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

FLORIDA RISING TOGETHER, *et al.*, Plaintiffs, v. LAUREL M. LEE, in her official capacity as Secretary of State of Florida, *et al.*, Defendants, and REPUBLICAN NATIONAL COMMITTEE, *et al.*, Intervenor-Defendants.	Case No. 4:21-cv-201

JOINT RESPONSE IN OPPOSITION TO THE FLORIDA RISING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs Florida Rising Together, UnidosUS, Equal Ground Education Fund, Hispanic Federation, Poder Latinx, Haitian Neighborhood Center Sant La, and Mi Familia Vota Education Fund (together, the "Florida Rising Plaintiffs")[1] allege that four sections of Chapter 2021-11, Laws of Florida (the "2021 Law") violate federal law. *See* Case No. 201, ECF 59. The Florida Rising Plaintiffs seek partial summary

[1] Plaintiff Faith in Florida has been voluntarily dismissed. ECF 229.

judgment on their compelled speech, vagueness, and Voting Rights Act Section 208 challenges to the following provisions:

(1) Section 97.0575, which enumerates the disclosures that organizations like the Florida Rising Plaintiffs must provide to registrants (the "Notification Provision"), and

(2) Section 102.031(4)(a)-(b), which prohibits anyone from "engaging in any activity with the intent to influence or effect of influencing a voter" either inside a polling place or within 150 feet of a drop box or polling-place entrance (the "Non-Solicitation Provision").

ECF 241.[2]

Secretary Lee opposes Plaintiffs' Motion for Partial Summary Judgment in its entirety. Supervisors Hays and Doyle oppose the Florida Rising Plaintiffs' motion as to the non-solicitation provision.[3]

STATEMENT OF FACTS

Senate Bill 90 was introduced on February 3, 2021. ECF 244-8 at 1. After four months of amendments and debate, Governor DeSantis signed Senate Bill 90 on May 6, 2021. *Id.* at 6.[4] The Florida Rising Plaintiffs sued less than two weeks later.

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[2] The other provisions Plaintiffs challenge in their Amended Complaint are the drop box provision found in Section 101.69(2)-(3), and the vote-by-mail application identification provision in Section 102.62(1)(b). *See* ECF 59 at ¶¶ 165-90.

[3] As this response is signed by counsel for the Supervisors, it is a *joint* response in opposition to the Florida Rising Plaintiffs' motion for partial summary judgment.

[4] Fla. Senate, *CS/CS/CS/SB90: Elections*, *available at* https://www.flsenate.gov/Session/Bill/2021/90.

Compare ECF 1 (*filed* May 17, 2021) *with* ECF 244-8 at 6 (bill approved on May 6, 2021). Although their Amended Complaint challenged five provisions of Florida law, their summary-judgment motion only seeks judgment as to the Notification Provision[5] and the Non-Solicitation Provision.[6]

Both provisions serve critically important State interests. The Notification Provision ensures that all registrants know the registration methods available to them and cautions them that their applications may not arrive on time if they rely on a third-party to deliver their application, which can result in a denial of the franchise. *See* ECF 244-36 at ¶ 18 ("A new voter whose registration information is received less than 29 days before a given election cannot vote in that election because that voter will have missed the 'book closing' deadline."). Informing registrants of alternative registration opportunities, in turn, prevents registrants from losing their access to the franchise based on the well-documented irregularities and complaints about how 3PVROs handle voter-registration information. *Id.* at ¶¶ 19-20. Fundamentally, Florida has an "interest[] in ensuring that as many eligible Floridians as possible timely and accurately register for elections." *Id.* at ¶ 21.

As for the Non-Solicitation Provision, the statute itself makes clear the State's interest in preventing undue harassment while voters wait in line at the polls. *See*

[5] Section 97.0575(3)(a), Florida Statutes.

[6] Section 102.031(4)(a)-(b), Florida Statutes.

infra at 18-20, 23-24; *see also* ECF No. 244-36 at ¶ 36, 142-43 (listing complaints about "aggressive campaign[ing]," "fights," "loud music," and "loud bull horns" around the polling places in Miami-Dade County). In any event, Florida's Non-Solicitation Rules "mirror the vast majority of state rules across the country," all of which prohibit influencing voters within a certain distance of a polling place. ECF 244-1 ¶ 15.

LEGAL STANDARD

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). Disputes are "'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Material" facts are those that might affect the outcome of the case under the governing substantive law, not those that "are irrelevant or unnecessary." *Id.*

Plaintiffs' motion fails to meet this standard.

ARGUMENT

In their Motion for Partial Summary Judgment, the Florida Rising Plaintiffs fail to meet their burden of showing that the Notification Provision constitutes

compelled speech in violation of the First Amendment.[7] Additionally, they fail to demonstrate that the Non-Solicitation Provision is unconstitutionally vague in violation of the due process clause. Finally, because Section 208 of the Voting Rights Act ("VRA") includes no private right of action, and the 2021 Law does not conflict with Section 208's requirements, the Florida Rising Plaintiffs' claim under Section 208 also fails. Their Motion for Partial Summary Judgment therefore should be denied.

I. The Notification Provision Is Not Unconstitutional Compelled Speech.

The information that the Florida Rising Plaintiffs must communicate under the Notification Provision does not constitute core First Amendment speech and, accordingly, the Notification Provision stands so long as it withstands minimal scrutiny. It is narrowly confined to the collection and delivery of government forms by organizations registered with the State to engage in voter registration. *See* Fla. Stat. § 97.0575 (2021). It does not extend to speech encouraging voter registration or assisting with voter registration generally. The information that must be disclosed does not amount to any statements regarding politics, ideology, or opinions; instead, it is non-controversial factual information that (in the commercial-speech context) a

[7] In the interest of avoiding needless duplication and considering that the Court has an independent responsibility to review Plaintiffs' standing, the Defendants will not rehash their standing argument here. Instead, Defendants refer the Court to their arguments addressing standing in their Motion for Summary Judgment. *See* ECF No. 245-1 at 6-22.

State may require so long as the disclosure-requirement passes minimal scrutiny. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 (1985) (holding that "appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal").

Simply put, the notification is not "inextricably intertwined" with protected First Amendment speech. *Cf. Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 796 (1988). Plainly, it directly advances Florida's compelling interest in "seeing that voter-registration applications are promptly turned in to an appropriate voter-registration office." *League of Women Voters of Florida v. Browning*, 863 F. Supp. 2d 1155, 1160 (N.D. Fla. 2012). It also prevents voter confusion and ensures that 3PVROs faithfully discharge their statutory obligations as fiduciaries to registrants that entrust their applications to their care.

Accordingly, minimal scrutiny applies, and the Notification Provision should be upheld. But even under higher levels of scrutiny, the State's chosen means to protect its interests still passes muster.

A. The Notification Provision Satisfies Minimal Scrutiny.

The Notification Provision ensures that each 3PVRO "serves as a *fiduciary* to the applicant," Fla. Stat. § 97.0575(3)(a) (2021) (emphasis added). The Notification Provision focuses narrowly on advancing that fundamental State interest; indeed, it applies only to application collection and delivery. *See also infra* at 9, 16-17.

Accordingly, the provision is more analogous to a regulation of commercial speech[8] than political speech, and it should be subject to scrutiny under that doctrine rather than heightened scrutiny.[9]

Moreover, as the Notification Provision requires only the promulgation of non-controversial, factual information as registration applications are collected, the Supreme Court's decision in *Zauderer* governs. *See Am. Meat Inst. v. United States Dep't of Agric.*, 760 F.3d 18, 20 (D.C. Cir. 2014) (holding that "*Zauderer* in fact does reach beyond problems of deception" to reach other disclosure mandates). Under *Zauderer*'s two-part analysis, this Court must (1) first "assess the adequacy of the interest motivating the" required disclosures, and then (2) "assess the relationship between the government's identified means and its chosen ends." *Id.* at 23, 25.

Florida has a simple, yet compelling interest: protecting its voters through the dissemination of truthful information, which in turn enables as many registrants as possible to access the franchise. *See* ECF 244-36 at ¶¶ 17-21. By enacting the Notification Provision, Florida aims to protect its citizens by enforcing a fiduciary

[8] To that end, many 3PVROs pay individuals to collect voter registrations. *See, e.g.*, ECF 272-6 at 34:11-35:12.

[9] As courts have recognized, common-law fiduciary duties (like the duties of care and loyalty) have similar underpinnings as commercial- and securities-law duties. *Cf. Gochnauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1049 (11th Cir. 1987).

duty against 3PVROs engaged in collecting and delivering registration applications. The Notification Provision requires them to provide registrants with complete and accurate information about the registration process, including the existence of an expedient online option, which ensures that prospective voters have every opportunity to register in a timely manner. As this Court recognized in *Browning*, "[t]he state has a substantial interest in seeing that voter-registration applications are promptly turned in to an appropriate voter-registration office." 863 F. Supp. 2d at 1160.

The Notification Provision, moreover, animates the State's interest in maximizing access to the franchise by informing prospective registrants of the risks inherent in relying on a third-party to deliver their applications. Specifically, the four required disclosures (1) inform the applicant that the 3PVRO may fail to deliver the voter registration application to the Division of Elections or appropriate supervisor within 14 days or before registration closes, (2) advise the applicant that he or she may deliver the voter registration application in person or by mail, (3) inform the applicant how to register online, and (4) inform the applicant how to determine whether an application has been delivered. *See* Fla. Stat. § 97.0575(3)(a). All four disclosures empower registrants by ensuring that they are fully informed and successfully registered in time to exercise their right to vote.

The Florida Rising Plaintiffs argue, mistakenly, that requiring them to provide

this information constitutes compelled political speech. But mandating them to provide this information is, at most, akin to commercial speech because a registrant's decision to use a 3PVRO constitutes a transaction that imposes a fiduciary responsibility on the 3PVRO. The statute merely enshrines this. *See* Fla. Stat. § 97.0575(3)(a) (2021) ("A [3PVRO] that collects voter registration applications serves as a fiduciary to the applicant."). Importantly, the Notification Provision is strictly limited to the time at which a 3PVRO collects a voter-registration application. *See* Fla. Stat. § 97.0575(3)(a).

In other words, the Notification Provision is narrowly confined to 3PVROs that are registered with the State, *see id.* § 97.0575(1), for the specific purpose of collecting and delivering government registration forms in a fiduciary capacity. And it is specifically linked to the physical *handling* of registration applications, rather than to encouraging or assisting speech. *See id.* § 97.0575(3)(a). Any organization or individual may encourage others to register to vote, may hand out voter-registration forms, or may assist individuals with registering online; all without making any disclosure whatsoever. The Notification Provision only applies if an organization desires to *collect and return* registrations on behalf of a registrant. In that instance, the organization must register with the State as a 3PVRO, accept the responsibilities of a fiduciary, and provide uncontroversial, factually accurate, and critically important information to the registrants they are serving.

The Florida Rising Plaintiffs unsuccessfully attempt to analogize this case to the compelled statements at issue in *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018), a case addressing a law that required pro-life pregnancy-care centers to alert individuals "about the availability of state-sponsored" abortion services—*i.e.*, "the very practice that petitioners [we]re devoted to opposing." *Id.* In contrast, the information mandated by the Notification Provision are (ostensibly) the information that the Florida Rising Plaintiffs want people to have—that which is necessary to ensure access to the ballot box. The information required by the Notification Provision is non-controversial and, critically, does not require the Florida Rising Plaintiffs to speak any political or ideological message whatsoever. And, because numerous 3PVROs in Florida have delivered voter registration applications late in recent years, *see, e.g.*, ECF 244-31 at 165:6-166:4; ECF 272-5 at 62:6-63:4; ECF 244-36 at ¶¶ 19-21, which Plaintiffs themselves acknowledge, *see* ECF 241-1 at ¶ 11, the statement that 3PVROs *may* not (as opposed to, for example, "will never") deliver a registration application on time is not only uncontroverted and non-ideological but also exceptionally important to those who trust 3PVROs with the voter-registration applications.

At bottom, 3PVROs exist to help eligible individuals successfully register to vote. The Notification Provision advances that goal. The State's informational requirement and the registration activities of 3PVROs therefore *complement* the

mission of the 3PVROs (rather than contravene them, as was the case in *Becerra*).

The Florida Rising Plaintiffs' reliance on *Riley*, 487 U.S. at 797, is similarly unavailing. The statute at issue in *Riley* required, *inter alia*, professional fundraisers to disclose to potential donors the gross percentage of funds retained in earlier charitable solicitations as part of their future solicitations. *Id.* at 784. The Court held that because the commercial aspects of the compelled statement were "inextricably intertwined" with core protected speech and could not be parceled out, the compelled statement violated the First Amendment. *Id.* at 796-98.

But unlike professional fundraisers acting on behalf of charities, 3PVROs are registrants of the State who are authorized to collect and deliver government forms. *See* Fla. Stat. § 97.0575(1). And telling registrants that 3PVROs may not deliver their applications on time is not intertwined with any core protected speech whatsoever. Nothing about filling out or collecting a voter-registration application is inherently political or persuasive. Indeed, this same "message" is communicated primarily by Florida's Supervisors of Elections when assisting applicants with registration, *see e.g.*, ECF 272-2 at 172:11-173:5; ECF 272-3 at 31:17-32:15; ECF 272-4 at 15:2-17, and is accomplished in an entirely non-partisan way without advocacy or persuasive speech of the kind at issue in *Riley*.

Under *Riley*, advocacy and persuasion are part and parcel of solicitation: *i.e.*, persuading someone to financially support a specific cause, which necessarily entails

agreement with or endorsement of that cause. The Notification Provision requires the promulgation of information that is nothing of the sort. For that reason, it does not implicate First Amendment protections in the way charitable solicitation does.[10]

For all these reasons, minimal scrutiny applies, and the notification provision survives it.

B. Alternatively, the Notification Provision Satisfies Intermediate or Heightened Scrutiny.

If this Court declines to apply the *Zauderer* test, it should instead examine the Notification Provision under the intermediate scrutiny test for commercial speech. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980). It should also find that the law passes muster under *Central Hudson* because it directly advances Florida's substantial interest in enforcing the duties of 3PVROs as fiduciaries to registrants (as set out in greater detail in the Memorandum in Support of Defendants' Motion for Summary Judgment, *see* ECF 245-1 at 77-80). The Florida Rising Plaintiffs' preferred alternatives, moreover, would not accomplish the State's interests.

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[10] *League of Women Voters v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006), is both un-controlling and inapposite. In deciding *Cobb* at the preliminary injunction stage, the Southern District of Florida applied the *Anderson-Burdick* framework and expressly rejected the plaintiffs' arguments that the Third-Party Voter Registration Law burdened their core political speech and was subject to strict scrutiny. *See id.* at 1331 n.21.

Florida has a long history of protecting voters by regulating voter registration. In 1995, when implementing the National Voter Registration Act, Florida decided to change its law to allow 3PVROs to collect registration applications. *See Cobb*, 447 F. Supp. 2d at 1317. The State did, however, impose a number of requirements, such as an oath in writing "acknowledged by the supervisor [or deputy] and filed in the office of the supervisor" that included "a clear statement of the penalty for false swearing." Fla. Stat. § 98.271(2)(a) (1993). These requirements evolved into a "fiduciary" relationship, underscoring the State's history of caution and care when allowing third-party volunteers to conduct voter registration activities. *See* H.R. Staff Analysis Fla H.B. 1567 (Apr. 4, 2005).[11]

Florida law imposes on fiduciaries a variety of enforceable duties, including the duty "the duty to disclose material facts" to their beneficiaries. *Sallah v. BGT Consulting, LLC*, No. 16-81483-CIV, 2017 U.S. Dist. LEXIS 101639, at *13 n.5 (S.D. Fla. June 29, 2017). Florida courts also recognize fiduciary duties "to inform the customer of the risks involved." *Ward v. Atl. Sec. Bank*, 777 So. 2d 1144, 1147 (Fla. 3d DCA 2001) (citation omitted). The Notification Provision does no more than ensure that 3PVROs abide by each of these fiduciary duties when registering voters.

[11] *Available at* https://www.flsenate.gov/Session/Bill/2005/1567/Analyses/20051567HETEL_h1567b.ETEL.pdf.

Notifications in furtherance of fiduciary duties are not unusual. Routine examples include, among other things, judicial recognition of an airline's fiduciary duty to warn their passengers of potential risks from flying with them, especially given the need for passengers to trust the airlines transporting them. *Eastern Air Lines, Inc. v. Silber*, 324 F.2d 38, 40 (5th Cir. 1963) (affirming that if airline knew or should have known of the likelihood of turbulence, "the defendant or its employees would be obligated to warn the passengers").

3PVROs bear a similar responsibility. 3PVROs know, or should know, that, historically, sometimes they (or their peers) have not delivered voter-registration applications on time. *See* ECF 244-31 at 165:6-166:4; ECF 272-5 at 62:6-63:4; ECF 244-36 at ¶¶ 19-21. For this reason, they should be aware that they have a common-law duty to warn registrants of this possibility. Rather than leave this duty solely in the realm of the common law, Florida has opted to codify it by creating a statutory (yet targeted) requirement that promises voter registrants interacting with 3PVROs that they will receive complete information concerning their registration options. Because it is difficult to make an informed choice without full and accurate information, the State has opted for the Notification Provision.

The Notification Provision therefore survives because there is a "relevant correlation or substantial relation between the governmental interest and the information required to be disclosed." *See Buckley v. Valeo*, 424 U.S. 1, 64 (1976)

(internal quotation marks omitted). In other words, the State has compelling interests in ensuring that Florida citizens are sufficiently informed with regard to their right to vote, which includes avoiding confusion as to whether 3PVROs represent the Supervisors of Elections, protecting the integrity of the voter-registration process, and upholding the statutory fiduciary duties of 3PVROs. *See Burson v. Freeman*, 504 U.S. 191, 199, 208-09 (1992) (plurality opinion) (holding a free-speech restriction on election-day solicitation was justified by "compelling interest[s] in protecting the right to vote," "protecting voters from confusion," and "preserving the integrity of its election process" (internal quotation marks omitted)). Record evidence demonstrates that the risk of late delivery by 3PVROs is real and consequential; when 3PVROs have failed to deliver registration applications on time, voters are disenfranchised. *See, e.g.*, ECF 244-31 at 165:6-166:4, ECF 272-5 at 62:6-63:4; ECF 244-36 at ¶¶ 19-21. This is not, as the Florida Rising Plaintiffs would have it, an "invented problem," *see* ECF No. 241-1 at 23.

There is, moreover, a "substantial relation" between the State's interests and the State's chosen methods to protect those interests. The Notification Provision clarifies for Florida citizens that, if they use a 3PVRO, their application may not be delivered on time and, to minimize that risk, alternative registration methods remain available. Contrary to the Florida Rising Plaintiffs' assertions, the State cannot accomplish these goals through, *e.g.*, the State communicating its message or

through "vigorous[] enforce[ment]" of Florida law penalizing 3PVROs submitting late registration forms, ECF 241-1 at 25. The former is not guaranteed to reach the intended audience, and although the latter punishes dilatory 3PVROs, the damage is done and is irremediable once a voter misses the chance to cast a ballot.

Simply put, the State has reached the correct, and abundantly reasonable, determination that the most practical way to provide information to all prospective voters engaging with 3PVROs is to have the 3PVRO itself provide that information to those registrants. *See, e.g.*, ECF 244-36 ¶¶17-18. A public-relations campaign would be capable of reaching every potential voter who may be approached by a 3PVRO. For instance, if a 3PVRO provides the notification to individuals without access to a computer or the Internet, that may be the only time such information is ever communicated to those individuals. And vigorous enforcement of penalties cannot deter all future violations, especially in the short run. Because the State must inform *all* registrants of disenfranchisement risk in real time to achieve its compelling interest of protecting every citizen's right to vote, there exists a substantial relation between the Notification Provision and the State's interests.

Finally, the Florida Rising Plaintiffs cite a Middle District of Tennessee case, *League of Women Voters v. Hargett*, to argue that strict scrutiny applies to mandatory voter-registration disclosures. ECF 241-1 at 21 (citing 400 F. Supp. 3d 706, 730 (M.D. Tenn. 2019)). *Hargett*, however, is distinguishable. In that case, the

disclaimer requirement applied to *all* "public communication regarding voter registration status" and was required to be broadcast alongside of "innocuous communications." 400 F. Supp. 3d at 730-31. The overbroad requirement at issue in *Hargett* is a far cry from Florida's targeted Notification Provision, which targets the only transaction that matters: collection and delivery of registration applications by organizations registered with the State to do so. It provides prospective voters the information they need to make an informed decision when they need it the most. In other words, it is narrowly tailored to serve the State's interests because it is targeted to "the time the application is collected"—*i.e.*, the point at which a prospective voter decides whether to rely on a 3PVRO to timely deliver the registration application. *See* Fla. Stat. § 97.0575(3)(a) (2021).

Because the Notification Provision is (1) a reasonable, non-controversial disclosure requirement that (2) is narrowly confined to organizations registered with the State to collect and deliver registration applications, and (3) directly advances the State's compelling interests in informing and protecting prospective voters entrusting their registration applications to 3PVROs, the Court should uphold it.

II. The Non-Solicitation Provision Is Not Unconstitutionally Vague.

A law is unconstitutionally vague under the Fourteenth Amendment's Due Process Clause if it "fails to provide people with ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or if it "authorizes or even

encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). To pass muster under the Due Process Clause, the State need only establish "reasonably clear lines" between proscribed and permitted conduct. *Smith v. Goguen*, 415 U.S. 566, 574 (1974). Courts are, and should be, exceptionally reluctant to declare statutes void for vagueness. *See, e.g.*, *Parker v. Levy*, 417 U.S. 733, 757 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972). Indeed, if a court can interpret a statute to avoid issues of vagueness, it must do so. *See, e.g.*, *Skilling v. United States*, 561 U.S. 358, 412 (2010); *Buckley*, 424 U.S. at 43-44.

The Court must begin by looking to the statutory text itself, because any "reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014) (quoting *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997)).[12] Section 102.031 begins with a broad grant of authority to each precincts' election board, which "shall possess full authority to maintain order at the polls and enforce obedience to its lawful commands during an election and the canvass of the votes." Fla. Stat. § 102.031(1). Subsection 2

[12] It is also important to remember the limited scope of the statute. The Non-Solicitation Provision applies to *only* 150-feet outside the polling place. *See* Fla. Stat. §§ 102.031, *et seq*. This very limited area is reserved for the weighty act of contemplating one's choices in an election. *Cf. Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1887 (2018). Outside of the non-solicitation zone, the Florida Rising Plaintiffs are not restricted from giving food or water to anyone who needs it.

highlights the purpose of this section by *requiring* the county sheriff to "deputize a deputy sheriff . . . to maintain good order." Fla. Stat. § 102.031(2). Indeed, subsection 2 references "order" at the polls *twice*, while subsection 4(c) grants the "supervisor or the clerk" the authority to "take reasonable action necessary to ensure order at the polling places including, but not limited to, having disruptive and unruly persons removed by law enforcement" showing that proper order in and around polling places is of great importance to Florida. Fla. Stat. § 102.031(2), (4)(c).

"[A]n examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud." *Burson v. Freeman*, 504 U.S. 191, 206 (1992) (plurality op.). To combat these "two evils," "all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments." *Id.* Florida's non-solicitation provision seeks the same ends through similar means: restricting certain activities from occurring within 150-feet of a polling place. Fla. Stat. § 102.031(4)(a)-(b). In any event, Florida has a per se interest in maintaining order at the polls.[13]

[13] *See Burson*, 504 U.S. at 208 (plurality op.) ("[B]ecause a government has such a compelling interest in securing the right to vote freely and effectively, this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question." (quoting *Munro v. Socialist Workers Party,* 479 U.S. 189, 195 (1986))); *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213,

To maintain order at the polls, the statute prohibits certain forms of solicitation. Subsection 4(a), states that: "*No person, political committee, or other group or organization may solicit voters* inside the polling place or *within 150 feet of a drop box or the entrance to any polling place* . . . ." Fla. Stat. § 102.031(4)(a) (emphases added). The word "solicit" is defined to "include, but not be limited to":

> [S]eeking or attempting to seek any vote, fact, opinion, or contribution; distributing or attempting to distribute any political or campaign material, leaflet, or handout; conducting a poll except as specified in this paragraph; seeking or attempting to seek a signature on any petition; selling or attempting to sell any item; *and engaging in any activity with the intent to influence or effect of influencing a voter*.

Fla. Stat. § 102.031(4)(b) (emphasis added). The Non-Solicitation Provision, by its own terms, sets the floor for impermissible conduct that is never allowed (the enumerated list), while also giving the Supervisors and the local Board some discretion to maintain order and prevent voter intimidation and election fraud (by indicating that "solicit" is "not . . . limited to" the items on the enumerated list).

The Florida Rising Plaintiffs, however, take issue with the "effect of influencing a voter" and "intent to influence" language of the Non-Solicitation

1220 (11th Cir. 2009) ("[T]he state has a significant interest in protecting the orderly functioning of the election process."). Therefore, the purpose of the statute is clear: the maintenance of order in and around the polls.

Provision. *See* ECF 241-1 at 29-30.[14] As a matter of law, statutory construction, and common sense, none of these provisions are unconstitutionally vague.

First, at least two canons of statutory construction support Defendants' reading. Where, as here, general terms or phrases are included in a series of more specific items, the general term should be interpreted to have meaning akin to the more specific surrounding terms and in light of the surrounding provisions. *See, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). Additionally, "[w]ords of a statute are not to be interpreted in isolation, rather a court must look to the provisions of the whole law and to its object and policy." *MicroStrategy Inc.*, 429 F.3d at 1363. When these phrases are construed reasonably in the context of the surrounding text and the object of the provision as a whole (together with the plain meaning of the word "solicit"), it is apparent that the Non-Solicitation Provision is not unconstitutionally vague.

Certainly, the Florida Legislature did not need to engage in the unwieldy exercise of spelling out every potential way that individuals or political groups could influence or attempt to influence voters near a polling location. Due process does not demand that level of specificity, particularly since the average person can

[14] Similarly, principles of statutory construction dictate that the phrase "any activity" cannot be read in isolation. *See MicroStrategy Inc. v. Bus. Objects, S.A.*, 429 F.3d 1344, 1363 (Fed. Cir. 2005). When the phrase "any activity" is construed reasonably in the context of the surrounding text and the provision as a whole, the provision is clear as to what it prohibits.

ascertain, generally, which sort of conduct is unsuitable. Nor is that level of detail necessary to guard against the *de minimis* risk of inconsistent enforcement. Because the Non-Solicitation Provision identifies in a commonsense way, through its plain text and clear purpose, the type of conduct it prohibits, the Non-Solicitation Provision is not unconstitutionally vague.

The Supreme Court in *Grayned* addressed a similar statute, in a similar context, and found that statute to be not unconstitutionally vague. At issue in *Grayned*, was an anti-noise ordinance that contained each of the alleged infirmities the Florida Rising Plaintiffs complain of here. The ordinance in *Grayned* states:

> No person, while on public or private grounds adjacent to any building which is a school or any class thereof is in session, shall willfully make or assist in making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof.

Grayned, 408 U.S. at 107-08. The Court reasoned that a statute "marked by 'flexibility and reasonable breadth, rather than meticulous specificity'" survives a vagueness challenge. *Id.* at 110. In other words, a statutory provision must be read in the context of the statute as a whole. *Id.* To that end, the Supreme Court found that "[a]lthough the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's announced purpose that the measure is whether normal school activity has been or is about to be disrupted." *Id.* at 112.

The same reasoning applies to the Non-Solicitation Provision here. For example, the "any noise or diversion" language from *Grayned* tracks the Non-

Solicitation Provision's "any activity" language. *Compare Grayned*, 408 U.S. at 107-08 *with* Fla. Stat. § 102.031(4)(b). The "which disturbs or tends to disturb the peace or good order" language in *Grayned* correlates directly to the "effect of influencing a voter" language[15] in the Non-Solicitation Provision. *Compare Grayned*, 408 U.S. at 107-08 *with* Fla. Stat. § 102.031(4)(b). Although the ordinance in *Grayned* could be read, just as the Florida Rising Plaintiffs do here, as "open-ended," ECF 241-1 at 30, that did not prevent the Court from finding the ordinance neither vague nor overbroad. *See Grayned*, 408 U.S. at 110 (vagueness); *id.* at 117 (overbreadth). Just as it was unnecessary for the ordinance in *Grayned* to enumerate every kind of noise or diversion that "tend[] to disturb the peace or good order," *id.*, Florida did not need to specifically define the meaning of "influence a voter" to coherently communicate the prohibition to those affected by it. The words of the provision and the statutory context surrounding it provide more than sufficient clarity and guidance to satisfy due process: the activities restricted by the Non-Solicitation Provision are *only* those activities done to influence voting because the

[15] There are several laws in which an "effect" requirement is built into the law itself. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (noting that "Congress substantially revised § 2 [of the Voting Rights Act] to make clear that a violation could be proved by showing discriminatory effect alone"); *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002) ("The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion.").

prevention of improper influence and voter intimidation is the *essence* of the Non-Solicitation Provision itself.[16]

If the Non-Solicitation Provision fails on vagueness grounds, then so too would many other statutes. Consider, for example, the prohibition on expenditures to influence voting, 18 U.S.C. § 597, the prohibition on the coercion of others to engage in political activity, 18 U.S.C. § 610, and the cases long-since upholding such statutes. *See United States v. Chestnut*, 394 F. Supp. 581, 587-88 (S.D.N.Y. 1975) ("All that is required is that the language employed convey a reasonable degree of certainty adequate to inform him of what is or is not prohibited.").

III. The Non-Solicitation Provision Is Not Preempted by Section 208.

A. Plaintiffs Lack Standing To Enforce Section 208.

As an initial matter, Section 208 only protects the rights of "*voter*[*s*] who require[] assistance to vote by reason of blindness, disability, or inability to read or write . . . ." 52 U.S.C. § 10508 (emphasis added). "Voters," then, are the only ones who suffer injury when they are denied the opportunity to be given assistance "by a person of [their] choice." *Id.*

[16] Further evidence of this is found in federal law where the Voting Rights Act allows an individual with a covered condition to choose any person to assist the individual voter *except for* the "voter's employer or agent of that employer or office or agent of the voter's union." 52 U.S.C. § 10508. The reason this limitation exists in "one of the most consequential . . . and amply justified exercises of federal legislative power in our Nation's history," *Shelby County v. Holder*, 570 U.S. 529, 562 (2013), is clear: to protect voters from undue intimidation and harassment.

The Florida Rising Plaintiffs argue that because, "Hispanic Federation, Poder, and Sant La have historically offered language assistance to voters with the intent and the effect of encouraging voters to remain in line to cast their ballots, and Mi Familia has provided assistance to voters with disabilities," they have standing to enforce Section 208. *See* ECF 241-1 at 34-35. But Section 208's plain text extends its protections only to voters requiring assistance, not to organizations that wish to provide voters with assistance. Because none of the Florida Rising Plaintiffs are voters who have been denied assistance by a person of their choice, they have not suffered an injury-in-fact under Section 208, do not have a cause of action under the statute, and lack standing to bring this claim. *Cf. Mason v. United Airlines*, 274 F.3d 314, 316 (5th Cir. 2001); *Todd v. Am. Multi-Cinema, Inc.*, 222 F.R.D. 118, 123 (S.D. Tex. 2003) (holding that a plaintiff "lack[ed] standing to assert a personal ADA claim" where the record established he was "not 'disabled' within the meaning of the Act").

The Florida Rising Plaintiffs make no attempt to show they satisfy the narrowly circumscribed third-party standing test. *Cf. Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (explaining that beyond the narrow circumstances of pure First Amendment issues or cases where enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights, the Supreme Court has "not looked favorably upon third-party standing"). For that

reason, they have waived this argument.

In short, because the Florida Rising Plaintiffs are not an injured party under Section 208, they lack standing to enforce it. On this basis alone, their motion for partial summary judgment on this claim should be denied.

B. Section 208 of the Voting Rights Act Does Not Provide a Private Right of Action.

No private right of action exists unless "Congress intended to create" one. *McCulloch v. PNC Bank, Inc.*, 298 F.3d 1217, 1222 (11th Cir. 2002). "The Supreme Court has cautioned the judiciary to exercise restraint in implying a private right of action[] and required that affirmative evidence of congressional intent to create a private remedy must exist." *Id.* Because Section 208 does not provide a private right of action to the Florida Rising Plaintiffs, they are not entitled to summary judgment.

Some of the VRA's provisions are enforceable by the U.S. Attorney General. *See, e.g.*, 52 U.S.C. § 10504. Others are enforceable by private litigants. *See, e.g.*, 52 U.S.C. § 10302(a). Section 208 conspicuously excludes any language indicating that it falls into the latter category. Indeed, Section 208 contains no remedial scheme whatsoever. *See* 52 U.S.C. § 10508.

The Florida Rising Plaintiffs fail to put forward any evidence of congressional intent to create a private remedy under Section 208. To the contrary, the legislative scheme demonstrates that Congress did not intend to create a private right of action: Congress unambiguously created private rights of action in various other sections of

the VRA but excluded it from Section 208. Obviously then, "when Congress wished to provide a private [] remedy, it knew how to do so and did so expressly," counseling strongly against this Court "imply[ing] a private remedy," *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571-72 (1979) (refusing to imply a private right of action under the Securities Exchange Act of 1934). By declining to do so under Section 208, Congress demonstrated that its intent was to *not* provide a private remedy—inferring a right of action despite this weighty evidence would fly in the face of the Supreme Court's admonition to exercise restraint in implying a private right of action, *McCulloch*, 298 F.3d at 1222.

C. The Non-Solicitation Provision Does Not Prevent a Voter Requiring Assistance from Receiving Assistance from a Person of the Voter's Choice.

Conflict preemption exists where a party's "compliance with both federal and state regulations is a physical impossibility," or where the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 399 (2012). Because compliance with the Non-Solicitation Provision creates no obstacles for compliance with Section 208 of the VRA, that provision is not preempted.

The Florida Rising Plaintiffs contend that the Non-Solicitation Provision "clearly bars an organization's provision of language assistance" and that if a volunteer aids disabled voters waiting in line, that activity is also clearly barred by

Section 29. *See* ECF 241-1 at 35-36. Setting aside the Florida Rising Plaintiffs' contradictory argument that the non-solicitation provision is vague (in contrast with "clear[]" as argued under their Section 208 analysis, *see id.*) regarding the activities that it prohibits and permits, Section 29 has a clear meaning—just not the meaning they give it. Nothing in the Non-Solicitation Provision prevents a disabled voter or a voter requiring language assistance from obtaining assistance from a person of the voter's choice, as required by Section 208. The Supervisors of Elections permit all voters needing assistance to vote by reason of blindness, disability, or inability to read or write to be accompanied by a person of their choice within the non-solicitation zone, *see, e.g.*, ECF 272-1 ¶¶ 5, 9. The Florida Rising Plaintiffs point to no record evidence outside their own *ipse dixit* to support a contrary conclusion.

Instead, such assistance for voters with disabilities is separately required by Florida law itself. Fla. Stat. § 101.051 (Any voter "who requires assistance to vote by reason of blindness, disability, or inability to read or write may request the assistance of two election officials or some other person of the elector's own choice . . . to assist the elector in casting his or her vote."). For the Florida Rising Plaintiffs to argue that Florida law is preempted by Section 208, when Florida law itself *requires* the very same assistance required by Section 208, is logically irreconcilable. Such a holding would also contravene established principles of statutory construction requiring statutes like these provisions of Florida state law to

be interpreted harmoniously to avoid such contradictions. *See United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." (citations omitted)).

Contrary to the Florida Rising Plaintiffs' assertion, *see* ECF No. 241-1 at 36, if a voter requiring assistance wishes to receive that assistance from a volunteer from one of their organizations, he is free to have that volunteer accompany him within the non-solicitation zone to assist with voting. Section 29 does not prohibit that activity, so long as the volunteer does not attempt to influence the voter's choice of how or for whom to vote, or otherwise violates election laws. *See, e.g.*, ECF 272-1 ¶¶ 5-6.

The Florida Rising Plaintiffs assert that providing such assistance to disabled voters violates Section 29 because giving such assistance would be done with the "intent" and "effect" of "influenc[ing]" the voter to stay and cast her vote. *Id.* The Court need not credit this absurd and overexpansive interpretation; if it were taken seriously, then the Non-Solicitation Provision would bar *any* individual from accompanying a voter to provide moral support, or for two people to go to their polling place together in a show of solidarity. In any event, the non-solicitation

provision does not make compliance with Section 208 "impossible." *Pet Quarters, Inc. v. Depository Tr. & Clearing Corp.*, 559 F.3d 772, 780 (8th Cir. 2009).

Accordingly, Plaintiffs are not entitled to summary judgment on their Section 208 claim.

CONCLUSION

For the foregoing reasons, and the reasons contained within Defendants' Motion for Summary Judgment, ECF Nos. 245, 245-1, Plaintiffs' Motion for Partial Summary Judgment should be denied.

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Respectfully submitted,

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NORTHERN DISTRICT OF FLORIDA
LOCAL RULE CERTIFICATION

I certify that the foregoing complies with the size and font requirements in the local rules. It contains 6,983 words.

/s/ Mohammad Jazil

CERTIFICATE OF SERVICE

I certify that on December 3, 2021, I served the foregoing on all counsel of record through this Court's CM/ECF system.

/s/ Mohammad Jazil