UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

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| LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., et al.,<br><br>Plaintiffs,<br><br>v.<br><br>LAUREL M. LEE, in her official capacity as Florida Secretary of State, et al.,<br><br>Defendants,<br><br>and<br><br>REPUBLICAN NATIONAL COMMITTEE, and NATIONAL REPUBLICAN SENATORIAL COMMITTEE,<br><br>Intervenor-Defendants. | Case No.: 4:21-cv-186-MW/MAF |



**_LEAGUE_ PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

This case challenges four provisions of Senate Bill 90, a sweeping alteration of Florida's election laws that will make it harder for lawful Florida voters—especially senior, young, and minority voters—to exercise their right to vote. The Florida Legislature enacted SB90 just months after an election that officials across Florida lauded as safe and secure. The highly controversial bill was enacted along party lines and over strong objections from voters, civil rights groups, and the county Supervisors of Elections themselves.

Defendants seek summary judgment on all of Plaintiffs' claims, but their Motion is more of a trial brief—it ignores most of Plaintiffs' evidence and mischaracterizes the evidence it does address. Plaintiffs are injured by the Challenged Provisions, which make it harder for them and their members to vote, require them to divert resources from other critical tasks, and both prevent them from engaging in expressive activity they would like to engage in and require them to say things they do not want to say. The Challenged Provisions are unconstitutional, because they make it harder for citizens to vote and cannot be justified by any state interest that makes it necessary to burden voting rights, and because they violate Plaintiffs' First Amendment rights. And they are part of a sordid history in Florida of changes to voting procedures that make it especially hard for Black and Latino

citizens to vote. At the very least, there are disputes of material fact on those questions, itself reason alone for the Court to deny Defendants' Motion.

## RESPONSE TO DEFENDANTS' STATEMENT OF FACTS

On one thing, everyone agrees: the administration of the 2020 election in Florida was a resounding success. Secretary of State Lee praised the election as "efficient and secure," with a "safe and efficient voting process" in which "all Florida voters, no matter how they chose to cast a ballot or who they voted for, can be confident in the integrity of our election system and the security of their votes." Ex. 1[1] at 25:15-26:11. Governor DeSantis described it as "perhaps the most transparent and efficient election in the nation." *See* Governor Ron DeSantis' State of the State Address, FLGov.com, https://www.flgov.com/2021/03/02/governor-ron-desantis-state-of-the-state-address-2/ (Mar. 2, 2021). Even the Republican National Committee's Temporary Committee on Election Integrity agreed in August 2021 that Florida had "managed [its 2020] elections extraordinarily well," praising it for having "fended off Democrat legal challenges, properly enacted reasonable accommodations in response to COVID, and maintained the integrity of [its] election processes." Ex. 2 at 7.



[1] All exhibit numbers correspond to the exhibits attached to the Notice of Filing Exhibits in Support of League Plaintiffs' Oppositions to Summary Judgment, ECF No. 350, and pincites to transcripts correspond to the original transcript page or pages.

In the spring of 2021, the Florida Legislature nevertheless voted along party lines to enact SB90, which made sweeping changes to Florida's election laws that will make it harder for many Florida voters to vote. *See* 2021 Fla. Laws Ch. 2021-11. The county Supervisors of Elections who administer elections in Florida did not ask for the enactment of SB90, and many would prefer to conduct elections under the prior law. *See, e.g.*, Ex. 3 at 115:5-15 ("[S]weeping election reform was not needed or requested by the Supervisors of Elections."); Ex. 4 at 47:13-18; Ex. 5 at 158:13-17 ("If I had a choice, I would veto Senate Bill 90 immediately if I had that power."); Ex. 6 at 109:9-14. Their professional association actively lobbied against SB90. Ex. 4 at 43:12-19; Ex. 7 at 190:14-22; Ex. 3 at 108:8-16, 111:4-6. Even now, only two of Florida's 67 Supervisors join in defending the law and seeking summary judgment on the merits. *See* Defs.' Mot. for Summ. J. at 44, ECF No. 321 (hereinafter "Mot.").



In their effort to justify SB90, Defendants point to a different "backdrop": what they call "national attention to allegations of election fraud made in the wake of the 2020 elections." *Id.* at 3. This is a truly extraordinary statement. Those allegations were *false*—even the RNC's 23-page, single-spaced study of "election integrity" in the 2020 election did not identify a single actual incident of voter fraud. Ex. 8 at 28:21-29:10; Ex. 2. In reality, the "national attention to allegations of election fraud" to which Defendants refer was the result of a cynical, concerted, and

unprecedented attack on the very underpinnings of American democracy that culminated in a violent assault on the United States Capitol. And Defendant Moody was among those stoking the fires. *See, e.g.*, Br. of Mo. and 16 Other States as Amici Curiae, *Texas v. Pennsylvania*, No. 22O155 (U.S. Dec. 9, 2020) (joined by Defendant Moody). For Defendants to use their public office to amplify false allegations of fraud and then point to the "national attention" those lies received as a justification for Florida to move to curb voting rights is extraordinarily audacious.

The *League* Plaintiffs challenge four provisions of SB90 (the "Challenged Provisions"). *First*, the "Drop Box Restrictions" require that all drop boxes for the return of mail ballots must be physically monitored, in person, by an employee of a Supervisor's office at all times they are available for use, and further provide that drop boxes which are not located at a Supervisor's main or permanent branch office may be open *only* during early voting hours. Fla. Stat. § 101.69(2)(a) (2021). The Drop Box Restrictions therefore make it far more expensive for Supervisors to offer drop boxes that are available 24/7 at the Supervisors' offices, and they flatly prohibit drop boxes elsewhere outside early voting hours. *E.g.*, Ex. 5 at 146:2-147:6; Ex. 6 at 40:1-11. Before SB90, some Supervisors chose to offer 24/7 drop boxes and others did not, and some chose to use in-person monitoring while others used video. Ex. 9 tbl. 24. As a result of SB90, however, many Supervisors have reduced the hours and locations of drop boxes they will offer in the future. *E.g.*, Ex. 6 at 40:1-11; Ex. 4 at

84:15-23. Not a single Supervisor testified that SB90's one-size-fits-all requirements do anything to curtail (nonexistent) fraud or otherwise improve elections in their county. *E.g.*, Ex. 4 at 85:10-86:15; *see also* Ex. 10 (Responses to RFA No. 7).

*Second*, the *League* Plaintiffs challenge the "Repeat Request Requirement," which halves the maximum duration of mail-ballot requests from four years to two: a single general election cycle. Fla. Stat. § 101.62(1)(a). SB90 will therefore require voters who wish to receive vote-by-mail ballots to request them twice as often. *Id.* This is a significant change, and both individual voters and organizations fear that many voters will forget to renew their requests and find themselves unable to vote by mail. *See, e.g.*, Ex. 11 at 17:14-18:10; Ex. 12 at 54:9-18; Ex. 13 at 44:24-45:25; Ex. 14 at 119:4-16.

*Third*, the *League* Plaintiffs challenge the "Line Warming Ban," which expands the definition of "solicitation" that is prohibited within 150 feet of polling places to now include "engaging in any activity with the intent to influence or effect of influencing a voter," in addition to prior prohibitions on "seeking or attempting to seek any vote, fact, opinion, or contribution; distributing or attempting to distribute any political or campaign material, leaflet, or handout; conducting a poll except as specified in this paragraph; seeking or attempting to seek a signature on any petition; [and] selling or attempting to sell any item." Fla. Stat. § 102.031(4)(b). Before SB90, several Plaintiffs participated in line warming activities, at which they

provided water, food, and non-partisan encouragement to people at and around polling places, including those waiting in line to vote within what is now defined as the non-solicitation zone. *See* Ex. 14 at 58:8-16, 150:10-17; Ex. 15 at 87:19-88:4; Ex. 13 at 38:7-14. They provided this assistance to those near polling places, in part, to influence voters to remain in line to vote. *E.g.*, Ex. 15 at 42:13-16. But they are unwilling to do so now because they fear prosecution for "solicitation" under SB90's new Line Warming Ban. Ex. 13 at 38:7-20, 59:10-60:2; Ex. 15 at 90:9-91:2; Ex. 14 at 150:18-151:9.

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

> A third-party voter registration organization must notify the applicant at the time the application is collected that the organization might not deliver the application to the division or the supervisor of elections in the county in which the applicant resides in less than 14 days or before registration closes for the next ensuing election and must advise the applicant that he or she may deliver the application in person or by mail. The third-party voter registration organization must also inform the applicant how to register online with the division and how to determine whether the application has been delivered.

*Id.*

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



## LEGAL STANDARD

Summary judgment is proper as to any "claim or defense" only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Credibility determinations" are inappropriate at the summary judgment stage. *See Ga. State Conf. of NAACP v. Fayette Cnty. Bd. of Commr's*, 775 F.3d 1336, 1343 (11th Cir. 2015). Rather, in deciding a summary judgment motion, "the Court must construe the evidence and all reasonable inferences arising from it in the light most favorable

to the non-moving party." *Whitehead v. BBVA Compass Bank*, 979 F.3d 1327, 1328 (11th Cir. 2020).

"The moving party bears the initial burden of proving the absence of a genuine issue of material fact." *Id.* The nonmoving party must then "'go beyond the pleadings' to establish that there is a 'genuine issue for trial'"—that is, that "'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Id.* (first quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986), then quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

## ARGUMENT

### I. Plaintiffs have standing for each of their claims.

Defendants first challenge Plaintiffs' standing, contending that Plaintiffs have not shown an injury-in-fact from the Challenged Provisions. Mot. 6-14. Defendants are wrong. One or more of the Plaintiffs has been or will be injured in fact by each of the four Challenged Provisions. No more is required, because Article III does not demand that *each* plaintiff have standing for each claim, so long as "[*a*]*t least one plaintiff* [has] standing to seek each form of relief requested in the complaint." *Town of Chester, N.Y. v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1651 (2017) (emphasis added).

#### A. Alan Madison, Cecile Scoon, the League, FLARA, and BVM have standing to challenge the Drop Box Restrictions.

Plaintiffs Alan Madison, Cecile Scoon, the League of Women Voters of Florida and the League of Women Voters of Florida Education Fund (collectively,

the "League"), the Florida Alliance of Retired Americans ("FLARA"), and Black Voters Matter ("BVM") all have standing to challenge the Drop Box Restrictions, which will make it harder for them and their members to vote by causing Supervisors to reduce the locations and hours in which drop boxes are offered, and will require the League and BVM to divert substantial resources from other priorities in response.

The Drop Box Restrictions will directly harm Mr. Madison, who voted in 2020 by returning his mail ballot to a drop box at 6:30 or 7:00 a.m., before business and early voting hours, and before anyone was monitoring the drop box. Ex. 12 at 24-25. Mr. Madison was able to do so because Indian River County, where he lives, offered a 24/7 drop box. Ex. 16 Nos. 2-3. But due to SB90, Indian River County will no longer offer a 24/7 drop box. Ex. 17 No. 14. Thus, while Indian River County may not "anticipate any changes to drop-box *locations*," Mot. 19 (emphasis added), the changes the County will make to drop box *hours* as a result of SB90 mean that Mr. Madison will likely no longer be able to vote as he has in the past. He therefore has standing to challenge the Drop Box Restrictions. *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009) (holding that the requirement to produce identification constitutes injury-in-fact even if a plaintiff has identification); *see also Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005).

The same is true of Ms. Scoon. She testified that she votes by mail and has used drop boxes in Bay County, where drop box availability has been reduced as a result of SB90. Ex. 13 at 12-13; Ex. 14 at 12-13; Ex. 42. Defendants argue that Ms. Scoon is not injured by the Drop Box Restrictions because she can vote in some other way. Mot. 11-12. But "[a] plaintiff need not have the franchise wholly denied to suffer injury." *Cox,* 408 F.3d at 1352. It will be harder for Ms. Scoon to vote when there are fewer drop boxes, and that suffices. *See id.*; *Billups*, 554 F.3d at 1351.

The League and FLARA also have associational standing to challenge the Drop Box Restrictions on behalf of their injured members. *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1160 (11th Cir. 2008). Defendants argue that the League and FLARA did not identify any injured members, Mot. 9. But Ms. Scoon is herself a League member who is injured by the Restrictions. Ex. 13 at 12-13; Ex. 14 at 12-13. In arguing that the League has no such members, Defendants cite deposition testimony addressing only whether "the League *entities* [could] face any type of enforcement action" under the Drop Box Restrictions—a separate question. ECF No. 318-23 at 46:14-22 (emphasis added). As for FLARA, William Sauers, a FLARA member, testified that he voted via a drop box in Palm Beach County in the most recent election, and Palm Beach County will reduce drop box availability because of SB90. Ex. 21 at 24, 56; Ex. 18 No. 3.

Ms. Scoon and Mr. Sauers are just two examples of League and FLARA members burdened by the Drop Box Restrictions. With many counties across Florida reducing drop box availability because of SB90, Ex. 9 tbl. 24, many of the other League and FLARA members who vote using drop boxes will surely be affected as well. And "[w]hen the alleged harm is prospective, [courts] have not required that the organizational plaintiffs name names." *Browning*, 522 F.3d at 1160 (holding NAACP had standing to sue on members' behalf where it was impossible to know in advance which members would be left off voter rolls); *see also Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1254 (N.D. Fla. 2016) (Walker, J.) ("Plaintiff need not identify *specific* aspiring eligible voters . . . who will be barred from voting . . . ."). In *Georgia Republican Party v. SEC*, 888 F.3d 1198, 1204 (11th Cir. 2018), the Eleventh Circuit suggested that this portion of *Browning* was limited by the Supreme Court's subsequent rejection of "probabilistic analysis as a basis for conferring standing" in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009). Here, however, unlike in *Georgia Republican Party* and *Summers*, the League and FLARA *have* each identified at least one affected individual member: Ms. Scoon and Mr. Sauers, respectively.



Finally, BVM and the League also have direct organizational standing to challenge the Drop Box Restrictions, which will injure their mission and require a diversion of resources. *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir.

2014). BVM's Executive Director testified that the Drop Box Restrictions will require BVM to allocate increased resources to educating voters about the changes to drop box hours and locations, and to allaying likely concerns in the Black community about drop box monitoring. Ex. 15 at 27-28, 71, 73:10-75:22. As a result of the Challenged Provisions, BVM has had to hire additional Florida staff, using funds that would have otherwise been allocated to its operations in other states, including Tennessee, and advocacy on issues including gentrification, police accountability, and environmental justice. *Id.* at 41:1-8, 62-63. Similarly, the League has been forced to expend significantly more resources informing members about the changes to drop boxes, including creating presentations and trainings. Ex. 19 at 39-40. And the League's other activities have suffered as a result: it has given less attention to redistricting and education on Amendment 4's changes to felon voting rights, and its Executive Director has been pulled away from fundraising. *Id.* at 38, 41, 43, 70.



Defendants cannot deny that this evidence exists, and they do not argue that it is legally insufficient. Instead, they assert that the League's diversion of resources contentions "ring hollow" because the League's advocacy against SB90 when it was being considered by the Legislature—a separate matter from its response to the practical implications of the *enactment* of SB90—was part of its normal operations. Mot. 9. This is, at most, a credibility argument that the Court cannot address at

summary judgment. As for BVM, Defendants complain that it did not adequately specify the activities from which it diverted funds in response to SB90. But BVM's explanation that it would otherwise have spent the money in other states and on advocacy regarding other issues is more than adequate. *See, e.g.*, *Browning*, 522 F.3d at 1166 (explaining resources "would otherwise be spent on registration drives and election-day education and monitoring"); *Billups,* 554 F.3d at 1350 (explaining volunteers and resources would be diverted "from 'getting [voters] to the polls' to helping them obtain acceptable photo identification").



### B. All of the Plaintiffs have standing to challenge the Repeat Request Requirement.

All of the Plaintiffs have standing to challenge the Repeat Request Requirement. The Individual Plaintiffs have all previously voted by mail and will now need to renew their requests for mail ballots twice as often, or else be unable to vote by mail in the future. Ex. 11 at 17:14-24; Ex. 13 at 44:24-45:25; Ex. 12 at 20:14-22; Ex. 20 at 19:21-20:16. And they reasonably fear that they may forget to do so. *E.g.*, Ex. 11 at 17:14-24; Ex. 12 at 20:14-22. They are therefore injured by the Requirement, which will make it harder for them to vote. The League and FLARA also have associational standing based on the injury to their members, including League members Ms. Scoon and Mr. Brigham, and FLARA member Mr. Sauer, who likewise votes by mail. Ex. 21 at 53:3-14; *see Browning*, 522 F.3d at 1160.

Defendants ignore Plaintiff Susan Rogers entirely, Mot. 8-14, and they say nothing about the burden that the Repeat Request Requirement will place on Ms. Scoon and Mr. Brigham. *Id.* at 11-13. They argue that Mr. Madison could "vote early or on Election Day" if he forgets to request a new mail ballot under the Repeat Request Provision. *Id.* at 14. But Mr. Madison need not show that he will be disenfranchised to have standing. *Cox*, 408 F.3d at 1352. And voting in person would be a burden, including because Mr. Madison is not sure that he would feel comfortable voting in person during the ongoing pandemic. Ex. 12 at 46:6-11. As for the League and FLARA, Defendants again argue that they failed to identify affected members—again relying on inapposite deposition testimony and ignoring that Ms. Scoon and Mr. Sauers are themselves such members. Mot. 8-11.



Finally, the League and BVM each have organizational standing to challenge the Repeat Request Requirement because they will be forced to divert resources from other tasks to educate their members about the need to more frequently request vote-by-mail ballots. The League has been forced to spend "an inordinate amount of time educating" its members about the changes, Ex. 19 at 34, and BVM is having to dedicate resources to educating voters about the change and will need to remind voters every election cycle that they will need to renew their requests, Ex. 15 at 37-38. As explained above, these expenditures are coming at the cost of other programs. *Supra* at 11-13.

### C. Cecile Scoon, the League, and BVM have standing to challenge the Line Warming Ban

As Plaintiffs explained in their own Motion for Summary Judgment, Plaintiffs Cecile Scoon, the League, and BVM have standing to challenge the Line Warming Ban, because each has historically provided water, snacks, and encouragement to people near polling places, would like to continue to do so, and cannot do so because of SB90. ECF No. 320-1 at 23-25. This direct impact on Ms. Scoon's, the League's and BVM's activities is sufficient to confer standing. *See Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1305 (11th Cir. 2017).



Defendants ignore the direct impact on BVM's activities. Mot. 9-10. They argue that the League's activities will be unaffected because they are "typically conducted outside the non-solicitation zone," and thus are not subject to the Line Warming Ban. *Id.* at 8. But as Ms. Scoon explained, before SB90, the League and its members would also assist voters in line to vote within the non-solicitation zone, something Ms. Scoon herself has done "many times." Ex. 14 at 149-151; *see also* ECF No. 320-1 at 23-24 (citing other evidence). And while some Supervisors did testify that they would not allow any third-party assistance within the non-solicitation zone, Ms. Scoon explains that not all have done so. Ex. 22 ¶¶ 4-8.

### D. The League and Ms. Scoon have standing to challenge the Deceptive Registration Warning Requirement.

Finally, the League and Ms. Scoon have standing to challenge the Deceptive Registration Warning Requirement. As Plaintiffs' explained in their Motion, SB90 forces the League and Ms. Scoon to give the Deceptive Registration Warning to every potential voter who registers with a League volunteer, which they would not otherwise do. ECF No. 320-1 at 9-11. And the Deceptive Registration Warning makes the League's registration efforts less effective. *Id.* As the Court has ruled, this forced expression itself constitutes injury-in-fact for purposes of standing. ECF No. 274 at 18 ("Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines [the] ends [that free speech serves]." (quoting *Janus v. AFSCME*, 138 S. Ct. 2448, 2464 (2018) (alterations in original)). The Requirement's interference with the League's and Ms. Scoon's voter registration efforts likewise constitutes injury in fact. *See Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1079 (N.D. Fla. 2004).



Defendants do not address the League's standing to challenge the Deceptive Registration Warning Requirement. Mot. 8-9. They argue that Ms. Scoon is not harmed "in her individual capacity" by the Deceptive Registration Warning Requirement because she has not yet registered voters after SB90 and she can still tell voters—after delivering the government mandated script—that their registration

forms will likely be turned in on time. *Id.* at 11. But they cannot deny that Ms. Scoon testified that she has often registered voters in the past and will register voters in the future, nor that SB90 will require her to deliver the Deceptive Registration Warning when she does so. Ex. 14 at 32:17-23, 68:4-69:9, 77:4-14; 83:24-85:3. No more is required for standing.

## II. There are disputes of material fact regarding Plaintiffs' *Anderson-Burdick* claim.

Count I of the Complaint alleges that SB90 imposes an undue burden on the right to vote in violation of the First and Fourteenth Amendments. Compl. ¶¶ 148-160. The legal standard for such claims is clear and well-established: courts must "apply the flexible standard from *Anderson* and *Burdick*." *Billups*, 554 F.3d at 1352 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)); *see also Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019) (holding that courts must "evaluate the constitutionality of a challenged election law by applying the *Anderson-Burdick* test").



Under *Anderson-Burdick*, courts must weigh "the burden imposed on voters" by the challenged laws "against the interests of the state" in enforcing them. *Billups*, 554 F.3d at 1352. This analysis proceeds in three steps. Courts "must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Anderson*, 460

U.S. at 789. Courts "then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* Finally, courts must "determine the legitimacy and strength of each of those interests," and "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* "Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Id.*

The full *Anderson-Burdick* balancing analysis is required no matter what level of burden is proved. "However slight [the] burden may appear, . . . it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (plurality op.) (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)); *see also id.* at 211 (Souter, J., dissenting) (expressly agreeing with this standard). Thus, "even when a law imposes only a slight burden on the right to vote, relevant and legitimate interests of sufficient weight still must justify that burden." *Lee*, 915 F.3d at 1318-19; *see also League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1215-16 (N.D. Fla. 2018). There is, however, a sliding-scale standard of review: "[t]he more a challenged law burdens the right to vote, the stricter the scrutiny to which" the law is subjected. *Lee*, 915 F.3d at 1319; *Detzner*, 314 F. Supp. 3d at 1215.

### A. Defendants' arguments about the legal standard are wrong.

Defendants open their discussion of the *Anderson-Burdick* claims with four arguments about the appropriate legal standard. Mot. 15-20. The Court need not resolve those issues now, because Defendants do not explain if or how those issues justify summary judgment in Defendants' favor. *See id.* But if the Court does reach those arguments, it should reject them.

*First*, Defendants renew their argument that only burdens on "voters generally" can render a law unconstitutional under *Anderson-Burdick*. Mot. 16-17. In line with ample binding precedent, the Court already rejected this argument, both in this case and in a prior one. ECF No. 274 at 38-40 (citing *Detzner*, 314 F. Supp. 3d at 1216). Defendants now argue that a facial challenge is different. But *Crawford* was itself a facial challenge, yet a majority of the Court still ruled that *Anderson-Burdick* requires consideration of whether a statute "imposes 'excessively burdensome requirements' on *any class of voters*," and explained that the "relevant" burdens were "those imposed on persons who are eligible to vote but do not possess a current photo identification" and that "[t]he fact that most voters already possess a valid driver's license . . . would not save the statute." 553 U.S. at 198, 202 (plurality op.) (quoting *Storer v. Brown*, 415 U.S. 724, 738 (1974) (emphasis added); *see also id.* at 199; *id.* at 212-14 (Souter, J., dissenting) (similar); *id.* at 239 (Breyer, J.,

dissenting) (similar). *Lee*, in which the Eleventh Circuit applied *Anderson-Burdick* this same way, was a facial challenge as well. *See Lee*, 915 F.3d at 1317, 1319.

*Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008), is not to the contrary, because a law that imposes disparate and undue burdens on some groups of voters *has no* "plainly legitimate sweep." As the Court put it in *Detzner*, it is "constitutionally untenable" for a state to "creat[e] a secondary class of voters" who are subject to additional burdens on voting that are unjustified by any adequate state interest. 314 F. Supp. 3d at 1217; *see also Bush v. Gore*, 531 U.S. 98, 104-05 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.").



*Second,* Defendants argue that *Anderson-Burdick* requires the Court to look at the whole electoral system, not just at the effects of SB90, in assessing whether SB90 burdens the right to vote. Mot. 17-18 (citing *Luft v. Evers*, 963 F.3d 665, 671-72 (7th Cir. 2020), and *Mays v. LaRose*, 951 F.3d 775, 785 (6th Cir. 2020)). But courts often address *Anderson-Burdick* claims by focusing specifically on the effect of the challenged statute. *See, e.g.*, *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1030-31 (N.D. Fla. 2018) (analyzing a vote-by-mail signature matching requirement under *Anderson-Burdick* by focusing on the effects of the challenged requirement, specifically); *Lee*, 915 F.3d at 1320-21 (same). That voters

may have other, alternative means of voting does not change the fact that they are burdened if a previously available means is made more difficult or impossible. And even when a voting procedure is offered "as a convenience to the voter," in addition to other options, "[c]onstitutional problems emerge . . . when conveniences are available for some people but affirmatively blocked for others." *Detzner*, 314 F. Supp. 3d at 1217 (quoting Fla. Stat. § 101.657).

*Third*, Defendants argue, citing no authority, that the Court may not consider the cumulative impact of the Challenged Provisions together. Mot. 18. This, of course, is directly inconsistent with Defendants' prior argument that the Court *must* consider Florida's whole electoral system, which would necessarily require the Court to assess all of the changes to that system made by SB90 together. Regardless, Plaintiffs will show that the Challenged Provisions work together to make the entire process of voting more difficult and burdensome, particularly for marginalized and vulnerable groups. Ex. 9 ¶¶ 318-321. The burdens begin with the Deceptive Registration Warning Requirement, which will deter some voters from registering, particularly voters from marginalized communities. Ex. 14 at 85:8-89:7; Ex. 13 at 22:10-25:11; Ex. 5 at 155:5-13. The burdens continue with the Repeat Request Requirement, which will make it more burdensome for voters to consistently request vote-by-mail ballots and will force voters who forget to do so to vote in person, leading to more crowded polling places and longer lines. Ex. 9 ¶ 317; Ex. 6 at 51:16-

18 ("Every voter who votes by mail is one fewer person potentially in line on Election Day."). The Drop Box Restrictions will then make it harder for those voters who remember to request vote-by-mail ballots to return them, likely causing further crowding. Ex. 9 ¶ 317. And the Line Warming Ban will prevent organizations from taking steps to make the resulting crowds at polling places more tolerable, making it harder for those voters who are forced to vote in person to do so. The Challenged Provisions therefore have a cumulative impact, and should be assessed cumulatively.[2]

*Finally*, Defendants argue that the State's interests are matters of "legislative fact" that need not be supported by any "record evidence." Mot. 19. At least in the Eleventh Circuit, the law is to the contrary: "[t]he existence of a state interest . . . is a matter of proof." *Duke v. Cleland*, 5 F.3d 1399, 1405 n.6 (11th Cir. 1993). It is not enough for state officials to assert in briefing that a law is justified—they must offer "record . . . evidence as to the state's interests in promulgating" the challenged law. *Id.* at 1405. The cases Defendants cite all arose in the particular context of voter ID



[2] Defendants also argue that if the Court finds only the cumulative burden unconstitutional, the Court should invalidate only part of the law. Mot. 19. Defendants cite no case adopting such an approach in a case involving cumulative harm—*Ayotte v. Planned Parenthood*, 546 U.S. 320, 328 (2006), merely holds that "when confronting a constitutional flaw in a statute, [courts] try to limit the solution to the problem." In any event, this is a question of remedy that has no bearing on summary judgment and that the Court need not address now.

requirements, which the Supreme Court had already concluded were supported by adequate state interests even in the absence of specific record evidence of preventable voter fraud. *See Crawford*, 553 U.S. at 195-96; *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014); *Billups*, 554 F.3d at 1351; *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1334 (11th. Cir. 2021). No such conclusion by the Supreme Court applies to the Challenged Provisions.

**B. Plaintiffs have ample evidence of burden.**

Defendants devote only a page-and-a-half to the sufficiency of Plaintiffs' evidence of burden and, in doing so, they focus entirely on Plaintiffs' expert reports. Mot. 20-22. Plaintiffs' evidence that the Challenged Provisions burden voting rights is not, however, limited to expert reports. Plaintiffs will offer testimony from Supervisors of Elections that SB90 "wasn't really about security, it wasn't about making the system more efficient; it was about creating obstacles and blocking" people from voting, and adopting "solutions that were designed to make it harder for people to vote." Ex. 5 at 158:13-159:12; *see also, e.g.*, Ex. 7 at 122:11-123:22. Supervisor Scott put it quite plainly: "you have a large group of people, and if you put up a series of obstacles, you are going to block some of those people from having access to votes." Ex. 5 at 140:15-141:6. Plaintiffs will offer testimony from voters about the burdens that SB90 imposes on them. *E.g.*, Ex. 20 at 19:19-25, 20:1-16, 30:3-16; Ex. 12 at 58-59. And they will offer testimony from organizations about

how harmful SB90 will be. *E.g.*, Ex. 15 at 27:6-31:11; Ex. 14 at 108:10-116:2. All of that testimony, and more, will establish that the Challenged Provisions impose a severe burden on voting rights. Defendants say nothing about it.

In any event, Defendants' criticisms of Plaintiffs' expert reports miss the mark. Defendants first complain that Dr. Herron (and Dr. Austin, who the *League* Plaintiffs did not offer) assumed rather than proved that SB90 was intended to discriminate against Black and Hispanic voters. Mot. 21. But Dr. Herron neither assumes nor proves discriminatory intent—he does not address intent at all. Rather, in the portion of Dr. Herron's report that Defendants criticize, Dr. Herron is describing discriminatory *effect*: that "individuals with disabilities were disproportionately likely to have a third party submit their [mail] ballots," and thus—it follows—disproportionately likely to be harmed by SB90's restrictions on third party ballot possession. Ex. 9 ¶ 242. (That portion of the statute is not, in any event, now at issue in this case.)



Defendants also complain that Plaintiffs' historical expert, Dr. Burton, did not explore possible non-discriminatory reasons for one out of hundreds of historical events detailed in his report: the rejection of Black voters' ballots at a disproportionately high rate in 2000. Mot. 21. But the particular reasons why ballots were rejected more than two decades before SB90 was passed this is at most a matter for cross-examination at trial, not a basis for summary judgment—particularly where

discriminatory intent is not an element of any of the *League* Plaintiffs' claims in this case.

Next, Defendants complain that Plaintiffs' experts failed to "quantify the alleged burden" from the Challenged Provisions. *Id.* at 21-22. It is true that Dr. Burton—a historian who offered a report on Florida's history of discriminatory voting laws and practices—was not asked to quantify the burden from SB90. *Id.* at 22. But Dr. Herron *did* quantify many of the burdens imposed by the Challenged Provisions. With respect to drop boxes, Dr. Herron analyzed, *e.g.*, the rates of drop box usage across Florida, Ex. 9 tbl. 10, 12, the timing of drop box submissions, *id.* tbl. 19-22, and the extent of reductions in drop box availability as a result of SB90, *id.* tbl. 24. With respect to the Line Warming Ban, Dr. Herron examined the extent of lines to vote in Florida, and the resulting effect of a prohibition on line warming. *Id.* ¶¶ 297-313. And with respect to the Deceptive Registration Warning Requirement, Dr. Herron analyzed the extent to which Third Party Voter Registration Organizations ("3PVROs") contribute to registering additional voters in Florida, and the extent to which reducing the efficacy of 3PVROs will reduce voter registrations. *Id.* ¶¶ 247-291. Finally, the Repeat Request Requirement burdens every Florida voter who chooses to vote by mail—a population that Herron quantified. *Id.* ¶¶ 90-111.

Defendants ignore all of this analysis and point to Dr. Herron's testimony that whether the burden that SB90 caused was "significant" or "insignificant" was a "question for the court." ECF No. 318-3 at 65-66. But context makes clear that what Dr. Herron meant was simply that the *legal significance* of SB90's effects—effects which he analyzed and described in detail—was a conclusion for the Court to resolve based on all of the evidence in the case. *See id.*

**C. The State's asserted interests are, at a minimum, disputed.**

Defendants also argue that they have significant evidence of state interests supporting the Challenged Provisions. But that evidence is—at a minimum—subject to disputes of material fact.

*First*, Defendants argue that the Drop Box Restrictions serve to increase the security of drop boxes. Mot. 22. But Plaintiffs will offer evidence that the Drop Box Restrictions serve no such interest. For one thing, SB90's restrictions on the hours and days during which drop boxes that are not in Supervisors' offices may be offered do nothing to serve security, and Defendants point to no other interest supporting that aspect of the Drop Box Restrictions. *See id.* at 22. Even as to the in-person monitoring requirement, many Supervisors did not have in-person monitoring of their drop boxes in the 2020 election, and there were no security issues anywhere in the state. *E.g.*, Ex. 23 at 44:20-45:4, 48:20-49:6; Ex. 31 at 82:3-13; Ex. 24 ¶¶ 19, 22; Ex. 25 ¶¶ 18, 25; Ex. 4 at 86:6-15. Supervisor Hays called the requirement "absurd,"

explaining that in his county, there had been a video-monitored drop box "there in place for every election since we moved into this building, and I have had not one instance of any kind of suspected malbehavior." Ex. 4 at 84:15-23, 86:6-15.

Moreover, as Supervisors explained, there is no reason to believe that a Supervisor of Elections employee tasked with monitoring a drop box would be able to do anything to stop a physical attack even in the unlikely event that one occurred. As Supervisor Scott explained, "Our drop boxes are not staffed by people who would violently confront an attacker. So there is really no difference between a person physically being there and a person watching on camera, in terms of a violent confrontation, if somebody wanted take an action like that against our elections." Ex. 5 at 120:18-121:5.



*Second*, Defendants argue that the Repeat Request Requirement serves to "minimize mistakes" that would otherwise occur, such as voters forgetting that they requested a ballot or neglecting to update their address. Mot. 22. But this, too, is disputed. Supervisors uniformly testified that, far from reducing mistakes, the Repeat Request Requirement will confuse voters and carries no benefits. *E.g.*, Ex. 3 at 137:23-138:1, 138:21-24; Ex. 24 ¶ 23; Ex. 6 at 91:5-14; Ex. 23 at 73:16-74:1; Ex. 26 at 86:8-11. And Supervisors have ample other tools to ensure that addresses are up to date and that ballots are counted only if they are completed by the voter herself, including sending the ballots by non-forwardable mail, so that "if the person has

moved and if their vote-by-mail request is still active, then that ballot would be returned to us as undeliverable." Ex. 5 at 93:8-17. The Supervisors use a thorough signature-matching process to ensure that the ballot is, in fact voted by the voter, which the Supervisors are confident is "very secure." *Id.* at 48:4-49:12; *see also, e.g.*, Ex. 6 at 56:16-58:1. Significantly, while Defendants rely on a declaration from Maria Matthews listing various mail-ballot request issues, ECF No. 318-54 ¶ 26, they make no showing that even one of those issues would have been prevented by a shorter validity period.

*Third*, Defendants argue that the Deceptive Registration Warning Requirement provides another way of informing voters about other ways to register to vote. Mot. 23. But information about other ways to register to vote and to return forms is already available to voters not only on the Department of State's website, but also on the voter registration form itself, and has been since 2013. *See* Register to Vote or Update Your Information, *Fla. Div. of Elections*, https://www.dos.myflorida.com/elections/for-voters/voter-registration/register-to-vote-or-update-your-information/ (Sept. 8, 2021); Florida Voter Registration Application, https://files.floridados.gov/media/704795/dsde39-english-pre-7066-20200914.pdf (effective Oct. 2013). Moreover, as explained in Plaintiffs' Motion, the required Warning is misleading, not (as Defendants argue, Mot. 22) truthful, and it therefore not only does not serve to inform voters, but will in fact likely deter some

voters from registering at all. ECF No. 320-1 at 15-16. Defendants also refer to concerns about 3PVROs submitting voter registration forms without voters' consent, ECF No. 318-54 ¶¶ 19-20—but nothing about the Deceptive Registration Warning Requirement addresses or would prevent that.

*Fourth*, Defendants argue that the Line Warming Ban protects voters from harassment. Mot. 23. But *harassment* was already prohibited. What SB90 adds is a prohibition on anything that might influence a voter *in any respect*—a vague and broad prohibition that Defendants make no effort to defend.

*Fifth*, Defendants point to historical testimony from their expert, Dr. Moreno, about absentee ballot fraud in 1993 and 1997. *Id.* at 23. But as Defendants note, Miami-Dade had already addressed that issue—which involved commercial ballot collection—years ago, by adopting a local ordinance prohibiting individuals from possessing multiple ballots. *Id.* In any event, the Challenged Provisions—which no longer include SB90's ban on volunteer ballot collection—could have done nothing to prevent the 1993 and 1997 frauds that Dr. Moreno describes. *See generally* ECF No. 318-6.

*Finally*, Defendants point to a report from their expert, Dr. Kidd, comparing Florida's present-day voting laws with its previous voting laws and other states' laws. Mot. 23-24. As Plaintiffs argue in a separate motion, this is improper expert testimony and should be excluded for that reason. ECF No. 349. But regardless, this

comparative analysis is not, in any event, a state interest, and Defendants do not explain why it justifies summary judgment.

## III. Defendants are not entitled to summary judgment on Plaintiffs' First Amendment challenges to the Line Warming Ban

### A. SB90 affects what activities are permissible outside polling places.

Defendants argue first that the Line Warming Ban does not affect what activity is permissible near polling places. Mot. 25. But Defendants themselves cannot agree on what is or is not now allowed. At points, Defendants argue that SB90 has no effect because non-partisan activities like distributing food and water has *never been allowed* near polling places. *Id.* at 25. But later, Defendants argue that "merely giving water to voters waiting in line" is *still allowed* even after SB90. *Id.* at 33-34. Defendants cannot have it both ways.



In fact, SB90 indisputably affects what is allowed near polling places, because it expands the definition of prohibited "solicitation." Fla. Stat. § 102.031(4)(b). Before SB90, solicitation included "seeking or attempting to seek any vote, fact, opinion, or contribution; distributing or attempting to distribute any political or campaign material, leaflet, or handout; conducting a poll except as specified in this paragraph; seeking or attempting to seek a signature on any petition; and selling or attempting to sell any item." Fla. Stat. § 102.031(4)(b) (2020). After SB90, however, "solicitation" now includes, in addition to those things, "engaging in any activity

with the intent to influence or effect of influencing a voter"—a far broader, and vaguer, prohibition. Fla. Stat. § 102.031(4)(b) (2021).

Despite SB90's clear expansion in the scope of activity prohibited within buffer zones, Defendants point to testimony from one of Florida's sixty-seven Supervisors of Elections—Brian Corley—stating that he had never allowed any activity other than exit polling within the buffer zone, even before SB90. Mot. 25 (citing ECF No. 318-27 at 168:1-8). (Defendants also cite testimony from Supervisor Michael Bennett that he was not aware of any line-warming activities in his county in 2020, but Supervisor Bennett did not say whether he would have permitted such conduct had someone sought to do it. ECF No. 318-28 at 107:9-13.)



In Plaintiffs' experience, however, at least some Supervisors did not consistently enforce a prohibition on non-partisan activities within the buffer zone before SB90, and instead sometimes permitted such activities. Ex. 22 ¶¶ 4-7; *see also* Ex. 14 at 149:16-152:1. That should be no surprise. Supervisor Corley testified that he prohibited such activities before SB90 under his general authority to "maintain order at the polls." Fla. Stat. § 102.031(1); *see* ECF No. 318-27 at 168:1-8. But so long as non-partisan activities were not disruptive, they would not be subject to prohibition under that general language. Defendants seem to agree, because they later argue that Florida law, even after SB90, does *not* prohibit non-partisan groups' distribution of food and water in the buffer zone. Mot. 32-33. In any

event, there is at least a dispute of fact over whether SB90's expanded definition of "solicitation" prohibits activity that was previously allowed, given Ms. Scoon's declaration and testimony, along with similar testimony from BVM. Ex. 22 ¶¶ 4-7; *see also* Ex. 14 at 149:16-152:1; Ex. 15 at 87:10-89:25.

**B. Plaintiffs' line warming activities are expressive.**

Defendants next argue that Plaintiffs' line warming activities are not expressive. But the Eleventh Circuit has held that events distributing food and water are expressive conduct if they are intended to convey a message and would reasonably be interpreted as doing so. *Ft. Lauderdale Food Not Bombs v. City of Ft. Lauderdale*, 901 F.3d 1235, 1241 (11th Cir. 2018). Plaintiffs' testimony shows that Line Warming Activities meet both requirements.

BVM's executive director explained that long waits to vote are "demoralizing," particularly in minority neighborhoods that have historically had the longest lines, and that "providing these line-warming services [makes the voter] feel like you actually matter." Ex. 15 at 102:3-103:25. He explained that BVM engages in line warming to "motivate voters" and "influence them to stay in line." *Id.* at 28:22-23. And Ms. Scoon explained that the League's "Party at the Polls" line warming events are designed to make "citizens feel like voting is fun and the whole family can come," which "just changes the whole dynamics of I've got to go vote and stand in line." Ex. 14 at 49:1-13.

The cases Defendants cite are distinguishable, because each involved the mere *collection* of mail ballots, a less traditionally expressive activity. *See Knox v. Brnovich*, 907 F.3d 1167 (9th Cir. 2018); *Feldman v. Ariz. Sec'y of State's Off.*, 840 F.3d 1057 (9th Cir. 2016); *Voting for Am., Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013). As the Ninth Circuit put it in *Feldman*, a viewer might "reasonably understand ballot collection to be a means of facilitating voting, not a means of communicating a message." 840 F.3d at 1084. The same cannot be said of Plaintiffs' line warming activities, which go beyond merely passively assisting voting to communicate a message that voting is important and that voters matter. *E.g.*, Ex. 15 at102:3-103:25; Ex. 14 at 49:1-13.



### C. SB90's Line Warming Ban is unconstitutional.

*First*, as Plaintiffs argue in their Motion, SB90's expanded definition of "solicitation" is unconstitutionally vague because it does not provide reasonable notice of what is prohibited. ECF No. 320-1 at 25-28. Indeed, Defendants themselves cannot decide whether the expanded definition of solicitation prohibits non-partisan activities like distributing food and water, arguing first that it has *always* been prohibited, Mot. 25, second that it is *now* prohibited under SB90, *id.* at 30 ("Food and drink can be distributed, just not at a certain place (near polling places) at a certain time (during elections) . . . ."), and finally that it is not prohibited at all, *id.* at

32. If Defendants, charged with interpreting and enforcing the law, cannot agree on its scope, Plaintiffs can hardly be expected to do so.

Defendants' confusion over the scope of the new definition is understandable, however, because the definition is extraordinarily broad and general. SB90 prohibits not only activities carried out with an intent to influence voters, but also activities that have the "*effect of* influencing a voter," regardless of the actor's intent. Fla. Stat. § 102.031(4)(b) (emphasis added). It therefore criminalizes conduct based on third parties' subjective reactions to it, making it impossible for anyone to know when they might be violating the law. *See Coates v. City of Cincinnati*, 402 U.S. 611, 612, 614 (1971) (holding law prohibiting conduct that was "annoying to persons passing by" unconstitutionally vague). Defendants' argument that the new definition prohibits only "[p]artisan efforts of individuals or campaigns to influence voters' decisions," Mot. 33, therefore cannot be squared with SB90's text.



Neither context nor canons of construction render SB90 less vague. Indeed, considering SB90's text as a whole reaffirms that the prohibition against actions with the "intent to influence or effect of influencing a voter" must cover more than merely partisan efforts to persuade a voter how to vote, because § 102.031(4)(a) already separately prohibited that even before SB90, by prohibiting "seeking or attempting to seek any vote." Fla. Stat. § 102.031(4)(a). The canon against surplusage instructs "courts to interpret a statute to effectuate all its provisions, so that no part is rendered

superfluous." *Hibbs v. Winn*, 542 U.S. 88, 89 (2004). The Secretary's limiting construction of the Ban would thus render it entirely superfluous of other preexisting portions of the statute—an outcome the courts are "loath" to reach. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004).

*Second*, the Line Warming Ban is unconstitutionally overbroad, precisely because it prohibits more than just partisan efforts to persuade a voter how to vote. *See* ECF No. 320-1 at 28-31. Defendants offer no justification for why it is necessary to prohibit more than such partisan efforts—indeed, they argue (contrary to the text of the statute) that the statute reaches only such efforts. Defendants therefore effectively concede that the Ban's scope exceeds what is necessary to achieve its purposes—a textbook overbreadth scenario. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). And while Defendants argue for a limiting construction, such a construction is allowed in the First Amendment context only if the construction is "reasonable and readily apparent," which it is not. *Boos v. Barry*, 485 U.S. 312, 330 (1988).



*Finally*, the Line Warming Ban is an unconstitutional infringement of freedom of speech. As explained above, Plaintiffs' conduct is expressive. *Supra* Part III.B. And Defendants are wrong to argue that parking lots and walkways leading to polling places are non-public forums. *Minnesota Voters Alliance v. Mansky* does not so hold—it held only that the *inside* of a polling place is a nonpublic forum. 138 S.

Ct. 1876, 1885-86 (2018). *Mansky* did not consider whether the area outside of a polling place is a public forum. The Line Warming Ban challenged here regulates conduct outside of a polling place, and a plurality of the Supreme Court has held that the area immediately surrounding a polling place, including "parks, streets, and sidewalks," are "quintessential public forums." *Burson v. Freeman*, 504 U.S. 191, 196 (2018). Moreover, the Ban is not limited to the partisan speech the Court has allowed governments to restrict in the immediate vicinity of polling places. *See id.* at 211. *Burson*'s concerns about partisan speech in the immediate vicinity of a polling place are wholly insufficient to justify the Ban's prohibitions of non-partisan speech and voter assistance.



Contrary to Defendants' arguments, the Line Warming Ban is plainly content-based. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Put differently, a law is content based "if it require[s] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (cleaned up). As the Court explained in *Reed*, some content-based restrictions "are more subtle, defining regulated speech by its function or purpose." 576 U.S. at 163. This is such a restriction. The Line Warming Ban prohibits (among other things) expression with the "effect of influencing a

voter," and whether expression has that effect will invariably turn on the message conveyed. Much like the ordinance in *Reed*, the scope of the Line Warming Ban "thus depend[s] entirely on the communicative content of" the expression at issue. *Id.* at 164.

The Line Warming Ban is therefore subject to strict scrutiny. As the Eleventh Circuit has recently emphasized, "[l]aws or regulations almost never survive this demanding test." *Otto v. City of Boca Raton*, 981 F.3d 854, 862 (11th Cir. 2020). And the Line Warming Ban cannot possibly survive it, precisely because it is overbroad, going far beyond the regulation of partisan solicitation that the Supreme Court upheld in *Burson*.



## IV. Defendants are not entitled to summary judgment on Plaintiffs' First Amendment challenges to the Deceptive Registration Warning Requirement

The Deceptive Registration Warning Requirement both infringes speech and compels speech, and it is unconstitutional for both reasons. A law that "compel[s] individuals to speak a particular message" by following a "government-drafted script" "alte[rs] the content of [their] speech" and is a "content-based regulation of speech," "presumptively unconstitutional," and subject to strict scrutiny. *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018); *see also Riley v. Nat. Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). Such laws may be upheld only if "the government proves that they are narrowly tailored to serve compelling state

interests." *NIFLA*, 138 S. Ct. at 2371. For the reasons given in Plaintiffs' Motion, the Deceptive Registration Warning Requirement does not survive that test. ECF No. 320-1 at 16-23.

Defendants first argue that the Deceptive Registration Warning Requirement "does not even implicate the First Amendment" because it *compels* speech rather than *limiting* speech. Mot. 38. This is nonsense. "[M]easures compelling speech are at least as threatening" as measures restricting it, "plainly violate[] the Constitution," and are "universally condemned." *Janus*, 138 S. Ct. at 2464. And because such laws "alte[r] the content of [speakers'] speech," they are a "content-based regulation of speech," "presumptively unconstitutional," and subject to strict scrutiny. *NIFLA*, 138 S. Ct. at 2371; *see also Riley*, 487 U.S. at 795. Defendants ignore this controlling precedent and cite only an unpublished district court decision, *Praise Christian Ctr. v. Huntington Beach*, No. 03-cv-1504, 2006 WL 8438002 (C.D. Cal. Feb. 23, 2006), which did not involve compelled speech at all.



Defendants next argue that the Deceptive Registration Warning Requirement is subject to a less demanding standard of review under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). Mot. 38-40. Not so. As Plaintiffs explained in their Motion, *Zauderer* does not apply where, as here, the government seeks to compel a speaker to disclose information about services available from *others*, rather than from the speaker himself. ECF No. 320-1 at 14-15 (citing *NIFLA*,

138 S. Ct. at 2372). Moreover, *Zauderer* applies only to laws compelling the disclosure of "purely factual and uncontroversial information," and the Deceptive Registration Warning is misleading, not factual and uncontroversial. *Id.* at 14-16. Whether nor not the Deceptive Registration Warning is technically true is irrelevant, because even laws compelling the disclosure of "factual information [that] might be relevant to the listener . . . clearly and substantially burden" speech and are subject to strict scrutiny. *Riley*, 487 U.S. at 798; *see also Tenn. State Conf. of NAACP v. Hargett*, 420 F. Supp. 3d 683, 708 (M.D. Tenn. 2019) ("The Supreme Court . . . has flatly rejected the argument that merely because a statement is technically true then the government can force a person to make that statement without offending the constitution."). Defendants argue that *NIFLA* is distinguishable because the Warning and 3PVROs' registration activities are complementary, rather than opposed. Mot. 40. But they offer no evidence of that, and Plaintiffs and at least some Supervisors strongly dispute it as a factual matter. *E.g.*, Ex. 14 at 85:8-89:7; Ex. 12 at 21:5-22:4; Ex. 5 at 155:5-13 ("I think it was designed to make it so that more often than not people will just walk away and not get registered.").



In the alternative, Defendants argue that the Deceptive Registration Warning Requirement satisfies the standard applicable to regulations of commercial speech. Mot. 41 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)). But the Supreme Court has never applied *Central Hudson* in a

compelled-speech case. Rather, in *Riley*, the Court applied strict scrutiny to a law requiring professional fundraisers to "disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity"—a plainly commercial context. 487 U.S. at 795; *see also NIFLA*, 138 S. Ct. 2371. The Court should do the same here. But even if *Central Hudson* applies, the Deceptive Registration Warning Requirement fails it, because the Warning is extraordinarily misleading, ineffective, and its purposes could be served instead by the State speaking for itself. *See Central Hudson*, 447 U.S. at 564; ECF No. 320-1 at 20-22.

The fact that the statute calls 3PVROs "fiduciaries" does nothing to change that. True, fiduciaries may in some circumstances have a common law duty to warn their customers about certain risks. But Plaintiffs' challenge is not to that sort of common law duty, but rather to SB90's blanket requirement that they convey to every potential voter that Plaintiffs may not return their registration forms on time, even though they will. Plaintiffs cite no case holding that the government can compel such speech simply by calling the speaker a "fiduciary," and the existence of a such a loophole would surely have come as a surprise to the *NIFLA* Court, which emphasized that the Court had "been especially reluctant to 'exemp[t] a category of speech from the normal prohibition on content-based restrictions,'" as Defendants'

argument would do. *NIFLA*, 138 S. Ct. at 2372 (quoting *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (plurality op.)).

## CONCLUSION

For the reasons given above, the Court should deny the Secretary's Motion for Summary Judgment.

## LOCAL RULE 7.1(F) CERTIFICATION

The undersigned certifies that this motion contains 9,929 words, excluding the case style and certifications.

Respectfully submitted this 3rd day of December, 2021.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 3, 2021 I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel in the Service List below.

/s/ Frederick S. Wermuth
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