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

HARRIET TUBMAN FREEDOM FIGHTERS CORP.,

Plaintiff,

Case No. 4:21-cv-00242-MW-MAF

v.

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

Defendants,

and

NATIONAL REPUBLICAN SENATORIAL COMMITTEE, et al,

Intervenors.
_____/

DEFENDANTS' REPLY IN SUPPORT OF SUMMARY JUDGMENT

Defendants, Secretary of State Lee, and Attorney General Moody (Defendants) reply to Plaintiff, Harriett Tubman Freedom Fighters' (Plaintiff's) response in opposition to Defendants' motion for summary judgment. For the reason discussed in Defendants' memorandum in support of law in support of summary judgment (ECF-215-1) and those discussed below, the Court should grant summary judgment in favor of Defendants.

ARGUMENT

I. PLAINTIFF LACKS STANDING BECAUSE IT PRESENTS NO COMPETENT EVIDENCE OF PARTICULARIZED INJURY.

To establish standing, Plaintiffs "must prove (1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision," *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020) (citations omitted). Plaintiffs must establish "by affidavit or other evidence 'specific facts,' which for purposes of the summary judgment motion will be taken to be true." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). "And that burden increase[s] with the successive stages of litigation: although mere allegations suffice[] at the pleading stage, actual evidence [is] required to withstand summary judgment." *City of Miami Gardens v. Wells Fargo & Co.*, 956 F.3d 1319, 1320 (11th Cir. 2020) (citing *Lujan*, 504 U.S. at 561).

Plaintiff does not provide any competent evidence to establish any "concrete and particularized" injury in fact attributable to Section 97.0575's notification provision. *Lujan*, 504 U.S. at 560.

Plaintiff alleges, without producing any evidence, that the notification provision injures its speech and association rights because it somehow "undermines the credibility they have established in the communities in which they work." ECF-232 at 4. Yet Plaintiff fails to identify, much less provide an affidavit from, a single voter who thought the notification requirement somehow undermined Plaintiff's credibility. In fact, Plaintiff's corporate representative testified in deposition that she is not aware of a single registrant who refused to register due to the disclaimer. ECF-238-1 at 122:10-16. Conclusory allegations, without supporting evidence, are not sufficient to survive summary judgment. *Barfield v. Brierton*, 883 F.2d 923, 934 (11th Cir. 1989) ("If the party's response consists of nothing more than a repetition of his conclusory allegations, the district court must enter summary judgment in the moving party's favor.").

Plaintiff also alleges that it "believes" that the notification provision requires it to say something that is "not true," "misinformation or disinformation," or "misleading." ECF-232 at 4-5. Those conclusory allegations are demonstrably untrue because, as Plaintiff itself acknowledged in its motion for summary judgment,

late-filed 3PVRO submissions have prevented Floridians from voting.[1] It also cannot be disputed that Floridians can deliver registration applications in person or by mail or register online, and voters can check their registration status online.[2] In fact, Plaintiff itself, when not collecting voter registration applications, advises potential registrants of the options of hand-delivering their applications or registering on-line. ECF-238-1 at 40:2-11.

Plaintiff's subjective "beliefs" about the potential effect of the notification requirement on its credibility or trust with potential registrants are not enough to establish standing. As the Supreme Court has emphasized, "[a]bstract injury is not enough." *L.A. v. Lyons*, 461 U.S. 95, 101 (1983). To establish standing, injuries must be "concrete and particularized." *Lujan*, 504 U.S. at 560.

Plaintiff also argues that the notification requirement somehow requires it to divert resources from other activities even though it did not start acting as a 3PVRO until after enactment of the notification provision. Moreover, Plaintiff cites no

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[1] "In 2020, SOEs identified only 12 Floridians in a single county as unable to vote in the March 2020 primary due to late 3PVRO submissions." ECF-216 at 19. The Secretary disputes this number. *See* ECF-214-43 at 5 n.1 (citing, *e.g.*, "a September 28, 2020, letter to the Voter Participation center detailing 20 voter registration applications delivered after book-closing for the March 27, 2020, Presidential Preference Primary, and 54 voter registration applications delivered after book-closing for the August 18, 2020, Primary Election"). Regardless of the number, any late submissions are too many.

[2] Florida Department of State, Elections, *Voter Information Lookup*, https://registration.elections.myflorida.com/en/CheckVoterStatus/Index (last visited Dec. 9, 2021).

evidence in support of this conclusory allegation other than conclusory and self-serving deposition testimony and discovery responses. *See* ECF-232 at 5. Once again, repetition of conclusory allegations, without more, is not sufficient to survive summary judgment. *See Barfield,* 883 F.2d at 934.

Finally, Plaintiff argues that it suffers a cognizable injury because the notification provision is void for vagueness. But this allegation presupposes that Plaintiff is correct on the merits, which is wrong for the reasons discussed in Defendants' memorandum in support of summary judgment, ECF-215-1 at 6-7, and below. Furthermore, Plaintiff's argument that the enforcement provision of section 97.0575(4) somehow places it "on pins and needles," ECF-232 at 8, is supported, once again, by nothing more than conclusory and self-serving deposition testimony that is not sufficient to survive summary judgment. ECF-232 at 8.

II. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S CONSTITUTIONAL CLAIMS.

A. Defendants are Entitled to Summary Judgment on Plaintiff's Void for Vagueness Claim in Count I of its Amended Complaint.

Defendants stand by the discussion of Plaintiff's void for vagueness claim in their memorandum of law in support of summary judgment, ECF-215-1 at 6-7, but make three additional points.

First, Plaintiff attempts to interject "facts" without supporting evidence. Initially, without citation to any evidence whatsoever, Plaintiff alleges that the

notification provision somehow "impedes [its] speech by forcing it to take on extensive and time-consuming compliance procedures to mitigate unknown risks to conduct voter registrations activities." ECF-232 at 10. Without citation to evidence, the Court is left to guess how a simple disclaimer requires 3PVROs to "take on extensive and time-consuming compliance procedures." *Id.* Again, conclusory allegations without evidence cannot survive summary judgment.

Second, citing its motion for summary judgment, Plaintiff claims that it presented evidence that the statute "risked arbitrary enforcement even before SB 90, as the Secretary has inconsistently fined SPVROs for untimely submitting forms under paragraph (3)(a)." ECF-232 at 11.[3] However, whether or not fines were assessed for untimely submissions historically (and any factual circumstances related to such assessment decisions) is entirely divorced from the question of whether conduct mandated or proscribed by statute is clear and sufficient to put Plaintiff on notice of what the law requires. Here, Plaintiff is on notice by virtue of the direct statutory language as to what is required.

Finally, Plaintiff once again asserts that subsection 97.0575(4) is vague because it fails to identify what relief the State may seek in an enforcement action. ECF-232 at 10-11. Plaintiff apparently recognizes that the statute's reference to "permanent or temporary injunction [or] restraining order" is not vague. Fla. Stat. §

[3] Plaintiff cites to ECF-216 at 31-32, but the correct citation is ECF-216 at 29-30.

97.0575(4). Instead, it focuses on the statute's reference to "other appropriate order." *Id.* But the fashioning of relief in enforcement cases is well within the province and expertise of the courts. As this Court found in *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1166-1167 (N.D. Fla. 2012), when subsection 97.0575(4) was challenged shortly after its enactment, the statute is "not unconstitutional" and "unobjectionable."

For these reasons and those stated in Defendants' memorandum in support of summary judgment, ECF-215-1 at 6-7, Defendants are entitled to summary judgment on Plaintiff's void for vagueness claim in Count I of its Amended Complaint.

B. Defendants are entitled to Summary Judgment on Plaintiffs' First Amendment Compelled Speech Claim in Count II of its Amended Complaint.

i. The Zauderer exception to strict scrutiny applies to Plaintiff's Free Speech Claim.

Plaintiff offers four arguments in support of its contention that *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985) does not apply in this case. All miss the mark.

First, the speech of 3PVROs, like Plaintiff, is in the nature of commercial speech because a voter's decision to allow a 3PVRO to accept responsibility for his or her registration application is, in effect, a transaction that imposes a fiduciary responsibility on the 3PVRO. *See* Fla. Stat. § 97.0575(3)(a) (2021) ("A [3PVRO]

that collects voter registration applications serves as a fiduciary to the applicant[.]"). The notification provision furthers the State's interest in ensuring that 3PVROs meet their fiduciary obligation to inform voters of risks associated with relying on a 3PVRO and alternative means of registration—all in furtherance of ensuring timely registration. 3PVROs are meant to "take [ ] back the completed application—together with other applications obtained in the same way—to a proper voter registration office." *Browning*, 863 F. Supp. 2d at 1158. This is not exactly what Plaintiff does.[4]

Plaintiff's business model is based on a commercial transaction with a grantor with the grantor compensating Plaintiff based on the number of registrations. Specifically, in deposition, Plaintiff's corporate representative testified that "[Plaintiff] had a 300-voter registration requirement to meet for the grant that [Plaintiff] received." ECF-238-2 at 173:4-8. So, "[i]n order to satisfy the grant, [Plaintiff] was required to process 300" by the "end of November." *Id.* at 173:13-18; *see also id.* at 89:12 (testifying that Plaintiff had only been collecting applications since September). In exchange, the grantor paid $9,000. *Id.* at 174:8-25.

[4] As explained in Defendant's memorandum in support of summary judgment, Plaintiff does not directly submit applications on behalf of registrants, but instead submits them to a third-party to conduct a "quality control" review which takes up to 10 days to complete. ECF-215-1 at 3-4.

Second, Plaintiff suggests that the *Zauderer* exception only applies in the context of licensed professionals, like lawyers, dentists, and abortion providers. ECF-232 at 14-15. Although the cases cited by Plaintiff involved professionals, none set forth a categorical rule that only "professional speech" is subject to the *Zauderer* standard. The focus of *Zauderer* is on "commercial speech," not some new category of "professional speech" as Plaintiff calls it. *See* ECF-232 at 15. In fact, the *Zauderer* Court never even used the term "professional speech." *See generally* 471 U.S. 626.

Third, Plaintiff once again wrongly claims that the notification provision "does not involve 'purely factual and uncontroversial information." ECF-232 at 15 (citation omitted). This is demonstrably untrue. As discussed above, Plaintiff itself acknowledged in its motion for summary judgment that Floridians have been unable to vote due to late-filed 3PVRO submissions. *Supra* at 1-2. It is not just a "theoretical possibility," as Plaintiff argues. ECF-232 at 16. And Plaintiff admitted in deposition that it advised potential registrants of alternative means of registering, including online and taking applications to the Supervisor of Elections office themselves. ECF-238-1 at 40:2-11.

Finally, in a classic case of circular reasoning, Plaintiff argues that the fact that the notification provision has been challenged in the lawsuits pending in this

Court "reflect[s] its controversial nature." ECF-232 at 16. Plaintiff cannot ignore undisputed facts by simply pointing to its own lawsuit.

ii. The Notification Provision Passes Scrutiny Under Central Hudson.

Because the notification provision requires disclosure of non-controversial factual information, it is subject to the *Zauderer* test, not the intermediate level of scrutiny applied in *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980). Nevertheless, the notification provision would survive *Central Hudson*'s stricter standard under the *Central Hudson* court's own reasoning. In that regard, the *Central Hudson* court found unconstitutional the Public Service Commission's prohibition of affirmative advertising by electric utilities because, in part, the Commission had not shown that its interest in energy conservation could not be protected by more limited regulation than a complete prohibition. *Id*. at 570. As an example of a more narrowly tailored regulation that would pass constitutional muster, the Court posited that the Commission "might . . . require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and the foreseeable future." *Id.* at 571. That is, for all practical purposes, what the State is doing here. It is not prohibiting or even restricting speech, but simply requiring 3PVROs to make noncontroversial factual statements designed to further the State's substantial interests.

iii. The Undisputed Facts Establish the State's Substantial Interest in Promoting Timely Submission of Voter Registration Applications.

Plaintiff is once again wrong in arguing that Defendants have not established substantial interests underlying the notification provision or that those interests are furthered by the notification requirement. As this Court recognized in *Browning*, 863 F. Supp. 2d at 1160, "[t]he state has a substantial interest in seeing that voter-registration applications are promptly turned in to an appropriate voter-registration office." The specific interest underlying the notification provision is simple but compelling: Protecting Florida voters through the dissemination of truthful information so that as many voters as possible may register on-time so that they can vote in the next election.

It is undisputed that late delivery can result, and in fact has resulted, in voters missing the deadline to register before an election thereby depriving them of the ability to vote in that election. ECF 214-43 ¶18. Providing Florida voters more information about the registration process, including referring them to a website so that they can meet fast approaching registration deadlines, directly furthers the State's interests. *Id.* As explained in the Defendant's motion for summary judgment, the notification provision also furthers the State's interest in ensuring that 3PVROs fulfill their statutory obligation to serve as fiduciaries to the voters they

assist by providing truthful information about alternative registration methods, so they can make an informed decision. ECF-215 at 10-13.

a. The Undisputed Facts Establish the Notification Provision is Not "unjustified" or "unduly burdensome" Under Zauderer.

In arguing that the notification provision is "unjustified" or "unduly burdensome," and once again attempts to downplay the undisputed fact that late 3PVRO delivery can result and, in fact, has resulted in voters missing the deadline to register before an election depriving those voters of the ability to vote in that election. ECF 214-43, at 5, ¶18. The mere fact that other forms of registering may at times have glitches does not make informed decision-making unjustified or unduly burdensome. Moreover, the notification provision is narrowly tailored to serve the State's substantial interests because it only applies at the time 3PVROs have contact with potential registrants and it simply requires 3PVROs to advise the potential registrants of truthful information.

b. The Undisputed Facts Establish the Notification Provision Directly Advances the State's Substantial Interests.

Defendants stand by their discussion of this issue in their memorandum of law in support of summary judgment. ECF-215-1 at 12-13.

C. Defendants are entitled to Summary Judgment on Plaintiff's Associational Claim in Count III of its Amended Complaint.

Defendants stand by their discussion of Plaintiff's associational claim in their memorandum of law in support of summary judgment, ECF-215-1 at 14-15, but

write further to discuss an additional issue raised in Plaintiff's response. Specifically, Plaintiff attempts to invoke the *Anderson-Burdick* framework applied in prior challenges of section 97.0575 in *Browning*, 863 F. Supp. 2d 1155, and *League of Women Voters v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006). Plaintiff's invocation of *Anderson-Burdick* is wrong. Moreover, Plaintiff's associational claim fails even if the Court were to apply *Anderson-Burdick*.

As the Eleventh Circuit made clear in *Jacobson*, which was decided after *Browning* and *Cobb, Anderson-Burdick* only applies to claims based on the right to vote. *Jacobson*, 974 F.3d at 1261 ("The basic problem with [plaintiffs'] complaint is that it is not based on the right to vote at all, so we cannot evaluate their complaint using the legal [*i.e.*, *Anderson-Burdick*] standards that apply to laws that burden the right to vote."). Here, the Plaintiff has not pled any burden on the right to vote, only burdens on its associational rights. Thus, Plaintiff has not pled a claim subject to the *Anderson-Burdick* framework.

Even if Plaintiff's associational claims were subject to the *Anderson-Burdick* balancing test, they would fail because the Plaintiff has failed to establish any burden on its associational rights to balance against the State's substantial interest in promoting timely submission of registration applications and ensuring that 3PVROs satisfy their fiduciary obligations. *See Jacobson*, 974 F.3d at 1261 ("*Anderson* and *Burdick* . . . requires us to weigh the burden imposed by the law against the state

interests justifying the law."). The notification requirement does not limit the number of potential registrants with whom Plaintiff can associate. It does not regulate the place or time at which it can associate with potential registrants. And it does not restrict what Plaintiff can say to potential registrants. It simply requires Plaintiff to convey truthful, non-controversial statements that further the State's substantial interests.

CONCLUSION

For the foregoing reasons and those set forth in Defendants' memorandum of law in support of summary judgement, ECF-215-1, the Court should grant summary judgment in Defendants' favor.

Dated: December 10, 2021

Respectfully submitted by:

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CERTIFICATE OF COMPLIANCE

I certify that foregoing complies with the size and font requirements in the local rules. It contains 2,786 words.

/s/ Mohammad O. Jazil

CERTIFICATE OF SERVICE

I certify that on December 10, 2021, I caused to be served a copy of the foregoing by CM/ECF to all counsel of record.

/s/ Mohammad O. Jazil