UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., et al.,

Plaintiffs,

v.

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

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE, and NATIONAL REPUBLICAN SENATORIAL COMMITTEE,

Intervenor-Defendants.

Case No.: 4:21-cv-186-MW/MAF

MEMORANDUM OF LAW IN SUPPORT OF *LEAGUE* PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

This case challenges four provisions of Senate Bill 90, a sweeping alteration of Florida's election laws that will make it harder for lawful Florida voters—especially senior, young, and minority voters—to exercise their right to vote. The Florida Legislature enacted SB 90 just months after an election that officials across Florida lauded as safe and secure. The highly controversial bill was enacted along party lines and over strong objections from voters, civil rights groups, and the county Supervisors of Elections themselves. Trial is set to begin on January 31, and many of the *League* Plaintiffs' claims, including those under the fact-intensive *Anderson-Burdick* standard, should indeed be tried. But two of the challenged provisions are so plainly unlawful under any account of the facts that no trial is needed. The *League* Plaintiffs thus move for summary judgment on those provisions now.

First, SB 90's new requirement compelling organizations that engage in voter registration to warn potential voters that the organization might not turn in the forms on time (the "Deceptive Registration Warning Requirement") is a clear violation of the First Amendment. Laws compelling speech in this way are subject to strict scrutiny and may be upheld only if the government proves they are narrowly tailored to serve compelling state interests. *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018). "Laws or regulations almost never survive this demanding test," *Otto v. City of Boca Raton,* 981 F.3d 854, 862 (11th Cir. 2020), and the Deceptive Registration Warning

Requirement is no exception. It does not serve any compelling state interest, because—among other reasons—"[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a [speaker] make statements or disclosures she would otherwise omit." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995). And it is not narrowly tailored, because Florida could easily speak for itself instead of forcing private organizations to speak for it, *NIFLA*, 138 S. Ct. at 2376, and could address any concerns it may have about late-returned registration forms—which the evidence shows are a rarity—by better enforcing its existing laws penalizing such delay, *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988).

Second, SB 90's expanded definition of what constitutes prohibited "solicitation" within 150 feet of a polling place (the "Line Warming Ban") is unconstitutionally vague and overbroad in violation of the First Amendment and the Due Process Clause. Among other problems, by prohibiting "any activity with the intent to influence or effect of influencing a voter," Fla. Stat. § 102.031(4)(b), the Line Warming Ban makes the scope of its criminal prohibition dependent, at least in part, on how voters react to a given activity, rather than on the nature of the activity itself, and therefore fails to provide adequate notice of its scope. And this is especially problematic because its scope is seemingly so broad, sweeping in a great deal of protected expression.

STATEMENT OF FACTS

The *League* Plaintiffs comprise four organizations working to empower and encourage civic participation in Florida—the League of Women Voters of Florida, Inc., the League of Women Voters of Florida Education Fund, Inc. (collectively, the "League"), Black Voters Matter Fund, Inc., and Florida Alliance for Retired Americans, Inc.—and four Florida voters. They bring five counts challenging four provisions of SB 90 which—separately and cumulatively—unconstitutionally burden the right to vote and infringe on the *League* Plaintiffs' First Amendment rights. With this motion, the *League* Plaintiffs seek summary judgment regarding two of those four challenged provisions: the "Deceptive Registration Warning Requirement" and the "Line Warming Ban."

A. The Deceptive Registration Warning Requirement

The Deceptive Registration Warning Requirement compels organizations that engage in voter registration to warn potential voters that the organizations "might not deliver" voter registration forms on time, and to "advise" and "inform" such applicants about other ways they can register to vote. Fla. Stat. § 97.0575(3)(a). In full, it provides:

> A third-party voter registration organization must notify the applicant at the time the application is collected that the organization might not deliver the application to the division or the supervisor of elections in the county in which the applicant resides in less than 14 days or before registration closes for the next ensuing election and must advise the applicant that he or she

> may deliver the application in person or by mail. The third-party voter registration organization must also inform the applicant how to register online with the division and how to determine whether the application has been delivered.

Id.

This provision builds on existing Florida laws, which the *League* Plaintiffs do not challenge, that—even before SB 90—required organizations that engage in voter registration to register with the state, to print their state-required unique identifier on all voter registration forms they collect, and to turn in all voter registration forms within ten days of collecting them from voters. *See* Fla. Stat. § 97.0575(1), (3), (5) (2020); *see also League of Women Voters of Fla. v. Browning*, No. 4:11cv628-RH/WCS, 2012 WL 12810507, at *1 (N.D. Fla. Aug. 30, 2012) (enjoining Florida from enforcing a deadline shorter than 10 days). Organizations that fail to comply with these requirements face escalating fines. *See* Fla. Stat. § 97.0575(3)(a) (2020). And the Attorney General has the authority to "institute a civil action for a violation of this section or to prevent a violation of this section." *Id.* § 97.0575(4). SB 90 extended the ten-day deadline to fourteen days, and left those escalating fines and the Attorney General's enforcement authority in place. *See Id*. § 97.0575(3), (5) (2021).

The evidence establishes that it is exceedingly rare for third-party voter registration organizations to fail to turn in completed registration forms promptly, within ten days (now fourteen days) after receipt from the voter. Many Supervisors

of Elections were unaware of any such late forms in their counties in recent election cycles, *see, e.g.*, Ex. 1 at 129:4-8;[1] Ex. 2 ¶ 31; Ex. 3 ¶ 34; Ex. 4 at 79:25-80:18, and others testified that only a tiny portion of registration forms were turned in after the ten-day deadline, Ex. 5 at 89:24-90:4; Ex. 6 at 92:11-24; Ex. 7 at 148:4-10. It is far rarer still for any delay to have resulted in a qualified voter being unable to vote, which could occur only if the form was turned in past "book closing"—the deadline for receipt of all voter registration forms for a particular election. Indeed, of the 67 Florida Supervisors of Elections, 64 admit they are unaware of a voter in their county who was unable to vote in 2020 because a third-party voter registration organization returned a registration form past book closing or not at all. *See* Ex. 8 (responses to Request for Admission No. 10). In all, this issue appears to have impacted an infinitesimal proportion of the 59,805 voters who registered or updated their registration through a third-party organization in Florida in 2020. *See* Ex. 9 at 165:15-21; Ex. 10 at 4; Ex. 11 at 62:17–63:4. Yet now, all third-party voter registration organizations are required to tell voters they help register that they may not return the forms in time for them to vote.

[1] All exhibit numbers correspond to the exhibits attached to the Notice of Filing Exhibits in Support of *League* Plaintiffs' Motion for Summary Judgment. ECF No. 319, and pincites to transcripts correspond to the original transcript page or pages.

This will severely and negatively hinder the League's and Plaintiff Cecile Scoon's ability to communicate with voters about voter registration. The League is a third-party voter registration organization, and Ms. Scoon has conducted and currently conducts voter registration through the League. Ex. 12 at 51:11-21; Ex. 13 at 68:4-69:9, 32:17-23; Ex. 14 at 19:9-25. The League takes great care to turn in voter registration forms promptly. It has never turned in a registration form past book closing, and it has only ever turned in a tiny handful of registration forms past the 10-day deadline, out of the thousands it has collected over many years. Ex. 13 at 69:6-11, 94:1-24. Yet the League and Ms. Scoon are seriously concerned that compelling them to recite the Deceptive Registration Warning will discourage voters from registering with them and reduce the efficacy of their registration drives. Ex. 13 at 85:8-86:10; Ex. 14 at 19:9-25.

B. The Line Warming Ban

The Line Warming Ban amended Florida's existing prohibition on partisan activities near polling place entrances. Before SB 90, Florida law prohibited "solicitation" within 150 feet of an entrance to a polling place, and defined "solicitation" to:

> include, but not be limited to, seeking 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; and selling or

> attempting to sell any item. The terms 'solicit' or 'solicitation' may not be construed to prohibit exit polling.

Fla. Stat. § 102.031(4)(b) (2020). SB 90 amended that definition by adding the following underlined text, so that "solicitation" is now defined to:

> include, but not be limited to, seeking 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; ~~and~~ selling or attempting to sell any item; and engaging in any activity with the intent to influence or effect of influencing a voter. The terms "solicit" or "solicitation" may not be construed to prohibit an employee of, or a volunteer with, the supervisor from providing nonpartisan assistance to voters within the no-solicitation zone such as, but not limited to, giving items to voters, or to prohibit exit polling.

Id. 102.031(4)(b) (current version).

Before SB 90, the League, Black Voters Matter, and Cecile Scoon conducted volunteer efforts at polling places, at which they provided water, food, and non-partisan encouragement to people at and around polling places, including those waiting in line to vote within what is now defined as the non-solicitation zone. *See* Ex. 13 at 58:8-16, 150:10-17; Ex. 15 at 87:19-88:4; Ex. 14 at 38:7-14. They provided this assistance, in part, to influence voters to remain in line to vote. *E.g.*, Ex. 15 at 42:13-16. But they are unwilling to do so now due to the Line Warming Ban. Ex. 14 at 38:7-20, 59:10-60:2; Ex. 15 at 90:9-91:2; Ex. 13 at 150:18-151:9.

LEGAL STANDARD

Summary judgment is proper as to any "claim or defense" "if 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). "The moving party bears the initial burden of proving the absence of a genuine issue of material fact." *Whitehead v. BBVA Compass Bank*, 979 F.3d 1327, 1328 (11th Cir. 2020). The nonmoving party must then "'go beyond the pleadings' to establish that there is a 'genuine issue for trial'"—that is, that "'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Id.* (first quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), then quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

In deciding a summary judgment motion, "the Court must construe the evidence and all reasonable inferences arising from it in the light most favorable to the non-moving party." *Id.* But the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To overcome a motion for summary judgment, the opposing party "must come forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Irby v. Bittick*, 44 F.3d 949, 953 (11th Cir. 1995) (quoting *Chanel, Inc. v. Italian Activewear, Inc.*, 931 F.2d 1472, 1477 (11th Cir. 1991)).

ARGUMENT

The Court should grant the *League* Plaintiffs summary judgment on their claims that the Deceptive Registration Warning Requirement is unconstitutional compelled speech (Count V), and that the Line Warming Ban is unconstitutionally vague and overbroad (Count IV).

II. The Deceptive Registration Warning Requirement is unconstitutional compelled speech.

The Deceptive Registration Warning Requirement is unconstitutional because it compels Plaintiffs and other third-party organizations to speak a government-mandated message they would otherwise not recite, and it is not narrowly tailored to serve any compelling state interest.

A. The *League* Plaintiffs have standing to challenge the Deceptive Registration Warning Requirement.

Plaintiffs the League and Cecile Scoon have standing to challenge the Deceptive Registration Warning Requirement: they have suffered an injury that is actual or imminent, fairly traceable to Defendants, and likely to be redressed by a favorable decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

The League's and Ms. Scoon's injuries from the Deceptive Registration Warning are straightforward: The League is a third-party voter registration organization in Florida, and its members—including Ms. Scoon—are especially interested in helping to register voters. Ex. 12 at 51:11-21; Ex. 13 at 32:17-23, 68:4-

69:9. Now, because of SB 90, the League is forced to give the Deceptive Registration Warning to every potential voter who registers with a League volunteer. Ex. 13 at 83:24-85:3. The League did not previously do so and would not otherwise do so. Ex. 13 at 77:4-14. And the League feels that the Deceptive Registration Warning makes its registration efforts less effective, because the League and its volunteers expend great effort to "build a rapport" with potential voters, and being forced to say, "I might not turn [the form] in on time is very damaging" to that relationship. Ex. 13 at 85:8-86:10. Ms. Scoon personally engages in voter registration with the League and feels the same way: that the Warning interferes with voter registration, harming potential voters by making them less likely to register to vote. Ex. 14 at 19:9-20:7.[2]

The Deceptive Registration Warning Requirement is therefore presently forcing both the League and Ms. Scoon to engage in expression that they would prefer not to engage in. As the Court has already ruled, this forced expression itself constitutes injury-in-fact for purposes of standing. ECF No. 274 at 18 ("Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines [the] ends [that free speech serves]." (quoting *Janus v. AFSCME*, 138

[2] In addition to the League and Ms. Scoon, Plaintiff Alan Madison has previously engaged in in-person voter registration and plans to do so again, depending among other things on the status of the COVID-19 pandemic and whether doing so would require him to recite the Deceptive Registration Warning. Ex. 16 at 52:2-54:4.

S. Ct. 2448, 2464 (2018))). In addition, the requirement impedes the League and Ms. Scoon's voter registration efforts, which likewise constitutes injury in fact. *See Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1079 (N.D. Fla. 2004) ("[A]n 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))).

Moreover, as the Court has also already held, this injury is directly traceable to Defendant Laurel M. Lee (the Secretary of State) and Defendant Ashley Moody (the Attorney General), and redressable by relief against them. ECF No. 274 at 26. Defendants Lee and Moody have already admitted they have authority to directly enforce the Deceptive Registration Warning Requirement, *id.*, and the Court has held that "enjoining Defendant Lee and Defendant Moody from using their powers to investigate and prosecute civil enforcement proceedings for suspected violations of this section will go a long way towards redressing Plaintiffs' constitutional injuries." *Id.* at 29. Nothing in the discovery record changes those conclusions.

B. The Deceptive Registration Warning Requirement is subject to strict scrutiny.

A law that "compel[s] individuals to speak a particular message" by following a "government-drafted script" that "alte[rs] the content of [their] speech" is a "content-based regulation of speech," "presumptively unconstitutional," and subject to strict scrutiny. *NIFLA*, 138 S. Ct. at 2371; *see also Riley*, 487 U.S. at 795. Such

laws may be upheld only if "the government proves that they are narrowly tailored to serve compelling state interests." *NIFLA*, 138 S. Ct. at 2371. "This stringent standard reflects the fundamental principle that governments have 'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Id.* (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). As the Eleventh Circuit has recently emphasized, "[l]aws or regulations almost never survive this demanding test." *Otto*, 981 F.3d at 862.

The Deceptive Registration Warning Requirement is subject to this exacting standard. Its plain text requires third-party voter registration organizations engaging in voter registration and collecting voter registration applications to "notify the applicant . . . that the organization might not deliver the application to the division or the supervisor of elections in the county in which the applicant resides in less than 14 days or before registration closes for the next ensuing election," to "advise the applicant that he or she may deliver the application in person or by mail," and to "inform the applicant how to register online with the division and how to determine whether the application has been delivered." Fla. Stat. § 97.0575(3)(a). It therefore requires such organizations to engage in "speech that [they] would not otherwise make," altering the content of their speech and requiring "exacting First Amendment scrutiny." *Riley*, 487 U.S. at 795, 798.

In *NIFLA*, the Supreme Court assumed *arguendo* that a less demanding standard of review might apply to laws compelling speech in the context of either "professional speech" or the disclosure of "purely factual and uncontroversial information." 138 S. Ct. at 2372, 2375. But neither category applies here. As for "professional speech," there is no "professional speech" exception to strict scrutiny under the First Amendment in the Eleventh Circuit, as that court has confirmed post-*NIFLA*. *See Otto*, 981 F.3d at 861. Rather, the Eleventh Circuit has held that characterizing content-based restrictions on expression as "professional regulations cannot lower" the strict-scrutiny bar, because "[t]he Supreme Court has consistently rejected attempts to set aside the dangers of content-based speech regulation in professional settings." *Id.* That is consistent with the Supreme Court's discussion in *NIFLA*, which emphasized that the Court had never "recognized 'professional speech' as a separate category of speech," and that "[t]he dangers associated with content-based regulations of speech are also present in the context of professional speech." *NIFLA,* 138 S. Ct. at 2371, 2374.

As for the disclosure of purely factual and uncontroversial information, even laws compelling the disclosure of "factual information [that] might be relevant to the listener . . . clearly and substantially burden" speech and are subject to strict scrutiny. *Riley*, 487 U.S. at 798; *see also Tenn. State Conf. of NAACP v. Hargett*, 420 F. Supp. 3d 683, 708 (M.D. Tenn. 2019) ("The Supreme Court . . . has flatly

rejected the argument that merely because a statement is technically true then the government can force a person to make that statement without offending the constitution."). *Riley* involved a law requiring professional fundraisers to "disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity." 487 U.S. at 795. This was plainly factual information that many potential donors would consider relevant, but *Riley* nevertheless subjected it to "exacting First Amendment scrutiny" and ruled it unconstitutional, explaining that "the compelled disclosure will almost certainly hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent." *Id.* at 799.

There is a narrow exception to this rule for laws requiring the disclosure of "purely factual and uncontroversial information about the terms under which . . . services will be available" *from the speaker* who is compelled to make the disclosure. *NIFLA*, 138 S. Ct. at 2372 (quoting *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985)). But this exception cannot apply here for two reasons. *First*, *NIFLA* holds that the *Zauderer* exception does not apply where the government seeks to compel a speaker to disclose information about services available from *others*, rather than from the speaker himself. *See id.* The Deceptive Registration Warning does that by compelling organizations to describe

other ways, not available through the third-party voter registration organization, in which voters may register to vote. *See id.*

Second, *Zauderer* does not apply where the information to be disclosed is misleading, rather than factual and uncontroversial. *See id.* And the Deceptive Registration Warning is not "factual and uncontroversial." Warning potential voters that third-party voter registration organizations "might not deliver the application" on time is extraordinarily misleading, because third-party voter registration organizations timely submit the overwhelming majority of voter registration forms that they collect. Fla. Stat. § 97.0575(3)(a). Third-party organizations submitted 159,728 voter registration forms in 2018 and 2019—10.3 percent of all voter registrations submitted in that time period. Ex. 17 ¶ 251-252 & tbl. 29. Even in 2020, in the midst of the COVID-19 pandemic, third-party voter registration organizations collected 59,805 registration forms. *Id*. Supervisors of Elections uniformly testified that only a tiny percentage of those voter registration forms were turned in after the 10-day deadline for submission that was in place before SB 90, and it was rarer still for forms to be submitted so late that they may have prevented a voter from voting. *See supra* pp. 4-5.

Moreover, and much like the disclosure in *Riley*, "the compelled disclosure will almost certainly hamper the legitimate efforts of" third-party voter registration organizations to register voters in Florida. 487 U.S. at 799. Requiring third-party

voter registration organizations to warn potential voters that they "might not deliver" the registration form on time will directly undermine third-party voter registration organizations' credibility and dissuade potential voters from registering to vote with them. And following that statement with a required explanation of the various other ways the applicant can register to vote will only reinforce that message. The *League* Plaintiffs reasonably fear that after hearing the warning, voters will likely not "hear anything else" and instead, they will say "never mind, I will do it myself or never mind forget it, I just won't register." Ex. 16 at 64:11-15; *see also* Ex. 14 at 20:1-2. Far from a harmless factual disclosure, the Deceptive Registration Warning Requirement "clearly and substantially burden[s]" third-party voter registration organizations' "protected speech," requiring "exacting First Amendment scrutiny." *Id.* at 798.

C. The Deceptive Registration Warning Requirement does not serve any compelling government interest.

The Deceptive Registration Warning Requirement cannot survive strict scrutiny because it is not narrowly tailored to serve any compelling state interest. The Secretary of State has articulated purported state interests in (1) reminding voters that they can register directly through various means, including online and (2) telling voters that by registering through a third-party group, they run the risk of their registration not being processed in time for book closing before an election. Ex. 18 at 2. Intervenor-Defendants further contend that the requirement serves the "orderly

administration of elections" by (1) minimizing the number of lost applications, and (2) ensuring that voters know about the other ways to register to vote that might be more convenient or timely. Ex. 19 at 9.[3]

These alleged state interests are not, as a matter of law, sufficiently compelling to justify the Deceptive Registration Warning Requirement. Both interests the Secretary of State asserts, as well as the second interest the Intervenors raise, constitute nothing more than an interest in providing potential voters with additional information. But "[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a [speaker] make statements or disclosures she would otherwise omit." *McIntyre*, 514 U.S. at 348; *see also Riley*, 487 U.S. at 798 (holding that "the State's interest in full disclosure" of the portion

[3] As for the Attorney General, the Office of Attorney General's Rule 30(b)(6) deponent was asked whether "the Office of Attorney General ha[s] a view on what state interests, if any, are served by Senate Bill 90's changes to the rules governing third-party voter registration organizations," and responded: "No. We don't pass the legislation, so we rely on the legislators and other elect[ed] officials to tell us what the interest would be or the legislative intent." Ex. 27 at 44:14-23. Yet at 3:54 pm today, three weeks after the close of fact discovery, the Attorney General served an "Unverified Supplemental Response" to the *League* Plaintiffs' first set of interrogatories, in which the Attorney General articulates for the first time certain state interests that the Attorney General now asserts the Deceptive Registration Warning Requirement serves. Ex. 29. This untimely submission contradicts the Office of Attorney General's sworn deposition testimony and should not be considered. But regardless, the interests the Attorney General asserts are effectively the same as those asserted by the Secretary of State, and they fail to constitute compelling state interests for the same reason.

of charitable solicitations that a fundraiser actually gives to a charity "is not as weighty as the State asserts").

Moreover, there is no evidence that voters who register with third-party voter registration organizations are not already aware of the hypothetical possibility that the organization might fail to turn in their registration form on time, or of the alternative registration options available to them. Even under deferential standards of review that are inapplicable here, *supra* Part II.B, disclosure requirements must "remedy a harm that is 'potentially real not purely hypothetical.'" *NIFLA*, 138 S. Ct. at 2377 (quoting *Ibanez v. Fla. Dep't of Bus. & Pro. Regul.*, 512 U.S. 136, 146 (1994)). Absent evidence that voters "do not already know" the information that the Deceptive Registration Warning seeks to convey, there can no adequate justification for the warning requirement. *Id.*; *see also Hargett*, 420 F. Supp. 3d at 708 (holding that "disclaimer requirements serve no compelling state interests" where there were "hypothetical situations in which individuals might be harmed by their confusion" absent the disclaimer, but "no evidence that such situations are likely or common").

In fact, voters who register with a third-party voter registration organization are surely already aware of the theoretical possibility that the organization might delay turning in their registration forms, just as in *Riley*, charitable donors were "undoubtedly aware that solicitations incur costs, to which part of their donation might apply." 487 U.S. at 799. That possibility is obvious. And much like the donors

in *Riley*, voters considering registering with a third-party organization are "free to inquire" about the possibility of delay, and to refuse to register with a third-party organization if they are not satisfied with the answer. *Id.* The state lacks a compelling interest in forcing third-party voter registration organizations to disclose information that is obvious, where there is no evidence voters do not already know the information.

The Intervenors' asserted state interest in minimizing the number of lost applications fares no better. *See* Ex. 19 at 9. There is no evidence that the Florida Legislature sought to advance such an interest via the Deceptive Registration Warning Requirement. Intervenors identify nothing in SB 90's legislative history suggesting that the purpose of the Deceptive Registration Warning Requirement was to reduce the number of lost voter applications. *See id.* Laws "cannot withstand strict scrutiny based upon speculation about what 'may have motivated' the legislature." *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996). For something "to be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose'" for the challenged law. *Id.* (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 730 & n.16 (1982)). Thus, "after-the-fact explanations cannot help a law survive strict scrutiny" under the First Amendment. *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 190 (D. Mass. 2015).

In any event, there is also no evidence that Florida has a compelling state interest in minimizing the number of lost voter applications, because there is no evidence that Florida has a problem with lost applications. Not one Supervisor of Elections mentioned any such concern, and the Supervisors consistently maintained that they would have no way of knowing whether voter registration forms have been lost. *See* Ex. 20 at 3-4; Ex. 21 at 4-5; Ex. 22 at 6; Ex. 23 at 4; Ex. 24 at 4; Ex. 25 at 5. Moreover, there is also no evidence that the Deceptive Registration Warning Requirement would do anything to prevent voter registration forms from being lost. In particular, there is nothing in the record suggesting that third-party voter registration organizations are less likely to turn in voter registration forms than voters are. Because it is the state's burden to prove that the warning serves a compelling interest, *NIFLA*, 138 S. Ct. 2361, this lack of evidence is fatal to the Intervenors' asserted interest in reducing lost applications.

D. The Deceptive Registration Warning Requirement is not narrowly tailored.

Even if a law compelling speech serves compelling state interests, it is unconstitutional unless it is "narrowly tailored" to further those interests. *NIFLA*, 138 S. Ct. at 2371. To meet the narrow tailoring requirement, the challenged law must be "*necessary* to serve the asserted [compelling] interest." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (quoting *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion)) (emphasis and alteration in original). "If a less restrictive

alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 804, 813 (2000).

Here, as in many compelled speech cases, a less-restrictive alternative is obvious: Florida could disseminate its desired message itself. As the Court explained in *Riley*, a law compelling speech is not narrowly tailored where "the State may itself publish" information via an advertising campaign instead of compelling private parties to speak, and thereby "communicate the desired information to the public without burdening a speaker with unwanted speech." 487 U.S. at 800; *see also NIFLA*, 138 S. Ct. at 2376 (holding compelled disclosure unconstitutional even under intermediate scrutiny because rather than compelling speech, the state "could inform the women itself with a public-information campaign").

Much as California did in *NIFLA*, Defendants may argue that an advertising campaign would be less effective than compelling private speech. 138 S. Ct. at 2376. But even under intermediate scrutiny, such an argument fails without "evidence to that effect," and there is none in this case. *Id.*; *see also Playboy Ent. Grp.*, 529 U.S. at 816 ("When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals."). And regardless, even "a 'tepid response' [to advertising] does not prove that an advertising campaign is not a sufficient alternative" for purposes of the narrow tailoring requirement. *NIFLA*, 138 S. Ct. at

2376 (quoting *Playboy Ent. Grp.*, 529 U.S. at 816). Florida "cannot co-opt" third-party voter registration organizations "to deliver its message for it" even if doing so would be more effective. *Id.*

Moreover, to the extent that the Deceptive Registration Warning Requirement is motivated by concerns about late-submitted voter registration forms, Florida has another less-restrictive alternative available: it could "vigorously enforce its [existing] laws to prohibit" the late submission of voter registration applications. *Riley*, 487 U.S. at 800. As explained above, Florida law "directly attacks the problem of" late submitted applications by requiring timely submission and providing for fines and other sanctions if applications are turned in late. *Supra* p. 4. To the extent the Deceptive Registration Warning Requirement "serves the same interest, it is merely a supplement." *McIntyre*, 514 U.S at 350 n.13. Yet these more direct enforcement mechanisms have gone largely unused. Florida frequently foregoes fines on third-party voter registration organizations that turn in late applications. *See, e.g.*, Ex. 26. The Attorney General's Rule 30(b)(6) representative was not even aware that the Office of Attorney General has any role in regulating such organizations or what rules apply to them—despite being specifically prepared to address that enforcement authority. *See* Ex. 27 at 42:10-13, 43:12-15; Ex. 28 at 4. Nor does the Attorney General have any view on whether these enforcement mechanisms were adequate before the enactment of SB 90. Ex. 27 at 44:1-8. If

Florida were seriously concerned about late-submitted voter registration forms, it could enforce these existing laws, rather than compelling private speech.

* * *

In sum, the Deceptive Registration Warning Requirement is subject to strict scrutiny because it compels third-party voter registration organizations to engage in misleading speech. Defendants must therefore prove that the requirement is narrowly tailored to serve a compelling state interest. But they cannot do so, including because there is no evidence that voters are not already aware of the information conveyed by the warning, and because less-restrictive alternatives, such as Florida engaging in its own speech and enforcing its existing laws, are readily available.

III. The Line Warming Ban is unconstitutionally vague and overbroad.

The Line Warming Ban is unconstitutionally vague and overbroad. It provides no adequate notice on the scope of what it prohibits, and it sweeps far too broadly, covering a great deal of protected speech.

A. The *League* Plaintiffs have standing to challenge the Line Warming Ban.

Plaintiffs the League, Black Voters Matter, and Ms. Scoon have standing to challenge the Line Warming Ban. Each has historically provided water and snacks to people near polling places and would like to continue to do so. Ex. 13 at 58:8-16, 60:9-61:13, 149:16-150:17; Ex. 15 at 87:19-88:4; Ex. 14 at 38:7-14. But absent relief

from the Court, Plaintiffs will not be able to engage in that activity in the future because of their concern that they will be accused of violating the new law. Ex. 14 at 38:7-20, 59:10-60:2; Ex. 15 at 90:9-91:2; Ex. 13 at 150:18-151:9. As Ms. Scoon explained, if she tried to give water to someone within 150 feet of a polling place, she "would be terrified that . . . [she] could be subject to prosecution, [she] could be subject to a fine, the League's name would be sullied, the President did something inappropriate. I mean, yeah, there's a lot riding on that and I'm not going to take that risk. I can't afford to." Ex. 14 at 59:14-21.

Plaintiffs' activity in providing water and snacks to people near polling places is constitutionally protected expressive conduct. *See Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale* (*Food Not Bombs I*), 901 F.3d 1235, 1243 (11th Cir. 2018); *see also Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale* (*Food Not Bombs II*), 11 F.4th 1266, 1286 (11th Cir. 2021) ("We have already concluded that the Individual Plaintiffs were engaging in constitutionally protected expression . . . ."). By engaging in that activity, Plaintiffs seek to encourage voter turnout and "embed in the children and the youth that would come that voting is a family thing, it's all about your family. Your vote is going to impact your school, it's going to impact your hospital, it's going to impact your roads." Ex. 13 at 52:14-53:2. Plaintiffs' self-censorship in forgoing such activities because they fear fines or prosecution under SB 90 constitutes injury-in-fact for standing purposes. *See ACLU*

v. Fla. Bar, 999 F.2d 1486, 1492 (11th Cir. 1993); *see also Virginia v. Am. Booksellers' Ass'n*, 484 U.S. 383, 393 (1988).

The Court has already held that this injury, too, is traceable to the Supervisor of Elections Defendants, who have statutory authority to enforce the Line Warming Ban, and redressable by relief against them. ECF No. 274 at 24-25, 28. As the Court explained, the Supervisors are responsible for designating the buffer zones and polling places, and they have statutory authority to ensure order at polling places. *Id.* at 25 (citing Fla. Stat. § 102.031(4)(a), (c)). Enjoining the Supervisors from enforcing the Line Warming Ban would, as a practical matter, allow Plaintiffs to continue to engage in line warming activities. Here, too, nothing in the discovery record changes those conclusions.

B. The Line Warming Ban is unconstitutionally vague.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A law is impermissibly vague in violation of the Due Process Clause "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Wollschlaeger v. Governor*, 848 F.3d 1293, 1319 (11th Cir. 2017) (quoting *Hill v. Colo.*, 530 U.S. 703, 732 (2000)). This analysis is conducted with a particularly skeptical eye when a law "abut[s] upon

sensitive areas of basic First Amendment freedoms." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). The "Constitution demands a high level of clarity from a law if it threatens to inhibit the exercise of a constitutionally protected right, such as the right of free speech." *Konikov v. Orange Cnty.*, 410 F.3d 1317, 1329 (11th Cir. 2005) (citing *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982)).

The Line Warming Ban's prohibition on "any activity with the intent to influence or effect of influencing a voter" is unconstitutionally vague because it fails to give "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408 U.S. at 108. This is so for at least two reasons.

First, the law criminalizes conduct based on third parties' subjective reactions to it, making it impossible for anyone to know when they might be violating the law. The Ban prohibits not only activities carried out with an intent to influence voters, but also activities that have the "*effect of* influencing a voter," regardless of the actor's intent. Fla. Stat. § 102.031(4)(b) (emphasis added). The Ban's focus on others' reactions to conduct resembles the law invalidated by the Supreme Court in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971). There, the Court held that a law making it unlawful for individuals to assemble on public property and engage in conduct that was "annoying to persons passing by" was unconstitutionally vague,

explaining that because "[c]onduct that annoys some people does not annoy others," it was impossible for someone to determine whether they were violating the law. *Id.* at 612, 614. Likewise here, when Plaintiffs operate their constitutionally protected programs, whether and how someone is "influenced" is out of Plaintiffs' control. Aside from completely halting their engagement in their protected activities, Plaintiffs have no way of determining whether their activities will violate the Ban.

Second, the law criminalizes conduct based on whether it is intended to or does "influenc[e] a voter," but the law does not define what is meant by "influenc[e] a voter." Fla. Stat. § 102.031(4)(b). In particular, while the Secretary of State has previously argued that the statute prohibits only "partisan efforts of individuals or campaigns to pressure or influence voters' decisions" about who to vote for, ECF No. 175-1 at 31-32, the text of the statute contains no such limitation. Rather, the statute's text leaves open the possibility, if not the likelihood, that it prohibits "influencing a voter" to stay in line, "influencing a voter" to cast a ballot, and "influencing a voter" to participate in democracy. And in interpreting a state law to determine if it is vague, a federal court cannot adopt a narrowing construction to save the law from unconstitutionality unless the construction is "reasonable and readily apparent." *Boos v. Barry*, 485 U.S. 312, 330 (1988). That is not so here.

Indeed, the Secretary's proposed limiting construction would render the Ban superfluous and duplicative of the statute's preexisting prohibition on "seeking or

attempting to seek any vote," as well as other parts of the statute. Fla. Stat. § 102.031(4)(b). It would also be duplicative of a nearly identical federal law. The Secretary argues that the Ban would prohibit handing out water bottles that have campaign logos pasted on the front or are supplemented with campaign literature. ECF No. 175-1 at 32-33. But the statute already separately prohibits "distribut[ing] any political or campaign material." Fla. Stat. § 102.031(4)(b). And "the rule against superfluities instructs courts to interpret a statute to effectuate all its provisions, so that no part is rendered superfluous." *Hibbs v. Winn*, 542 U.S. 88, 89 (2004). The Secretary's limiting construction of the Ban would thus render it entirely superfluous of other preexisting portions of the statute—an outcome the courts are "loath" to reach. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004).

C. The Line Warming Ban is unconstitutionally overbroad.

In addition to being vague, the Line Warming Ban has an expansive breadth that restricts an unacceptably large amount of constitutionally protected speech. The overbreadth doctrine is premised on the notion that free-speech "freedoms need breathing space to survive," because "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 521-22 (1972) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). As a result, the "government may regulate in the area only with narrow

specificity," and speech regulations must "be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression." *Id.* at 522. "[T]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep." *City of Chi. v. Morales*, 527 U.S. 41, 52 (1999) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612-615 (1973)). The Ban is unconstitutional under this doctrine because it "create[s] a criminal prohibition of alarming breadth," pulling within its prohibitions a significant amount of protected speech. *United States v. Stevens*, 559 U.S. 460, 474 (2010).

The First Amendment protects the rights of free speech and expression—including "the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988). Encouraging voters to cast a ballot and assisting voters to do so "necess[arily] involves . . . the expression of a desire for political change." *Id.* at 421. Discussions about voting "implicate[] political thought and expression." *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 724 (M.D. Tenn. 2019) (quoting *Buckley v. Am. Const. Law Found. Inc.*, 525 U.S. 182, 195 (1999)). And the Eleventh Circuit has specifically held that providing food in a public forum is constitutionally protected expressive conduct. *See Food Not Bombs I*, 901 F.3d at 1243.

Here, the *League* Plaintiffs' non-partisan volunteer efforts at polling places are core political speech. The *League* Plaintiffs provide food, water, and assistance to people near polling places, including those waiting in line to vote. *See* Ex. 13 at 58:8-16; Ex. 15 at 87:19-88:4; Ex. 14 at 38:7-14. Plaintiffs do so in part to encourage and allow voters to stay in line and vote, in lines that are often disproportionality longer in black communities. Ex. 15 at 28:9-13, 83:16-24. When Plaintiffs and other organizations provide non-partisan support to voters at polling places, they are therefore engaged in core political speech and expression. *Food Not Bombs I*, 901 F.3d at 1243.

On its face, the Ban now appears to criminalize this speech and expression, by prohibiting any conduct that has the intent or effect of "influencing a voter," without limitation or explanation of what kind of influence is impermissible. As stated previously, when Plaintiffs provide food, water and non-partisan encouragement to people near polling places, including to those waiting in line to vote, their intent *is* to influence, specifically to influence the voter to stay in line to vote. Ex. 15 at 42:17-20. If Plaintiffs continue to exercise their constitutionally protected speech and expression by providing this support to people near polling places, they now risk criminal prosecution. The predictable result of the Ban's expansive prohibition will therefore be to cause the *League* Plaintiffs and others to "refrain from constitutionally protected speech," *FF Cosms. FL, Inc. v. City of Mia.*

Beach, 866 F.3d 1290, 1303-04 (11th Cir. 2017), to avoid the risk of criminal prosecution.

In defending the Ban, the Secretary of State has previously relied on the Supreme Court's decision in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), and the nonpublic forum standard. ECF No. 175-1 at 37. But *Mansky* is inapplicable because it held only that the *inside* of a polling place is a nonpublic forum, 138 S. Ct. at 1886; *id.* at 1885 (noting "parks, streets, sidewalks, and the like" are "traditional public forums"). *Mansky* did not consider whether the area outside of a polling place is a public forum. The Line Warming Ban challenged here regulates conduct *outside* of a polling place, and importantly, a plurality of the Supreme Court has held that the area immediately surrounding a polling place, including "parks, streets, and sidewalks," are "quintessential public forums." *Burson*, 504 U.S. at 196. Equally problematic, the Ban is not limited to the partisan speech the Court has allowed governments to restrict in the immediate vicinity of polling places. *See id.* at 211. *Burson*'s concerns about *partisan* speech in the immediate vicinity of a polling place are wholly insufficient to justify the Ban's prohibitions of non-partisan speech and voter assistance. *Id.*

CONCLUSION

For the foregoing reasons, the *League* Plaintiffs' Motion for Partial Summary Judgment should be granted, and the Court should enter summary judgment for Plaintiffs on Counts IV and V of the Corrected First Amended Complaint.

LOCAL RULES CERTIFICATION

Undersigned counsel certifies that this response contains 7675 words, excluding the case style, tables of contents and authorities, and certifications.

Dated: November 12, 2021

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I HEREBY CERTIFY that on November 12, 2021, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel in the Service List below.

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