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

LEAGUE OF WOMEN VOTERS, *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-186

JOINT RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs League of Women Voters of Florida, Inc., League of Women Voters of Florida Education Fund, Black Voters Matter Fund, Inc. ("BVM"), Florida Alliance for Retired Americans, Inc., Cecile Scoon, Susan Rogers, Dr. Robert Brigham, and Alan Madison (together, the "LWV Plaintiffs) allege that Chapter 2021-11, Laws of Florida violates federal law. *See* ECF No. 160. The LWV Plaintiffs move for summary judgment on their counts related to:

(1) Section 97.0575, which enumerates the disclosures that organizations like the LWV Plaintiffs must provide to registrants (the "Notification Provision"), and

(2) Section 102.031(4)(a)-(b), which prohibits anyone from "engaging in any activity with the intent to influence or effect of influencing a voter" either inside a polling place or within 150 feet of a drop box or polling-place entrance (the "Non-Solicitation Provision").

ECF No. 320.

Secretary Lee opposes the LWV Plaintiffs' Motion for Summary Judgment in its entirety. Attorney General Moody opposes the LWV Plaintiffs' Motion as to the Notification Provision. Supervisors Hays and Doyle oppose the LWV Plaintiffs' motion as to the Non-Solicitation Provision.[1]

STATEMENT OF FACTS

Senate Bill 90 was introduced on February 3, 2021. ECF 318-8, at 1. After four months of amendments and debate, Governor DeSantis signed Senate Bill 90 on May 6, 2021. *Id*. at 6.[2] The LWV Plaintiffs filed suit moments after the law was signed. *Compare* ECF 1 (*filed* May 6, 2021) *with* ECF 318-8, at 6 (bill approved on May 6, 2021). Although their Amended Complaint challenged five provisions of

[1] As this response is signed by counsel for the Supervisors, it is a *joint* response in opposition to the LWV Plaintiffs' motion for summary judgment.

[2] Fla. Senate, *CS/CS/CS/SB90: Elections*, *available at* https://www.flsenate.gov/Session/Bill/2021/90.

Florida law, their summary-judgment motion only seeks judgment as to the Notification Provision[3] and the Non-Solicitation Provision.[4]

Both provisions serve critically important State interests. The Notification Provision ensures that all registrants know the registration methods available to them and cautions them that their applications may not arrive on time if they rely on a third-party to deliver their application, which can result in a denial of the franchise. *See* ECF 318-54 ¶ 18 ("A new voter whose registration information is received less than 29 days before a given election cannot vote in that election because that voter will have missed the 'book closing' deadline."). Informing registrants of alternative registration opportunities, in turn, prevents registrants from losing their access to the franchise based on the well-documented irregularities and complaints about how 3PVROs handle voter-registration information. *Id.* ¶¶ 19-20. Fundamentally, Florida has an "interest[] in ensuring that as many eligible Floridians as possible timely and accurately register for elections." *Id.* ¶ 21.

As for the Non-Solicitation Provision, the statute itself makes clear the State's interest in preventing undue harassment while voters wait in line at the polls. *See infra* at 17-20; *see also* ECF No. 318-54 ¶ 36, p. 142-143 (listing complaints about "aggressive campaign[ing]," "fights," "loud music," and "loud bull horns" around

[3] Section 97.0575(3)(a), Florida Statutes.

[4] Section 102.031(4)(a)-(b), Florida Statutes.

the polling places in Miami-Dade County). In any event, Florida's Non-Solicitation Rules "mirror the vast majority of state rules across the country," all of which prohibit influencing voters within a certain distance of a polling place. ECF 318-1 ¶ 15.

RELEVANT LEGAL STANDARD

Summary judgment is appropriate when "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 LWV Plaintiffs' motion fails this standard.

ARGUMENT

Assuming that one or more of the LWV Plaintiffs has established standing,[5] this Court should deny the LWV Plaintiffs' Motion for Partial Summary Judgment

[5] In the interest of avoiding needless duplication and considering that the Court has an independent responsibility to review the LWV Plaintiffs' standing, the Defendants will not rehash their standing argument here. Instead, Defendants refer the Court to their arguments addressing standing in their Motion for Summary Judgment. *See* ECF No. 321-1, at 6-14.

and should instead enter summary judgment for Defendants because neither their compelled speech, their vagueness, or their overbreadth arguments have merit.

A. The Notification Provision Is Not Unconstitutional Compelled Speech.

The information that the LWV Plaintiffs must communicate under the Notification Provision does not constitute core First Amendment speech and, accordingly, the Notification Provision stands so long as it satisfies minimal scrutiny. And it does indeed satisfy this level of scrutiny. It is narrowly confined to the collection and delivery of government forms by organizations registered with the State to engage in voter registration. *See* Fla. Stat. § 97.0575 (2021). It does not extend to speech encouraging voter registration or assisting with voter registration generally. The information that must be disclosed does not amount to any statements regarding politics, ideology, or opinions; instead, it is non-controversial factual information that (in the commercial-speech context) a State may require so long as the disclosure-requirement passes minimal scrutiny. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 (1985) (holding that "appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal").

Simply put, the notification is not "inextricably intertwined" with protected First Amendment speech. *Cf. Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 796 (1988). Plainly, it directly advances Florida's compelling interest in "seeing that voter-

registration applications are promptly turned in to an appropriate voter-registration office." *League of Women Voters of Florida v. Browning*, 863 F. Supp. 2d 1155, 1160 (N.D. Fla. 2012). It also prevents voter confusion and ensures that 3PVROs faithfully discharge their statutory obligations as fiduciaries to registrants that entrust their applications to their care.

Accordingly, minimal scrutiny applies, and the Notification Provision should be upheld. But even under higher levels of scrutiny, the State's chosen means to protect its interests still passes muster.

1. The Notification Provision Satisfies Minimal Scrutiny.

The Notification Provision ensures that each 3PVRO "serves as a *fiduciary* to the applicant," Fla. Stat. § 97.0575(3)(a) (2021) (emphasis added). The Notification Provision focuses narrowly on advancing that fundamental State interest; indeed, it applies only to application collection and delivery of registrations. It is certainly not, as the LWV Plaintiffs suggest, the sweeping regulation of any and all speech encouraging registrants to register to vote. *See, e.g.,* ECF No. 320-1, at 15-16. *See also infra* at 9. Accordingly, the provision is more analogous to a regulation of commercial speech[6] than political speech, and it should be subject to scrutiny under

[6] To that end, many, if not most, of the LWV Plaintiffs pay individuals to collect voter registrations. *See, e.g.*, ECF No. 351-4, at 34:11-35:12.

that doctrine rather than heightened scrutiny.[7]

Moreover, as the Notification Provision requires only provision of non-controversial, factual information as registration applications are collected, the Supreme Court's decision in *Zauderer* governs. *See Am. Meat Inst. v. United States Dep't of Agric.*, 760 F.3d 18, 20 (D.C. Cir. 2014) (holding that "*Zauderer* in fact does reach beyond problems of deception" to reach other disclosure mandates). Under *Zauderer*'s two-part analysis, this Court must (1) first "assess the adequacy of the interest motivating the" required disclaimers, and then (2) "assess the relationship between the government's identified means and its chosen ends." *Id.* at 23, 25.

Florida has a simple, yet compelling interest: protecting its voters through the dissemination of truthful information, which in turn enables as many potential voters as possible to access the franchise. *See* ECF 318-54 ¶¶ 17-21. By enacting the Notification Provision, Florida aims to protect its citizens by enforcing a fiduciary duty against 3PVROs engaged in collecting and delivering registration applications. The Notification Provision requires them to provide registrants with complete and accurate information about the registration process, including the existence of an

[7] As courts have recognized, Florida common-law fiduciary duties (like the duties of care and loyalty) have similar underpinnings as commercial- and securities-law duties. *Cf. Gochnauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1049 (11th Cir. 1987).

expedient online option, which ensures that potential voters have every opportunity to register in a timely manner. As this Court recognized in *Browning*, "[t]he state has a substantial interest in seeing that voter-registration applications are promptly turned in to an appropriate voter-registration office." 863 F. Supp. 2d at 1160.

The Notification Provision, moreover, animates the State's interest in maximizing access to the franchise by informing prospective registrants of the risks inherent in relying on a third-party to deliver their applications. Specifically, the four required disclosures (1) inform registrants that the 3PVRO may fail to deliver their registration applications to the Division of Elections or appropriate supervisor within 14 days or before registration closes, (2) advise registrants that they may deliver voter registration applications in person or by mail, (3) inform registrants how to register online, and (4) inform registrants how to determine whether their applications have been delivered. *See* Fla. Stat. § 97.0575(3)(a). All four disclosures empower potential voters by ensuring that they are fully informed and successfully registered in time to exercise their right to vote.

Arguments that the required disclaimers are compelled political speech miss the mark. Mandating the LWV Plaintiffs to provide this information is, at most, akin to commercial speech because a registrant's decision to use a 3PVRO constitutes a transaction that imposes a fiduciary responsibility on the 3PVRO. The statute merely enshrines this. *See* Fla. Stat. § 97.0575(3)(a) (2021) ("A [3PVRO] that collects voter

registration applications serves as a fiduciary to the applicant."). Importantly, the Notification Provision is strictly limited to the time at which a 3PVRO collects a voter-registration application. *See* Fla. Stat. § 97.0575(3)(a).

In other words, the Notification Provision is narrowly confined to 3PVROs that are registered with the State, *see id.* § 97.0575(1), for the specific purpose of collecting and delivering government registration forms in a fiduciary capacity. And it is specifically linked to the physical *handling* of registration applications, rather than to encouraging or assisting speech. *See id.* § 97.0575(3)(a). Any organization or individual may encourage others to register to vote, may hand out voter-registration forms, or may assist individuals with registering online; all without making any disclosure whatsoever. The Notification Provision only applies if an organization desires to *collect and return* registrations on behalf of a voter. In that instance, the organization must register with the State as a 3PVRO, accept the responsibilities of a fiduciary, and provide uncontroversial, factually accurate, and critically important information to the registrants they are serving.

The LWV Plaintiffs unsuccessfully attempt to analogize this case to the compelled statements at issue in *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018), a case addressing a law that required pro-life pregnancy-care centers to alert individuals "about the availability of state-sponsored" abortion services—*i.e.*, "the very practice that petitioners [we]re devoted to opposing." *Id.* In contrast, the

information mandated by the Notification Provision are (ostensibly) the information that the LWV Plaintiffs want people to have—that which is necessary to ensure access to the ballot box. The information required by the Notification Provision is non-controversial and, critically, does not require the LWV Plaintiffs to speak any political or ideological message whatsoever. And, because numerous 3PVROs in Florida have delivered voter registration applications late in recent years, *see, e.g.*, ECF No. 318-54 ¶¶ 17-21; 318-27, at 165:6-66:4, as the LWV Plaintiffs themselves acknowledge, *see* ECF No. 320-1, at 15, the statement that 3PVROs *may* not (as opposed to, for example, "will never") deliver a registration application on time is not only uncontroverted and non-ideological but also exceptionally important to those who trust 3PVROs with the voter registration applications.

At bottom, 3PVROs exist to help eligible individuals successfully register to vote. The Notification Provision advances that goal. The State's informational requirement and the registration activities of 3PVROs therefore *complement* the mission of the 3PVROs (rather than contravene them, as was the case in *Becerra*).

The LWV Plaintiffs' reliance on *Riley*, 487 U.S. at 797, is similarly unavailing. The statute at issue in *Riley* required, *inter alia*, professional fundraisers to disclose to potential donors the gross percentage of funds retained in earlier charitable solicitations as part of their future solicitations. *Id.* at 784. The Court held that because the commercial aspects of the compelled statement were "inextricably

intertwined" with core protected speech and could not be parceled out, the compelled statement violated the First Amendment. *Id.* at 796-98.

But unlike professional fundraisers acting on behalf of charities, 3PVROs are licensees of the State who are authorized to collect and deliver government forms. *See* Fla. Stat. § 97.0575(1). And telling registrants that 3PVROs may not deliver their applications on time is not intertwined with any core protected speech whatsoever. Nothing about filling out or collecting a voter-registration application is inherently political or persuasive. Indeed, this same "message" is communicated primarily by Florida's Supervisors of Elections when assisting voters with registration, *see, e.g.*, ECF No. 351-1, at 172:11-173:5; 361-2, at 31:17-32:15; 351-3, at 15:2-17, and is accomplished in an entirely non-partisan way without advocacy or persuasive speech of the kind at issue in *Riley*.

Under *Riley*, advocacy and persuasion are part and parcel of solicitation: *i.e.*, persuading someone to financially support a specific cause, which necessarily entails agreement with or endorsement of that cause. The Notification Provision requires the promulgation of information that is nothing of the sort. For that reason, it does not implicate First Amendment protections in the way charitable solicitation does.[8]

[8] *League of Women Voters v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006), is both un-controlling and inapposite. In deciding *Cobb* at the preliminary injunction stage, the Southern District of Florida applied the *Anderson-Burdick* framework and expressly rejected the plaintiffs' arguments that the Third-Party Voter Registration Law burdened their core political speech and was subject to strict scrutiny. *See id.* at

For all these reasons, minimal scrutiny applies, and the notification provision survives it.

2. Alternatively, the Notification Provision Satisfies Intermediate or Heightened Scrutiny.

If this Court declines to apply the *Zauderer* test, it should instead examine the Notification Provision under the intermediate scrutiny test for commercial speech. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980). It should also find that the law passes muster under *Central Hudson* because it directly advances Florida's substantial interest in enforcing the duties of 3PVROs as fiduciaries to voting applicants (as set out in greater detail in the Secretary's Memorandum in Support of Defendants' Motion for Summary Judgment, *see* ECF No. 321-1, 40-43. The LWV Plaintiffs' preferred alternatives, moreover, would not accomplish the State's interests.

Florida has a long history of protecting voters by regulating voter registration. In 1995, when implementing the National Voter Registration Act, Florida decided to change its law to allow 3PVROs to collect registration applications. *See Cobb*, 447 F. Supp. 2d at 1317. The State did, however, impose a number of requirements, such as an oath in writing "acknowledged by the supervisor [or deputy] and filed in the office of the supervisor" that included "a clear statement of the penalty for false

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1331 n.21.

swearing." Fla. Stat. § 98.271(2)(a) (1993). These requirements evolved into a "fiduciary" relationship, underscoring the State's history of caution and care when allowing third-party volunteers to conduct voter registration activities. *See* H.R. Staff Analysis Fla H.B. 1567 (Apr. 4, 2005).[9]

Florida law imposes on fiduciaries a variety of enforceable duties, including the duty "the duty to disclose material facts" to their beneficiaries. *Sallah v. BGT Consulting, LLC*, No. 16-81483-CIV, 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) (citation omitted). The Notification Provision does no more than ensure that 3PVROs abide by each of these fiduciary duties when registering voters.

Notifications in furtherance of fiduciary duties are not unusual. Routine examples include, among other things, judicial recognition of an airline's fiduciary duty to warn their passengers of potential risks from flying with them, especially given the need for passengers to trust the airlines transporting them. *Eastern Air Lines, Inc. v. Silber*, 324 F.2d 38, 40 (5th Cir. 1963) (affirming that if airline knew or should have known of the likelihood of turbulence, "the defendant or its employees would be obligated to warn the passengers").

[9] *Available at* https://www.flsenate.gov/Session/Bill/2005/1567/Analyses/20051567HETEL_h1567b.ETEL.pdf.

3PVROs bear a similar responsibility. 3PVROs know, or should know, that, historically, sometimes they (or their peers) have not delivered voter-registration applications on time. *See, e.g.*, ECF No. 318-54 ¶¶ 17-21; 318-27, at 165:6-66:4. For this reason, they should be aware that they have a common-law duty to warn registrants of this possibility. Rather than leave this duty solely in the realm of the common law, Florida has opted to codify it by creating a statutory (yet targeted) requirement that promises voter registrants interacting with 3PVROs that they will receive complete information concerning their registration options. Because it is difficult to make an informed choice without full and accurate information, the State has opted for the Notification Provision.

The Notification Provision therefore survives because there is a "relevant correlation or substantial relation between the governmental interest and the information required to be disclosed." *See Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (internal quotation marks omitted). In other words, the State has compelling interests in ensuring that Florida citizens are sufficiently informed with regard to their right to vote, which includes avoiding voter confusion as to whether 3PVROs represent the Supervisors of Elections, protecting the integrity of the voter-registration process, and upholding the statutory fiduciary duties of 3PVROs. *See Burson v. Freeman*, 504 U.S. 191, 199, 208-09 (1992) (plurality opinion) (holding a free-speech restriction on election-day solicitation was justified by "compelling

interest[s] in protecting the right to vote," "protecting voters from confusion," and "preserving the integrity of its election process" (internal quotation marks omitted)). Record evidence demonstrates that the risk of late delivery by 3PVROs is real and consequential; when 3PVROs have failed to deliver registration applications on time, voters are disenfranchised. *See, e.g.*, ECF No. 318-54 ¶¶ 17-21; 318-27 at 165:6-66:4, in contrast with LWV Plaintiffs' assertion that this is merely a "rarity," *see* ECF No. 320-1, at 2.

There is, moreover, a "substantial relation" between the State's interests and the State's chosen methods to protect those interests. The Notification Provision clarifies for Florida citizens that, if they use a 3PVRO, their application may not be delivered on time and, to minimize that risk, alternative registration methods remain available. Contrary to the LWV Plaintiffs' assertions, the State cannot accomplish these goals through, *e.g.*, the State communicating its message or through "vigorous[] enforce[ment]" of Florida law penalizing 3PVROs submitting late registration forms, ECF 320-1, at 21-22. The former is not guaranteed to reach the intended audience, and although the latter punishes dilatory 3PVROs, the damage is done and is irremediable once a voter misses the chance to cast a ballot. *Democratic Party of Ga., Inc. v. Crittenden,* 347 F. Supp. 1324, 1346 (N.D. Ga 2018) ("[T]he disenfranchisement of the right to vote is an irreparable injury and one that cannot be easily redressed.").

Simply put, the State has reached the correct, and abundantly reasonable, determination that the most practical way to provide information to all prospective voters engaging with 3PVROs is to have the 3PVRO itself provide that information to those registrants. *See, e.g.*, ECF No. 318-54, at ¶¶ 17-18. A public-relations campaign would be capable of reaching every potential voter who may be approached by a 3PVRO. For instance, if a 3PVRO provides the notification to individuals without access to a computer or the Internet, that may be the only time such information is ever communicated to those individuals. And vigorous enforcement of penalties cannot deter all future violations, especially in the short run. Because the State must inform *all* registrants of disenfranchisement risk in real time to achieve its compelling interest of protecting every citizen's right to vote, there exists a substantial relation between the Notification Provision and the State's interests.

Finally, the LWV Plaintiffs cite a Middle District of Tennessee case, *League of Women Voters v. Hargett*, to argue that strict scrutiny applies to mandatory voter-registration disclosures. ECF No. 241-1, at 21 (citing 400 F. Supp. 3d 706, 730 (M.D. Tenn. 2019)). *Hargett*, however, is distinguishable. In that case, the disclaimer requirement applied to *all* "public communication regarding voter registration status" and was required to be broadcast alongside of "innocuous communications." 400 F. Supp. 3d at 730-31. The overbroad requirement at issue in *Hargett* is a far

cry from Florida's targeted Notification Provision, which targets the only transaction that matters: collection and delivery of registration applications by organizations registered with the State to do so. It provides prospective voters the information they need to make an informed decision when they need it the most. In other words, it is narrowly tailored to serve the State's interests because it is targeted to "the time the application is collected"—*i.e.*, the point at which a prospective voter decides whether to rely on a 3PVRO to timely deliver the registration application. *See* Fla. Stat. § 97.0575(3)(a) (2021).

Because the Notification Provision is (1) a reasonable, non-controversial disclosure requirement that (2) is narrowly confined to organizations registered with the State to collect and deliver registration applications, and (3) directly advances the State's compelling interests in informing and protecting prospective voters entrusting their registration applications to 3PVROs, the Court should uphold it.

B. The non-solicitation provision is neither vague nor overbroad.

"Condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). Yet the LWV Plaintiffs here not only expect "mathematical certainty" but go further by using their "imagination" to "conjure up hypothetical cases in which the meaning of disputed terms will be in nice question." *Id.* at 110 n.15 (alteration omitted) (quoting

American Communications Assn, v. Douds, 339 U.S. 382, 412 (1950)). Their efforts cannot justify a grant of summary judgment in their favor.

1. The non-solicitation provision is not unconstitutionally vague.

A law is unconstitutionally vague under the Fourteenth Amendment's Due Process Clause if it "fails to provide people with ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or if it "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). To pass muster under the Due Process Clause, the State need only establish "reasonably clear lines" between proscribed and permitted conduct. *Smith v. Goguen*, 415 U.S. 566, 574 (1974). Courts are, and should be, exceptionally reluctant to declare statutes void for vagueness. *See, e.g.*, *Parker v. Levy*, 417 U.S. 733, 757 (1974); *Grayned*, 408 U.S. 104. Indeed, if a court can interpret a statute to avoid issues of vagueness, it must do so. *See, e.g.*, *Skilling v. United States*, 561 U.S. 358, 412 (2010); *Buckley*, 424 U.S. at 43-44.

The Court must begin by looking to the statutory text itself, because any "reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014) (quoting *Robinson v. Shell*

Oil Co., 519 U.S. 337, 341 (1997)).[10] Section 102.031 begins with a broad grant of authority to each precincts' election board, which "shall possess full authority to maintain order at the polls and enforce obedience to its lawful commands during an election and the canvass of the votes." Fla. Stat. § 102.031(1). Subsection 2 highlights the purpose of this section by *requiring* the county sheriff to "deputize a deputy sheriff . . . to maintain good order." Fla. Stat. § 102.031(2). Indeed, subsection 2 references "order" at the polls *twice*, while subsection 4(c) grants the "supervisor or the clerk" the authority to "take reasonable action necessary to ensure order at the polling places including, but not limited to, having disruptive and unruly persons removed by law enforcement" showing that proper order in and around polling places is of great importance to Florida. Fla. Stat. § 102.031(2), (4)(c).

"[A]n examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud." *Burson v. Freeman*, 504 U.S. 191, 206 (1992) (plurality op.). To combat these "two evils," "all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting

[10] It is also important to remember the limited scope of the statute. The Non-Solicitation Provision applies to *only* 150-feet outside the polling place. *See* Fla. Stat. §§ 102.031, *et seq*. This very limited area is reserved for the weighty act of contemplating one's choices in an election. *Cf. Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1887 (2018). Outside of the non-solicitation zone, the LWV Plaintiffs are not restricted from giving food or water to anyone who needs it.

compartments." *Id.* Florida's non-solicitation provision seeks the same ends through similar means: restricting certain activities from occurring within 150-feet of a polling place. Fla. Stat. § 102.031(4)(a)-(b). In any event, Florida has a per se interest in maintaining order at the polls.[11]

To maintain order at the polls, the statute prohibits certain forms of solicitation. Subsection 4(a), states that: "*No person, political committee, or other group or organization may solicit voters* inside the polling place or *within 150 feet of a drop box or the entrance to any polling place . . .*." Fla. Stat. § 102.031(4)(a) (emphases added). The word "solicit" is defined to "include, but not be limited to":

> [S]eeking 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; selling or attempting to sell any item; *and engaging in any activity with the intent to influence or effect of influencing a voter*.

Fla. Stat. § 102.031(4)(b) (emphasis added). The Non-Solicitation Provision, by its own terms, sets the floor for impermissible conduct that is never allowed (the

[11] *See Burson*, 504 U.S. at 208 (plurality op.) ("[B]ecause the government has such a compelling interest in securing the right to vote freely and effectively, this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation at issue." (quoting *Munro v. Socialist Workers Party,* 479 U.S. 189, 195 (1986))); *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1220 (11th Cir. 2009) ("[T]he state has a significant interest in protecting the orderly functioning of the election process."). Therefore, the purpose of the statute is clear: the maintenance of order in and around the polls.

enumerated list), while also giving the Supervisors and the local Board some discretion to maintain order and prevent voter intimidation and election fraud (by indicating that "solicit" is "not . . . limited to" the items on the enumerated list).

The LWV Plaintiffs, however, take issue with the "effect of influencing a voter" and "intent to influence" language of the Non-Solicitation Provision. *See* ECF 320-1, at 26-28.[12] As a matter of law, statutory construction, and common sense, none of these provisions are unconstitutionally vague.

First, at least two canons of statutory construction support Defendants' reading. Where, as here, 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). Additionally, "[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.*, 429 F.3d at 1363. When these phrases are construed reasonably in the context of the surrounding text and the object of the provision as a whole (together with the plain meaning of the

[12] Similarly, principles of statutory construction dictate that the phrase "any activity" cannot be read in isolation. *See 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 the surrounding text and the provision as a whole, the provision is clear as to what it prohibits.

word "solicit"), it is apparent that the Non-Solicitation Provision is not unconstitutionally vague.

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 near a polling location. Due process does not demand that level of specificity, particularly since the average person can ascertain, generally, which sort of conduct is unsuitable. Nor is that level of detail necessary to guard against the *de minimis* risk of inconsistent enforcement. Because the Non-Solicitation Provision identifies in a commonsense way, through its plain text and clear purpose, the type of conduct it prohibits, the Non-Solicitation Provision is not unconstitutionally vague.

The Supreme Court in *Grayned* addressed a similar statute, in a similar context, and found that statute to be not unconstitutionally vague. At issue in *Grayned*, was an anti-noise ordinance that contained each of the alleged infirmities the LWV Plaintiffs complain of here. The ordinance in *Grayned* states:

> No person, while on public or private grounds adjacent to any building which is a school or any class thereof is in session, shall willfully make or assist in making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof.

Grayned, 408 U.S. at 107-08. The Court reasoned that a statute "marked by 'flexibility and reasonable breadth, rather than meticulous specificity'" survives a vagueness challenge. *Id.* at 110. In other words, a statutory provision must be read

in the context of the statute as a whole. *Id.* To that end, the Supreme Court found that "[a]lthough the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's announced purpose that the measure is whether normal school activity has been or is about to be disrupted." *Id.* at 112.

The same reasoning applies to the Non-Solicitation Provision here. For example, the "any noise or diversion" language from *Grayned* tracks the Non-Solicitation Provision's "any activity" language. *Compare Grayned*, 408 U.S. at 107-08 *with* Fla. Stat. § 102.031(4)(b). The "which disturbs or tends to disturb the peace or good order" language in *Grayned* correlates directly to the "effect of influencing a voter" language[13] in the Non-Solicitation Provision. *Compare Grayned*, 408 U.S. at 107-08 *with* Fla. Stat. § 102.031(4)(b). Although the ordinance in *Grayned* could be read, just as the LWV Plaintiffs do here, as "open-ended," ECF No. 320-1, at 26, that did not prevent the Court from finding the ordinance neither vague nor overbroad. *See Grayned*, 408 U.S. at 110 (vagueness); *id.* at 117 (overbreadth). Just as it was unnecessary for the ordinance in *Grayned* to enumerate

[13] There are several laws in which an "effect" requirement is built into the law itself. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (noting that "Congress substantially revised § 2 [of the Voting Rights Act] to make clear that a violation could be proved by showing discriminatory effect alone"); *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002) ("The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion.").

every kind of noise or diversion that "tend[] to disturb the peace or good order," *id.*, Florida did not need to specifically define the meaning of "influence a voter" to coherently communicate the prohibition to those affected by it. The words of the provision and the statutory context surrounding it provide more than sufficient clarity and guidance to satisfy due process: the activities restricted by the Non-Solicitation Provision are *only* those activities done to influence voting because the prevention of improper influence and voter intimidation is the *essence* of the Non-Solicitation Provision itself.[14]

If the Non-Solicitation Provision fails on vagueness grounds, then so too would many other statutes. Consider, for example, the prohibition on expenditures to influence voting, 18 U.S.C. § 597, the prohibition on the coercion of others to engage in political activity, 18 U.S.C. § 610, and the cases long-since upholding such statutes. *See United States v. Chestnut*, 394 F. Supp. 581, 587-88 (S.D.N.Y. 1975) ("All that is required is that the language employed convey a reasonable degree of certainty adequate to inform him of what is or is not prohibited.").

[14] Further evidence of this is found in federal law where the Voting Rights Act allows an individual with a covered condition to choose any person to assist the individual voter *except for* the "voter's employer or agent of that employer or office or agent of the voter's union." 52 U.S.C. § 10508. The reason this limitation exists in "one of the most consequential . . . and amply justified exercises of federal legislative power in our Nation's history," *Shelby County v. Holder*, 570 U.S. 529, 562 (2013), is clear: to protect voters from undue intimidation and harassment.

Finally, despite the LWV Plaintiffs' protestations to the contrary, the interpretation advanced by the State is not "superfluous." ECF No. 320-1, at 27-28. A political party may do any number of things to attempt to *influence* a voter while stopping short of expressly *seeking* a vote. For example, imagine an organization that wants to interact with voters within the non-solicitation zone whose members wear shirts with a web address on it (or an entreaty to visit a website). If that web address contains a list of recommended candidates, it would run afoul of the prohibition on "engaging in any activity with the intent to influence or effect of influencing a voter." It is not clear, however, that those shirts would be prohibited under the "seeking or attempting to seek any vote" provision of the law, *see* Fla. Stat. § 102.031(4)(a), nor is it clear it would be covered under the "distributing or attempting to distribute any political or campaign material." *Id.*

Take, as another example, a situation in which an individual takes pictures of voters in line and posts them on the internet with threats of harassment if the voter casts a ballot in favor of a certain cause. Doing so would not constitute "seeking or attempting to seek any vote, fact, opinion," *id.*; instead, the harasser is seeking to *stop* voters from casting a ballot. It would, however, plainly constitute "engaging in any activity with the intent to influence . . . a voter" provision. *See id.* With ubiquitous cell phone usage and profligate digital harassment, providing extra protections against untoward voter intimidation, particularly around the area where

votes are cast, is plainly warranted. The Non-Solicitation Provision exists to provide this protection.

As the foregoing examples show, influencing a voter is broader than merely seeking a voter's vote. It follows, then, that the existing prohibition on "seeking or attempting to seek any vote" is not co-extensive with improper influence. For this reason, it is plainly not superfluous.

2. The non-solicitation provision is not overbroad.

The overbreadth doctrine prohibits regulation of substantially more protected speech than necessary to achieve regulatory purposes. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). For an overbreadth challenge to succeed, a regulation's over-inclusiveness "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. That said, the overbreadth is a "manifestly[] strong medicine" sparingly employed by courts only "as a last resort." *Id.* at 613. For this reason, if "a limiting construction has been or could be placed on the challenged statute," the statute shall not fall. *Id.* at 613. Indeed, "[i]t has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be readily susceptible to a narrowing construction, it will be upheld." *Virginia v. American Booksellers Ass'n.,* 484 U.S. 383, 397 (1988) (internal quotations omitted). And where, as here, "conduct and not merely speech is

involved, . . . the overbreadth of a statute must not only be real, but substantial as well." *Id.* at 615.

As an initial matter, that the LWV Plaintiffs seek to engage in conduct and not speech weighs in heavily in favor of the Non-Solicitation Provision's constitutionality. The LWV Plaintiffs claim that they are prevented from providing food, water, and assistance in all instances. ECF No. 320-1, at 30. If so, their wish to engage in *conduct* undercuts their overbreadth arguments. *See Broadrick,* 413 U.S. at 615. This is especially true because the conduct they believe is prohibited 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); *accord Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale (FNB II)*, 11 F.4th 1266, 1292 (11th Cir. 2021); *see also* ECF No. 321-1, 25-28.

To the extent the Non-Solicitation Provision prohibits the distribution of food and water to voters, and even if the distribution of food and water were protected by the First Amendment (it's not), the State could *still* regulate this activity because the statute regulates nonpublic forums (*i.e.*, polling locations and surrounding areas). Nonpublic forums, in turn, remains subject to content-based speech restrictions, including political-advocacy prohibitions.[15] *See Mansky*, 138 S. Ct. at 1885-86. If

[15] The U.S. Supreme Court's First Amendment precedent permits states to create "nonpublic forums." *See Mansky*, 138 S. Ct. at 1885.

the regulation of a nonpublic forum is reasonable (and here, it is), it is lawful, and a separate overbreadth analysis is not appropriate. *See Hodge v. Talkin*, 799 F.3d 1145, 1171 (D.C. Cir. 2015). Specifically, because the Non-Solicitation Provision plainly targets activities taken with the intent or effect of influencing a voter, it is materially identical to political advocacy that the State may constitutionally restrict in and around polling locations. *See Mansky*, 138 S. Ct. at 1885-86.

Although the LWV Plaintiffs ask the Court to disregard *Mansky*, ECF No. 320-1, at 31, *Mansky*'s non-public forum discussion cleanly tracks this case. In *Mansky*, the Court reasoned that a polling place is a "government-controlled property set aside for the sole purpose of voting." *Id.* at 1886. Florida's 150-foot non-solicitation zone (during an election) is also "government-controlled property set aside for the sole purpose of voting." *Id.*[16] Naturally, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully directed." *Greer v. Spock*, 424 U.S. 828, 836 (1976). And at the time of an election, the State controls the property within 150 feet of a polling place for use in an election, even if the area might constitute a public forum during other times.

Mansky also explains that the State's interest outside polling place sets the

[16] *See also Burson,* 504 U.S. at 215-216 (Scalia, J. concurring) ("'Streets and sidewalks' are not public forums *in all places*.") (emphasis in original) (quoting *Geer*, 424 U.S. 828).

relevant floor for determining the State's interests inside the polling place. *See Mansky*, 138 S. Ct. at 1887 ("[T]hat the State was warranted in designating an area for the voters as 'their own' as they *enter* the polling place suggests an interest more significant, not less, *within* the polling place." (emphasis in original)). For all these reasons, *Mansky* commands that government regulation of speech in the area surrounding a polling place is a constitutional use of State power.

Even if the Court were to conclude that the area around a polling place is a public forum, the Non-Solicitation Provision is *still* constitutional because the "right to use a public place" for protected First Amendment activity may be restricted "for weighty reasons." *Grayned*, 408 U.S. at 115. In other words, the State's imposition of reasonable time, place, and manner restrictions depend on context. *Id.* at 115-117. "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Id.* at 116.

In this context, the "normal" activity of polling places and there surrounding areas is voting; *i.e.*, contemplation of choices and casting ballots. *See Mansky*, 138 U.S. at 1887. Allowing individuals to exert pressure on voters while they undertake this responsibility contravenes this activity. *See Burson*, 504 U.S. at 207-08 (holding that the restrictions in question were "common-sense" and that "[t]he only way to preserve the secrecy of the ballot is to limit access around the voter."). For this reason, the Supreme Court has found "that some restricted zone[s]" are

"necessary . . . to serve the States' compelling interest in preventing voter intimidation and election fraud." *Burson*, 504 U.S. at 206 (plurality op.); *see also id.* at 216 (Scalia, J. concurring in judgment) (reasoning that the area immediately around a polling place is "not a traditional public forum" yet agreeing with the plurality that the Tennessee non-solicitation law was constitutional); *Mansky*, 138 S. Ct. at 1886-87 (agreeing that it is "not an unconstitutional choice" to have a protected zone around a polling place (quotation omitted)). For its part, the Eleventh Circuit "believe[s] that the sanctity of the voting process and the abuse it has historically faced *must allow* the Florida legislature to exercise some foresight, to take precautions, and to prohibit questionable conduct near polling places before that conduct proves its danger." *Citizens for Police Accountability Political Committee*, 572 F.3d at 1222.

Accordingly, Florida's Non-Solicitation Provision reasonably regulates polling locations, which are nonpublic fora, and, accordingly, complies with the First Amendment. Even if the Court considers an area around a polling place to be a public forum, the non-solicitation provision is *still* constitutional. ECF No. 321-1, at 29-31. Therefore, the LWV Plaintiffs are not entitled to summary judgment on their overbreadth claim.

CONCLUSION

For the foregoing reasons, and the reasons contained within the Secretary, Attorney General, and Supervisors' Joint Motion for Summary Judgment, ECF No. 320; 320-1, this Court should deny the LWV Plaintiffs' motion for summary judgment and enter summary judgment against the LWV Plaintiffs.

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. It contains 7,116 words.

/s/ Mohammad Jazil

CERTIFICATES OF SERVICE

I certify that on December 3, 2021, I served the foregoing on all counsel of record through this Court's CM/ECF system.

/s/ Mohammad Jazil