trial . . . may eliminate the need" to resolve an issue at all, this Court may deny summary judgment. *United States ex rel. Greenville Equip. Co. v. U.S. Cas. Co.*, 180 F. Supp. 715, 717 (D. Del. 1960). Here, addressing at trial whether Plaintiffs' activities are expressive at all may resolve the issue of whether the non-solicitation provision satisfies First Amendment scrutiny. Accordingly, the parties' motions for summary judgment are **DENIED** as to the First Amendment speech theory asserted in Count V of Plaintiffs' amended complaint.

3

That leaves Plaintiffs' vagueness and overbreadth claims. But whether Plaintiffs' conduct implicates the First Amendment impacts this Court's analysis of these claims as well. Vagueness challenges receive more lenient review when raised in a First Amendment context. *See Vill. of Hoffman Ests. v. Flipside, Hoffman Ests.*, Inc., 455 U.S. 489, 494 (1982). And vagueness claims not implicating the First Amendment "must be examined in the light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550 (1975). Thus, this Court will not resolve Plaintiffs' vagueness claims at this juncture.

In turn, this Court's overbreadth analysis may turn on how this this Court resolves other issues at trial. Accordingly, the parties' motions for summary

judgment are **DENIED** as to the vagueness and overbreadth theories alleged in Count V of Plaintiffs' amended complaint.

F

Next, this Court addresses the registration-warning provision, which Plaintiffs allege violates the First Amendment by compelling speech. In moving for summary judgment, Defendants make two arguments.[11] First, they argue that the registration requirement is subject to—and easily passes—minimal scrutiny. Second, they argue that, even if this Court subjects the warning requirement to more heightened scrutiny, it advances a compelling state interest. Plaintiffs, by contrast, argue that the registration-warning provision compels speech, and is thus subject to strict scrutiny—which it fails.

The threshold issue, then, is what framework applies. Defendants first argue that strict scrutiny cannot apply because "[t]he notification provision and Plaintiffs' activities are *complementary*." ECF No. 245-1 at 77 (emphasis in original). Defendants, however, cite no authority in support of the proposition that compelled speech is acceptable so long as a court decides that the government's message complements the speaker's message—likely because there is none.

[11] Elsewhere, Defendants argue that the registration-warning provision "does not infringe on any speech." *See* ECF No. 321-1 at 43, *in* Case No. 4:21cv186. Here, however, Defendants seem to concede that the provision *does* infringe on speech to some degree but contend that any infringement is constitutional.

As the Supreme Court has explained, government-required notices *are* content-based restrictions; "[b]y compelling individuals to speak a particular message, such notices 'alte[r] the content of [their] speech.' " *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("*NIFLA*") (alteration in original) (quoting *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)). Still, because "the general rule that content-based restrictions trigger strict scrutiny is not absolute," this conclusion does not automatically mean strict scrutiny applies. *Dana's R.R. Supply v. Att'y Gen., Fla.*, 807 F.3d 1235, 1246 (11th Cir. 2015).

Recognizing that exceptions exist, Defendants assert that a more deferential standard of review from either *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) or *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) applies to Plaintiffs' claims. These cases apply, Defendants say, because Plaintiffs' "communications with voters are conceptually closer to commercial speech than to protected political expression."[12] ECF No. 245-1 at 78. Beyond this *ipse dixit*,

[12] Both *Zauderer* and *Central Hudson* are plainly limited to commercial speech. *Zauderer*, by its own terms, applies only to commercial speech by professionals. 471 U.S. at 629 ("This case presents additional unresolved questions regarding the regulation of commercial speech by attorneys."). *See also NIFLA*, 138 S. Ct. at 2372 ("[O]ur precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.' " (quoting *Zauderer*, 471 U.S. at 651)). *Central Hudson*, likewise, governs commercial speech. 447 U.S. at 564–66 (setting out "a four-part analysis" to govern "commercial speech cases"). While Defendants dance around this conclusion in several related cases, *see, e.g.*, ECF No. 321-1 at 44, *in* Case No. 4:21cv186 (arguing that *Zauderer* "applies to

Defendants do not explain why Plaintiffs' speech resembles commercial speech. That is because it doesn't; both *Zauderer* and *Central Hudson* are plainly inapplicable here.

*Zauderer*, by its own terms, applies only to commercial speech by professionals. 471 U.S. at 629 ("This case presents additional unresolved questions regarding the regulation of commercial speech by attorneys."). *See also NIFLA*, 138 S. Ct. at 2372 ("[O]ur precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.' " (quoting *Zauderer*, 471 U.S. at 651)). *Central Hudson*, likewise, governs commercial speech. 447 U.S. at 564–66 (setting out "a four-part analysis" to govern "commercial speech cases").

Plaintiffs' speech is not commercial. Commercial speech is "expression related solely to the economic interests of the speaker and its audience." *Central Hudson*, 447 U.S. at 561. *See also Dana's*, 807 F.3d at 1246 (defining commercial speech as "a narrow category of necessarily expressive communication that is related solely to the economic interests of the speaker and its audience . . . or that does no more than propose a commercial transaction." (quotations omitted)); *Commercial*,

non-controversial factual statements like the ones required here"), in this case, Defendants attack the issue head-on by attempting to liken Plaintiffs' speech to commercial speech.

BLACK'S LAW DICTIONARY (6th ed. 1990) ("Relates to or is connected with trade and traffic or commerce in general; is occupied with business and commerce.").

Here, there is absolutely no allegation—not a hint—that Plaintiffs charge voters a fee to return their applications or are somehow in the business of returning voter registration applications. And, at any rate, other courts have already rejected Defendants' argument, explaining that "voter-registration information does not propose any kind of commercial transaction." *Minn. Voters All. v. City of Saint Paul*, 442 F. Supp. 3d 1109, 1117 (D. Minn. 2020); *See also League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 730 n.10 (M.D. Tenn. 2019) (same). In short, neither *Zauderer* nor *Central Hudson* apply.

That said, the issue of what level of scrutiny applies is not a binary question as the parties suggest. To be sure, ordinarily, when one of the above exceptions does not apply, a content-based regulation is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). Here, however, there is yet another layer of nuance.

The *Anderson–Burdick* test is typically used to evaluate First Amendment challenges to election laws. *See Anderson*, 460 U.S. at 786–89. But when an election law does "not control the mechanics of the electoral process" and is instead "a regulation of pure speech," an "exacting scrutiny" test applies. *McIntyre v. Ohio*

*Elections Comm'n*, 514 U.S. 334, 345 (1995) (quoting *Meyer v. Grant*, 486 U.S. 414, 420 (1988)). *See also Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021) ("[C]ompelled disclosure requirements are reviewed under exacting scrutiny.").

Under exacting scrutiny, this Court must "uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *Id.* at 347. "Though possibly less rigorous than strict scrutiny, exacting scrutiny is more than a rubber stamp." *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1249 (11th Cir. 2013) (quoting *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012)).

Whether strict or exacting scrutiny applies here is far from clear. *Compare Minnesota Voters*, 442 F. Supp. 3d at 1118 (applying strict scrutiny) *with Hargett*, 400 F. Supp. 3d at 725 (applying exacting scrutiny). And even under *Anderson–Burdick*, strict scrutiny might apply. *See Citizens for Legis. Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998) (explaining that "a law severely burdens voting rights if it discriminates based on content instead of neutral factors").

This Court need not decide now what standard applies—nor would it be prudent to do so in the absence of briefing by the parties.[13] Defendants are not

[13] This Court highlights the issue now to alert the parties that they must be prepared to address what standard applies at trial.

entitled to summary judgment under any standard. And, although a close call, this Court finds that material issues of fact preclude summary judgment for Plaintiffs.

Florida contends that the registration-warning provision serves a compelling interest: "protecting voters by regulating voter registration." ECF No. 245-1 at 78. Defendants have also submitted at least some evidence suggesting that the registration-warning provision could advance that interest. *See also* ECF No. 244-31 at 166 (testimony by the Pasco County Supervisor of Elections that "eight voter registrations that were submitted by a third-party voter registration organization that were turned in late and subsequently after book closing for the presidential preference primary"). To be sure, Plaintiffs vehemently contest Defendants' assertions, but that is all the more reason to address this issue once the record is fully developed.

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Given what's on the line, the stakes are simply too high to exercise anything less than the most scrupulous caution. The parties' motions for summary judgment are therefore **DENIED** as to Counts VIII of Plaintiffs' amended complaint.

G

Finally, this Court addresses Plaintiffs' First Amendment challenge to SB 90's delivery requirement. That provision provides for fines against third-party voter registration organizations if they fail to deliver registration applications to the "supervisor of elections in the county in which the applicant resides" within 14 days. § 97.0575(3)(a)(1)–(3), Fla. Stat.

To start, the parties disagree as to whether the act of returning voter registration forms implicates the First Amendment at all. Plaintiffs contend that their "voter registration activities . . . constitute protected associative conduct." ECF No. 280 at 89. Moreover, they say, the delivery requirement "constitutes unconstitutional viewpoint and speaker-based discrimination, in that it imposes different obligations on [Plaintiffs] than it does on other persons who register voters, such as government agencies, political parties, and family members of the applicant, all of whom may continue to return applications to any Supervisor." *Id.* at 90.[14] So, Plaintiffs argue, the delivery requirement is subject to exacting scrutiny—which it fails.

[14] This does not appear to be entirely true. Florida law defines "Third-party voter organizations" as "any person, entity, or organization soliciting or collecting voter registration applications." § 97.021(40), Fla. Stat. It then excludes from this definition any "person who seeks only to register to vote or collect voter registration applications from that person's spouse, child, or parent" and any "person engaged in registering to vote or collecting voter registration applications as an employee or agent of the division, supervisor of elections, Department of Highway Safety and Motor Vehicles, or a voter registration agency." *Id.* § 97.021(40)(a)–(b). A voter registration agency is further defined as "any supervisor of elections or individual authorized by the Secretary of State to accept voter registration applications and execute updates to the

By contrast, Defendants argue that the delivery requirement does not affect [Plaintiffs'] ability to speak or associate at all." ECF No. 245-1 at 83. Plaintiffs can speak all they want, say Defendants; the delivery requirement does not come into play until the speaking is done, and it is time to return the registration forms. Plus, Defendants claim, the delivery requirement does not constitute viewpoint discrimination because family members, who can return registrations to any supervisor, "presumably . . . feel similarly about the imperative of voter registration." *Id.* at 83.

Many cases have addressed this issue. This Court, for example, has held that the act of collecting voter registration applications implicates a host of constitutional rights. *See League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1158 (N.D. Fla. 2012). As this Court explained, "encouraging others to register to vote" is "core First Amendment activity." *Id.* And "speak[ing] and act[ing] collectively with others" in the context of voter registration "implicat[es] the First Amendment right of association." *Id.* Finally, this Court noted that the process of registering people to vote is intertwined with the right to vote itself, explaining that "[t]ogether speech and voting are constitutional rights of special significance; they are the rights

statewide voter registration system." *Id.* § 97.021 (45). Accordingly, political parties appear to be "Third-party voter organizations" under Florida law.

most protective of all others, joined in this respect by the ability to vindicate one's rights in a federal court." *Id.* at 1159.

Some courts agree with that analysis. *See League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314, 1322 (S.D. Fla. 2006) (explaining that "the collection and submission of voter registration drives is intertwined with speech and association"). *See also Hargett*, 400 F. Supp. 3d at 720; *Am. Ass'n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1200 (D.N.M. 2010); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 702 (N.D. Ohio 2006). Some disagree. *See Voting for Am., Inc. v. Steen*, 732 F.3d 382, 391 (5th Cir. 2013) ("[B]ecause the canvassers' speech-related activities are distinct from both the collection and delivery of the forms and from the voters' 'speech' in registering, the drives themselves cannot be amalgamated into protected 'expressive conduct.' "); *Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018) (same). *See also League of Women Voters of Fla. v. Browning*, 575 F. Supp. 2d 1298, 1319 (S.D. Fla. 2008) ("The undersigned agrees that the collection and handling of voter registration applications is not inherently expressive activity.").

Having carefully reviewed the above-cited cases, this Court sees no reason to deviate from its previous ruling; the act of returning a registration application is inextricable from the other, speech-imbued aspects of encouraging Floridians to register to vote. And, at any rate, the act of collecting and returning voter registration

forms implicates third-party registration organizations' right to associate, both with their members and with unregistered Floridians—an issue cases like *Steen* and *Knox* refused to grapple with. Finally, the rules under which voter registration forms may be returned implicate the fundamental right to vote, and thus trigger some level of constitutional scrutiny. All that said, recognizing the limited scope of the parties' briefing on this issue, this Court will entertain argument at trial on whether it should revisit this ruling. So the parties must be prepared to readdress the issue at trial.

Further, accepting that returning voter registration forms implicates various constitutional rights, the parties should also be prepared to address the issue of what rubric this Court should use to evaluate the registration-delivery requirement. Some courts have applied *Anderson–Burdick* to similar laws. *Browning*, 863 F. Supp. 2d at 1159 (noting that "[e]very court that has addressed a constitutional challenge to provisions regulating voter-registration drives has concluded that the governing standards are those set out in *Anderson*"). *See also Cobb*, 447 F. Supp. 2d at 1331 (applying *Anderson–Burdick*). Others have applied exacting scrutiny. *Hargett*, 400 F. Supp. 3d at 728 (applying exacting scrutiny to restriction on "the collection and submission of applications" (quotation omitted)).

Just as explained above, this Court need not decide now what standard applies. Instead, this Court highlights this issue solely for the parties' benefit.[15] Under any standard of review, material disputes of fact preclude summary judgment for either party. Thus, both parties' motions for summary judgment are **DENIED** as to Count VII of Plaintiffs' amended complaint.

Accordingly,

**IT IS ORDERED**:

1. Defendants' motion for summary judgment, ECF No. 245, is **GRANTED in part** and **DENIED in part**. The motion is granted only to the extent that Plaintiffs mount a facial challenge to the non-solicitation provision under the First Amendment. The motion is otherwise denied.
2. Plaintiffs' motion for summary judgment, ECF No. 241, is **DENIED**.
3. Going forward, for the benefit of this Court and to avoid any prejudice to Defendants at trial, **Plaintiffs shall include in their pretrial stipulation due December 27, 2021, a list of each claim at issue and identify whether Plaintiffs are proceeding with an as-applied or facial challenge—or both—as to each claim**. If neither designation is applicable, the Plaintiffs must so state. This Court requires notice of the

[15] That said, this Court notes that if it determines that *Anderson–Burdick* applies, Count VII would presumably be subsumed within Count IV.

Plaintiffs' position ahead of trial for purposes of focusing this Court's attention during the presentation of evidence.

**SO ORDERED on December 17, 2021.**

**s/Mark E. Walker**
**Chief United States District Judge**