Nos. 22-11133-GG, 22-11143-GG, 22-11144-GG, 22-11145-GG (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., et al.,
Plaintiffs-Appellees,

v.

FLORIDA SECRETARY OF STATE, et al.,
Defendants-Appellants.

Appeal from the U.S. District Court for the Northern District of Florida,
Nos. 4:21-cv-242, 4:21-cv-186, 4:21-cv-187, 4:21-cv-201 (Walker, C.J.)

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Per Rule 26.1 and Circuit Rule 26.1, appellants certify that the Republican National Committee and National Republican Senatorial Committee have no parent corporation, and no corporation owns 10% or more of their stock. No publicly traded company or corporation has an interest in the outcome of this case or appeal. Per Circuit Rule 26.1-2(c), appellants certify that the CIP contained in the previous briefs are complete, with one addition:

1. Hetzel, Jeffrey S., *Attorney for Intervenor-Defendants-Appellants*

Dated: August 31, 2022

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TABLE OF CONTENTS

TABLE OF CITATIONS

*primary authority

Cases

Statutes

Other Authorities

STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Intervenors fully adopt the State's opening brief and reply brief.

INTRODUCTION & SUMMARY OF ARGUMENT

If the plaintiffs' arguments sound familiar, it's because they were made at the stay stage. Yet a unanimous motions panel disagreed and granted a stay. The arguments haven't improved with age. This Court should vacate in part and reverse in part.

Because the registration-disclaimer provision was repealed by legislation, this Court should vacate that part of the district court's judgments. The plaintiffs resist vacatur because they contend that *appellants*—none of whom is Florida's legislature or governor—somehow engineered the repeal. But they cite no case where a court denied vacatur on that ground. The plaintiffs' conspiracy theory is both unsupported by the facts and inconsistent with the respect that courts give to legislatures. And even by their telling, the Republican intervenors had nothing to do with the repeal. Fairness to them is a sufficient reason to order vacatur. As is the threat of steep attorney's fees against the State based on a ruling that it never got a chance to appeal.

The plaintiffs' arguments against the solicitation definition remain unpersuasive. They assume that parties must be bound by an injunction to have standing to appeal, which has never been the law. On the merits, the plaintiffs do not appreciate the high hurdle they must clear to prove that the law is *facially* overbroad or vague. They identify no unconstitutional application other than their own "line warming" activities; and even that application isn't unconstitutional, as a court recently held in similar litigation in Georgia. And while the plaintiffs spend a lot of time quoting prior briefs, they spend no time proving that the challenged law, in light of its text and context, has no core.

ARGUMENT

This Court should vacate with respect to the registration disclaimer because the appeal became moot based on happenstance. This Court should reverse with respect to the solicitation definition because the district court erred in finding the law facially overbroad and vague.

I. This Court should vacate as moot the district court's decision on the registration-disclaimer provision.

The plaintiffs concede that, because SB524 repealed the registration disclaimer, the parties' dispute over that provision "is now moot." LWV-Br.2. The plaintiffs also don't dispute that, in countless cases where legislation moots a claim on appeal, courts have vacated the decision below. *See* Br.13-15. The plaintiffs invoke the *Bancorp* exception to vacatur, though they misdescribe when that exception applies. *Bancorp* does not overcome the ordinary rule of vacatur unless two conditions are met: The party seeking vacatur "voluntarily forfeited" further review by, for example, settling or failing to appeal. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). And vacatur is not otherwise "equitable." *Id.* at 29. Neither condition is met here.

1. Appellants did not voluntarily forfeit their right to appeal; they appealed, but their appeal became moot because a bill was approved by the legislature and governor—neither of whom is a party. The plaintiffs do not dispute that "*Bancorp* … is usually inapplicable when legislative action moots a case." *Nat'l Black Police Ass'n v. D.C.*, 108 F.3d 346, 353 (D.C. Cir. 1997). Unless the legislature is a party, a repeal of the challenged

law makes the state defendants "akin to a party who finds its case mooted on appeal by 'happenstance,'" *id.*, and "mootness by happenstance provides *sufficient* reason to vacate," *Bancorp*, 513 U.S. at 25 n.3 (emphasis added).

The plaintiffs contend that this rule should not apply when state defendants "were involved in the repeal," LWV-Br.44, but they cannot find a single case denying vacatur on that ground. The one case they cite is irrelevant because the county that mooted the case *was* a party. *See Staley v. Harris Cnty.*, 485 F.3d 305, 311 (5th Cir. 2007) (en banc) ("Here, it is clear that Harris County"—the sole defendant and appellant—"caused this case to become moot."). The plaintiffs' exception would make little sense. Legislation cannot be "imputed" to executive-branch defendants. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1131 (10th Cir. 2010). "Even assuming" executive actors "actively lobbied" for the legislation, lobbying is not "control"; only the legislature could pass the law, so the case still "became moot as a consequence of the actions of a third party." *Id.* And it is "commendable," not evidence of bad faith, if a "lawsuit" helps convince a State "that the existing law is flawed" as a matter of policy. *Khodara Env't, Inc. ex rel. Eagle Env't L.P. v. Beckman*, 237 F.3d 186, 195 (3d Cir. 2001); *Nat'l Black Police Ass'n*, 108 F.3d at 352.

Even if the plaintiffs' exception existed, it would not apply here. In a convoluted story that guest-stars a "veteran Florida politics reporter," the plaintiffs speculate that "the Secretary of State and Supervisors" convinced the Florida legislature to repeal the registration disclaimer but then not have the governor sign it unless the district court

ruled against them. LWV-Br.45-48. This theory has many problems. The simplest is that no one thinks *the Republican intervenors* were involved with the repeal. So the mootness is still happenstance for them, which alone warrants vacatur. *See Humane Soc. of U.S. v. Kempthorne*, 527 F.3d 181, 187-88 (D.C. Cir. 2008).

Even for the Secretary and supervisors, the plaintiffs cite no evidence that these defendants controlled the passage or timing of the repeal. The plaintiffs cite Senator Hutson, but he said that the Secretary and supervisors asked him to "dela[y] the due date" for a report, not to repeal the registration disclaimer. *3/3/22 Senate Session Part 2* at 38:29-39:38, Fla. Channel, bit.ly/3wBaBr8. And Governor DeSantis did not say anyone influenced him or explain what "provision" he thought got "dinged" in court (Chief Judge Walker dinged many). *DeSantis Signs Elections Reform Bill*, WCTV News (recorded April 25, 2022), bit.ly/3AXgG3Y. The fact that he thanked the State's chief election official after signing a major election bill is unsurprising. *Cf.* LWV-Br.48. And if the goal was to wait out Chief Judge Walker, why would the legislature *pass* SB524 before the district court issued its decision? Surely the plaintiffs don't think the plan was to scrap SB524—a bill with over 30 provisions that the plaintiffs call "'a legislative victory' for the Governor"—if Chief Judge Walker upheld the registration disclaimer. The plaintiffs' narrative makes little sense, let alone reflects "the respect that courts owe other organs of government." *Nat'l Black Police Ass'n*, 108 F.3d at 352. While the plaintiffs accuse Florida of "cat-and-mouse tactics," LWV-Br.48, their "'cat's paw' theory has no application to legislative bodies," *Brnovich v. DNC*, 141 S. Ct. 2321, 2350 (2021).

2. In all events, vacatur would be equitable here. As the plaintiffs admit, vacatur "'is rooted in equity'" and thus always "'turns on the conditions and circumstances of the particular case.'" LWV-Br.43 (quoting *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018)). Yet the plaintiffs do not respond to several of the circumstances that make vacatur equitable here. Most importantly, vacatur should prevent the plaintiffs from recovering attorney's fees on this provision. *S-1 & S-2 By & Through P-1 & P-2 v. State Bd. of Educ. of N.C.*, 21 F.3d 49, 51 (4th Cir. 1994) (en banc); Doc. 673 at 17-18. It would not be fair to hit taxpayers with multiple, large fee awards based on a ruling that Florida's public officials had no chance to appeal. The plaintiffs also ignore that vacatur would serve the goals of constitutional avoidance. *See* Br.16; *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 79 (1997). And they ignore their unclean hands here; before this Court entered a stay, the plaintiffs asked the district court to *preclear* SB524's repeal of the registration disclaimer, knowing full well that it would moot that part of the pending appeals. *See* Doc. 682. The plaintiffs' only equitable argument is that the district court's opinion is a valuable "'precedent.'" LWV-Br.49. But vacatur will not prevent other courts from seeing the district court's reasoning. *Rio Grande Silvery Minnow*, 601 F.3d at 1133. It will prevent the district court's opinion from having any legal consequences, and it will warn other courts to be cautious before following that opinion—precisely what's equitable here. *Id.*

II. This Court should reverse the district court's decision on the solicitation definition.

Just as they had standing to stay it, appellants have standing to challenge the district court's decision on the solicitation definition. That definition is neither facially overbroad nor facially vague.[1]

A. Appellants have standing.

The plaintiffs contend that no one has standing to defend the solicitation definition on appeal except the nine county supervisors whom the district court enjoined. The plaintiffs made the same argument when opposing appellants' motion for a stay, LWV-Br.16, but the motions panel granted a stay without even *mentioning* standing. Standing deserved no mention because the plaintiffs' argument has no merit.

Being bound by an injunction is sufficient for appellant standing, but it's not necessary. *See Tachiona v. United States*, 386 F.3d 205, 211 (2d Cir. 2004) (noting the lack of "a *per se* bar against appeals by parties not bound by the judgment"). Private intervenors, for example, often have standing to appeal even when the enjoined governmental defendants choose not to. *E.g.*, *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019) (trade association could appeal injunction against USDA); *In re Subpoena to*

[1] The plaintiffs do not cross-appeal anything, ask this Court to affirm on any alternative ground, or seek a remand on the solicitation definition. So other than facial overbreadth and facial vagueness, they have abandoned all other challenges to the solicitation definition. They can no longer claim that the definition unconstitutionally restricts speech or association on its face, Doc. 380 at 12; unconstitutionally restricts speech or association as applied to them, Doc. 160 at 64-66; or is preempted by the Voting Rights Act, Doc. 665 at 187.

Testify Before Grand Jury Directed to Custodian of Recs., 864 F.2d 1559, 1561 (11th Cir. 1989) (journalists could appeal order restricting university's communications). The test is not whether the lower court's remedy binds the appellant, but whether the lower court's "judgment" causes the appellant an injury that would be redressed by "a 'favorable ruling' from the appellate court." *West Virginia v. EPA*, 142 S. Ct. 2587, 2606 (2022). Though only one appellant needs to meet this test, *Brnovich*, 141 S. Ct. at 2336, both the state defendants and the Republican intervenors meet it here.

1. The Secretary of State has appellate standing. As the State's "chief election officer," he has a state-law duty to "[o]btain and maintain uniformity" in state elections. Fla. Stat. §97.012(1). The judgment below prevents him from doing so because it orders nine supervisors, but not the other 58, to allow solicitations that violate Florida's election code. And the Secretary cannot exercise his power to "adopt by rule uniform standards," *id.*, because the supervisors are not "likely to ignore" a federal-court order "in favor of a regulation issued by the Secretary," *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1257 (11th Cir. 2020). This kind of "direct, articulable" interference with the Secretary's "authority" is sufficient to give him appellate standing. *Tachiona*, 386 F.3d at 214; *accord Newman v. Graddick*, 740 F.2d 1513, 1517-18 (11th Cir. 1984) (attorney general had appellate standing to argue that judgment "adversely affects his interest as Attorney General"); *Wash. Utilities & Transp. Comm'n v. FCC*, 513 F.2d 1142, 1150 (9th Cir. 1975) ("an adverse effect on the performance of official duties constitutes the kind of injury necessary to support standing to sue" (citing *U.S. ex rel. Chapman v. Fed. Power Comm'n*, 345

U.S. 153, 155-56 (1953))), *abrogated in other part by Alfred L. Snapp & Son, Inc. v. P.R. ex rel. Barez*, 458 U.S. 592 (1982). Denying the Secretary standing in this context would give plaintiffs a perverse incentive to challenge election laws only in certain counties—most likely counties that vote heavily for one party or where the supervisors agree with the plaintiffs and refuse to defend the law (as happened here).

The plaintiffs' reliance on *Jacobson* is confused. In *Jacobson*, the plaintiffs lacked standing to sue the Secretary. The Secretary did not cause, and could not redress, the plaintiffs' injuries because the challenged law was enforced by nonparty supervisors beyond the Secretary's control. 974 F.3d at 1253. But *Jacobson* involved standing to sue, while the question here is standing to appeal. "The most obvious difference between standing to appeal and standing to bring suit is that the focus shifts to injury caused by *the judgment* rather than injury caused by *the underlying facts*." 15A Fed. Prac. & Proc. Juris. §3902 (2d ed.) (emphasis added). A judgment can injure an appellant even if that appellant did not injure the plaintiff; the questions are distinct. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618 (1989). Here, the district court's judgment harms the Secretary by hindering his official duties. That injury does not have the causation/redressability problem that plagued the plaintiffs in *Jacobson*. "Because [the Secretary's] injury is caused by the very [judgment] that [he] challenge[s] on appeal, it would be redressed by a favorable ruling from this Court." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 150 (2010).

2. The Republican intervenors also have appellate standing. Standing to appeal is assessed "[a]t the time of the district court's … injunction." *Democratic Exec. Comm. of*

Fla. v. NRSC, 950 F.3d 790, 794 (11th Cir. 2020). At that time, "the next statewide election was set to begin in less than four months (and local elections were ongoing)." *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1371 (11th Cir. 2022). This "[l]ate judicial tinkering with election laws" causes well-known harms to "political parties." *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurral). It requires the Republican Party to "diver[t] personnel and time to educating voters about the modified law." *Democratic Exec. Comm.*, 950 F.3d at 794. Those resources would otherwise be spent on get-out-the-vote efforts in Florida. The Republican party also spends "significant resources in the recruiting and training of volunteers and poll watchers." *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 306 (5th Cir. 2022); *see* Fla. Stat. §101.131. The district court's injunction not only requires the Republican intervenors to spend resources retraining those poll watchers on the legality of solicitations, *La Union*, 29 F.4th at 306, but also diminishes the poll watchers' effectiveness by requiring them to monitor those solicitations for abuse.

The Republican intervenors do not need to prove these injuries with "record evidence." LWV-Br.19. Appellate standing was not relevant in the district court; it didn't become relevant until *after* the trial ended and the court invalidated the solicitation definition. Courts thus do not require a party who isn't bound by the judgment to "*prove* that it has an interest affected by the judgment; *stating* a *plausible* affected interest [is] sufficient." *Off. Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 78 (2d Cir. 2006) (emphasis added). In *Democratic Executive Committee*, for example, this Court

held that one of the Republican intervenors had appellate standing based on a diversion-of-resources theory "allege[d]" in its brief. 950 F.3d at 794. To be safe, the intervenor had moved to "submit a declaration in support of its standing." NRSC-Reply.6 n.2, 2019 WL 4926478. But this Court *denied* that motion. *See* Order (Feb. 19, 2020), No. 18-14758. It instead relied on what the intervenor had "allege[d]" about its standing in its brief. 950 F.3d at 794. This Court should do the same (though, if it would help, the Republican intervenors are again willing to submit a declaration).

B. The solicitation definition is not overbroad.

The plaintiffs do not dispute that, to prevail on their facial challenge, the solicitation definition must be not just "overbroad," but "substantially overbroad." *United States v. Williams*, 553 U.S. 285, 302 (2008). Nor do they dispute that facial overbreadth is "strong medicine" and a "last resort." *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 14 (1988). They instead ask the Court to defer to the district court's "factual findings." They assert that the solicitation definition covers large amounts of "expression." And they focus on its application to their specific line-warming activities. These arguments are irrelevant, wrong, or both.

1. Substantial overbreadth is a question of law reviewed de novo, not a question of fact reviewed for clear error. *Contra* LWV-Br.21 & n.6. Facial overbreadth requires courts to read "the text" of the statute and determine whether a "substantial" number of its applications are unconstitutional—pure questions of law. *United States v. Woods*,

684 F.3d 1045, 1057 & n.10 (11th Cir. 2012). Here, for example, the district court said it was determining overbreadth by "construing the statute" and imagining various hypotheticals, "not" by considering "how the statute *actually applies*." Doc. 665 at 171. While it made factual findings about the plaintiffs' conduct, substantial overbreadth asks whether *most* applications of a statute are unconstitutional, not a small number of applications. *United States v. Fleury*, 20 F.4th 1353, 1363 (11th Cir. 2021). That inherently legal determination is always reviewed "*de novo*." *Woods*, 684 F.3d at 1057 n.10; *accord United States v. Dean*, 635 F.3d 1200, 1203 (11th Cir. 2011) (explaining, in a case alleging facial overbreadth, that "[w]e review the constitutionality of a statute *de novo*"); *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1203 (11th Cir. 2009) ("[O]ur review of the district court's findings of 'constitutional facts,' as distinguished from ordinary historical facts, is *de novo*.").

2. The plaintiffs never really try to show that the solicitation definition is substantially overbroad. They focus on their own line-warming activities, *see* LWV-Br.22-24, 39-42, but they admit that their specific conduct is "largely beside the point" for proving *facial* overbreadth, LWV-Br.39. The plaintiffs also argue that the solicitation definition "regulates a substantial amount of expression and expressive conduct," LWV-Br.22, 25, 37-38, but the plaintiffs are focused on the wrong question. The right question is whether a substantial number of the law's applications are *unconstitutional*. States can constitutionally regulate speech in many circumstances (based on the nature of the speech, the nature of the forum, and the nature of the State's interest); but those

constitutional applications do not count when assessing facial overbreadth. *See New York v. Ferber*, 458 U.S. 747, 773 (1982); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 n.6 (2008); *Hill v. Colorado*, 530 U.S. 703, 730-32 (2000).

Though the plaintiffs nitpick a few of appellants' examples, LWV-Br.24, the plaintiffs never respond to appellants' larger point: Whole categories of the definition's applications are perfectly constitutional. *See* Br.19-20. The lawful applications include *every* application to pure conduct. *Every* application to the interior of the polling place. *Every* application to commercial solicitations. *Every* application to speech that would survive strict scrutiny. And *every* application to distributions of food and water that, given the surrounding circumstances, are not expressive. The plaintiffs do not dispute that distributing food and water is *normally* not expressive. *Ft. Lauderdale Food Not Bombs v. City of Ft. Lauderdale*, 11 F.4th 1266, 1292 (11th Cir. 2021). Nor do they deny that distributions like theirs are not expressive near dropboxes, when the lines aren't long, or without all the surrounding tables and signs that the plaintiffs include. Though the plaintiffs have "[t]he burden of establishing overbreadth," *Fleury*, 20 F.4th at 1362, they never discharge it because they "fail to describe the instances of arguable overbreadth," *Wash. State Grange*, 552 U.S. at 450 n.6. And those instances are insubstantial compared to the law's plainly legitimate sweep.

3. Focusing on the plaintiffs' specific line-warming activities proves the point. Though the solicitation definition would not be facially overbroad even if it were un-constitutional as applied to the plaintiffs, *Cheshire Bridge Holdings, LLC v. City of Atlanta,*

Ga., 15 F.4th 1362, 1377 (11th Cir. 2021), the definition cannot be facially overbroad if it is *constitutional* as applied to the plaintiffs, since their line-warming activities are the only unconstitutional application they identify, *see Wash. State Grange*, 552 U.S. at 450 n.6. The definition is constitutional as applied to the plaintiffs' line-warming activities, as a court just ruled in the related litigation in Georgia.

As Judge Boulee explained in Georgia, laws banning the distribution of food and water near the polling place can survive even strict scrutiny. *See In re Georgia Senate Bill 202*, No. 1:21-mi-55555-JPB, 2022 WL 3573076, at *15-*20 (N.D. Ga. Aug. 18). A historical consensus "dating back to the colonial period," the court explained, allows States to create a "buffer" around the polling place. *Id.* at *15 (citing *Burson v. Freeman*, 504 U.S. 191, 208-10 (1992)). Within that buffer, States can impose even content-based restrictions on protected speech to "restor[e] peace and order around the polls; protec[t] voters from political pressure and intimidation; and suppor[t] election integrity." *Id.* at *18. Banning line warming within the buffer zone is narrowly tailored to those goals because line-warming activities cause commotion, involve "close contact" that deters voting, and create the perception of "improper motive and electioneering." *Id.* at *16-*17. Under binding precedents like *Burson* and *Browning*, strict scrutiny in this context does not require "evidence of necessity"; States can act to prevent these harms before they occur. *Id.* at *17-18 & n.20 (citing *Burson*, 504 U.S. at 208; and *Citizens for Police Accountability Political Committee v. Browning*, 572 F.3d 1213, 1220 n.14 (11th Cir. 2009)). And line-warming groups remain free to hand out food and water "outside the Buffer

Zone" and engage in various forms of speech "inside the Buffer Zone." *Id.* at *19. So too with Florida. *See* HEP-Br.22-27; Georgia-Br.7-13. And so too with the other States that ban this kind of activity. *See* LDF-Br.18-21.[2]

Though the solicitation definition would survive it, the plaintiffs wouldn't be entitled to strict scrutiny anyway. Unlike the exit polling in *Browning*, the plaintiffs' activities are at most expressive conduct, not pure speech. Regulations of expressive conduct are subject to more lenient scrutiny. *See* Br.27-28. That lenient scrutiny applies here because Florida's goals—"protecting voters from confusion and undue influence" and "preserving the integrity of the election process"—are perfectly legitimate and are not tied to the suppression of ideas. *Browning*, 572 F.3d at 1219.

Separately, the act of giving food and water to voters in line is not expressive. The plaintiffs give voters in certain counties food and water because they want those voters to stay in line and vote. The plaintiffs might subjectively believe that giving voters free things communicates support for voting. LWV-Br.23. And voters might be "grateful" to receive free things. LWV-Br.24. But giving away free things is still just giving away free things. The only reason it seems communicative is that the plaintiffs accompany it with *other* speech giving reasons why they're giving out the food and water. But

[2] Judge Boulee went on to conclude that Georgia's line-warming ban is likely unconstitutional *outside* the 150-foot buffer zone. 2022 WL 3573076, at *19-20. Appellants respectfully disagree, mostly because line warming is not speech. But Judge Boulee's reasoning does not apply here, as Florida's ban does not apply beyond the 150-foot buffer zone. *See* Fla. Stat. §102.031(4)(a).

the need for that other speech proves that the distribution itself does not express a message. *Rumsfeld v. FAIR*, 547 U.S. 47, 66 (2006). And nothing in SB90 prohibits that other speech; as applied to the plaintiffs, it prohibits only the act of giving things to voters in line.

The plaintiffs have no good answer for the cases holding that helping people vote by, for example, collecting and delivering their voting materials is not expressive. *See Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018); *Feldman v. Ariz. Sec'y of State's Off.*, 840 F.3d 1057, 1084 (9th Cir. 2016); *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 391 & n.4 (5th Cir. 2013). Like the plaintiffs here, the plaintiffs in those cases also claimed that their conduct expressed "suppor[t]" for voting, told people that "voting is the most fundamental right," "convey[ed] their support for the democratic process," and "ensure[d] that [voters'] voices [were] heard on Election Day." *Knox*, 907 F.3d at 1181; *Feldman*, 840 F.3d at 1083. But the courts were unpersuaded because the laws regulated only the conduct itself. So too here. *See* RITE-Br.16-18.

C. The solicitation definition is not unconstitutionally vague.

Though their arguments do not honor it, the plaintiffs do not dispute the standard for facial vagueness: The law must have no core, meaning it lacks "any ascertainable standard for inclusion and exclusion." *Smith v. Goguen*, 415 U.S. 566, 578 (1974). The plaintiffs cannot satisfy this standard because the solicitation definition is not vague as to them. And the definition has a core, even if certain applications present close cases.

The plaintiffs' attempt to make the statute vague by focusing on the parties' *arguments* in the district court, rather than the text and context of the law, is unpersuasive.

1. The plaintiffs cannot prevail because the solicitation ban does clearly regulate *them*. The plaintiffs do not dispute "the rule that '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Holder v. Humanitarian Law Proj.*, 561 U.S. 1, 20 (2010). And that rule "makes no exception for conduct in the form of speech." *Id.* Nor do the plaintiffs dispute that the solicitation definition is unusually clear about its application to their conduct. *See* Br.39. The statute carves out an exception for "giving items to voters" in the no-solicitation zone when "the supervisor" does it. Fla. Stat. §102.031(4)(b). That exception makes it clear that, for individuals who are *not* working for the supervisor, "giving items to voters" in the no-solicitation zone *is* prohibited.

2. Even apart from its clear application to the plaintiffs, the solicitation definition has a core. The plaintiffs do not dispute that "solicit" has a plain meaning, requiring the solicitor to deliberately approach voters to seek something from them or give something to them. Br.36-38. All the listed examples surrounding the solicitation definition involve precisely that. And this context, plus a dose of history and common sense, answer the plaintiffs' rhetorical questions about what it is that solicitors cannot "influenc[e]" voters about. *Cf.* LWV-Br.27-28. The solicitation definition is an election law, that prohibits solicitations of "voters," who are standing in line right outside the "polling place," during the time to vote: The impermissible influence is on the voter's

decision whether and how to vote. Br.36-39. The listed examples of "seeking … any vote" or "distributing … campaign material" are obvious examples of changing *how* someone votes. Fla. Stat. §102.031(4)(b). And the remaining examples address *whether* someone votes; as this Court explained in *Browning*, voters "faced with running the gauntlet" of various forms of solicitation at the polls "will refrain from participating in the election process." 572 F.3d at 1220 (cleaned up).

Nor does the solicitation definition invite subjectivity or arbitrary enforcement. The plaintiffs do not claim that a solicitor's "intent to influence" a voter is anything but an objective fact; in fact, intent requirements help cure vagueness problems. *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007); *High Ol' Times v. Busbee*, 673 F.3d 1225, 1231 (11th Cir. 1982). Nor is the phrase "effect of influencing a voter" subjective; whether a solicitation changed someone's decision whether or how to vote is "a true-or-false determination." *Williams*, 553 U.S. at 306. And courts would read this language to require the solicitation to not only affect a voter's decision, but for the solicitor to know that his conduct has that "natural and probable" effect. Br.42. Reading this scienter requirement into the statute would not make the word "intent" superfluous. *Cf.* LWV-Br.31. It requires "knowledge," which is a lower scienter requirement than intent but a scienter requirement all the same. *United States v. Aguilar*, 515 U.S. 593, 599 (1995); *Maestas v. State*, 76 So. 3d 991, 994 (Fla. Dist. Ct. App. 2011).

The solicitation definition is not facially vague for failing to define the word "activity" or using the broad modifier "any." *Cf.* Fla.-Rising-Br.53. That a statute fails to

"define each and every word" does not make it vague. *United States v. Sepulveda*, 115 F.3d 882, 886 n.9 (11th Cir. 1997). Especially not with a word as common as "activity," which is ubiquitous in federal and state statutes. *E.g.*, *Moore v. Brown*, 868 F.3d 398, 401 (5th Cir. 2017). As for the word "any," there is nothing vague about it. Though it gives the solicitation definition a wide scope (albeit in a narrow context), scope and vagueness are separate questions. *United States v. Brenson*, 104 F.3d 1267, 1281 (11th Cir. 1997).

3. It is no exaggeration to say that the plaintiffs address virtually *none* of appellants' arguments about the text, context, or history of the solicitation definition; they spend their entire brief accusing appellants of hypocrisy. They stress that, in a motion to dismiss filed over a year ago, the Secretary argued that the solicitation definition does not cover the plaintiffs' line-warming activities. LWV-Br.11 (citing Doc. 175-1). But the Secretary lost that argument, in no small part because the plaintiffs successfully pointed to "the plain language of the statute." Doc. 197 at 23. And the Secretary did not raise that argument again after the evidence was fully developed at trial.

The plaintiffs are wrong to assume that arguments in a brief can make a statute vague. Despite relying so heavily on this point, the plaintiffs do not cite a single case supporting it. The caselaw rejects stronger versions of the argument. That law-enforcement officers on the ground have "different interpretations" of a law "does not render [it] unconstitutionally vague." *First Vagabonds Church of God v. City of Orlando, Fla.,* 610 F.3d 1274, 1288 (11th Cir.), *vacated*, 616 F.3d 1229 (11th Cir. 2010), *reinstated in relevant part*, 638 F.3d 756 (11th Cir. 2011); *accord Joel v. City of Orlando*, 232 F.3d 1353, 1360 (11th

Cir. 2000). Nor is a law vague when different courts adopt contradictory interpretations of it, *United States v. Kernell*, 667 F.3d 746, 754 (6th Cir. 2012); *United States v. Morrison*, 686 F.3d 94, 104 (2d Cir. 2012), or even when the same court does, *Mannix v. Phillips*, 619 F.3d 187, 200 (2d Cir. 2010). Facial vagueness turns on the "the language of the law itself." *SisterSong Women of Color Reprod. Just. Collective v. Governor of Ga.*, 40 F.4th 1320, 1327 (11th Cir. 2022) (cleaned up). Important matters like the constitutionality of a state law cannot turn on what litigants might happen to argue in a brief. *Cf.* Fed. R. Civ. P. 8(e) (parties can make alternative and inconsistent arguments).

Similar problems plague the plaintiffs' reliance on testimony from a few supervisors. The plaintiffs want to leave the impression that Supervisors White and Latimer, so confused as to what the solicitation definition prohibits, decided to outright ban all line-warming activities. *See* LWV-Br.32. But those supervisors testified that they banned these activities *before* SB90 added the contested part of the solicitation definition. *See* Doc. 549-3 at 50; Doc. 562 at 58-59. That testimony undercuts the plaintiffs' vagueness argument because it suggests that supervisors already understood these activities to fall under the natural meaning of Florida's preexisting, nonexclusive definition of "solicit." Br.9, 40; *see* Doc. 562 at 59 ("I don't know if I would agree … that the definition is hard to interpret").

CONCLUSION

On the registration disclaimer, this Court should grant appellants' pending motion and dismiss No. 22-11133, vacate the relevant portions of the district court's decision, and remand with instructions to dismiss the plaintiffs' challenges as moot. On the solicitation definition, this Court should reverse.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7) because it contains 5,289 words, excluding the parts that can be excluded. This reply also complies with Rule 32(a)(5)-(6) because it's prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font (plus 14-point Helvetica font for headings).

Dated: August 31, 2022 */s/ Cameron T. Norris*

CERTIFICATE OF SERVICE

I e-filed this reply, which will email everyone requiring notice.

Dated: August 31, 2022 */s/ Cameron T. Norris*