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

LEAGUE PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Defendants' Joint Opposition (ECF No. 355; "Opp.") confirms that the Court should grant the *League* Plaintiffs' motion for partial summary judgment on their (1) compelled speech challenge to the Deceptive Registration Warning Requirement, and (2) vagueness and overbreadth challenges to the Line Warming Ban. Defendants make no argument that the Deceptive Registration Warning Requirement can survive strict scrutiny, and their arguments for a more forgiving standard of review are contrary to Supreme Court precedent. As for the Line Warming Ban, Defendants argue vociferously that it is not vague, but they offer no explanation of what, exactly, it prohibits. Nor do Defendants offer any justification for the Ban's expansive breadth, which extends far beyond the voter intimidation and partisan activities that Defendants say justify the Ban.

Defendant White's separate filing (ECF No. 353; "White Opp.") argues that the *League* Plaintiffs lack standing as to her, specifically, because she never allowed non-partisan activities close to polling places even before the Line Warming Ban. But the *League* Plaintiffs offer uncontradicted evidence that they would seek to engage in line warming activities across Florida, including in Miami-Dade where White is the Supervisor of Elections, were it not for the Line Warming Ban. No more is required for standing.

ARGUMENT

I. The Deceptive Registration Warning Requirement is unconstitutional.

The Deceptive Registration Warning Requirement is subject to strict scrutiny because it "compel[s] individuals to speak a particular message" by following a "government-drafted script" that "alte[rs] the content of [their] speech." *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018); *see also Riley v. Nat'l Fed'n. of the Blind of N.C.*, 487 U.S. 781, 795, 798 (1988). Defendants offer no argument that the Requirement can satisfy strict scrutiny, *see* Opp. 5-17, and for the reasons set forth in the *League* Plaintiffs' Motion, it does not. ECF No. 320-1 at 16-23.

A. *Zauderer* is inapplicable.

Defendants attempt to avoid this inevitable result by arguing instead that the Court should assess the Deceptive Registration Warning Requirement under the more lenient standard of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), which Defendants say applies to required disclosures of "non-controversial factual information . . . (in the commercial-speech context)." Opp. 5. But *Zauderer* is inapplicable for at least four reasons.

First, *Zauderer* is inapplicable even on Defendants' own account because the *League* Plaintiffs' voter registration activities are not "commercial" in nature. *See Minn. Voters All. v. City of St. Paul*, 442 F. Supp. 3d 1109, 1117 (D. Minn. 2020) ("[V]oter-registration information does not propose any kind of commercial

transaction."). Defendants cite no contrary authority. They do not explain why they believe the *League* Plaintiffs' voter registration activities qualify as "commercial." Defendants contend in passing that the *League* Plaintiffs pay individuals to collect voter registrations. Opp. 6 n.6. Not so. The cited testimony is from a representative of Florida Rising Together, not one of the *League* Plaintiffs, ECF No. 351-4 at 11:5-9, and the *League* Plaintiffs' voter registration efforts are conducted by volunteers. *See, e.g.*, ECF No. 319-13 at 77:16-23. Regardless, Defendants cite no authority that merely paying an employee to engage in any activity whatsoever—even when that activity is clearly not commercial in nature—converts that activity into commercial speech for purposes of the First Amendment. *Riley*, which refused to treat speech of "professional fundraisers" as commercial, shows that payment does not make speech commercial. *See Riley*, 487 U.S. at 795-96.

Second, *Zauderer* is inapplicable because, even if the Plaintiffs could properly be deemed to be engaging in commercial activity (and they cannot), the Deceptive Registration Warning Requirement would compel Plaintiffs to provide information about *alternatives* to their services—namely, that the applicant "may deliver the application in person or by mail," and "how to register online with the division" of elections. Fla. Stat. § 97.0575(3)(a). A requirement to disclose information about competing, "*state*-sponsored services," rather than about "the services that [the disclosing organizations] provide," is not subject to *Zauderer*'s more forgiving

standard. *NIFLA*, 138 S. Ct. at 2372. It makes no difference that the Deceptive Registration Warning *also* includes information purportedly about registering with the Third Party Voter Registration Organization ("3PVRO") itself, because "where . . . the component parts of a single speech are inextricably intertwined, [courts] cannot parcel out the speech, applying one test to one phrase and another test to another phrase." *Riley*, 487 U.S. at 796. Strict scrutiny applies.

Third, *Zauderer* is inapplicable because the required Warning is misleading and will interfere with the *League* Plaintiffs' voter registration activities. Even if the warning is literally true, that does not suffice to invoke *Zauderer*'s more lenient standard. In *Riley*, the disclosure was factually true—it required professional fundraisers to disclose the true portion of donations from the past 12 months that had gone to the charity they represented. 487 U.S. at 795. But in invalidating the requirement, the Supreme Court applied strict scrutiny because the requirement would nevertheless "hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent," noting that, in many cases, "the disclosure will be the last words spoken as the donor closes the door or hangs up the phone." *Id.* at 799-800. Undisputed testimony from the *League* Plaintiffs and at least one Supervisor of Elections shows that the same is true here. *E.g.*, ECF No. 319-12 at 51:11-21; ECF No. 319-13 at 68:4-69:9; ECF No. 319-14 at 19:9-25; ECF No. 319-4 at 155:5-13.

Similarly, in *NIFLA*, California sought to compel crisis pregnancy centers to inform their patients that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women"—a statement that was, undeniably, factually correct. 138 S. Ct. at 2369. Defendants' attempt to distinguish *NIFLA* because the Deceptive Registration Warning Requirement "does not require the LWV Plaintiffs to speak any political or ideological message whatsoever," Opp. 10, makes no sense—the same was true in *NIFLA* itself.

Finally, the fact that 3PVROs are licensed by the state and called "fiduciaries" does not change the analysis. *NIFLA* rejected these arguments, too, explaining that states cannot have "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement," and that "'[s]tate labels cannot be dispositive of [the] degree of First Amendment protection.'" 138 S. Ct. at 2375 (quoting *Riley*, 487 U.S. at 796).

B. *Central Hudson* is inapplicable.

Defendants alternatively argue for intermediate scrutiny under *Central Hudson*, the test that applies to some regulations of commercial speech. Opp. 12-17 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S.

557, 564 (1980)). But Defendants provide little to no argument in support of that standard's applicability, and there is no basis for applying it here.

As a threshold matter, *Central Hudson* applies only to "commercial speech, that is, expression related solely to the economic interests of the speaker and its audience." 447 U.S. at 561. As explained above, the *League* Plaintiffs' voter registration activities are not commercial in nature, making *Central Hudson* categorically inapplicable. Moreover, the Supreme Court has never applied *Central Hudson* to laws *compelling* speech, rather than regulating it. *See, e.g.*, *NIFLA*, 138 S. Ct. at 2371-74; *Riley*, 487 U.S. at 798. The equivalent test for compelled speech in the commercial context is *Zauderer*, and as just explained, *Zauderer* does not apply.

Even if some form of intermediate scrutiny applied, the Deceptive Registration Warning Requirement would still fail it as a matter of law, because a desire to disseminate information is an inadequate justification for compelling speech even under intermediate scrutiny. *See NIFLA*, 138 S. Ct. at 2376. Thus, even supposing the Warning Requirement was "the most practical way to provide information to all prospective voters engaging with 3PVROs," Opp. 16, that would not justify the law under intermediate scrutiny. California made nearly the same argument in *NIFLA*, and the Court rejected it, explaining that the state could "obviously . . . inform the women itself with a public-information campaign," and

thus could not justify compelling speech. 138 S. Ct. at 2376. Notably, the Court came to this conclusion even though such a campaign had already been tried by the government and found to be inadequate. *Id*.

The same is true here. If Florida wants potential voters to know about other means of voter registration and the supposed dangers of using a 3PVRO, Florida can tell them itself. Indeed, Florida already provides much of that information on the state's voter registration form itself. *See* Florida Voter Registration Application, https://files.floridados.gov/media/704795/dsde39-english-pre-7066-20200914.pdf (effective Oct. 2013). And even if Florida thinks its own speech will be less effective, Florida "cannot co-opt the [3PVROs] to deliver its message for it"—this is true even if the law were subject to some form of intermediate scrutiny. *NIFLA*, 138 S. Ct. at 2376.

II. The Line Warming Ban is unconstitutional.

A. The Line Warming Ban is vague.

The Line Warming Ban in unconstitutionally vague because it (1) criminalizes conduct based on third parties' subject reactions to it, and (2) prohibits actions that are intended to or do "influenc[e] a voter" without defining what that means. Fla. Stat. § 102.031(4)(b). It therefore "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," and "it authorizes or even encourages arbitrary and discriminatory enforcement." *Wollschlaeger v.*

Governor, 848 F.3d 1293, 1319 (11th Cir. 2017) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). Defendants' arguments against summary judgment only confirm these problems, because while Defendants argue that the Line Warming Ban is clear, their Opposition never says with any clarity what they believe the Ban prohibits. *See* Opp. 17-30.

Defendants argue first that the Line Warming Ban suffices under *Grayned v. City of Rockford*, 408 U.S. 104 (1972), but the case is not analogous. *Grayned* considered the constitutionality of an ordinance that prohibited anyone, "while on . . . grounds adjacent to any building in which a school . . . is in session," from "willfully mak[ing] or assist[ing] in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session . . . ." *Id*. at 107-08. While the Court noted the case presented a "close" question, it was ultimately persuaded that the statute was not unconstitutionally vague for reasons that are not present here. *Id*. at 107-09. The Illinois Supreme Court had previously narrowed the "tends to disturb" language to cover only "actual or imminent interference with the 'peace and good order' of the school." *Id.* at 111-12. As a result, the Court found that the statute provided a clear measure for what was prohibited: "whether normal school activity *has been or is about to be* disrupted." *Id.* at 112 (emphasis added). This gave regulated persons notice of how to conform their conduct to avoid coming within the statutory prohibition. In contrast, the Line Warming Ban is not so easily

reduced to a similar test that would allow an organization to confidently predict whether its conduct will come within the Ban. Its prohibition on any conduct that could have the "effect of influencing a voter" remains mysterious—in fact, its clear meaning is so elusive that despite arguing that it is *not* vague, Defendants never even attempt to tell the Court what they think it means.

Defendants also argue that the Court must interpret the statute to avoid vagueness if it is possible to do so. Opp. 18. But Defendants cite the wrong legal standard for adopting a limiting construction—their cases involve *federal* statutes. *See id.* (citing *Skilling v. United States*, 561 U.S. 358, 412 (2010), and *Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976)). Because the Line Warming Ban is a *state* statute, the Court's authority to issue a limiting construction is highly circumscribed: the Court may do so only if the construction is "reasonable and readily apparent." *Boos v. Barry*, 485 U.S. 312, 330 (1988). Regardless, Defendants do not identify any limiting construction for the Court to impose under that standard, because they never say what they believe the statute means.

Similarly, while Defendants argue that canons of construction clarify the statute's scope, Opp. 21, they never explain what it is that they believe those canons show the statute prohibits, aside from essentially echoing the statutory language—"activities done to influence voting." *Id*. at 24. Even assuming the canons apply in the manner that Defendants say, they leave the statute as vague as it started.

Defendants' attempt to analogize the Line Warming Ban to two federal prohibitions fares no better. Both federal provisions are narrow and clear. Section 597 prohibits vote buying—offering or making "an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate." 18 U.S.C. § 597. Section 610 prohibits coercing federal employees "to engage in, or not to engage in, any political activity." *Id.* § 610. Those are clear prohibitions, with very different language from that in the Line Warming Ban. Defendants do not explain why a ruling that the Line Warming Ban is vague would affect those much clearer and narrower provisions.

Finally, Defendants argue that their interpretation of the Line Warming Ban does not render SB90's additions to the definition of prohibited "solicitation" surplus because the new additions increase the reach of prohibited conduct. But Defendants' hypotheticals only illustrate how vague the challenged provision is. Before SB90, assessing Defendants' hypothetical of shirts with a web address would have been relatively straightforward: by wearing the shirts, was the organization seeking or attempting to seek a vote? *See* Opp. 25. The answer might turn on the details of the shirts and the website in question, but at least the inquiry would be a focused one. In contrast, under the Line Warming Ban, the analysis is hopelessly diffuse: whether the organization intends to, or its actions will have the effect of, "influencing a voter" in apparently *any* respect. If an organization had nothing to do with politics and wore

shirts seeking only to build general name recognition, would that count as "influencing a voter"? Defendants do not say, but they also do not offer any justification for prohibiting such conduct. As for Defendants' hypothetical about posting photographs of voters to intimidate them, such conduct would squarely violate Florida's separate, generally applicable prohibition on voter intimidation. *See* Fla. Stat. § 104.0615.

B. The Line Warming Ban is overbroad.

In addition to being vague, the Line Warming Ban is also overbroad, because it prohibits substantially more than is needed to serve Florida's asserted interest in protecting voters from harassment and intimidation. In arguing otherwise, Defendants do not explain why it is necessary for Florida to restrict non-partisan, non-disruptive activities, such as the provision of food and water, within 150 feet of a polling place. Defendants do not even take a position on whether such activities *are* prohibited, much less explain why. Opp. 27. Defendants instead argue that the scope of the Line Warming Ban is restricted to "political advocacy," but as Plaintiffs have explained, the sweep of its text is far broader, covering activities that are intended to or do influence a voter in any respect. *See* ECF No. 320-1 at 26-27.

Defendants also argue that the 150-foot zone is a nonpublic forum, and that the *League* Plaintiffs' activities are not expressive. As the *League* Plaintiffs have elsewhere explained, Defendants are wrong on both fronts. ECF No. 320-1 at 24-25,

31; ECF No. 352 at 32-33, 35-37. But for purposes of the overbreadth challenge, these arguments are beside the point. A plaintiff may bring an overbreadth challenge even if the plaintiff's own conduct falls within the legitimate sweep of the statute, so long as the statute covers a substantial amount of protected activity. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Here, the statute prohibits all non-partisan expression that might influence a voter in any respect, plainly meeting that standard. And overbreadth analysis is fully applicable to nonpublic forums. *See, e.g.*, *Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987).

Because Defendants offer no justification for the Line Warming Ban's sweeping breadth, it is necessarily overbroad.

III. Plaintiffs Have Standing as to Supervisor White (and the other Supervisors).

In a separate filing, Defendant Christina White, Supervisor of Elections for Miami-Dade County, contends that the *League* Plaintiffs lack standing to sue her regarding the Line Warming Ban, because she says the *League* Plaintiffs have not engaged in line warming activities in Miami-Dade and because the Line Warming Ban has not affected and will not affect what activities she permits at polling places in her county.

Defendant White's arguments, however, are contrary to the evidence and, in any event, irrelevant as a matter of law. The *League* Plaintiffs have historically engaged in line warming activities throughout Florida; but for their concerns about

prosecution under the Ban, they would do so in the future, including in Miami-Dade, which is Florida's largest county. ECF No. 350-22 ¶¶ 8, 9; ECF No. 319-13 at 150:18-151:9. This self-censorship suffices to establish injury-in-fact. *See ACLU v. Fla. Bar*, 999 F.2d 1486, 1492, 1494 (11th Cir. 1993). True, Defendant White says that—regardless of the Ban—she intends to prohibit *any* organizational activity at within 150 feet of polling places. But the pre-SB90 law which Defendant White cites as her basis for prohibiting line warming activities gives her the authority only to "maintain order at the polls." Fla. Stat. § 102.031(1). It is not clear that she has the power to—or constitutionally may—independently impose a blanket prohibition against nondisruptive, nonpartisan activities. That provision therefore did not prompt self-censorship by the *League* Plaintiffs in the way that the Line Warming Ban now does. *See* ECF No. 350-22 ¶ 7.

Enjoining Supervisor White from enforcing the Line Warming Ban would return matters to the status quo, under which the *League* Plaintiffs sought to offer line warming activities throughout Florida (making informed case-by-case determinations about whether and where to do that activity that was at times informed by requests of Supervisors and their staff). *See id.* ¶ 8. An injunction against Defendant White's enforcement of the Line Warming Ban in Miami-Dade would therefore, as a practical matter, redress Plaintiffs' injuries "at least in part." *I.L. v. Alabama*, 739 F.3d 1273, 1282 (11th Cir. 2014); *see also New Ga. Project v.*

Raffensperger, No. 1:21-cv-1229-JPB, slip op. at 16 (N.D. Ga. Dec. 9, 2021) ("[T]o satisfy redressability requirements for standing purposes, Plaintiffs need to show only that an injunction against [the] Defendants would address at least some of the alleged injuries in this case."). Not only could the *League* Plaintiffs once again engage in nonpartisan line warming activities, as they did throughout the state before SB90, they could assess any assertions by Supervisors or their staff that such activity was inappropriate on its own merits (not under the shadow of the Ban).

CONCLUSION

For the reasons given above, the Court should grant the *League* Plaintiffs' Motion for Partial Summary Judgment.

Respectfully submitted this 10th day of December, 2021.

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LOCAL RULE CERTIFICATION

The undersigned certifies that this response contains 3,184 words, excluding the case style and certifications.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 10, 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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