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, et al.,

Intervenor-Defendants.

Cases Consolidated for Trial:

Case No.: 4:21-cv-186-MW/MAF
4:21-cv-187-MW/MAF
4:21-cv-201-MW/MAF
4:21-cv-242-MW/MAF

THE SECRETARY'S AND INTERVENOR-DEFENDANTS' RESPONSE TO NAACP, FRT, AND LOWV PLAINTIFFS' MOTION TO PRECLUDE DEFENDANTS' REFERENCE TO FLA. STAT. § 101.051(2)

The Secretary and Intervenor-Defendants, pursuant to this Court's order on February 1, 2022, *see* ECF No. 506, respond to Plaintiffs' motion to preclude Defendants' and Intervenor-Defendants' reference to Fla. Stat. § 101.051(2) during cross-examinations to insinuate that Plaintiffs' witnesses have violated the statute. *See* ECF No. 505. Plaintiffs argue that such questioning is "pointless" because Section 101.051(2) allegedly does "not apply to these activities," and they claim that

the Section did not "prohibit[] Plaintiffs' line-relief activities before SB 90 was enacted." *Id.* at 1-2.

Plaintiffs' newfound position is surprising because Plaintiffs argue in their opening statement (as they have throughout this litigation) that Senate Bill 90 changed Florida law to prohibit them from providing assistance to blind, disabled, or illiterate voters. Plaintiffs' Opening Statement, ECF No. 439 at 20–21 (citing 52 U.S.C. § 10508). Yet the operative provision of Section 101.051(2) did not change, is not being challenged.[1]

Regardless, Plaintiffs misconstrue Section 101.051(2) and erroneously contend that it is irrelevant to this case.

First, Plaintiffs argue that the statute's prohibition only narrowly applies to "efforts to persuade blind, disabled, or illiterate voters to *let them go into the voting booth with them*." *See* ECF No. 505 at 3 (emphasis added). But that is not all Section 101.051(2) prohibits. Beyond its restriction on being physically present in the voting booth with an elector (except as permitted under Subsection (1)), Subsection (2) goes

[1] Senate Bill 90 amended Section 101.051(2) to prohibit solicitation of blind, disabled, or illiterate voters within 150 feet of the entrance of a polling place or an early voting site, rather than within 100 feet as was the law pre-SB 90, and added "a drop box location" to the list of sites where the non-solicitation zone applies. *Compare* Fla. Stat. § 101.051 (2) (2020), available at https://dos.myflorida.com/media/703582/2020-election-code-complete.pdf, *with* Fla. Stat. § 101.051 (2) (2021) (LexisNexis, Lexis Advance through the 2021 Regular and First and Second Extraordinary Sessions).

on to broadly provide that no one may "solicit any elector in an effort to *provide assistance to vote* pursuant to subsection (1)." Fla. Stat. § 101.051(2) (emphasis added).[2] Subsection (1), in turn, describes the assistance that is permitted for blind, disabled, or illiterate voters: any such voter may "request the assistance of two election officials or some other person of the elector's own choosing . . . to assist the elector in casting his or her vote." Fla. Stat. § 101.051(1). Assistance in casting one's vote is plainly not confined to the act of going into the voting booth together, as confirmed by Subsection (1)'s separate provision allowing blind, disabled, or illiterate voters to receive assistance "*before* retiring to the voting booth." *Id.* (emphasis added).

Although Plaintiffs attempt to conflate "assist[ing] the elector in casting his or her vote" with being "in the voting booth" with the elector, the statutory text

[2] Specifically, subsection (2) begins by providing that "[i]t is unlawful for any person to be in the voting booth with any elector except as provided in subsection (1)." § 101.051(2). Importantly, the subsection's next sentence uses different language for the *solicitation* it prohibits—*i.e.*, soliciting "in an effort to provide assistance to vote." *Id.* If the Florida legislature intended to confine the solicitation ban to merely attempting to provide assistance in the voting booth, it knew how to say that. *Cf. Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks omitted)). Because the legislature used more expansive language in the second sentence, this Court should "avoid a reading which renders some words [of the statute] altogether redundant." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) (applying canon against surplusage).

clearly distinguishes between the two, and provides for a wider range of potential assistance that disabled voters can request. In fact, Subsection (1) expressly permits assistance with reading the ballot's items before the voter retires to the voting booth (presumably including while waiting in line), while Subsection (2) indicates that an individual of the person's choosing can also assist an elector by being "in the voting booth" with the elector as permitted by Subsection (1). *Id.* § 101.051(2). Alternatively, Subsection (1) permits a person of the elector's choice to "retire to the voting booth" *on behalf of* the elector to cast the elector's ballot according to his or her choice, without the elector physically in the voting booth at all. *See id.* § 101.051. Contrary to Plaintiffs' assertion, then, providing "assistance to vote pursuant to subsection (1)" is not limited to going into the voting booth with the elector, but includes a wider range of options for accommodating the particular needs of individual disabled voters. Plaintiffs' myopic interpretation of Section 101.051 is specious.

Instead, interpretating these provisions accurately[3] requires holistically reading the phrase "assist[ing] the elector in casting his or her vote" to encompass both assistance that takes place *before* entering the voting booth as well as assistance

[3] "The provisions of a text should be interpreted in a way that renders them compatible, not contradictory." *City Beverage-Illinois, LLC v. Vital Pharm., Inc.*, No. 20-61353-CIV, 2021 U.S. Dist. LEXIS 88308, at *9 (S.D. Fla. May 10, 2021) (citations omitted).

within the voting booth. Defendants maintain that Section 101.051 permits such assistance even as blind, disabled, or illiterate voters wait in line to cast their votes, as long as the assistance is requested by the voter rather than as a result of being solicited while they are actually in line.[4] It follows, then, that Section 101.051(2) prohibits people from approaching blind, disabled, or illiterate voters waiting in line to vote. Regulations such as this serve a compelling interest; they maintain a zone of serenity around the polling place so voters may exercise their fundamental rights free from interference. *Cf. Citizens for Police Accountability Pol. Comm. v. Browning*, 572 F.3d 1213, 1220-21 (11th Cir. 2009) (recognizing need for "a zone of order around the polls" because "it is probable that some—maybe many—voters faced with running gauntlet will refrain from participating in the election process merely to avoid the resulting commotion").

Which brings us to Plaintiffs' argument that Defendants' questioning

[4] Separately, this point is important to Defendants' argument that Plaintiffs' Section 208 claim fails. Defendants contend that Section 101.051 adheres closely to the protections afforded under Section 208 of the Voting Rights Act, which directly undermines Plaintiffs' argument that the non-solicitation provision is preempted by Section 208, as outlined further in Defendants' briefing in this case. *See, e.g.*, Joint Response to Florida Rising Plaintiffs' Mot. for Partial Summary Judgment, 4:21-cv-201, ECF No. 274 at 28-29. Importantly, in interpreting the scope of Section 208's protections, Courts have consistently applied it to "all aspects of the voting process" rather than just the act of voting in the voting booth. *United States v. Berks Cnty.*, 277 F. Supp. 2d 570, 584 (E.D. Pa. 2003); *see also OCA-Greater Hous. v. Texas*, 867 F.3d 604, 614-15 (5th Cir. 2017) (rejecting contention that "the term refers only to the literal act of marking the ballot"); *id.* at 615 ("'To vote' . . . plainly contemplates more than the mechanical act of filling out the ballot sheet.").

regarding Section 101.051(2) is irrelevant to Plaintiffs' claims.

To the contrary, Defendants' questioning on this issue is highly relevant because it goes to the heart of Plaintiffs' standing to sue. Plaintiffs cannot satisfy the redressability prong for Article III standing when they challenge one provision of law (§ 102.031(4)(b)), but another provision of law (§ 101.051(2)) still serves as a bar to relief. The Eleventh Circuit and other courts agree. *See, e.g.*, *KH Outdoor, L.L.C. v. Clay Cnty., Fla.*, 482 F.3d 1299, 1303 (11th Cir. 2007) ("Any injury [plaintiff] actually suffered … is not redressible because [their actions] failed to meet the requirements of other statutes and regulations not challenged."); *Fla. Family Policy Council v. Freeman*, 561 F.3d 1246, 1255-58 (11th Cir. 2009) (nonprofit group lacked redressability in challenging a canon of judicial conduct, but not the related statute "requir[ing] the same thing," because "the chill wind from [the other would] still blow"); *Harp Adver. Ill., Inc., v. Village of Chicago Ridge, Ill.*, 9 F.3d 1290, 1292 (7th Cir. 1993) ("[Plaintiff] suffers an injury…, but winning the case will not alter that situation.").

Thus, if Plaintiffs are correct that Senate Bill 90's non-solicitation provision prohibits approaching disabled voters to assist them in the non-solicitation zone, the existence of an alternative statutory provision (not challenged in this action) prohibiting the same conduct would preclude relief for Plaintiffs here.

Importantly, Plaintiffs themselves have repeatedly argued that Senate Bill 90

prohibits them from approaching disabled voters in the non-solicitation zone to assist them while waiting to vote. *E.g.*, NAACP Pls.' Am. Compl., ECF No. 45 ¶ 161 (alleging that the non-solicitation provision may expose "volunteers to potential criminal liability" for aiding voters with disabilities in the non-solicitation zone); Opening Statement, ECF No. 439 at 14 (arguing that the non-solicitation provision prevents Plaintiffs from "providing non-partisan assistance to voters in line to vote, including those with disabilities and those needing language assistance").

Plaintiffs have thus opened the door to the relevance of whether a separate provision of Florida law prohibits the conduct they allegedly engaged in. For instance, Cecile Scoon, President of the League of Women Voters of Florida, testified on the first day of trial of an instance when she assisted a voter at a polling location. Ms. Scoon noticed an elderly voter getting out of a car who "normally walked with a walker,"[5] so she "immediately went over to the elderly lady" to stabilize her, asked her if she "was going to vote," and assisted her in line to the door of the polling location. *See* January 31, 2022 Tr. 60:5-18. She further testified that a "good portion" of such assistance she and other League members provide to voters waiting at the polls in the non-solicitation zone is "physical support." *Id.* at 61:10–13, 59:2–60:4; *see also id.* at 219:14-19, 221:25–222:10, 227:3-10, 227:25–228:17

[5] *Cf.* 28 C.F.R. § 35.137 ("A public entity shall permit individuals with mobility disabilities to use . . . manually-powered mobility aids, such as walkers . . . in any areas open to pedestrian use.").

(testimony by Esteban Garces that Poder Latinx staff approached voters to provide language assistance at a distance of 50 feet from the polling location, including while voters were waiting in line). Contrary to Plaintiffs' aspersions, *see* ECF No. 505 at 4, Defendants have asked questions about the propriety of these activities under Florida law to build a record in support of their redressability argument, not to "waste time" or "sow confusion."

Finally, Plaintiffs' concern that this line of questioning creates "serious risk of unfair prejudice," ECF No. 505 at 4, is undermined by the fact that this is a bench trial. As the Court has repeatedly instructed during this trial, judges as the triers of fact can more easily separate out relevant testimony from any potential prejudicial impact. The standard for excluding evidence is thus less severe here, particularly where the evidence is directly material to Defendants' redressability argument, and where Defendants seek to preserve this information for the record and the benefit of any reviewing court. That said, Defendants will continue to exercise prudence in only raising such questions where a foundation of testimony, in conjunction with Plaintiffs' and third-parties' filings and arguments in this case, make it relevant to Defendants' arguments in response.

For these reasons, Plaintiffs' motion should be denied.

Dated: February 3, 2022 Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to all counsel of record through the Court's CM/ECF system on February 3, 2022.

/s/ Mohammad O. Jazil
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