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

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

DEFENDANTS' CORRECTED MOTION FOR SUMMARY JUDGMENT

Defendant Laurel M. Lee, in her official capacity as the Florida Secretary of State, moves this Court to grant summary judgment in favor of Defendants on all remaining claims in the Amended Complaint, ECF No. 59, for the reasons set forth in the separately filed Supporting Memorandum. Supervisors Hays and Doyle join to defend the constitutionality of section 101.62(1)(a)-(b), Florida Statutes (the vote-by-mail request provision) and section 102.031(4)(a)-(b), Florida Statutes (the non-solicitation provision) as set forth in sections I-IV(F) and IV(H) of the Supporting Memorandum.

Due to technical difficulties, counsel for the Secretary could not upload exhibits referenced in the memorandum of law onto the Court's CM/ECF system until after 11:59PM on November 12, 2021. The attached corrected memorandum updates only the citations to exhibits later uploaded to this Court's CM/ECF system early on the morning of November 13, 2021.

Dated: November 13, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 13, 2021, I served the foregoing on all counsel of record through this Court's CM/ECF system.

/s/ Mohammad Jazil

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

DEFENDANTS' CORRECTED MEMORANDUM OF LAW IN SUPPORT OF SUMMARY JUDGMENT*

* Due to technical difficulties, counsel for the Secretary could not upload exhibits referenced in the memorandum of law onto the Court's CM/ECF system until after 11:59PM on November 12, 2021. This corrected memorandum updates only the citations to exhibits later uploaded to this Court's CM/ECF system early on the morning of November 13, 2021.

I. Introduction

Plaintiffs Florida Rising Together ("Florida Rising), UnidosUS, Equal Ground Education Fund ("Equal Ground"), Hispanic Federation, Poder Latinx, Haitian Neighborhood Center Sant La ("Sant La"), and Mi Familia Vota Education Fund ("Mi Familia") (together, the "Florida Rising Plaintiffs")[1] allege that four sections of Chapter 2021-11, Laws of Florida ("2021 Law") violate federal law. *See* Case No. 201, ECF 59. These sections amend the following statutes: (1) Section 97.0575, Florida Statutes, which provides a timeframe by which third-party voter registration organizations must deliver completed applications ("**voter registration delivery provision**") and sets forth disclaimers such organizations must make to applicants ("**voter registration disclaimer provision**"); (2) Section 101.69, Florida Statutes, which provides a uniform and secure statewide standard for the use of drop boxes used to return vote-by-mail ballots ("**drop box standard**"); (3) Section 101.62(1)(b), Florida Statues, which requires voters who wish to vote by mail to provide an acceptable form of identification ("**vote-by-mail identification provision**"); and (4) Section 102.031(4)(a)-(b), Florida Statutes, which prohibits anyone from "engaging in any activity with the intent to influence or effect of influencing a voter" inside a polling place or within 150 feet of a drop box or entrance of any polling place ("**non-solicitation provision**").

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

The Secretary and the Supervisors[2] (collectively "Defendants"), each in their official capacities, move for summary judgment on all remaining counts related to the three provisions. After an initial discussion of the facts and the relevant standard on summary judgment, the Secretary and Supervisors begin, as should always be the case, with Plaintiffs' lack of standing to bring their claims. Defendants address Plaintiffs' standing; the intentional race-based discrimination claims under the Fourteenth and Fifteenth Amendments, and Section 2 of the VRA ("VRA") in Claims I, II, and III, ECF 59 ¶¶ 165-182; the First and Fourteenth Amendment claims in Claim IV, using the *Anderson/Burdick*[3] framework, *id.* ¶¶ 183-190; claims brought under Section 208 of the VRA in Claim VI, *id.* ¶¶ 211-218; the First Amendment claims in Claims V, VII and VIII directed at the voter registration delivery and disclaimer provisions, *id* ¶¶ 219-252; and the First and Fourteenth Amendment "overbr[eadth] and vague[ness]" claim in Claim V directed at the non-solicitation provision, *id.* ¶¶ 191-210.

[2] Alan Hays and Tommy Doyle, the Supervisors of Elections for Lake County and Lee County, join in the defense of the vote-by-mail request and non-solicitation provisions. Therefore, the Supervisors join sections I through IV(F) and IV(H) of the Motion and Memorandum to the extent those two provisions are at issue.
[3] *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

II. Statement of Facts

Legislatures have plenary authority to set the time, manner, and place of elections under the federal and state constitutions. The Florida Legislature passed, and the Governor signed, Senate Bill 90 ("SB90"), codified as Chapter 2021-11 Laws of Florida ("2021 Law") consistent with that grant of authority.

The 2021 Law was not enacted in a vacuum. It was introduced with the following backdrop: Several attempts to enact last-minute changes to election rules through emergency actions or court orders; national attention to allegations of election fraud made in the wake of the 2020 election; and concerns about the fairness of elections. *See* Ex 15 at (Ex. D at p. 10). Then, there is Florida, with its own history of voter fraud. *See, e.g.,* ECF 244-1 at ¶ 19. The Florida Legislature thus enacted certain revisions to its laws to proactively address issues of voter security. SB90—which became the 2021 Law—was introduced on Feb. 3, 2021. ECF 244-8 at 1. The process by which the legislature enacted the law was average in all respects except for the ongoing pandemic that required some changes to the public engagement process. After four months of amendments and debate, Governor DeSantis approved SB 90 on May 6, 2021. *Id.* at 6.

Even after SB90, voting in Florida is either as easy or easier than voting in most states. ECF 244-1 ¶¶ 8-15. Specifically, Florida's rules respecting early voting and vote-by-mail have become progressively easier since the 1980s. *Id.* ¶ 9. Florida's

requirement that drop boxes be made available to voters puts Florida in the rarefied air of only ten states allowing this method of voting. *Id.* ¶ 10. Florida's third-party voter registration rules are consistent with the "vast majority of states that impose requirements on" third-party voter registration organizations ("3PVROs") and Florida's fourteen-day deadline for returning registration forms is longer than the average permitted by other states. *Id.* ¶ 12. Florida's absentee ballot verification rules are well within the norm of all states and "[o]nly four states (other than states that conduct all or mostly all-mail elections) have [ID] verification checks that are less strenuous" than Florida's. *Id.* ¶13. Florida's rule that a no-excuse absentee ballot be requested every two years "makes Florida the most lenient state among the thirty-eight states that regulate absentee voting in some way short of a no-excuse permanent absentee or all-mail voting." *Id.* ¶ 14. Finally, Florida's non-solicitation rules "mirror the vast majority of state rules across the country" prohibiting the influencing of voters within a certain distance of polling places. *Id.* ¶ 15.

Provisions of the 2021 Law that Plaintiffs' challenge are simply reasonable, rational, and constitutional voting regulations. Notwithstanding these facts, Plaintiffs filed suit.

III. Relevant Legal Standard

Summary judgment is appropriate when, as here, "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled

to judgment as a matter of law." Fed. R. Civ. P. 56(a). Disputes are "'genuine'…if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Material" facts are those that might affect the outcome of the case under the governing substantive law, not those that "are irrelevant or unnecessary." *Id.* The nonmoving party also has an obligation to come forward with "specific facts showing there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "A mere 'scintilla' of evidence supporting the [nonmoving] party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990).

IV. Argument

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), "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).

Assuming one or more of the Plaintiffs have established standing, this Court should still enter summary judgment in favor of Defendants on the merits of the remaining claims. Plaintiffs fail to produce evidence sufficient to show intentional

race-based discrimination or discriminatory effects. The drop box, vote-by-mail request, voter registration delivery provision, and non-solicitation provisions easily pass the *Anderson/Burdick* test. The voter registration delivery and disclaimer provisions and non-solicitation provision satisfy the requirements of the First Amendment. Vagueness and overbreadth claims against the non-solicitation provision are without merit. And the Section 208 claim is ripe for summary judgment in favor of Defendants.

A. Plaintiffs Lack Standing.

Plaintiffs' burden to establish Article III standing increases at the summary judgment stage for each of their claims.

Also, because incorporated entities have no right to vote, they must prove standing by showing either harm to their members or harm to themselves as organizations. *Jacobson*, 974 F.3d at 1248-49. Associational standing requires that "an organization… prove that its members would otherwise have standing to sue in their own right." *Id.* at 1249. Relatedly, "an organization has standing to sue on its own behalf if the defendant's illegal acts impair its ability to engage in projects by forcing the organization to divert resources to counter those illegal acts." *Id.* at 1250. Specifically, a Plaintiff must show what the organization would "divert resources away *from* in order to spend additional resources on combating" the alleged illegal acts. *Id.*

Because none of Plaintiffs' experts have quantified the magnitude of any burden on Plaintiffs, Plaintiffs fail to demonstrate concrete, particularized injury-in-fact that satisfies Article III.

1. *Florida Rising.*

Plaintiff Florida Rising alleges that it is a nonprofit "with a mission to increase the voting and political power of marginalized and excluded constituencies." ECF 59 at ¶ 20.

Florida Rising is a membership organization, *see* ECF 244-19 at 11:17–22, but it does not identify any of its members who have been harmed by the 2021 Law. Florida Rising does not know which or how many of its members would be unable to provide one of the three forms of permissible identification under the vote-by-mail request provision. *Id.* at 48:24–49:3. It is similarly unaware of any persons who have declined to register to vote due to the notification requirement (although it asserts a speculative chilling effect) and does not know whether any educational materials will need to be updated. *Id.* at 55:4–22. In past elections, Florida Rising reports that it has exclusively set up its tables "within the designated permissible space," which means their operations will be unaffected by the non-solicitation provision. *Id.* at 61:9–20. While Florida Rising claims that some of its members may have difficulty voting via their preferred method of drop box during early voting hours, it believes that those individuals will still be "able to vote by mail or . . . any

other way." *Id.* at 51:15–52:3. Consequently, Florida Rising has failed to meet its associational standing burden on any of the challenged provisions.

It has also failed to sufficiently demonstrate organizational standing. When questioned about how resources had to be diverted in response to the 2021 Law, Florida Rising's corporate representative repeatedly used speculative language: "we're still in the planning phases" and "don't have a full analysis yet;" "it's unclear to us how much [sending forms to the voter's county of residence] is going to cost in mileage or postage;" the organization "might need to . . . figure out" how to lawfully assist voters who are waiting in line and "may have to develop new strategies to communicate." *Id.* at 77:24–78:16, 79:13–19, 80:3–12. But what is abundantly clear from the deposition is that none of this work has actually begun, and the organization is still unsure what form that work might take (or what it might cost, or where that money might come from). Organizational standing cannot rest on such a thin reed.

2. *UnidosUS.*

Plaintiff UnidosUS alleges that it "is a nonprofit organization and the nation's largest Latino civil rights and advocacy organization." ECF 59 ¶ 27. It "has offices in Florida and has 17 affiliated community-based nonprofit organizations (Affiliates) based or working in" several Florida counties. *Id.* UnidosUS "conducts voter registration by community canvassing in high-traffic commercial areas or

events, placement of digital ads, mailers and contacting voters directly," and "provides support and technical assistance to Affiliates to conduct voter registration with their existing members." *Id.*

UnidosUS claims that the 2021 Law will require it "to divert resources from other projects to hire additional staff to handle the sorting, packaging and delivering of voter registration forms to the correct county, and will also have to add additional staff to triple check the county of all registrants." *Id.* ¶ 28. Further, UnidosUS claims that it "will have to divert its limited resources from other projects to translate instructions to voters regarding the changes made by the passage of SB 90 and provide Spanish-language assistance to Spanish-dominant Florida eligible voters." *Id.* ¶ 29.

UnidosUS stated that it always has to update its voter education materials "any time a new law passed that impact[s] [its] activities." ECF 244-21 at 103:14–04:9. The staff time allegedly diverted thus far has affected only full-time employees for whom "discussing the relevant laws [of] the state of Florida . . . falls under generally what work needs to be done on behalf of UnidosUS." *Id.* at 118:9–119:12. That's no injury, it's just the cost of doing business as an organization that educates voters concerning changes in state law—the kind of core activity UnidosUS refers to as an "ongoing function." *Id.* at 120:23–121:5. Although UnidosUS testifies that it has had internal discussions about the need to hire additional staff in response to the 2021

Law, it has not decided what form that additional staffing will take. *Id.* at 106:23–107:20. Furthermore, UnidosUS has not actually attempted to register anyone to vote in Florida since the enactment of the 2021 Law, so any fears as to how that process will be affected are purely speculative. *Id.* at 111:11–17.

UnidosUS claims that the 2021 Law will require a substantial diversion of resources, but it fails to explain how their response so far has differed appreciably from how they would respond to *any* change to Florida law. This is not enough for organizational standing.

3. ***Equal Ground.***

Plaintiff Equal Ground alleges that it is a nonprofit "organization with a mission to register, educate, and increase engagement among Black voters in Florida's I-4 corridor." ECF 59 ¶ 30. *Id.* Equal Ground claims that the 2021 Law is causing it to "strategiz[e] shifts in staffing, funding, and programming." *Id.* ¶ 32.

Equal Ground does not have members. Burney-Clark Dep., ECF 244-22 at 14:8–9. As a result, Equal Ground may only claim that it has organizational standing, which it has failed to establish here. Equal Ground's use of future language in the Complaint is telling in this regard. It is "currently strategizing," "anticipates creating new "materials, and "foresees" impacts to its Souls to the Polls and line warming efforts. ECF 59 ¶ 32. These potential future harms are too speculative to satisfy the injury prong of standing at the summary judgment stage. *See Lujan*, 504 U.S. at 567

("[s]tanding is not 'an ingenious academic exercise in the conceivable'" (citation omitted)).

The speculative nature of Equal Ground's claims is perhaps best illustrated by its statements about the non-solicitation provision. On its website, Equal Ground states that "[a]ttempts by anyone to offer a voter waiting in line water food or anything else may be prohibited depending on how the county implements SB 90." ECF 244-22 at 68:13–69:4. Equal Ground believes such activities may be prohibited "[b]ecause that is what the law states." *Id.* at 70:13–71:13. But Equal Ground agreed "that the act of offering water or food is not partisan" and "that offering food or water does not entail influencing a voter." *Id.* at 71:8–13; *see also id.* at 66:6–16 (acknowledging that as a 501(c)(3) Equal Ground cannot endorse a candidate, endorse a political party, and cannot influence a voter). These admissions belie Equal Ground's non-solicitation provision allegations. These alleged harms are therefore too speculative to establish standing.

Similarly, Equal Ground's alleged harms to its Souls to the Polls program are insufficient to create standing regarding the non-solicitation provision. Specifically, Equal Ground stated that it "ha[d] chosen not to do Souls to the Polls again this year because drop boxes are not an option for us to make available to people in the event that they show up to a park and praise event." *Id.* at 53:19–22. Yet Equal Ground agreed that it could "still hold events at places where existing drop boxes are placed,"

and "[i]f it chose to" Equal Ground "could also look up where drop boxes are going to be and then plan towards that location." *Id.* at 54:22–25, 56:10–14. The fact that Equal Ground chose not to conduct its Souls to the Polls program instead of making minimal efforts to ascertain the location of drop boxes and adjust accordingly demonstrates that these alleged harms are grossly overstated.

Equal Ground also voluntarily "declined to do any voter registration" in the wake of SB 90. *Id.* at 53:2–9, 58:23–59:5. Beyond expressing their fear that the voter registration disclaimer provision could cause reputational harm, Equal Ground has not set forth facts establishing that it has or will suffer actual harm—especially considering the fact that every third-party voter registration organization must provide the same disclaimer.

Regarding the voter registration delivery provision, Equal Ground admitted that sorting applications "wouldn't be a burden," rather the burden lay in "delivering these ballots on a regular basis." *Id.* at 65:6–20. However, Equal Ground did not explore alternative options that could minimize any potential burden caused by the provision, it simply decided not to register voters. *See id.* at 63:13–22. Equal Ground "did not have an office available for people until this summer and was not aware that we'd be opening or reopening our headquarters until this summer after having it closed for the greater portion of a year, so the decision not to hold a voter registration drive came before we made the decision to open an office." *Id.* As such, it appears

that Equal Ground's decision not to register voters was significantly impacted by factors other than the 2021 Law.

Like other Florida Rising Plaintiffs, Equal Ground "track[s] election related legislation throughout the year" and "provide[]s updates throughout the year as developments warrant." *Id.* at 32:9–14, 42:18–19, 42:25–43:1. Regardless of the 2021 Law, Equal Ground admitted that it "would need to look at [its] policies and procedures related to voter registration, vote by mail . . . before these elections." *Id.* at 57:8–15. Consequently, Equal Ground's allegation that "[i]t anticipates creating new voter educations guides, staff trainings, and community events to update voters on the changes wrought by SB 90," ECF 59 ¶ 32, is an undertaking that it would perform before any election. These allegations are therefore insufficient to confer organizational standing.

4. *Hispanic Federation.*

Plaintiff Hispanic Federation alleges that it is a "nonprofit nonpartisan, community organizing, and advocacy organization with an office in central Florida." ECF 59 ¶ 33. Hispanic Federation claims that it "assists the Hispanic electorate to register to vote, apply for vote-by-mail ballots, and vote during election day and early voting," and "assists Florida voters waiting in long lines within 150 feet of poll sites and early voting locations." *Id.* ¶ 34.

Hispanic Federation lacks standing. As an initial matter, and excepting some

minor confusion about the non-solicitation zone, Hispanic Federation stated that it plans to continue doing all of the same activities it did before. ECF 244-23 at 99:4–101:7.

Hispanic Federation has never and will never distribute food or water within the non-solicitation area as marked by the relevant Supervisor of Elections.[4] *Id.* at 81:13–83:23; 120:3–17. Further, Hispanic Federation is a non-profit organized under 501(c)(3) of the Internal Revenue Code and is prohibited from advocating for the election or defeat of candidates. *Id.* at 83:24–84:9, 84:20–25, 87:4–11, 100:20–101:1.

Likewise, Hispanic Federation has no standing to challenge the voter registration delivery position. Hispanic Federation previously failed to deliver voter registration applications on time, *id.* at 57:7–22, and it admitted that it is possible that it could happen again in the future, *id.* at 58:16–59:4, 59:10–17. Hispanic Federation has also not registered any voters since the enactment of the 2021 Law. *Id.* at 69:15-70:2. Therefore, the only possible harm to Hispanic Federation is the cost of postage. *Id.* at 75:10-76:14. However, since Hispanic Federation has not conducted voter registration activity since the enactment of the 2021 law, any

[4] The witness expressed some confusion as to the previous law when she maintained that the non-solicitation zone was only 100 feet, ECF 244-23 at 83:15–19, 100:6–19, when, in fact, it was 150 before the 2021 Law was enacted. *Compare* Fla. Stat. § 102.031(4)(a)(2019) *with* Fla. Stat. § 102.031(4)(a)(2021).

potential harm suffered by Hispanic Federation is purely speculative with respect to the delivery provisions of the 2021 Law.

Hispanic Federation is also not injured by the voter registration disclaimer provision. Initially, Hispanic Federation already directs people to the Secretary of State's website to register to vote as part of their registration activities. *Id.* at 71:5–24. Further, Hispanic Federation has not done any voter registration since the 2020 election, and, therefore, no one has declined to be registered because of the disclaimer provision. *Id.* at 69:15–70:2.

Hispanic Federation does nothing with respect to drop boxes other than informing voters of the option. *Id.* at 77:1–15.

Finally, Hispanic Federation cannot claim standing for harms on behalf of voters. Hispanic Federation has no individual members, *id.* at 20:15–18, and therefore cannot have associational standing. As such, Hispanic Federation can only have standing on an organizational standing theory, but Hispanic Federation does not divert funds, they raise funds for the activities they wish to finance. *Id.* at 98:3–22. Hispanic Federation has not yet incurred any increased costs to comply with the 2021 Law. *Id.* at 68:9–17. Moreover, Hispanic Federation cannot identify any program that will have funds diverted from it in order to comply with the 2021 Law. *Id.* at 105:17-25.

5. *Poder Latinx.*

Plaintiff Poder Latinx alleges that it "is a social justice, organizing, and civic engagement organization whose mission is to build a political wave where Latinx communities, inclusive of immigrants and people of color, are decision-makers in our democracy and play a vital role in the transformation of our country." ECF 59 ¶ 41.

Poder Latinx does not have members. Garces Dep., ECF 244-20 at 20:3–4. Consequently, Poder Latinx may only claim that it has organizational standing, which it has not established in this case. Notably, "Poder Latinx is a project of Tides Advocacy, not a standalone 501(c)(4)," and although Tides Advocacy is registered in the state of Florida, Poder Latinx is not registered in any state. *Id.* at 14:2–14, 28:17–19. Similarly, Poder Latinx does not file any paperwork with the I.R.S. *Id.* at 28:24–29:3. Tides Advocacy is not a party to this case, and Poder Latinx has not set forth allegations establishing that as "a project of Tides Advocacy" it has the ability sue in its own right.

Poder Latinx alleges that it will need to divert resources to update materials, train staff, and educate voters in response to the 2021 Law. *See* ECF 59 ¶ 45. Such changes are not unique to the 2021 Law though. Poder Latinx agreed that "[a]nytime voting legislation would be passed, Poder Latinx would necessarily have to update its materials to stay in compliance." ECF 244-20 at 56:11–14. Additionally, Poder

Latinx admitted that it "would update its trainings and kind of incur a cost to be able to continue to comply with the law." *Id.* at 56:15–21. Moreover, Poder Latinx confirmed that "before any election…[it] wouldn't just reuse the materials from the last election cycle," rather it "would evaluate everything to make sure it's still compliant." *Id.* at 65:23–66:2. As such, updating materials, training staff, and educating voters are not unique expenses specific to the 2021 Law, rather they are regular costs incurred during the normal course of Poder Latinx's operations.

Poder Latinx claims that it is "no longer able to provide language access support to voters that are in line." *Id.* at 54:22–24. Similarly, Poder Latinx believes the non-solicitation provision bans providing food or drink to voters standing in line, even if done in a nonpartisan manner. *Id.*; *id.* at 56:3–5. However, Poder Latinx has not provided a basis for these assertions. As a result, these allegations appear to be mere speculative fears.

Poder Latinx contends that it has had issues with the voter registration disclaimer provision, that it has "received feedback from our staff that this is disengaging voters, potential voters to register to vote with us," and that "two voters have already turned away because they didn't like what the disclaimer said." *Id.* at 53:5–13. The representative for Poder Latinx was not present during those two instances though, and he could not provide specifics about those "one to two people." *Id.* at 83:2–85:13. Notably, however, Poder Latinx not only acknowledged

that "the voter registration disclaimer[] is [] a true statement," *id.* at 58:6–13, it admitted that during the 2020 election there were two instances where it failed to timely submit voter registration applications, *id.* at 35:17–20. Specifically, "on one occasion 5, and another occasion 50 voter registrations" were not submitted on time. *Id.* at 36:4–14. Additionally, the Osceola County Supervisor of Elections alerted Poder Latinx about an issue that necessitated an independent investigation. *Id.* at 38:2–39:11. Poder Latinx is not aware of whether the investigation is still ongoing. *Id.* at 40:3–8. Consequently, Poder Latinx's conduct demonstrates the need for the voter registration disclaimer provision.

6. *Sant La.*

Plaintiff Sant La alleges its "mission is to empower, strengthen, and uplift South Florida's Haitian community by providing free access to information and existing services to ensure its successful integration." ECF 59 ¶ 46. "Sant La conducts voter education and outreach as part of its civic engagement work." *Id.* at 48.

Sant La does not have members. ECF 244-18 at 15:22–16:3. As a result, Sant La may only claim that it has organizational standing, which it has failed to establish. At the outset, Sant La has not set forth specific facts explaining why the 2021 Law "effectively bars Sant La from continuing its voter and language assistance activities for Haitian Creole-speaking voters." *See* ECF 59 ¶ 52. Sant La believes that the 2021

Law "prohibits people from providing language assistance to an individual voter inside the polling place," ECF 244-18 at 101:23–102:6, but it provides no justification for that interpretation. Furthermore, Sant La has not asked either the Supervisor of Elections in Miami-Dade County, the State Division of Elections, or the Secretary of State's office whether that interpretation is accurate. *Id.*

Sant La is a 501(c)(3) organization that cannot engage in political activities, advocate for a candidate, or advocate for a political party. *Id.* at 33:10–34:3. Sant La does not have a reason to believe that providing translation assistance would violate the non-solicitation provision. Moreover, Sant La admits that "the County [] provide[s] Haitian Creole voting and election materials," ECF 59 ¶ 48, and that it is unaware of any instances where a potential voter didn't vote because those materials were too difficult to read, where a potential voter left a voting site because they couldn't figure out how to vote, or where a potential voter did not vote because a translator was unavailable, ECF 244-18 at 53:20–56:4. Sant La further acknowledges that poll monitors can walk into polling places with a voter to provide language assistance. *Id.* at 56:5–8. As a result, Sant La has failed to put forth "a factual showing of perceptible harm," *Lujan*, 504 U.S. at 567, regarding its non-solicitation provision claims.

Sant La's allegations that it will have divert resources to train staff, educate voters, and update materials are similarly insufficient to establish standing. Sant La

has "always done th[e] kind of work" needed "to be sure that [Sant La's] clients understand the dos and don'ts" of elections. ECF 244-18 at 70:16–72:15. In order to properly advise clients, Sant La would need to be aware of current election laws and make sure that its materials and presentations were accurate. So updating its staff, clients, and materials in response to the 2021 Law is simply Sant La make changes in the normal course of its operations. *See id.* at 98:3–8. Moreover, Sant La has not dedicated a specific portion of its budget to potential issues stemming from the 2021 Law, has not created a specific program or initiative in response to the 2021 Law, nor has it sought funding for a future program that focuses on the 2021 Law. *Id.* at 77:15–78:3.

7. *Mi Familia.*

Plaintiff Mi Familia alleges it is a "nonpartisan, nonprofit civic engagement organization, with offices in Florida, dedicated to empowering and engaging the Latino community in the democratic process." ECF 59 ¶ 53.

Plaintiff Mi Familia does not have members. Marquez Dep., ECF 244-24 at 12:21–22. Consequently, Mi Familia may only argue that it has organizational standing, which it has not established here. As with other Florida Rising Plaintiffs, Mi Familia's claims that it will have to divert resources to update materials, trainings, staff, and the community in response to the 2021 Law are undercut by its admissions that "any time there would be a change in the election laws, then [it]

would make changes to make sure it complies with those laws" and "any time there would be those changes, the organization would change its presentations and trainings to account for those changes." *Id.* at 42:5–13; *see also id.* at 18:11–21. Such customary changes in the normal course of its operations are insufficient to establish organizational standing.

Mi Familia alleges that in 2020 it "encourage[ed] people to remain in line to exercise their right to vote and even partnered with different local restaurants to provide food and beverages to individuals facing lines with wait times of upwards of two hours." ECF 59 ¶ 54. However, there is nothing in the record to suggest that Mi Familia is not free to perform the same activities in the future. *See* ECF 244-24 at 40:22–24; *id.* at 40:3–21 (agreeing that "handing out food or water wouldn't influence a voter's decision); *id.* at 20:13–22. Mi Familia therefore has failed to allege a sufficient injury to establish standing regarding the non-solicitation provision.

Mi Familia's claims that it is harmed by the voter registration disclaimer are similarly belied by the record. *Id.* at 30:21–31:6; 35:4–9.

Finally, Mi Familia claims that the voter registration delivery provision "will require staff to be re-trained and to expend additional resources to ensure that fines are not incurred." ECF 59 ¶ 57. In particular, Mi Familia argues that the provision "forces us – for the quality control people, we have to have three additional people

to make sure that we review the registration, when we're sending based on different counties" and "that is an additional cost of staff, of shipping cost and to make sure that we don't send the registration to the wrong county." ECF 244-24 at 31:12–18. Mi Familia has not quantified those costs. Without more, these broad and nebulous statements are insufficient to establish standing.

B. Plaintiffs Are Unable to Establish Intentional Race-based Discrimination under the Fourteenth and Fifteenth Amendments, and Section 2 of the Voting Rights Act.

Plaintiffs' intentional racial discrimination claims against Defendants fail. Racial discrimination claims under the Fourteenth and Fifteenth Amendments "require[] proof of *both* an intent to discriminate and actual discriminatory effect." *Greater Birmingham Ministries v. Sec'y of Ala.*, 992 F.3d 1299, 1321 (11th Cir. 2021). Courts assess both claims under a two-step framework. "Plaintiffs must first show that the State's decision or act had a discriminatory purpose and effect." *Id.* Without evidence of "both intent *and* effect," Plaintiffs' "constitutional claims fail" at step one. *Id.* If Plaintiffs clear that first threshold, "'the burden shifts to the law's defenders to demonstrate that the law would have been enacted without th[e] [racial discrimination] factor.'" *Id.*

Furthermore, Section 2 of the VRA (52 U.S.C. § 10301) requires Plaintiffs to either demonstrate proof of intent or demonstrate "that a challenged election practice

has resulted in the denial or abridgment of the right to vote based on color or race."[5] *Chisom v. Roemer*, 501 U.S. 380, 394 (1991).

The test in *Village of Arlington Heights v. Metropolitan Housing Development Corporation* governs all intent claims at issue here. 429 U.S. 252, 265 (1977).[6] *Arlington Heights* requires courts to assess:

> (1) [T]he impact of the challenged law; (2) the historical background; (3) the specific sequence of events leading up to its passage; (4) procedural and substantive departures; and (5) the contemporary statements and actions of key legislators. And, because these factors are not exhaustive, the list has been supplemented: (6) the foreseeability of the disparate impact; (7) knowledge of that impact; and (8) the availability of less discriminatory alternatives.

Greater Birmingham, 992 F.3d at 1321-22. The key question is whether "the legislature as a whole was imbued with racial motives." *See Brnovich v. DNC*, 210 L. 3d. 2d 753, 785 (2021). Because Plaintiffs have failed to point to any evidence of discriminatory intent in this case, much less evidence sufficient to create a genuine issue of material fact, Defendants are entitled to judgment on the racial intent claims.

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[5] Defendants assume for the purposes of this filing that Section 2 of the VRA allows for an intent claim. They reserve the right to argue in this and other cases that the plain language of Section 2 allows for only an effect claim if it allows for a cause of action at all. *See Brnovich*, 210 L. Ed. 2d at 786 (Gorsuch, J., concurring).

[6] Because Plaintiffs cannot prove *effect* since any alleged burdens of Florida's election laws amount to no more than "the usual burdens of voting," *Brnovich*, 210 L. Ed. at 773, 778-79, 781, the analysis of discriminatory intent is unnecessary, *Greater Birmingham*, 992 F.3d at 1321. In so far as it *is* necessary, Plaintiffs' intent claims are also mostly complaints about "the usual burdens of voting." *Cf. Brnovich*, 210 L. Ed. at 773, 778-79.

1. *The Impact of the Challenged Law.*

For discriminatory impact to carry the day, Plaintiffs must couple impact with sufficient factual allegations to "establish a pattern, unexplainable on grounds other than race." *Greater Birmingham*, 992 F.3d at 1322 (quotation omitted). Plaintiffs' evidence fails to establish that "clear pattern." *Id.*; *Brnovich*, 210 L. Ed. 2d at 785.

Plaintiffs cite no evidence that minority voters cannot follow the rules and procedures imposed by the 2021 Law, or that any voter cannot vote because of the law. *Cf.* ECF 244-33 at 146:7-147:1 (explaining that nothing in SB90 will prevent Lee County voters from registering and voting); ECF 244-31 at 142:12-22 (same in Pasco County); ECF 244-28 at 194:3-25 (same in Hillsborough County). Plaintiffs attempt to quantify the supposed impacts of the law, but this ultimately amounts to a mere conclusory assertion that there will be a discriminatory impact; when pressed on the question, their experts acknowledged they do not know how much of an impact will result, or that marginal differential impacts may exist but they are extremely minor. *E.g.*, ECF 244-9 at 136:17-37:4, 159:14-23, 191:4-18, 220:6-17 (admitting that the impact of the 2021 Law's provisions on minority voters cannot be quantified); ECF 244-15 at 147:1-150:17 (acknowledging she did not know whether marginal differences between rates of minority voters and white voters using drop boxes, returning ballots by USPS, and waiting to vote in person were statistically significant). That Plaintiffs cannot muster evidence of disparate impacts

(or magnitude of impacts) of any practical significance fatally undermines their claim that the Florida legislature must have *known* about such alleged impacts.

Disparate impacts alone are typically insufficient to show intentional discrimination anyway. *Benitez v. Georgia Dep't of Cmty. Health*, 2007 WL 9710227, at *4 (N.D. Ga. Oct. 3); *Arlington Heights*, 429 U.S. at 264-65. Plaintiffs do not deny that SB90 is facially race-neutral. Courts will not "'regard neutral laws as invidious ones, *even when their burdens purportedly fall disproportionately on a protected class*.'" *Greater Birmingham*, 992 F.3d at 1327.

Because this is not the "rare" case where impacts alone are determinative, *id.* at 1322, this factor weighs strongly in favor of dismissal.

2. *The historical background.*

Courts "cannot accept official actions taken long ago as evidence of current intent." *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987). The historical background inquiry thus does not involve "an unlimited look-back to the past discrimination" that, "in the manner of original sin, condemn[s] governmental action that is not itself unlawful." *Greater Birmingham*, 992 F.3d at 1323-26. Instead, there must be a close tie to the 2021 Law. *Id.*

History cited by Plaintiffs does not stem from "the precise circumstances" surrounding SB90's passage; it predates SB90. *Id.* at 1325. That history cannot be

used to prevent Florida from enacting otherwise valid election reforms. *Id.* Plaintiffs' evidence under this factor is therefore inadequate.

Specifically, Plaintiffs allege that "[f]rom 1972 to 2012… multiple counties in Florida were required under the [the VRA] to seek federal [pre]clearance for changes to their election laws," ECF 59 ¶¶ 68-69, but neglect to mention that the State of Florida, as a whole, has never been a covered jurisdiction.[7] Plaintiffs also attempt to connect the past with today's Florida by invoking post-reconstruction history. *E.g.*, ECF 59 ¶¶ 65-66, 77; ECF 244-35 at 7-11; ECF 244-9 at 169:11-171:12. Many of their other allegations simply distort the past, *e.g.*, ECF 59 ¶ 70 (mistaken voter purge), or attempt to allude to a discriminatory dimension where there was none, ECF 59 ¶ 74 (adjusting early voting day). The historical background actually connected to the law points to no intentional discrimination.

Claims about high Black and Latino use of vote-by-mail ballots in 2020 similarly ask this Court to infer that the Florida Legislature changed the rules because, during *one* election in the midst of a global pandemic, more people overall, including Black and Latino voters, used vote-by-mail ballots; and that Blacks and Latinos in Florida form a monolithic voting bloc that votes against the political party

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[7] Plaintiffs also attempt to minimize the importance of *Shelby County v. Holder* that held the coverage formula under Section 4 of the VRA unconstitutional. 570 U.S. 529 (2013). What directly follows from this is that the Florida jurisdictions that were covered were covered *unconstitutionally*.

that currently has majorities in the Florida Legislature. *See, e.g.*, ECF 59 ¶¶ 5-7. Statements about minority party voters using drop boxes more than majority party voters, *see* ECF 244-15 at 148:5-150:17 (noting 1.3 point difference in drop box use), also prove inconsequential because "partisan motives are not the same as racial motives." *Brnovich*, 210 L. Ed. 2d at 785; *see also Greater Birmingham*, 992 F.3d at 1326-27 (noting "partisan reasons" fail to provide the requisite historical background for racial intent).

References to past cases also fail because, again, there is no demonstrated link to the 2021 Law. Some of these cases failed to find racial animus, and others included no discussion of racial discrimination claims at all. *E.g.,* ECF 59 ¶¶ 77-79; ECF 244-9 at 224:6-25:14, 232; ECF 244-35 at 42, 49-52.

3. *Sequence of Events Leading to Passage and Any Procedural and Substantive Departures.*

Plaintiffs must adduce evidence of racial discrimination in "the precise circumstances surrounding the passage of the [challenged] law." *Greater Birmingham*, 992 F.3d at 1325. *Arlington Heights* tells us that "[t]he specific sequence of events leading up to the challenged decision also may shed *some* light on the decisionmaker's purposes." 429 U.S. at 267 (emphasis added). The word "some" means that, even if this Court found significant evidence of unexplainable procedural deviations, this factor alone cannot support a finding of intent. Plaintiffs must prove that *the policymakers* had the impermissible intent. *Id.* That means "the

legislature as a whole." *Brnovich*, 210 L. Ed. 2d at 785. But "determining the intent of the legislature is a problematic and near-impossible challenge." *Greater Birmingham*, 992 F.3d at 1324. And the plaintiff must overcome a presumption that the legislature acted in good faith. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

Additionally, because the legislature had "valid neutral justifications… for [SB90]"—"combatting voter fraud, increasing confidence in elections, and modernizing [Florida's] elections procedures"—most of Plaintiffs' remaining evidence is irrelevant. *Greater Birmingham*, 992 F.3d at 1326-27. It does not matter whether SB90 was passed, for example, "at the end of the… legislative session," after "truncated debate," on a "strictly party-line vote," or with "no black legislators" voting for it. *Id.* Plaintiffs identify no relevant procedural irregularities. That opponents of SB90 complained about "the brevity of the legislative process" is not the kind of allegation that can "overcome the presumption of legislative good faith." *Abbott*, 138 S. Ct. at 2328-29.

In all events, Plaintiffs' evidence fails to establish racial discrimination because the alleged irregularities would have affected "all individuals" equally, not some "identifiable minority group." *Rollerson v. Port Freeport*, 2019 WL 4394584, at *8 (S.D. Tex. Sept. 13). Plaintiffs "[n]otably" do not allege that those procedural departures ever materialized into "substantive departures." *Greater Birmingham*, 992 F.3d at 1326 n.39. The measures that ultimately passed mirror laws that exist

in other States, and Plaintiffs do not claim that these reforms would be illegal if they were passed in, say, New York or Delaware.

Regardless, for these two prongs of *Arlington Heights*, most of the Plaintiffs' arguments can be attributed to changes made in response to a once-in-a-generation pandemic. *Cf.* ECF 59 ¶¶ 4-8. For instance, SB90's timing is not suspect because it was enacted after the pandemic triggered a wave of election litigation and a dramatic increase in absentee-by-mail ballots. It "should come as no surprise" then that Florida would want to address voting laws relevant to this topic at this time. *See Inclusive Communities Proj., Inc. v. Heartland Cmty. Ass'n, Inc.*, 824 F. App'x 210, 220 (5th Cir. 2020).

Plaintiffs' claim that the "strike all" amendment was unusual or "flawed," *see* ECF 59 ¶¶ 101-02, is also not true. The Florida Legislature has frequently used the "strike all" tool. In 2021, the Florida Legislature has used the tool 359 times on 260 bills, *i.e.*, on 8.4% of all bills during the 2021 Regular Session, and 440 times on 268 bills, *i.e.*, on 7.6% of all bills during the 2020 Regular Session.[8] Indeed, prior to the 2021 and 2020 sessions, strike all amendments were commonly used by legislators

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[8] This Court may take judicial notice of public records. *See Universal Express, Inc. v. United States SEC*, 177 Fed. App'x. 52, 53 (11th Cir. 2006) (unpublished). This information is available from the Florida Legislature's website at https://www.flsenate.gov/Session/Bills/2021?chamber=both&searchOnlyCurrentVersion=True&isIncludeAmendments=False&isFirstReference=True&citationType=FL%20Statutes&pageNumber=1 (last visited Nov. 11, 2021), using the search terms "strike all" and "delete all" for "All Bill Versions" in both "Senate and House".

in Florida for convenience and efficiency purposes. *See* ECF 244-30 at 189:6-190:10; ECF 244-29 at 216:7-21.

Statements made during political campaigns are irrelevant for similar reasons. These statements—"remote in time and made in unrelated contexts"—"do not qualify as contemporary statements probative of" the Florida Legislature's motive for passing SB90. *DHS*, 140 S. Ct. at 1916.

4. *Contemporaneous Statements of Key Legislators.*

Nor can Plaintiffs show discriminatory intent through statements of "key legislators" "made contemporaneously" with the 2021 Law's passage. *Greater Birmingham*, 992 F.3d at 1322. Key legislators like Senate Sponsor Baxley are alleged to have said that "[w]e are doing this bill because it becomes clear as you look across the country that there is a lot of confusion from many people on different fronts." ECF 59 ¶ 91. Senator Baxley is also alleged to have said that the 2021 Law was needed to address "some issues going on around the country, different places, and we want to be proactive and prevent things from going awry, rather than waiting to have some kind of debacle to recover from." *Id.* (alteration omitted). Statements like these demonstrate a proactive approach to addressing issues—not an intent to discriminate. After all, the Florida Legislature "was not obligated to wait for something similar to happen closer to home." *Brnovich*, 210 L. Ed. 2d at 783. The statements simply evidence the State's commitment to the "integrity of its election

procedures"—to minimizing voter fraud and protecting voters against undue influence from third parties. *Brnovich*, 210 L. Ed. 2d at 762-63, 777, 782-83.

Plaintiffs' expert also asserts that legislators who supported SB90 made contemporaneous statements consistent with "racial resentment" during the legislative session by using terms like "responsibility" and "lazy" in reference to voters failing to vote despite having four different voting methods and ample time available to them in Florida. *See* ECF 244-15 at 185:22-192:25. However, when asked whether racial resentment can be disentangled from principles of individualism, initiative, and personal responsibility traditionally associated with conservatism, Plaintiffs' expert made conclusory assertions that they can be, but failed to articulate a clear principle, *see id.* at 185-194, and ultimately acknowledged she did not know what was in that legislator's head at the time he said those words. *See id.* at 198:1-99:13.

Again, however, what matters is the intent of "the legislature as a whole." *Brnovich*, 141 S. Ct. at 2350. Legislators "who vote to adopt a bill are not the agents of the bill's sponsor or proponents," *id.*, and this Court cannot treat the intent of individual legislators "as *the* legally dispositive intent of the entire body of the [Florida] legislature on [SB90]," *Greater Birmingham*, 992 F.3d at 1325. Defendants fail to point to any statements that would be sufficient to carry this burden.

5. *Foreseeability and Knowledge of Disparate Impact.*

Plaintiffs are also unable to demonstrate foreseeability or knowledge of a disparate impact. This inquiry requires that a disparate effect be both "foreseeable" and "anticipated." *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464-65 (1979). Importantly, "[d]isparate impact and foreseeable consequences, without more, do not constitute a constitutional violation." *Id*. at 464.

As an initial matter, federal law gives Florida ample leeway to revise election laws to boost voter confidence, to streamline elections by promoting uniformity, to reduce the burden on election officials to prevent improper interference, political pressure, or intimidation; and to make it hard to cheat. These purposes are race neutral and entirely legitimate. *See Brnovich*, 141 S. Ct. at 2349-50 (preventing fraud, voter intimidation, and undue influence); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191-97 (2008) (Stevens, J.) (improving procedures, preventing fraud, and promoting confidence).

Plaintiffs' objection that any concern with fraud was tenuous given the lack of evidence of voter fraud in the 2020 election cycle does not survive *Brnovich*. 141 S. Ct. at 2348. More broadly, "concerns regarding fraud" do not morph from a legitimate state interest into "a facade for racial discrimination" whenever the legislature fails to cross some imaginary evidentiary threshold. *DNC v. Reagan*, 904 F.3d 686, 719 (9th Cir. 2018). States can pass election reforms to prevent fraud

without "*any* evidentiary showing," *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009) (emphasis added), and can act prophylactically to prevent fraud "without waiting for it to occur and be detected within its own borders," *Brnovich*, 141 S. Ct. at 2348. Both the Carter-Baker Commission and the Supreme Court have already confirmed, after all, that "[f]raud is a real risk," especially with absentee voting. *Id.* at 2347-48. Even if all these concerns with fraud were "mistaken," Plaintiffs cite no evidence to suggest they aren't "sincere." *Brnovich*, 141 S. Ct. at 2350. In any case, Plaintiffs simply ignore Florida's "independent" interest in restoring "public confidence in the integrity of the electoral process." *Crawford*, 553 U.S. at 197.

Lastly, discrimination is not a plausible conclusion from Plaintiffs' evidence in light of obvious alternative explanations. The most obvious alternative explanation is that the legislature thought SB90 was good policy. Plaintiffs' evidence does nothing to pierce the presumption that these statements and findings were made in good faith. Indeed, legislators can have "a serious legislative debate on the wisdom of early mail-in voting" without incurring liability for intentional discrimination. *Brnovich*, 141 S. Ct. at 2349-50. Florida cannot be liable for expressing the same concerns over absentee-voting fraud that both the Supreme Court and the Carter-Baker Commission have credited.

The most telling indication that SB90 is about policy, not racial discrimination, is the fact that Plaintiffs challenge only portions of the bill. If racial discrimination were the motivation behind SB90, then that motivation would taint the entire bill. But Plaintiffs refuse to go that far, because they know that many provisions of SB90 make it easier to vote. *See* ECF 244-1 ¶¶ 8-16. For example, SB90 requires all supervisors of elections to provide drop boxes and set their locations at least 30 days before an election. *Id.* ¶ 33. It also allows *anyone* to return up to two absentee ballots on behalf of other voters (and allows anyone to return an unlimited number for their immediate family members). *Id.* ¶ 40. If Plaintiffs are right that minority voters suffer longer wait times and prefer to vote absentee, then it "raises the question": "'why would a racially biased legislature'" adopt reforms that make these options *easier*? *Greater Birmingham*, 992 F.3d at 1324. Plaintiffs' evidence provides no answers.

While SB90 surely reflects the legislature's sincere views about policy, another explanation for it besides race—partisanship—is just as obvious. Section 2 addresses discrimination "on account of race or color," 52 U.S.C. §10301(a), and "partisan motives are not the same as racial motives," *Brnovich*, 141 S. Ct. at 2349; *see Rucho v. Common Cause*, 139 S. Ct. 2484, 2503 (2019) ("securing partisan advantage" is a "permissible intent"). Yet Plaintiffs' own evidence alleges partisan motivations throughout—from one expert affirming that *partisanship* shapes beliefs

about voter confidence, ECF 244-15 at 110:10-12, to another expert acknowledging that "race and partisanship are closely connected together" such that motivations are difficult to disentangle. ECF 244-9 at 93:8-18. Every bit of Plaintiffs' evidence implicating race is equally consistent with partisanship; Plaintiffs never make any effort to disentangle the two; and Occam's razor suggests that partisan motives are the predominant explanation. *Cf. Luft v. Evers*, 963 F.3d 665, 671 (7th Cir. 2020).

Plaintiffs' allegations then amount to little more than legal conclusions– claims of discriminatory impacts without an explanation or quantification of those impacts. *E.g.*, ECF 59 ¶¶ 178; ECF 244-35 at 61 (asserting without support that SB90 "will plainly affect Black and Hispanic voters far more than white voters, a fact the legislature and governor had to know").

Additionally, Plaintiffs' failure to show that the Florida Legislature *knew* about the disparate impacts on minority voters is also unsurprising because the evidence now shows impacts to be either unquantifiable or *de minimis* at best.[9]

Divining the legislature's purported "knowledge" based on arguments and testimony provided by *opponents* of SB90 does not solve Plaintiffs' problem. "The Supreme Court has… repeatedly cautioned… against placing too much emphasis on the contemporaneous views of a bill's opponents"; the "speculations and accusations

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[9] *See* ECF 244-9 at 136:17-138:1, 159:14-160:12, 191:4-18, 220:6-17; ECF 244-15 at 147:1-150:17.

of… opponents simply do not support an inference of the kind of racial animus discussed in… *Arlington Heights*." *Butts v. N.Y.C.*, 779 F.2d 141, 147 (2d Cir. 1985). Plaintiffs' reliance on statements from those opposing the 2021 Law's passage, *see* ECF 59 ¶¶ 86-89, 101, 103, 111, 116, 121-122, 142-143, 158, are thus unavailing; legislators are not required to take the word of their political opponents at face value especially when those opponents presented no objective evidence of a foreseeable and anticipated impact. *See Brnovich,* 210 L. Ed. at 785. Section 2 does not give the opponents of election reform a heckler's veto; a bill's supporters can simply disbelieve the arguments and predictions of the other side. *Cf. Brnovich*, 210 L. Ed. at 784-85; *Greater Birmingham*, 992 F.3d at 1327 (refusing to infer that the legislature had "foreknowledge" of disparate impacts because its proffered justifications were legitimate).

Additionally, a legislature's knowledge that a law will have disparate impacts is not intentional discrimination. *See Friends of Lake View Sch. Dist. Inc. No. 25 of Phillips Cty. v. Beebe*, 578 F.3d 753, 761-62 (8th Cir. 2009). Intentional discrimination means the legislature passed a particular law "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *McCleskey*, 481 U.S. at 298. Plaintiffs' evidence establishes nothing like that—an allegation that would be implausible anyway given the States' "wide discretion" in crafting election laws and Florida's "legitimate reasons" for choosing these reforms.

Id. at 298-99. As the Supreme Court explained in *Brnovich*, virtually every election reform can cause "predictable disparities" on minorities, given preexisting disparities in "employment, wealth, and education." 141 S. Ct. at 2339. Yet Section 2 is not designed to "make it virtually impossible" to pass reforms. *Id.* at 2343.

Because Plaintiffs lack evidence regarding foreseeability, anticipation, or knowledge of disparate impacts, these factors also weigh heavily in favor of Defendants.

6. *Availability of Less Discriminatory Alternatives.*

While Plaintiffs make passing statements in their amended complaint alleging the existence of less discriminatory alternatives, *see* ECF 59 ¶¶ 89-90, 171, 178, they fail to put forward any evidence capable of showing that the 2021 Law is discriminatory. *See Greater Birmingham*, 992 F.3d at 1327 ("[W]ithout proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional.").

Furthermore, a State is not required to show that "a less restrictive means would not adequately serve the State's objectives." *Cf. Brnovich*, 210 L. Ed. 2d at 781. The failure to adopt Plaintiffs' preferred solution does not mean that the Legislature failed to adopt alternatives that lessened any potentially discriminatory impact. *See Greater Birmingham*, 992 F.3d at 1327. For example, the Florida Legislature provided multiple ways for a voter to provide sufficient identification to

receive a vote-by-mail ballot. *See id.* (a voter ID law that allows the use of many forms of ID, including options for a free ID does not show a failure to consider less discriminatory alternatives); *see also* Fla. Stat. § 101.62 (allowing a voter to provide a driver license number, an ID number, or the last four digits of their Social Security number).[10]

Importantly, the State Legislature considered three major iterations of the law that became the 2021 Law, and ultimately chose the least restrictive version of those three. For instance, earlier versions of the bill would not have grandfathered in those voters who made vote-by-mail requests in 2020 (thereby requiring them to make their next request in 2022 rather than 2024), *see* ECF 244-29 at 98:18-101:4; and the final bill opted to *require* drop boxes instead of banning them altogether, subject to the in-person monitoring requirement, *see* ECF 244-28, Dep. Ex. 3 at 4. Many Supervisors who had voiced opposition to earlier versions of the bill ultimately found the final version to be much more palatable after its development through the legislative process. *See, e.g.*, ECF 244-30 at 188:1-89:5; ECF 244-29 at 98:18-99:1 (Supervisor Earley found the bill "much more problematic in the beginning"); *id.* at 189:14-23 ("[C]ertainly my biggest concerns [with the bill], I think were resolved.");

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[10] Voters on Medicare and Medicaid are already required to have the required ID's. ECF 244-25 at 40:23-41:15.

ECF 244-28 at 87:7-10 (agreeing that the final version of SB90 was "more favorable to voters" than earlier iterations).

The evidence demonstrates that the legislature considered the Supervisors' input and that their input ultimately resulted in a bill that was less restrictive. *See* ECF 244-26 at 25:2-28:16 (noting that Miami-Dade Board of County Commissioners' resolution directed their lobbyist to oppose a provision of SB90 that was later removed from final version of bill); ECF 244-28 at 86:9-87:10; ECF 244-33 at 42:13-21, 144:5-12. Lake County Supervisor Alan Hays, who was the chairman of the Florida Supervisors of Elections legislative committee during the relevant time period, testified that he was actively involved in the legislative process, had "frequent interchanges with the legislators" throughout the evolution of the bill, and that SB90 became "significantly better" as a result of his involvement and that of the Florida state association of Supervisors of Elections ("FSE"). ECF 244-30 at 37:7-11, 43:20-44:15, 139:21-140:7, 187:4-10. In fact, despite opposing it initially, Supervisor Hays supported the final version of the bill. *See id.* at 43:20-44:15, 188:1-189:5.

In sum, because evidence adduced cannot establish intentional racial discrimination under *Arlington Heights*, this Court should thus grant summary judgment.

C. Defendants are Entitled to Summary Judgment on Plaintiffs' Discriminatory Effect Claims under Section 2 of the Voting Rights Act.

Plaintiffs' discriminatory effect claims under Section 2 of the VRA fare no better.[11] The Act provides in pertinent part that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State…in a manner which *results* in a denial or abridgment of the right…to vote on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). The discriminatory result "is established if, based on the *totality of circumstances*, it is shown that" the relevant group "ha[s] less opportunity than other members of the electorate to participate in the political process *and* to elect representatives of their choice."[12] *Id.* § 10301(b) (emphasis added). The Supreme Court recently emphasized two tasks critical for the "totality of circumstances" analysis: (1) disentangling the "usual burdens of voting" from *unusual* burdens, *Brnovich*, 210 L. Ed. 2d at 772-73, 778-79, 781, and then (2) weighing those burdens against the State's interests, recognizing that the Act "does not require a State to show that its chosen policy is

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[11] In fact, it is an open question whether there exists "an implied cause of action under §2" in the first instance. *Brnovich,* 210 L. Ed. 2d at 786 (Gorsuch, J. concurring). For the purposes of this motion, and this motion alone, Defendants assume that one exists.

[12] Initially, Plaintiffs fail to show how the 2021 Law keeps them from electing candidates of their choice. This is fatal. *See Greater Birmingham*, 992 F.3d at 1329.

absolutely necessary or that a less restrictive means would not adequately serve the State's objectives." *Id*. at 781.

In assessing the burden, the Supreme Court also stated that "any circumstance that has a logical bearing on whether voting is 'equally open' and affords equal 'opportunity' may be considered." *Id.* Considerations included (1) "the size of the burden imposed by the challenged voting rule," (2) "the degree to which a voting rule departs from what was standard practice when Section 2 was amended in 1982," (3) "[t]he size of any disparities in a rule's impact on members of different racial or ethnic groups," (4) "the opportunities provided by a State's entire system of voting when assessing the burden imposed by a challenged provision," and (5) "the strength of the state interests served by a challenged voting rule." *Id*. at 772-74.

Here Plaintiffs lack sufficient evidence to support their allegations of discriminatory effect that could satisfy the U.S. Supreme Court's test in *Brnovich*. Because these allegations are ultimately speculative and conclusory, Defendants are entitled to summary judgment on Plaintiffs' Section 2 claim.

1. *The Size of the Burden Imposed.*

Disentangling the "usual burdens of voting" from unusual burdens begins with an assessment of the "size of the burden." *Id*. at 772-73. This "highly relevant" size inquiry looks at how voters are burdened (from the minor inconvenience of walking to the mailbox or the significant burden of being required to enter, for

example, a precinct in a gated community that excludes them) and how many voters are burdened (a small subset in one county or a large portion statewide). *Id.*; *see also id.* at 773 n.11. But Plaintiffs fail to provide evidence concerning both qualitative and quantitative measures of magnitude sufficient to show discriminatory effect.

The Plaintiffs' qualitative evidence clearly does not pass muster. For example, Plaintiffs' expert witness contended that requiring a voter to provide a Florida driver's license number, ID number, or the last four digits of their Social Security Number presents something more than a usual burden of voting for the voter. ECF 244-9 at 61:6-62:18 (alleging that the simple fact that one must "identify yourself" to request a ballot is cause for "concern"). There are no facts alleging why that would be the case, beyond an inchoate belief that individuals should not "have to provide any identification" to obtain an absentee ballot. *See id.* at 61. Beyond that, Florida's requirement that a voter provide some information to affirm their identity to cast an absentee ballot is well within the norm. ECF 244-1 ¶ 60.

Similarly, Plaintiffs contend that the drop box standard imposes more than the usual burdens of voting. ECF 244-9 at 176:9-18 (alleging that the drop box standard makes voting harder because "it's placing a burden on" the Supervisor's employees, focusing exclusively on the potential for a $25,000 fine). This sounds more like an issue of budgetary constraint and institutional capacity for *the Supervisors* than an

unusual burden on the voters. Regardless, if "[h]aving to identify one's own polling place and then travel there to vote does not exceed the usual burdens of voting," *Brnovich*, 210 L. Ed. 2d at 778, then Plaintiffs' allegation here cannot be sufficient to prevail on their discriminatory effect claim. This is especially so when the totality of circumstances is considered—voters may still vote through other means besides absentee voting, including early voting or voting in person on election day; a voter who is unable to drop off their absentee ballot at a drop box during early voting hours can still mail in the absentee ballot through the U.S. Postal Service. It is thus clear that these requirements are not unusually burdensome at all.[13] What's more, Florida is only one of only *ten* states that *requires* voters be given a drop box as an option. ECF 244-1 ¶ 35; *see also id.* at 19, Table 3. The majority of states (27 in total) *prohibit* the use of drop boxes at all. *Id.*

Plaintiffs' quantitative evidence is insufficient as well. The Plaintiffs' experts assert variations of the following: "SB90 is part of a pattern of racially discriminatory voting laws and practices designed to roll back practices that make it easier to vote when they are used disproportionately by Black Floridians[.]" ECF 244-15 at 14:20-15:4; *see id.* at 122. While some of the Plaintiffs' experts analyze

[13] As the "opportunities provided" by Florida's election system are part of the assessment of the "size of the burden imposed" by that system, the factors will be considered together. *See Brnovich*, 210 L. Ed. 2d at 774 ("[C]ourts must consider the opportunities provided by a State's entire system of voting when assessing the burden imposed by a challenged provision.").

disparities between different races and other demographic groups, they fail to analyze the magnitude of any disparities. *See* ECF 244-12 at 76:20-77:7 (confirming that the purpose of expert report was "not to quantify that disproportionate impact, just to state that [he] believe[s] it will exist"). Thus, for those that do cite some differences across racial groups regarding use of drop boxes and absentee voting, Plaintiffs fail to provide evidence that these are of any practical significance. *Cf.* ECF 244-15 at 126:4-13 (expert acknowledged she is uncertain how much of Black voters' increased use of vote-by-mail "is explained by the pandemic").

2. *The Degree to which the Rules Depart from Standard Practice in 1982.*

If Plaintiffs had demonstrated with specificity the size of the burdens imposed, then the "benchmark" against which those burdens should be judged is Florida's 1982 election code, since that was the legislation in effect when Congress last amended Section 2 of the VRA. *Brnovich*, 210 L. Ed. 2d at 774; *id.* at 777 n.15. Under that "benchmark," Florida's 2021 Law easily passes muster.

Like most states, in 1982 Florida allowed only in-person voting, Fla. Stat. § 101.011 *et seq*. (1973), with limited-excuse absentee voting, Fla. Stat. § 101.011 *et seq.*; *see* Fla. Stat. Ann. § 97.063 (1982).

Since 1982, Florida has made voting more convenient through the addition of mandatory and discretionary early voting days. Fla. Stat. § 101.657. Forty years ago, an early voting option was not even codified in law; today, supervisors are

required to offer at least eight early voting days, with the provision of additional days left to the discretion of the supervisor. ECF 244-1 at 13-16. In addition to permitting voting in-person on Election Day and during the mandatory (and additional discretionary) early voting period, Florida has since 1982 greatly expanded access to vote-by-mail ballots. Specifically, before 1996, Floridians hoping to use the convenience of vote-by-mail needed to have their ballots notarized or signed by two witnesses who themselves were registered to vote in Florida; in 1996, the Florida Legislature lowered the requirement to a single witness signature, and in 2004 repealed the witness requirement altogether. Ch. 2004-232, § 1, Laws of Fla.; Ch. 96-57, § 4, Laws of Fla. *Id.* Only since 2001 have Floridians been able to vote-by-mail without a statutorily recognized justification for doing so. Ch. 2001-40, § 53, Laws of Fla. Now, no excuse vote-by-mail without the need for notaries or witnesses is permitted and the use of drop boxes (first used during the 2020 election cycle) are also now permitted. But safeguards for the vote-by-mail process must keep pace with these innovations. After all, as this Court previously recognized, Florida has a "rich history of absentee-ballot fraud, including at least two elections in which courts invalidated every single absentee ballot because of widespread fraud." *Fla. St. Conf. of NAACP v. Browning*, 569 F. Supp. 2d 1237, 1251 (N.D. Fla. 2008); *see also* ECF 244-26 at 36:24-37:17 (confirming cases of individuals casting ballots in more than one jurisdiction and instances in Miami-Dade where 3PVROs

altered the information provided by voters on their applications without their consent); *see also* ECF 244-28 at 106:17-21 (confirming cases of voter fraud referred to law enforcement in Hillsborough County).

Thus, the 2021 Law imposes minimal, if any, burdens when compared to voting as it existed in Florida in 1982. The sections being challenged—together with the other twenty-seven sections of the 2021 Law—work to ensure that voting remains safe *and* accessible in the State. Importantly, any departures from standard practice in 1982 *benefit* the very groups and voters that Plaintiffs purport to represent. Plaintiffs are unable to demonstrate otherwise; they instead measure the 2021 Law against the improper baseline of 2020, which is an outlier of an election held during a global pandemic. *See, e.g.*, ECF 244-4 at 4 (criticizing Herron expert report for extrapolating from rates of Black VBM voting in 2020 as if that year was a reasonable baseline for predicting the future).

3. *The Size of any Disparity in a Rule's Impact on Members of Different Racial or Ethnic Groups.*

The size of any disparity is an important touchstone in the analysis because the "mere fact that there is some disparity does not necessarily mean that a system is not equally open [or] does not give everyone an equal opportunity to vote." *Brnovich*, 210 L. Ed. 2d at 774. Here, just as Plaintiffs failed to demonstrate the size of any burden under the first factor, they have failed to provide evidence of any facts that go to the *extent* of any disparity. ECF 244-12 at 55:16-56:10 ("I do not have

specific numbers I can cite to."); ECF 244-9 at 136:17-37:4 (Dr. Austin conceded she could not "predict approximately how many people would be impacted" by the vote-by-mail request provision). Simply alleging that there *is* a disparity is inadequate to create an issue of material fact regarding discriminatory effect. A prediction discerned from historical trends is not a cognizable injury.

4. ***The Strength of the State Interests Served by a Challenged Voting Rule.***

Because every voting rule imposes some burden, it is important to consider the reason for the law in the first instance. *Brnovich*, 210 L. Ed. 2d at 774. "Rules that are supported by strong state interests are less likely to violate §2." *Id*. "[S]trong state interests" include, but are in no way limited to, preventing voter fraud, "[e]nsuring that every vote is cast freely, without intimidation or undue influence," *id*., and maintaining the integrity of the election system as a whole, including confidence in the system. *Id*.

Strong interests are implicated here. The State has a *per se* interest in preventing voter fraud because "a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Id.* at 783.[14] Because of that interest, the Florida Legislature "was not obligated to wait for

[14] That said, there *is*, as this Court has previously found, evidence of election fraud in Florida. *See Browning*, 569 F. Supp. 2d at 1251; ECF 244-24 at 36:24-37:17; ECF 244-25 at 106:17-21; *see also* ECF 244-6 at 19-29 (detailing the extensive recent history of absentee ballot voter fraud in Florida).

something closer to home" before enacting the 2021 Law being challenged here. *Id*. The Carter-Baker Commission's report relied on by the U.S. Supreme Court explains why. *See supra* 33-34. The 2021 Law goes directly to the heart of many issues presented in the Commission. The non-solicitation provision limits the potential for third parties to pressure or intimidate voters into making certain voting selections. And the voter identification and third-party voter registration rules are focused on guarding against the kind of election fraud the Commission warned against. All of the provisions in the 2021 Law challenged by Plaintiffs further Florida's important interests in, among other things, election integrity, preventing voter fraud, and promoting uniformity, efficiency and confidence in the electoral system as a whole. In short, the 2021 Law was a legitimate use of state power to further well-known and well-accepted state interests. These interests are amply supported. *See, e.g.*, ECF 244-34 at 49, 90-91 (testifying that drop box standard "ensure[s] the security of those boxes" through in-person monitoring); *id.* at 58 (vote-by-mail request provision is "just another layer of security" akin to "multi-factor authentication"); *id.* at 160 (explaining that "whole point" of non-solicitation provision is to ensure "those who come to vote are not harassed in any way that might be trying to influence them").

In sum, the Plaintiffs have failed to put forward facts or evidence capable of supporting their discriminatory effect claim under the VRA, therefore summary judgment is warranted.

D. The Drop Box, Vote-by-Mail Request, and Non-Solicitation Provisions Pass the *Anderson/Burdick* Test.

1. *Need to Quantify a Burden and Show That It Outweighs the State's Interests.*

The U.S. Constitution "provides that States may prescribe '[t]he Times, Places and Manner of holding Elections….'" *Burdick*, 504 U.S. at 433. The *Anderson/Burdick* test is therefore supposed to make it more difficult for federal courts to overturn state election laws, not less so. The whole point of these cases is that, although voting is a fundamental right, most election rules are *not* subject to strict scrutiny. *Burdick*, 504 U.S. at 433. "States—not federal courts—are in charge of setting [election] rules," *New Ga. Proj. v. Raffensperger*, 976 F.3d 1278, 1284, 1279-80 (11th Cir. 2020), and rules that govern how, when, and where voters must vote are "'inevitabl[e]'" and "necessar[y]," and "'must be…substantial'" if elections "'are to be fair and honest'" and "'orderl[y].'" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Burdick*, 504 U.S. at 433. Contrary to Plaintiffs' position, "no one is 'disenfranchised'" if they fail to heed reasonable time, place, and manner voting rules. *New Ga. Proj.*, 976 F.3d at 1282. Any inability to vote is

"not caused by [the rules], but by [voters'] own failure to take timely steps to [comply]." *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973).

In sum, *Anderson/Burdick* requires Plaintiffs to satisfy a two-step inquiry, with each step imposing a heavy burden. First, Plaintiffs must prove that the challenged laws inflict a cognizable burden on their rights and quantify the burden's severity. *Timmons*, 520 U.S. at 358. The "extent of the burden… is a factual question on which the [plaintiff] bears the burden of proof," *Democratic Party of Hawaii v. Nago*, 833 F.3d 1119, 1124 (9th Cir. 2016), and the plaintiff must "direct th[e] Court to… admissible and reliable evidence that quantifies the extent and scope." *Common Cause/Ga. v. Billups,* 554 F.3d 1340, 1354 (11th Cir. 2009). Second, Plaintiffs must show that the burden outweighs the State's proffered interests. *Timmons*, 520 U.S. at 358. Only when an election law "subject[s]" voting rights "to 'severe' restrictions" does a court apply strict scrutiny. *Burdick*, 504 U.S. at 434. Election laws that "impose[] only 'reasonable, nondiscriminatory restrictions'" are "'generally'" justified by "'the State's important regulatory interests.'" *Id.* There is no constitutional right to be free from "the usual burdens of voting." *Crawford*, 553 U.S. at 198.

These rules must be rigorously applied to prevent *Anderson/Burdick* from "trading precise rules and predictable outcomes for the imprecision and unpredictability of how the judicial-assignment wheel turns." *Daunt v. Benson*, 956

F.3d 396, 425 (6th Cir. 2020) (Readler, J. concurring). The test is not an invitation for courts to simply weigh "whether a rule is beneficial, on balance"; that "political question" must be resolved by legislators, not judges. *Luft*, 963 F.3d at 671. The *Anderson/Burdick* framework should almost always favor upholding State election laws because "[o]ur founding charter never contemplated that federal courts would dictate the manner of conducting elections." *Jacobson*, 974 F.3d at 1269.

Four additional points bear mention.

First, Plaintiffs' burden is especially high here because they must prove that the 2021 Law violates *Anderson/Burdick* on its face. Plaintiffs' claim is facial because they ask this Court to invalidate the challenged provisions across the board, not on a case-by-case basis. *See* ECF 59 ¶¶ 198-201 (alleging that the non-solicitation provision is "unconstitutionally overbroad" and is "facially overbroad"); *see Crawford*, 553 U.S. at 189; *League of Women Voters of Minn. Educ. Fund v. Simon*, 2021 WL 1175234, at *6 (D. Minn. Mar. 29).

Because Plaintiffs challenge the 2021 Law on its face, Plaintiffs "bear a heavy burden of persuasion." *Crawford*, 553 U.S. at 200. They must prove that "'no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). This standard is not met when "the statute has a plainly legitimate sweep." *Crawford*, 553 U.S. at 202. Thus, even a

showing that a provision imposes "an unjustified burden on *some* voters" cannot justify invalidating "the entire" provision. *Id.* at 203. Plaintiffs' arguments about "burdens tied to the peculiar circumstances of individual voters"—essentially all their arguments—are thus irrelevant for purposes of their facial *Anderson-Burdick* claim. *League of Women Voters of Minn.*, 2021 WL 1175234, at *9.

In fact, burdens that do not affect voters generally are never relevant under *Anderson/Burdick*.[15] *See* ECF 122-1 at 10-12; *McDonald v. Board of Election Comm'rs*, 394 U.S. 802 (1969) (holding that voters may be treated differently so long as they are not "absolutely prohibited from exercising the franchise.").

Second, when assessing whether a law burdens the right to vote, courts must consider "the landscape of all opportunities that [the State] provides to vote." *Mays*, 951 F.3d at 785. In *New Georgia Project*, for example, the Eleventh Circuit faulted the district court for not considering how the "numerous avenues" for voting in Georgia "mitigate the…impact" of the challenged provision. 976 F.3d at 1281-82. Florida has provided, if anything, more avenues. Florida's "many… provisions that make it easy to vote cut in its favor" under *Anderson/Burdick*. *Luft*, 963 F.3d at 675. And those provisions considered as a whole mean that strict scrutiny cannot possibly

[15] As the Court rejected the broader argument at the motion-to-dismiss stage, Order on MTD (ECF 201 at 38-40) Defendants raise a narrower point about facial challenges. Defendants reserve this argument for appeal.

apply because no one in Florida is "totally denied a chance to vote" by the 2021 Law. *Mays*, 951 F.3d at 787.[16]

Third, Plaintiffs cannot get around the defects of their *Anderson/Burdick* claim by asserting a "cumulative impact" theory—*i.e.*, arguing that the challenged provisions are constitutional in isolation but together constitute a severe burden. Initially, the challenged provisions are all reasonable, nondiscriminatory regulations of the kind that *Anderson/Burdick* deems perfectly constitutional. Adding them together is just summing zeroes. Second, the challenged provisions do not cumulate, legally or logically. In any given election, a voter can vote using only one method. A person who wants to vote early in-person is not affected by a regulation that affects VBM; a person who wants to wait in line on election day is not affected by the regulation of drop boxes; and so on. The only burdens that could possibly cumulate are burdens that affect the *same method* of voting, and Plaintiffs identify precious few of those. Third, a "cumulative impact" theory cannot justify the relief that Plaintiffs seek. If the unconstitutionality derives only from the provisions' cumulative force, then the defect should be remedied by invalidating only *one* of the challenged provisions. Otherwise, the Court would be granting Plaintiffs relief

[16] In fact, mail voting regulations do not implicate the right to vote at all. *See* ECF 122-1 at 7-10. Because this Court rejected that argument at the motion-to-dismiss stage, Defendants are raising a narrower point about how the Court must consider all the ways that Floridians can vote. Defendants reserve their broader argument for appeal.

beyond that necessary to remedy any injury. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006).

Fourth, on the other side of the scale, *Anderson/Burdick* treats the State's interests as a "legislative fact" so long as they are reasonable. *Frank v. Walker* (*Frank I*), 768 F.3d 744, 750 (7th Cir. 2014). States need not submit "*any* record evidence in support of [their] stated interests." *Common Cause/Ga.*, 554 F.3d at 1353 (emphasis added); *Greater Birmingham Ministries, 992 F. 3d at 1334*. States can rely on "post hoc rationalizations," can "come up with [their] justifications at any time," and have no "limit[s]" on the type of "record [they] can build in order to justify a burden placed on the right to vote." *Mays v. LaRose*, 951 F.3d 775, 789 (6th Cir. 2020).

Relatedly, States can pass election reforms to prevent fraud without compiling concrete evidence of past fraud—let alone concrete instances of fraud in their State. States can act prophylactically to stop fraud before it starts. *See Brnovich*, 141 S. Ct. at 2348 ("[I]t should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders."); *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). States can rely on instances from other jurisdictions, court decisions, general history, or common sense. *Common Cause/Ga.*, 554 F.3d at 1353; *Frank I*, 768 F.3d at 750. The U.S. Supreme Court has held that the "risk of voter fraud" is "real" and that "the

prevention of fraud" is a "strong and entirely legitimate state interest." *Crawford*, 553 U.S. at 194, 196; *Brnovich*, 141 S. Ct. at 2348, 2340.

Nor is fraud prevention the only interest that can justify election reforms. *Brnovich*, 141 S. Ct. at 2348. States can act to reduce the risk of "pressure and intimidation." *Id.* States also have a legitimate interest in "improv[ing] and moderniz[ing] election procedures" that they believe are "antiquated" or "inefficient." *Id.* at 191. Promoting "orderly administration" and decreasing "voter confusion" are also legitimate state interests, *Brnovich*, 141 S. Ct. at 2345, as is the "independent" interest in protecting election "'integrity'" and restoring "voter confidence," which in turn "encourages citizen participation in the democratic process." *Id.* at 197.

2. *Plaintiffs' Inability to Quantify Burdens Is Fatal.*

Plaintiffs rely on expert reports to establish that a burden exists. That work is flawed. Plaintiffs' experts concede that they never quantified the burdens. This failure to quantify the burdens is fatal. Without some attempt at quantification, this Court can neither judge the alleged burdens against the pre-2021 Law baseline nor balance the burden against the State's interests.

First, Plaintiffs' experts have relied upon a number of assumptions in their reports that are not supported by any identified evidence. For example, several of their experts assume *ipso facto* that the 2021 Law was intended to reduce Black and

Hispanic voting rates given that turnout for those groups was so high in 2020 but provide no evidence supporting that proposition. ECF 244-4 at 6 (analyzing Herron report); ECF 244-9 at 179:23-180:20 (explaining that while legislators did not express discriminatory intent in passing the 2021 Law, instead she considered the absence of evidence meaningful). Others present data, such as the fact that the ballots of Black voters were rejected at a higher rate than whites in 2020, without exploring plausible non-discriminatory reasons. ECF 244-4 at 9. These experts extrapolate extensively from 2020 voting trends, when data from other non-pandemic years is likely more relevant. *Id.* at 6 (noting that Black voters were "significantly less likely" to have another person deliver their ballot in 2008). Experts need to justify the analytical choices that they make; these experts have not.

In addition to Plaintiffs' experts' methodological flaws, they also failed to quantify the alleged burden that the 2021 Law imposes on Florida voters. Dr. Burton refused to speculate on the extent of the law's effect, claiming that he was "not asked to quantify the extent of that impact." ECF 244-12 at 67:25-68:2. Although Dr. Herron alleged that the provisions of the 2021 Law challenged here had raised the cost of voting in Florida, he refused to answer as to the extent of that effect, calling it "a question for the court." ECF 244-13 at 63:3-65:3. Simply alleging the directionality of a change is not enough when courts also require a demonstration of

the severity of the alleged burden. Given that the extent of the burden is an essential component of *Anderson/Burdick*, this error is fatal.

3. *The State's Interests Are Substantial.*

While Plaintiffs have provided little, if anything, to balance for purposes of *Anderson/Burdick*, the State has much to support the 2021 Law.

As Director of the Florida Division of Election, Maria Matthews, states in her declaration, each of the provisions at issue furthers the State's interests. ECF 244-36 at ¶¶ 15-16. Specifically, Matthews testified that the "main focus" of the drop box standard "was to ensure the security of those boxes" by providing for continuous monitoring while they are in use, and that it did not constitute "a significant change" from prior practice. ECF 244-34 at 49, 90-91. She also explained that the personal identifying information now required by the vote-by-mail request provision is "just another layer of security to ensure that the person who is asking for the ballot is entitled to ask for it," akin to "multi-factor authentication." *Id.* at 58. Matthews testified that the notification provision provides "another way of letting the voter be informed…and that they have options" for how to return their ballots, *id.* at 128, and that "the whole point" of the non-solicitation provision "is not to try to influence or try to get a vote" by ensuring that "those who come to vote are not harassed in any way that might be trying to influence them." *Id.* at 160.

Dr. Moreno's report lends further support for the State's interests. Moreno explains how the 1993 Hialeah mayoral election was marred by "hundreds of ballots…forged with tracing paper and erasable ink," and how the 1997 Miami mayoral election "was plagued with widespread ballot fraud." Moreno Dep., ECF 244-6 at 19. Prior to the 2021 Law, local jurisdictions were forced to take matters into their own hands; Miami-Dade County adopted a local ordinance prohibiting individuals from possessing multiple absentee ballots. *Id.* at 22. Dr. Moreno concluded that the 2021 Law "is an appropriate response to Florida's history of absentee ballot fraud" and "will not have racially discriminatory effects." *Id.* at 7.

Dr. Kidd's expert report places Florida's 2021 Law in context. Kidd explains that Florida has, since 1982, made voting easier. Florida once required an excuse to vote early in addition to notarization and witness requirements, but now permits universal early voting with nothing beyond the voter's own certification that they are properly registered. ECF 244-1 at 6, 9.

Indeed, Kidd discusses how Florida's standards for voting remain more lenient than those of most of the country. After the 2021 Law, Florida is now one of only ten states that affirmatively *requires* drop boxes to be provided to voters, and it is "less restrictive than over half" of all states in its restrictions on the persons authorized to return absentee ballots. *Id.* at 6-7. Two states require a witness

signature for voting absentee, and four states require a copy of the voter's photo ID; Florida requires neither. *Id.* at 7-8.

Thus, the 2021 Law passes the *Anderson/Burdick* test.

E. Plaintiffs Fail to Demonstrate Preemption of the 2021 Law by Section 208 of the Voting Rights Act.

Plaintiffs also fail to demonstrate that Section 208 of the VRA preempts the 2021 Law because the Florida law allegedly "criminalizes the precise conduct that is contemplated and encouraged by Section 208" ECF 59 ¶ 217.

1. *There is no Private Cause of Action.*

Section 208 does not provide a private right of action to Plaintiffs. The VRA contains many sections dedicated to a remedial scheme to enforce its provisions. Some provisions are enforceable by the U.S. Attorney General, *see, e.g.*, 52 U.S.C. § 10504, and some provisions are enforceable by private litigants, *see, e.g.*, 52 U.S.C. § 10302(a). Section 208 contains no remedial scheme whatsoever. 52 U.S.C. § 10508.

No private right of action exists unless "Congress intended to create" one. *McCulloch v. PNC Bank, Inc.,* 298 F.3d 1217, 1222 (11th Cir. 2002). "The Supreme Court has cautioned the judiciary to exercise restraint in implying a private right of action, and required that affirmative evidence of congressional intent to create a private remedy must exist." *Id.*

In this case, although Congress's intent in Section 208 certainly was to allow

needed assistance to voters who are disabled, blind, or illiterate, *see* JoNel Newman, *Ensuring That Florida's Language Minorities Have Access to The Ballot*, 36 Stetson L. Rev. 329, 354 (2007), Plaintiffs provide no affirmative evidence of congressional intent to create a private remedy under Section 208. To the contrary, the legislative scheme demonstrates that Congress did not intend to create a private right of action: Congress unambiguously created private rights of action in various other sections of the VRA but conspicuously excluded it from Section 208. Obviously then, "when Congress wished to provide a private [] remedy, it knew how to do so and did so expressly," counseling strongly against this Court "imply[ing] a private remedy," *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571-72 (1979) (refusing to imply a private right of action under the Securities Exchange Act of 1934). By declining to do so under Section 208, Congress demonstrated that its intent was to *not* provide a private remedy—inferring a right of action despite this weighty evidence would fly in the face of the Supreme Court's admonition to exercise restraint in implying a private right of action, *McCulloch*, 298 F.3d at 1222.

2. *Section 208 Does Not Preempt Florida Law.*

Turning to the merits, Section 208 provides that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508.

Conflict preemption exists where a party's "compliance with both federal and state regulations is a physical impossibility," or where the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 399 (2012). The Eleventh Circuit has affirmed its presumption of non-preemption when a state acts "in a field which the States have traditionally occupied," rooted in the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Fla. E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324, 1328 (11th Cir. 2001).

As the Senate Report's discussion of Section 208 states regarding its objectives and the issue of preemption of state legislation:

> The Committee recognizes the legitimate right of any State to establish necessary election procedures, subject to the overriding principle that such procedures shall be designed to protect the rights of voters. State provisions would be preempted *only to the extent* that they *unduly burden the right recognized in this section*, with that determination being a practical one dependent upon the facts.

S. Rep. No. 417, 97th Cong., 2d Sess. at 62-63 (emphasis added). Because regulating elections is a quintessential area of traditional state regulation, the Plaintiffs must overcome a strong presumption against preemption. They cannot.

Plaintiffs fail to produce evidence capable of demonstrating that the non-solicitation provision unduly burdens the rights of disabled voters to receive assistance by a person of the voter's choice. Again, the Plaintiffs' reading of the non-

solicitation provision as criminalizing "providing a chair or bringing water" or a "friend or family member" holding a voter's spot in line, is an overly expansive interpretation. ECF 59 ¶ 215. So, there is no conflict whatsoever with the demands of Section 208 of the VRA. In any event, the provision does not make compliance with Section 208 "impossible." *Pet Quarters, Inc. v. Depository Tr. & Clearing Corp.*, 559 F.3d 772, 780 (8th Cir. 2009); *see also* 52 U.S.C. § 10508 (requiring assistance by "a person of the voter's choice," not assistance by the voter's *first* or even *preferred* choice).

Thus, Defendants are entitled to judgment on the Section 208 claim.

F. The Non-Solicitation Provision Complies with the First Amendment.

The non-solicitation provision prohibits individuals from "engaging in any activity with the intent to influence or effect of influencing a voter" within a "150 feet" buffer zone. Fla. Stat. §102.031(4). Plaintiffs contend that the non-solicitation provision, as applied to the distribution of food and water by individuals not on the Supervisor's staff, violates the First Amendment. This claim is flawed as a matter of law and fact. Distributing food and water is conduct, not speech. Even if it were speech, the non-solicitation provision survives any form of scrutiny.

1. *The Facts Support Summary Judgment.*

The Supervisors' testimony poses a fatal obstacle to Plaintiffs' challenge. Supervisors consistently explain that the non-solicitation provision *does not require*

them to do anything differently than they did in previous elections. ECF 244-31 at 166:23-168:22 ("[W]e have never allowed any sort of activity other than exit polling… within the no-solicitation zone… and we are going to continue our policy moving forward."); Bennett Dep., ECF 244-32 at 107:9-13 (reporting that no groups provided food or water to Manatee County voters in 2020). Supervisors also contend that the non-solicitation provision's buffer zone helps maintain order at polling places. *See* ECF 244-26 at 77:9-78:5, 20:16-21:8; *see also* ECF 244-27 at Dep. Ex.7 at 1-2 (noting issues with "loud music" and "blow horns").

Thus, this Court should enter judgment against Plaintiffs' First Amendment challenge to the non-solicitation provision.

2. *The Non-Solicitation Provision Does Not Implicate the First Amendment.*

Facts aside, the non-solicitation provision does not implicate the First Amendment because it regulates only non-expressive conduct. The First Amendment does not protect "conduct," even though most conduct is "'in part initiated, evidenced, or carried out by means of language.'" *Rumsfeld v. FAIR*, 547 U.S. 47, 62 (2006). While regulating conduct imposes "incidental" burdens on speech, that "hardly means that the law should be analyzed as one regulating . . . speech rather than conduct." *Id*. Conduct must be "inherently expressive" to count as speech. *Id.* at 66. Stated differently, conduct must express an "identifiable" message, *Bar-Navon v. Brevard Cnty. Sch. Bd.*, 290 F. App'x 273, 276 (11th Cir.

2008), to the average person. *Burns v. Town of Palm Beach*, 999 F.3d 1317, 1347 (11th Cir. 2021). This test is not a low bar: An "expansive" definition of expressive conduct would allow a "limitless variety of conduct" to be labeled speech because it is "possible to find some kernel of expression in almost every activity a person undertakes." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570 (1991).

Distributing food and drink near a polling place is not inherently expressive. Such assistance could mean a variety of things: "Stay in line," "Thanks for voting," "You look thirsty/hungry," or "Vote for my candidate." It could mean the distributor is serving the recipients for innumerable personal reasons without intending to convey any message whatsoever. A recipient cannot tell what message, if any, is being expressed without additional speech—a telltale sign that the conduct is "not … inherently expressive." *FAIR*, 547 U.S. at 66. Recipients might "understand the distribution…as merely a means to carry out an otherwise-conveyed message"—"something like 'vote!' or 'voting is important.'" *Lichtenstein*, 489 F. Supp. 3d at 767. But without that extra speech, a recipient could only "speculate" what "discernible message" or non-message is being expressed by the "mere act" of distributing food and drink. *Id*. at 767-68.

Rather than expression, distributing material accomplishes a utilitarian goal: It gives thirsty people drink and hungry people food. As Plaintiffs admit, they do this so that voters will stay in line and vote under the logic that people who are

hungry or thirsty might leave early. While Plaintiffs believe their conduct facilitates voting, "facilitating voting" is "not . . . communicating a message." *Feldman v. Ariz. Sec'y of State's Off.*, 840 F.3d 1057, 1084 (9th Cir. 2016). That is true even if Plaintiffs' conduct is "the product of deeply held personal belief," has "social consequences," and "discloses" their approval of voting (or their disapproval of lines). *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126-27 (2011).

Courts have held that far more direct methods of facilitating voting are *not* expressive conduct. Collecting and returning absentee ballots is not speech. *See Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018). Neither is collecting or returning registration applications. *See Voting for Am.*, 732 F.3d at 391 & n.4. Groups in those cases also argued that their actions conveyed a message of support for voting, voters, and the democratic process. *See Knox*, 907 F.3d at 1181. Plaintiffs cannot explain why providing food and water to people waiting in line communicates this message but helping people vote does not.

As the Eleventh Circuit explained, the expressive nature of "food distribution" can only be "decided in an as-applied challenge." *Ft. Lauderdale Food Not Bombs v. City of Ft. Lauderdale*, 901 F.3d 1235, 1241 (11th Cir. 2018) ("*FNB I*"). That is because food distribution is not "on its face an expressive activity." *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1032 (9th Cir. 2006). The Eleventh Circuit concluded that certain "food sharing events" for homeless people

in public parks were expressive only after considering "five…factors." *FNB I*, 901 F.3d at 1242. Those factors are simply not met in this context. *See Burns*, 999 F.3d at 1343-47 (deeming other conduct not expressive because the *FNB I* factors were mostly absent). Unlike public parks, polling places are not hubs for free speech or association; and unlike the homeless, voters are not an identifiable group with a well-known need for food and drink. *Cf. FNB I*, 901 F.3d at 1242-43.

In sum, the 2021 Law regulates only conduct. The non-solicitation provision thus does not implicate the First Amendment at all (and prohibiting the solicitation of voters obviously survives rational-basis review).

3. *Even if the Non-Solicitation Provision Implicates the First Amendment, It Passes Scrutiny.*

Finally, the non-solicitation provision satisfies First Amendment scrutiny in any event.

The non-solicitation provision applies only in nonpublic forums, so it need only be "reasonable in light of the purpose served by the forum: voting." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1886-88, 1883 (2018). As relevant here, the law applies inside polling places and within a 150-foot buffer zone. *See* Fla. Stat. §102.031(4)(a). Polling place interiors are obviously nonpublic forums. *Id.* at 1886. And this Court should hold that, on election day, "the parking lots and walkways leading to the polling places are nonpublic forums." *United Food & Com. Workers Loc. 1099 v. City of Sidney*, 364 F.3d 738, 750 (6th Cir. 2004). As the Supreme Court

explained in *Mansky*, its fractured decision in *Burson v. Freeman* did not resolve "whether the public sidewalks and streets surrounding a polling place qualify as a nonpublic forum." *Id*. Justice Scalia, who provided the fifth vote in *Burson*, persuasively documented the long tradition of treating them as such. *See* 504 U.S. 191, 214-16 (1992) (Scalia, J., concurring). A majority of the U.S. Supreme Court cited his opinion approvingly in *Mansky*, stressing that States have long restricted speech "in *and around* polling places on Election Day." 138 S. Ct. at 1883. These buffer zones are appropriate given "the special governmental interests surrounding…polling places," the need for a "bright-line prophylactic rule," and the fact that the non-solicitation provision imposes no limit on Plaintiffs' ability to "communicate [their] message through [actual] speech." *Hill*, 530 U.S. at 728-29.

The non-solicitation provision would still only be subject to intermediate scrutiny even if it regulated expressive conduct in a *public* forum. The provision is content and viewpoint neutral: It prohibits "any activity" with the forbidden intent of influencing voters. Fla. Stat. §102.031(4)(b); *see Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th at 1291-94 (11th Cir. 2021) (*FNB II*) (explaining why a prohibition on "the provision of food…in order to meet [the public's] physical needs" was content and viewpoint neutral). The provision resembles a time, place, or manner restriction—the quintessential content-neutral law. *See McCullen v. Coakley*, 573 U.S. 464, 479 (2014). Food and drink can be

distributed, just not at a certain place (near polling places) at a certain time (during elections); and whatever message the distribution communicates can still be uttered, just not in a certain manner (by distributing food and drink). *See Clark*, 468 U.S. at 294-95. Content-neutral regulations of expressive conduct "need only satisfy the 'less stringent" standard from *O'Brien*"—*i.e.*, "intermediate scrutiny." *FNB II*, 11 F.4th at 1294. They need only "'promote[] a substantial government interest that would be achieved less effectively absent the regulation.'" *FAIR*, 547 U.S. at 67.

The non-solicitation provision survives strict scrutiny as well. In *Burson*, a plurality of the U.S. Supreme Court concluded that Tennessee's buffer-zone law satisfied strict scrutiny. 504 U.S. at 211. Similar reasoning applies here because States have a "compelling interest" in protecting voters from "confusion," "undue influence," "fraud," "pressure," and "intimidation." *Id.* at 199; *Brnovich*, 2021 WL 2690267, at *13. States must be able to enact prophylactic provisions—rather than rely on *ex post* prosecutions—because improper influence can be subtle, hard to detect, and irreparably damaging to the electoral process. *See Burson*, 504 U.S. 191, 206-07 (1992) (plurality op.). Florida's provision is especially narrow because it regulates only the distribution of material with "the intent to influence or effect of influencing a voter." Fla. Stat. §102.031(4)(b); *see Williams*, 553 U.S. at 293-94 (scienter requirement bolsters law's constitutionality).

G. The Non-Solicitation Provision Is Neither Vague nor Overbroad.

Plaintiffs' unconstitutional vagueness and overbreadth arguments also fail.

1. *The Non-Solicitation Provision Provides Reasonable Notice of Permitted Activity.*

A law is unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment when it "fails to provide people with ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or because it "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). "[R]easonably clear lines" between proscribed and permitted conduct are all that is required to pass muster. *Smith v. Goguen*, 415 U.S. 566, 574 (1974). Generally, the Supreme Court is reluctant to declare statutes void for vagueness. *See Parker v. Levy*, 417 U.S. 733, 757 (1974).

Plaintiffs assert that the non-solicitation provision is unconstitutionally vague because it fails to draw an absolute line separating proscribed from permitted speech and conduct within the 150-foot buffer zone. ECF 59 ¶¶ 206-10. Their argument hinges on the use of the words "any activity" and "influence," which Plaintiffs argue have "myriad conceivable meanings" leaving them "unable to determine" which activities are criminalized within that perimeter. *Id.* ¶¶ 206-07. They warn that "[t]he inevitable result . . . is the chilling of protected political speech and expression." *Id.* ¶ 208. These arguments do not withstand scrutiny.

The text of the provision reveals it cannot reasonably be interpreted to criminalize "any activity" within the no-solicitation zone—and Plaintiffs point to no language beyond the two words "any activity" that reasonably prohibits, *inter alia*, the nonpartisan provision of food, or water, or a chair to a voter.

First, contrary to Plaintiffs' decision to read "any activity" in isolation, the canons of construction mandate that "[w]ords of a statute are not to be interpreted in isolation; rather a court must look to the provisions of the whole law and to its object and policy." *MicroStrategy Inc. v. Bus. Objects, S.A.*, 429 F.3d 1344, 1363 (Fed. Cir. 2005). When the phrase "any activity" is construed reasonably in the context of surrounding text and the provision as a whole, it is unambiguous in what it prohibits: Partisan efforts to pressure or influence voters' decisions within the buffer zone.

Second, when general terms or phrases are included in a series of more specific items, the general term should be interpreted to have meaning akin to the more specific surrounding terms and in light of the surrounding provisions. *See, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). Applying this canon, it is apparent that the non-solicitation provision does not prohibit innocent, nonpartisan assistance to voters in line. Instead, the provision targets efforts to influence voter decision-making near polling locations.

Notably, the "any activity" restriction is qualified by the important phrase "with the intent[17] to *influence* or effect of *influencing* a voter," demonstrating that the provision does not extend to run-of-the-mill activities like giving voters a drink of water—rather, the restriction narrowly targets activities that have a reasonable likelihood of swaying a voter's decision on how to vote. Fla. Stat. § 102.031(4)(e) (emphasis added).

Hence, merely giving water to voters waiting in line would not be an activity "with the effect of influencing a voter." Certainly, the Florida Legislature did not need to engage in the unwieldy exercise of spelling out every potential way that individuals or political groups could influence or attempt to influence voters approaching a polling location—due process does not demand that level of enumeration to prohibit obviously unsuitable conduct in all its various permutations. Nor is that level of detail necessary to guard against the de minimis risk of inconsistent enforcement. Instead, because the non-solicitation provision identifies the prohibited conduct through its plain text and clear purpose, the provision is not unconstitutionally vague.

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[17] The Supreme Court "has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982). Accordingly, the scienter requirement of "intent to influence…a voter" alleviates any alleged vagueness that may exist with respect to that restriction.

Third, even if the phrase "any activity" *is* vague when viewed in isolation, the series of prohibited activities immediately preceding the provision, coupled with its broader context, reveals exactly the kinds of "activities" the statute prohibits and manifests an unmistakable purpose of prohibiting partisan solicitation near polling locations. This is because the language comes from the definitions of "solicit" and "solicitation" under the provision. Dictionary definitions confirm that "solicit" is ordinarily understood to mean to entreat, approach with a request or plea, urge, or entice to action. *See, e.g.*, *Solicit*, *Merriam-Webster's Dictionary*, https://www.merriam-webster.com/dictionary/solicit (last accessed November 9, 2021). Importantly, the word does not ordinarily include the mere act of giving assistance. The items included in the non-solicitation provision's list of prohibited actions preceding the provision at issue bolsters this interpretation. Fla. Stat. § 102.031(4)(e).

Finally, contrary to Plaintiffs' foreboding, the carveout for supervisors' volunteers and employees bolsters the Secretary's interpretation because it confirms the exact kinds of activities the statute permits: "providing *nonpartisan* assistance to voters within the no-solicitation zone such as…giving items to voters." Fla. Stat. § 102.031(4)(e) (emphasis added). Restricting assistance within the zone to nonpartisan activities bolsters Defendant's argument that the legislature was primarily concerned with restricting *partisan* activities.

Thus, Plaintiffs' vagueness claims fail.

2. *The Overbreadth Claims Must Fail.*

Because Plaintiffs' Count V pleads vagueness and overbreadth together, Defendants discuss the overbreadth doctrine here.[18] The doctrine prohibits regulation of substantially more protected speech than is necessary to achieve regulatory purposes. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). A regulation's overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. Overbreadth is, however, a "manifestly[] strong medicine" sparingly employed by courts "only as a last resort," *id.* at 613. If "a limiting construction has been or could be placed on the challenged statute," the statute is saved. *Id.* at 613.

First, as described in the above analysis of vagueness, the 2021 Law does not prohibit the kinds of activities that Plaintiffs allege. *See supra* at 69-72.

Second, even if the non-solicitation provision prohibits expressive conduct, that speech would still not be protected from regulation because the statute clearly regulates polling locations, which are nonpublic forums subject to content-based speech restrictions, including political advocacy prohibitions.[19] *See Mansky*, 138 S.

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[18] The U.S. Supreme Court has "not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

[19] The U.S. Supreme Court's First Amendment precedent permits states to create "nonpublic forums." *See supra* at 66-67.

Ct. at 1885-86. If the regulations of a nonpublic forum are reasonable, they are lawful; a separate overbreadth analysis is not appropriate. *See Hodge v. Talkin*, 799 F.3d 1145, 1171 (D.C. Cir. 2015). Here, the statute plainly targets partisan activities with the intent or "effect of influencing a voter," which is essentially identical to political advocacy that may be restricted in polling locations. *See Mansky*, 138 S. Ct. at 1885-86.

Thus, Plaintiffs' overbreadth claim fails too.

H. The Voter Registration Notification and Delivery Provisions Comply with the First Amendment.

First, Plaintiff argues that the notification provision unconstitutionally compels Plaintiff "to speak for the government," and that the required notification "undermine[s] [Plaintiffs'] credibility by forcing [them] to tell potential voters that, in effect, Plaintiffs cannot be trusted with their registration forms." *See* ECF 59 ¶¶ 250-51. Plaintiffs are wrong for two reasons. First, because the notifications Plaintiffs must provide to voters are non-controversial factual statements, they are subject to minimal scrutiny, which is easily satisfied here. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 650-52 (1985). Second, even if the required notifications warrant a more searching review, the State meets this burden because the required disclaimers advance the State's substantial—indeed compelling—interest in ensuring that 3PVROs fulfill their statutory obligation to

serve as fiduciaries to the voters they assist with registration. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980).

1. *The Notification Provision Satisfies Minimal Scrutiny.*

Zauderer's two-part analysis applies to non-controversial factual statements like those required here. Under *Zauderer*, this Court must first "assess the interest motivating the" required disclaimers, and then "assess the relationship between the government's identified means and its chosen ends." *Am. Meat Inst. v. United States Dep't of Agric.*, 760 F.3d 18, 23, 25 (D.C. Cir. 2014) (holding that "*Zauderer* in fact does reach beyond problems of deception" to reach other disclosure mandates).

Florida's interest is simple but compelling: Protecting its voters through the dissemination of truthful information enabling as many voters as possible to register and vote. *See* ECF 244-36 at ¶¶ 17-21.

There is a direct link between the chosen means and the State's ends. It is undisputed that 3PVROs sometimes deliver forms late. *Id.* ¶ 18. Late delivery can result in voters missing the registration deadline before an election. *Id.* Providing Florida voters more information about the registration process, including the existence of an expedient online option, directly furthers the State's interests. *Id.*

The State's chosen means is also consistent with the statutorily imposed fiduciary duty that 3PVROs owe to voters and which Plaintiffs do not challenge here. Specifically, the three required disclosures: (1) inform voters that the 3PVRO

may fail to deliver the voter's registration application to the appropriate supervisor within 14 days or before registration closes, (2) inform voters how to register to vote online, and (3) inform voters how to check the delivery status of the voter's application. *See* Fla. Stat. § 97.0575(3)(a). All three disclaimers empower voters to make informed decisions.

Plaintiffs cite *National Institute of Family & Life Advocates v. Becerra* to argue that the notification provision "compel[s them] to speak a particular message," but that comparison is meritless. 138 S. Ct. 2361. The notification provision and Plaintiffs' activities are *complementary*, not diametrically opposed; the State is requiring Plaintiffs to advance a goal they already support (the successful registration of as many eligible voters as possible) by informing voters about the online registration option and how to check their status. Plaintiffs contend that the required disclaimer is "inaccurate" but that is untrue: Voters *do* have the ability to register online, they *can* check their status, and 3PVROs *have* in the past failed to deliver registration applications on time. *See* ECF 244-31 at 142:12-22; 109:14-19; 165:6-21.

2. ***The Notification Provision Satisfies Heightened Scrutiny Because it Directly Advances the State's Interest in Enforcing the Fiduciary Duties of 3PVROs.***

Even if this Court determines that more searching scrutiny is merited and applies the *Central Hudson* test, Florida's history of regulating each 3PVRO "as a

fiduciary to the applicant," Fla. Stat. §97.0575(3)(a), underscores the State's interest in requiring disclaimers.

Specifically, 3PVRO communications with voters are conceptually closer to commercial speech than to protected political expression, subjecting the notification provision to the intermediate scrutiny reserved for commercial speech rather than the strict scrutiny reserved for protected political speech. So if this Court rejects the *Zauderer* test, it should apply *Central Hudson*: (1) Is the communication misleading or related to unlawful activity?; (2) If not misleading, is there a substantial state interest supporting the regulation?; (3) Does the regulation directly advance the asserted state interest?; and (4) Could the asserted interest be served as well by a more limited regulation of speech? *See Central Hudson*, 447 U.S. at 563-64.

As the State does not allege Plaintiffs' communications with voters are misleading, the analysis begins with the State's interest in requiring disclosure.

Florida has a long history of protecting voters by regulating voter registration activity. In 1995 Florida implemented the provisions of the National Voter Registration Act, permitting 3PVROs to collect applications. "Prior to 1995, only state officials and individuals deputized by supervisors of elections as registrars could collect voter registration applications in Florida." *League of Women Voters v. Cobb*, 447 F. Supp. 2d 1314, 1317 (S.D. Fla. 2006) (citation omitted). The 1995 rules included a number of requirements, such as a written oath required to be

"acknowledged by the supervisor [or deputy] and filed in the office of the supervisor" including "a clear statement of the penalty for false swearing." Fla. Stat. § 98.271(2)(a) (1993). These requirements evolved into a "fiduciary" relationship, underscoring the State's history of caution when allowing 3PVROs to conduct voter registration activities. *See* H.R. Staff Analysis Fla H.B. 1567 (Apr. 4, 2005).[20]

The notification requirement at issue directly advances the State's substantial interest in enforcing the fiduciary duties that 3PVROs owe to voters. *Central Hudson*, 447 U.S. at 564. "Florida courts recognize a breach of fiduciary duty claim at common law." *Gochnauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1049 (11th Cir. 1987). Fiduciaries have a variety of enforceable duties to their beneficiaries, including "the duty to disclose material facts." *Sallah v. BGT Consulting, LLC*, 2017 U.S. Dist. LEXIS 101639, at *13 n.5 (S.D. Fla. June 29, 2017). Florida courts also recognize fiduciary duties "to inform the customer of the risks involved." *Ward v. Atl. Sec. Bank*, 777 So. 2d 1144, 1147 (Fla. 3d DCA 2001). This duty is particularly important when "one party has information which the other party has a right to know because" one party is a fiduciary. *Friedman v. Am. Guardian Warranty Servs., Inc.*, 837 So. 2d 1165, 1166 (Fla. 4th DCA 2003).

[20]https://www.flsenate.gov/Session/Bill/2005/1567/Analyses/20051567HETEL_h1567b.ETEL.pdf

Section 97.0575 ensures that 3PVROs abide by each of these fiduciary duties when registering voters.

Notifications—disclaimers—in furtherance of fiduciary duties are not unusual. Courts have recognized a fiduciary duty of airlines to warn passengers of potential risks from flying with them, especially given the need for passengers to trust the airlines transporting them. *See, e.g., Fleming v. Delta Airlines*, 359 F. Supp. 339 (S.D.N.Y. 1973) (holding that airline was negligent in failing to warn passengers of forecasted turbulence).

3PVROs bear a similar responsibility. 3PVROs know, or should know, of the possibility of late-delivered applications based on historical experience, *see* ECF 244-31 at 165:6-166:4, and thus have a duty to warn voters of that possibility when voters entrust them with their applications. Florida has not prohibited 3PVROs from communicating with voters or collecting their applications; it has simply required them to notify voters of the possibility of late delivery and of the availability of the online registration option. The choice of which route to pursue still lies where it should—with the voter.

Thus, the disclosure requirement should be upheld under either minimal or intermediate scrutiny. Summary judgment is therefore appropriate.

3. *The Notification Provision Does Not Violate Plaintiffs' First Amendment Rights.*

In Count VIII, Plaintiffs allege that the notification provision infringes upon their First Amendment rights by "chill[ing] the protected speech, expression, and association that occurs during voter registration activities." ECF 59, ¶ 243. Plaintiffs also allege that the notification provision "unconstitutionally forces Plaintiffs . . . to speak for the government by making a disclaimer or warning that Plaintiffs would not otherwise recite." *Id.* ¶ 250. Based on these allegations, Plaintiffs claim the provision violates the First Amendment. These claims fail as a matter of indisputable fact and law.

Plaintiffs cannot establish that the notification provision "diminish[es] and impair[s] Plaintiffs' ability to engage in protected political speech" because it in no way diminishes Plaintiffs' ability to communicate and associate with potential registrants. *Id.* ¶ 244. The notification provision does not "limit[] the number of voices who will convey [Plaintiffs'] message and the hours they can speak" nor does it "limit[] the size of the audience they can reach." *Meyer v. Grant*, 486 U.S. 414, 422-3 (1988). Voters are no less likely to register with Plaintiffs, but they will have more complete information that will help them ensure their registration applications will be received on time. Plaintiffs have the same ability to associate with potential registrants as they did before the recent changes.

For the reasons discussed below, *infra* at 82-83, the notification provision is not a "content-based regulation of speech" as Plaintiffs allege. That is because the provision simply requires disclosure of factually accurate, non-controversial information. Moreover, even if the notification provision were a content-based restriction subject to heightened scrutiny, which it is not, it furthers the State's compelling interest in ensuring that 3PVROs fulfill their statutory obligation to serve as fiduciaries to the voters they assist with registration. *See supra*, at 77-79. And it is narrowly tailored to serve the State's interests because it only applies when 3PVROs have contact with potential registrants and it merely requires them to provide truthful information. The State has a valid interest in ensuring voters are successfully registered and has selected a means calculated to achieve that end.

4. *The Delivery Provision Complies with the First Amendment.*

Plaintiffs also allege that the voter registration delivery provision restricts their political speech in violation of the First Amendment. ECF 59 ¶¶ 222-28. They further claim it constitutes a form of "viewpoint discrimination" based on "Plaintiffs' expression of a disfavored belief in the importance of engagement and enfranchisement of eligible Florida voters." *Id.* ¶¶ 229-33. This claim is not only unsupported by law, it gets the State's interest entirely backwards.

Plaintiffs cannot demonstrate the delivery requirement "chills the protected speech, expression, and association involved in Plaintiffs' voter registration

activities" because it does not affect their ability to speak or associate at all. *Id.* ¶ 225. 3PVROs can speak with any voters they want and collect whatever applications they want—so long as the applications are returned to the correct county. Hence, the delivery requirement does not come into play until *after* Plaintiffs' speech has occurred; all that is left is to properly and timely deliver an application to effectuate the *voter's* right to vote. Voters are no less likely to utilize 3PVROs because of additional regulations imposed on the back end. If a 3PVRO suffers reputational damage, it will be because of its own failure to correctly process applications. Reputational damage caused by an organization's failure to lawfully perform the services in which it allegedly specializes is not a constitutional violation.

Furthermore, the delivery requirement is not "viewpoint discrimination." Plaintiffs highlight the fact that the requirement does not apply to individuals who return the applications of family members. ECF 59 ¶ 233. As an initial matter, this undermines Plaintiffs' claim that they are being discriminated against because of their belief in the importance of registering voters; presumably individuals who return ballots feel similarly about the imperative of voter registration, and yet the 2021 Law does not impose the same requirement on them.

Viewpoint discrimination is a subset of the broader category of content discrimination, and "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message

expressed." *Harbourside Place, LLC v. Town of Jupiter*, 958 F.3d 1308, 1318 (11th Cir. 2020) (quotation omitted). Not only is the delivery requirement not viewpoint discrimination—it is not even content discrimination. 3PVROs are not required to deliver applications to the voter's county of residence "because of the topic discussed or the idea or message expressed," because no topic is discussed or message expressed in the course of that delivery. *Id.* States "have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes," *Timmons*, 520 U.S. at 364, which includes the delivery of registration applications. Here, it is most efficient for a voter's application to be delivered directly to the supervisor of elections responsible for registering them, thereby ensuring they will be timely registered in time for the next election.

The State's interest in applying this requirement to 3PVROs and not individuals is rooted in the fiduciary status of 3PVROs. The SEC does not regulate public companies because of their viewpoints, it does so because they engage in a particular activity (issuing shares) that carries with it particular duties to beneficiaries (in that case, shareholders). Plaintiffs are 3PVROs that owe a fiduciary duty—rooted in common law[21] and codified in statute[22]—to the voters whose applications they collect. State law does not impose the same duty on individuals,

[21] *Gochnauer*, 810 F.2d at 1049; *Sallah*, 2017 U.S. Dist. LEXIS 101639, at *13 n.5.
[22] Fla. Stat. § 97.0575(3)(a).

and the very scale at which 3PVROs operate further justifies the State's interest in ensuring the large quantities of ballots they deliver are correctly processed. The delivery requirement does not discriminate on the basis of viewpoint, and it does not even apply to speech. It is an eminently reasonable exercise of the State's interest in protecting the "efficiency of their ballots and election processes." *Timmons*, 520 U.S. at 364.

V. Conclusion

For the foregoing reasons, this Court should entry summary judgment against Plaintiffs on all remaining counts in this case.

Dated: November 13, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing complies with the size and font requirements in the local rules; however, the foregoing, combined with the accompanying memorandum of law, exceeds the allowable word limits. The undersigned has filed a Motion to exceed the word limits up to 20,000 words. *See* ECF 239. As of filing the Court has not yet ruled on the Motion. The accompanying memorandum contains only 19,929 words, which is less than the amount requested in the Motion.

/s/ Mohammad Jazil

CERTIFICATE OF SERVICE

I certify that on November 13, 2021, I served the foregoing on all counsel of record through this Court's CM/ECF system.

/s/ Mohammad Jazil