UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., et al.,

Plaintiffs,

v.

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

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE, and NATIONAL REPUBLICAN SENATORIAL COMMITTEE,

Intervenor-Defendants.

Cases Consolidated for Trial:

Nos.: 4:21-cv-186-MW/MAF
4:21-cv-187-MW/MAF
4:21-cv-201-MW/MAF
4:21-cv-242-MW/MAF

LEAGUE, _FLORIDA RISING TOGETHER_ AND _HARRIET TUBMAN FREEDOM FIGHTERS_ PLAINTIFFS' JOINT BRIEF IN RESPONSE TO COURT'S ORDER REQUESTING BRIEFING ON SPECIFIC QUESTIONS RELATED TO FIRST AMENDMENT SCRUTINY

Pursuant to the Court's Order Requesting Briefing on specific questions related to First Amendment scrutiny, ECF No. 636, the *League, Florida Rising Together* and *Harriet Tubman Freedom Fighters* Plaintiffs in the above-captioned

consolidated cases respond to the Court's questions as they relate to the Registration Disclaimer Provision as follows:

COURT'S QUESTION 1: What level of scrutiny applies to Plaintiffs' speech when registering Floridians to vote?

The Registration Disclaimer Provision is subject to strict scrutiny because it "compel[s] individuals to speak a particular message[.]" *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018); *see also Riley v. Nat'l Fed'n of Blind of N.C.*, 487 U.S. 781, 795 (1988). "When the government 'compel[s] speakers to utter or distribute speech bearing a particular message,' . . . such a policy imposes a content-based burden on speech and is subject to strict-scrutiny review." *McClendon v. Long*, 22 F.4th 1330, 1337-38 (11th Cir. 2022) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S.622, 641-42 (1994)). As Plaintiffs have previously explained, ECF No. 583, and Defendants have conceded, ECF No. 582, it makes no difference that Plaintiffs may comply with the Registration Disclaimer Provision by displaying a written sign or disclaimer rather than through literal speech—the same was true in both *NIFLA* and *McClendon*. *See NIFLA*, 138 S. Ct. at 2369; *McClendon*, 22 F.4th at 1333-34.

Defendants have analogized the Registration Disclaimer Provision to compelled disclosure requirements, which are subject to "exacting scrutiny" rather than "strict scrutiny." ECF No. 582. But as the Supreme Court recently held, what distinguishes compelled disclosure cases (subject to exacting scrutiny) from compelled speech cases (subject to strict scrutiny) is not the "electoral context"—

compelled disclosure laws are subject to exacting scrutiny even outside of that context. *Ams. for Prosperty Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021). Rather, what distinguishes compelled disclosure cases is the nature of the compulsion involved.

Compelled disclosure cases involve the "compelled disclosure of *affiliation with* groups engaged in advocacy," which operates as a "restraint on freedom of association." *Id.* at 2382 (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958)) (emphasis added). Examples include laws compelling disclosure of an organization's donors, *id.* at 2380, and membership lists, *NAACP*, 357 U.S. at 460. Nearly all the cases Defendants cited in their prior submission to the Court on this subject, ECF No. 582, fall into this category. *See Citizens United v. FEC*, 558 U.S. 310, 366 (2010) (applying exacting scrutiny to requirement that "televised electioneering communications funded by anyone other than a candidate must include a disclaimer" identifying the funder); *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1240, 1245 (11th Cir. 2013) (applying exacting scrutiny to requirement that PACs "must disclose their donors who seek to influence Florida elections"); *Gaspee Project v. Mederos*, 13 F.4th 79, 84-85 (1st Cir. 2021) (applying exacting scrutiny to law requiring disclosure of donor information by organizations engaged in political spending); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 548-49 (4th Cir. 2012) (applying exacting scrutiny to challenge to PAC donor and

expenditure disclosure requirements); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 874-75 (8th Cir. 2012) (similar); *Nat'l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34 (1st Cir. 2012) (similar); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010) (similar); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (similar). Not one of those cases compelled an organization or individual to express a message with which it disagreed, rather than merely disclosing information about its donors and expenditures.[1]

The Registration Disclaimer Provision is not a compelled disclosure law subject to exacting rather than strict scrutiny, because it does not require Plaintiffs to disclose their funders or their members. Rather, the Registration Disclaimer Provision is a textbook compelled speech law. It compels Plaintiffs to express a message—that they might not deliver voter registration forms on time, and that the voter can register to vote in other ways—that Plaintiffs consider misleading, that undermines Plaintiffs' registration efforts, and with which Plaintiffs disagree. In that way, the Registration Disclaimer Provision is directly analogous to the law at issue in *NIFLA*, which compelled pro-life crisis pregnancy centers to express a message—that women could get low cost care, including abortion care, elsewhere—that, even

[1] Defendants also cited *Citizens for John W. Moore Party v. Board of Election Commissioners*, 794 F.2d 1254 (7th Cir. 1986), but that was a challenge to a law preventing one person from circulating petitions for candidates from more than one political party in a given election cycle—it did not involve compelled expression or compelled disclosure at all.

if factually true, directly undermined the centers' work and was contrary to their values. *See NIFLA*, 138 S. Ct. at 2371 ("By requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly alters the content of petitioners' speech." (citation and internal quotation marks omitted).

Anderson-Burdick analysis does not substitute for a compelled speech analysis here, because the Registration Disclaimer Provision "does not control the mechanics of the electoral process," and is "a regulation of pure speech." *McIntyre v. Ohio Election Comm.*, 514 U.S. 334, 345 (1995).[2] "'[E]ncouraging others to register to vote' is 'pure speech,' and, because that speech is political in nature, it is a 'core First Amendment activity.'" *League of Women Voters of Tenn. v. Hargett*, 400 F. Supp. 3d 706, 720 (M.D. Tenn. 2019) (quoting *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1158 (N.D. Fla. 2012)).[3] *NIFLA* is explicit

[2] This distinction makes little practical difference, however, because as the Supreme Court held in *Bonta*, exacting scrutiny requires narrow tailoring just as strict scrutiny does, and even "a substantial relation to an important interest is not enough to save a disclosure regime that is insufficiently tailored." *Bonta*, 141 S. Ct. at 2384.

[3] In contrast, in *League of Women Voters of Fla. v. Browning*, 575 F. Supp. 2d 1298, 1322 (S.D. Fla. 2008), the court applied *Anderson-Burdick* to a voter-registration regulation that did "not place any direct restrictions or preconditions on" organizations' "interactions with prospective voters," but "simply regulates an administrative aspect of the electoral process—the handling of voter registration applications by third-party voter registration organizations *after* they have been collected from applicants." Here, the Registration Disclaimer Provision *does* place direct restrictions or preconditions on Plaintiffs' interactions with prospective voters, by requiring Plaintiffs to deliver the disclaimer with which they disagree.

that laws "compelling individuals to speak a particular message," including by posting a message, are classic, content-based speech restrictions at the core of the First Amendment's protections. 138 S. Ct. at 2371. Under *McIntyre*, such restrictions are not subject to *Anderson-Burdick*, even in the electoral context. *See* 514 U.S. at 345. And while *McIntyre* applied exacting rather than strict scrutiny to the law there at issue, that was because that law prohibited only *anonymous* speech, and thus functioned as a "disclosure requirement," requiring that any speech be accompanied by the disclosure of the speaker. *Id.* at 336, 348.

Absent some categorical exception, the Registration Disclaimer Provision is therefore subject to strict scrutiny. *NIFLA*, 138 S. Ct. at 2371. No such exception applies. The Court has already held that the speech at issue is not commercial. ECF No. 636 at 2; ECF No. 380 at 18. And as explained in response to the Court's second question, *infra*, there is no basis for applying a lesser level of scrutiny to the Registration Disclaimer Provision as professional speech, either.

Consistent with this analysis, in *Tennessee State Conference of NAACP v. Hargett*, 420 F. Supp. 3d 683, 692 (M.D. Tenn. 2019), the court held unconstitutional a law that required organizations making "public communication regarding voter registration status" to "display a disclaimer that such communication is not made in conjunction with or authorized by the secretary of state." In doing so, the court explained that the law implicated "the well-developed caselaw regarding

government-compelled speech" and was therefore presumptively unconstitutional and could be justified only if the government proved it was narrowly tailored to serve compelling state interests—the strict scrutiny standard. *Id.* at 707-08. The disclaimer failed to meet that standard and was preliminarily enjoined. *Id.*[4]

COURT'S QUESTION 2: What legal basis, if any, is there to justify treating Plaintiffs' voter registration activities like other professional conduct (i.e., informed consent in the medical context)?

No legal basis exists to apply a lower level of scrutiny to the Registration Disclaimer Provision on the theory that Plaintiffs' voter registration activities are "professional" conduct.

First, while *NIFLA* assumed *arguendo* that a lower tier of scrutiny might apply to laws compelling professional speech, the Eleventh Circuit has since expressly rejected any "professional speech" exception to strict scrutiny, explaining that "characterization of [challenged] ordinances as professional regulations cannot lower" the strict scrutiny standard, because "[t]he Supreme Court has consistently rejected attempts to set aside the dangers of content-based speech regulation in professional settings[.]" *Otto v. City of Boca Raton*, 981 F.3d 854, 861 (11th Cir. 2020). Thus, at least in the Eleventh Circuit, content-based regulations of speech in

[4] The challenged provisions in Tennessee were repealed in April 2020 in the wake of the preliminary injunction ruling. Tenn. Pub. Laws 2020, Ch. 654 (passed as HB 2363).

the professional context—including in the medical context as in *Otto*—are subject to strict scrutiny.

The fact that Third-Party Voter Registration Organizations ("3PVRO") must register with the state does nothing to change this. Even if the registration requirement were akin to a licensing requirement, *NIFLA* explains that to lower the tier of scrutiny due to a licensing regime would "give[] the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement. States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose 'invidious discrimination of disfavored subjects.'" *NIFLA*, 138 S. Ct. at 2375 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423-24 n.19 (1993)).

Further, where courts have applied lesser scrutiny to some regulations of professionals' speech, they have done so only for such professionals' *commercial* speech. "[T]he lawyer's statements in *Zauderer* would have been 'fully protected' if they were made in a context other than advertising." *NIFLA*, 138 S. Ct. at 2374 (quoting *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 637 n.7 (1985)). The professionals in question have been those traditionally required to hold licensure and meet certain state-established educational and training standards. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884

(1993) (doctors); *Zauderer*, 471 U.S. at 651 (attorneys); *Borgner v. Brooks*, 284 F.3d 1204 (11th Cir. 2002) (dentists).

As this Court has already noted, Plaintiffs' "speech is not commercial." ECF 636 at 2 (citing, *e.g.*, ECF 380 at 18). And Florida law does not in fact impose a licensing requirement on registration organizations, but merely requires them to register with the State. *See* Fla. Stat. § 97.0575(1). State law does not require voter registration canvassers to meet any educational requirements or obtain licensure. *See* Fla. Stat. § 97.0575; Fla. Admin. r. 1S-2.042. And the Florida statute does not allow the Secretary to decline to provide a 3PVRO identification number to a registering organization based on failure to meet any particular educational standards or a licensing fee. *See* Fla. Stat. § 97.0575; Fla. Admin. r. 1S-2.042.

The fact that organizations may view themselves as "professional" in the sense of acting in a manner likely to induce trust does not warrant their treatment as "professional" in any legal sense consistent with common law duties such as healthcare providers. And while organizations "serve" their community in the sense of civic responsibility and engagement, they do not—nor could they under state or federal law—be paid by voters for registration "services."

In addition, the lower tier of scrutiny applicable to certain commercial, professional speech—including some informed consent requirements—is limited to "the giving of truthful, nonmisleading information about the nature of the procedure"

the doctor proposes to perform. *Casey*, 505 U.S. at 882; *see also NIFLA*, 138 S. Ct. at 2372 (lesser scrutiny for laws requiring professionals to disclose "purely factual and uncontroversial information about the terms under which . . . services will be available" (quoting *Zauderer,* 471 U.S. at 651) (internal quotation marks omitted)). *NIFLA* held that the challenged notice requirement did not fall within this category because "it require[d] these clinics to disclose information about *state*-sponsored services" rather than the terms of their own services. *Id.* at 2372. Similarly, here, to the extent portions of the disclaimer do include any factual information, those portions require Plaintiffs' to disclose information about other modes of registration offered by the state, not their own voter registration activities.[5] And the remaining portions of the mandatory disclaimer, requiring Plaintiffs to stay that they "might not" turn in applications on time, is misleading at best and false at worst, given how rarely applications are submitted after the close of registration.

[5] Moreover, much of this information is misleading or false. In particular, only voters with Florida-issued driver licenses and ID cards can register to vote online, Fla. Stat. § 97.0525(4)(a); and there is no comprehensive tracking system for 3PVROs to point to as to delivery status, because the statewide registration lookup contains no information regarding the application unless and until it is processed, and the person is added to the voter roll. ECF 402 at 32, ¶¶ 22–24. And, as Plaintiffs will argue elsewhere, the collective effect of the Registration Disclaimer Provision, by including the other "options" available for registration in the same breath as requiring Plaintiffs to convey that *they* might not deliver the forms on time, is dissuasive rather than informational in nature.

Thus, the Registration Disclaimer Provision is not subject to any lower tier of scrutiny as professional speech. Rather, it must satisfy strict scrutiny.

Respectfully submitted this 26th day of February, 2022.

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I HEREBY CERTIFY that on February 26, 2022 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.

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