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

FLORIDA RISING TOGETHER, et al., Plaintiffs, v. LAUREL M. LEE, in her official capacity as the Secretary of State of Florida, et al., Defendants.	Case No. 4:21-cv-201-MW-MJF

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE FLORIDA RISING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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Plaintiffs submit this memorandum in further support of their motion for summary judgment on Counts 5, 6, and 8 (ECF 241), and in response to Defendants Lee, Hays, and Doyle's Opposition (ECF 274) ("Opp.") and Defendant White's Response (ECF 275). Defendants cross-moved for summary judgment on these counts, confirming that the parties agree there are no disputed material issues of fact. None of the other 64 Supervisor Defendants opposes the motion. ECF 267, 269, 270.

Defendants point to no disputed material facts that would preclude summary judgment on Plaintiffs' compelled speech, vagueness, and preemption claims. Instead, Defendants rely on incorrect legal standards and raise meritless jurisdictional issues. Because Defendants' legal arguments are unavailing, the Court should grant Plaintiffs' motion for summary judgment on Counts 5, 6, and 8.

ARGUMENT

I. SECTION 7 COMPELS SPEECH IN VIOLATION OF THE FIRST AMENDMENT

A. Section 7 Is Subject to Strict Scrutiny

Section 7 of SB90 compels speech by Plaintiffs in violation of the First Amendment. A law that alters the content of a person's speech is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *NIFLA v. Becerra*, 138 S. Ct.

2361, 2371 (2018). Defendants do not come close to establishing Section 7 can survive the strict scrutiny mandated by *NIFLA*.

Defendants incorrectly assert Section 7 is subject to "minimal scrutiny" under *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985). Opp. 5-12. That argument ignores that *Zauderer* is a "commercial speech" case, and the compelled statements regarding voter registration plainly do not constitute commercial speech. Defendants admit as much when they argue that the statements are "akin to commercial speech.," *id.* at 9, rather than commercial speech.[1]

In any event, even commercial speech does not "retain[] its commercial character when it is inextricably intertwined with otherwise fully protected speech." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988). The statements compelled by Section 7 are "intertwined with" the other protected messages that 3PVROs convey in the context of encouraging and assisting Floridians to register to vote. *See generally* ECF 280, SOF ¶12. Consequently, even if the statements compelled by Section 29 were deemed commercial speech, they would still be subject to strict scrutiny in light of the overall context in which they must be made.

[1] Defendants' suggestion that 3PVROs' speech is "commercial" because 3PVROs are supposedly "fiduciaries" when they help a voter register to vote, Opp. 9 (citing Fla. Stat. § 97.0575(3)(a), seriously misstates Florida law. The cited provision describes 3PVRO responsibilities upon *receipt* of a voter application—that they must "ensur[e] that any voter registration application" is "promptly delivered." Defendants cite nothing to support their suggestion, Opp. 13-14, that 3PVROs have other, more expansive fiduciary duties to prospective voters.

Defendants also ignore that *Zauderer* applies only where a law requires the disclosure of "purely factual and uncontroversial information about the terms under which ... services will be available." *Zauderer*, 471 U.S. at 651. Section 7 is hardly "non-controversial." The compelled disclaimer implies to potential voters that late delivery of registration applications is a significant problem, though the record does not support that. ECF 241-1, SOF ¶11. It is designed to and has dissuaded people from registering and damages Plaintiffs' reputations. ECF 241-1 at 19, SOF ¶¶ 9, 21. *Zauderer* therefore does not apply in this case.

B. Section 7 Is Not Narrowly Tailored to Serve Compelling State Interests

Defendants do not dispute that no purpose for Section 7 was identified during legislative debate. ECF 280 SOF ¶18. This is fatal under strict scrutiny because "to be a compelling interest, the State must show that the alleged objective was the legislature's actual purpose." *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (internal quotation marks omitted). Defendants have not, and cannot, identify where any of the interests identified in their brief (*i.e.*, "informing prospective registrants of the risks inherent in relying on a third-party to deliver their application" and "seeing that voter registration applications are promptly turned in to an appropriate voter-registration office," Opp. 8) were discussed in legislative debate, nor have they shown that either of the supposed state interests mentioned was the legislature's actual purpose.

Even if *post hoc* rationalizations could be "compelling" (and as a matter of law, they cannot), Defendants make no effort to show why the disclosure is "narrowly tailored" to advance these interests. For example, they do not explain why informing the prospective applicant "how to register online," Opp. 8, advances these interests. Nor does telling the applicant that the 3PVRO "may deliver the application in person or by mail." *Id.* And Defendants nowhere discuss, as they are required to do, why potential "more benign and narrowly tailored options," such as printing the disclaimer on the state form, would not be sufficient. *See generally* ECF 241-1 at 20 (discussing obligation to do so under *Riley*).

In sum, Section 7 of SB90 compels speech in violation of Plaintiffs' First Amendment rights. Defendants have failed to identify a compelling interest or explain how Section 7 is narrowly tailored to serve such interests.

II. SECTION 29 IS UNCONSTITUTIONALLY VAGUE

Most notable about Defendants' oppositions is what Defendants omit: an interpretation of what Section 29 actually means. *See* Opp. 17-24. Nowhere does their brief address the conflicting interpretations given to the provision by the legislative sponsors, the Secretary, and the Supervisors. ECF 241-1 SOF ¶¶16-18. Indeed, Defendants' brief confirms the statute's imprecision, describing Section 29 as restricting any "activities done to influence voting." Opp. 23. Defendants do not, for example, address Plaintiffs' argument that the phrase "any activity" is so vague

as to encompass "encouraging a voter to stay in line and vote." ECF 241-1 at 24-27. Is that an "activity done to influence voting"? Defendants do not say.

In arguing that Section 29 provides fair notice, Defendants point to generic canons of interpretation, including that terms should be interpreted in line with more specific surrounding language and in line with the object of the provision as a whole. ECF 274 at 21. But Defendants do not say how those canons clarify the "any activity" language. Defendants' argument seems to be that because other terms in the statute prohibit efforts to influence a voter's choice of candidate, the "any activity" language must be limited to "partisan" activities. They do not address that this is not how Supervisors Hays, Doyle, and White interpret the provision; rather these Defendants think "any activity" means "all activities," ECF 238-11 at 130:16-131:8; ECF 271-34 at 82:7-14, and White referred to the language as "vague," ECF 238-10 at 77:15.

Defendants' argument, in essence, is that Section 29 merely bars "partisan" conduct already prohibited by the pre-existing provisions of § 102.031(4)(b). Putting aside that the term "partisan" is itself vague, their interpretation runs squarely afoul of the canon against superfluity. And Defendants cannot reconcile their construction with Section 29's language allowing only Supervisors' agents to provide "nonpartisan" assistance. ECF 241-1 at 27. In any event, Plaintiffs would accept a judgment interpreting the "any activity" provision to reach only activities

that were previously barred by § 102.031(4)(b) prior to SB90, and holding that insofar as the provision reaches further, it is unconstitutionally vague.

None of the cases or statutes Defendants cite, Opp. 18, supports their position. For example, the provision at issue in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), barring loud "noises" that "disturb [the] good order" of a classroom, is far more specific than language about "any activity" that may "influence" a voter. Even then, the Supreme Court held that it would have found the statute vague except that the Supreme Court of Illinois had previously given clear interpretation to similar ordinances. *Id.* at 110-12. And laws prohibiting specific activities such as bribes or coercion, Opp. 24, are not remotely as vague as a law prohibiting "any activity" to influence a voter.

Independently, Section 29 is vague because it encourages or authorizes seriously discriminatory enforcement. ECF 241-1 at 28-29; *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Defendant do not address this argument, which is an independent basis for finding the statue vague and granting summary judgment. In particular, Defendants do not dispute that multiple Supervisors read the law to ban all activities within the 150-foot radius because, as Defendant White testified, the provision is "vague." ECF 241-1 SOF ¶18. In light of this undisputed evidence of *actual* discriminatory enforcement, Plaintiffs are entitled to summary judgment that the statute is unconstitutionally vague.

III. SECTION 208 OF THE VRA PREEMPTS SECTION 29

A. Plaintiffs Have Standing to Enforce Section 208

Defendants do not dispute that Plaintiffs have altered their programs and diverted resources in response to Section 29's restriction on language assistance at the polls. *See* ECF 241-1, SOF ¶¶16-17; ECF 280 at 38-39; *id.* SOF ¶68. That is sufficient to establish organizational standing. ECF 241-1 at 29-30; *see, e.g.*, *New Georgia Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1284-87 (N.D. Ga. 2020) ("[r]easonably anticipating the organization will need to divert resources in the future suffices to establish standing" to raise Section 208 preemption claim).

Defendants claim that Plaintiffs have no standing to enforce Section 208 because they are organizations rather than individual voters. That is incorrect. As one court recently explained, it is "of no significance" that organizational plaintiffs "are not themselves voters denied the protections of Section 208." *Ark. United v. Thurston*, 517 F. Supp. 3d 777, 793-94 (W.D. Ark. 2021). An organization has standing to raise a preemption claim if it "show[s] that the state's alleged violation of federal law vis-à-vis voters required the organization to divert resources to respond." *Id.*; *see also OCA-Greater Houston v. Texas*, 867 F. 3d 604, 610-12 (5th Cir. 2017) (finding sufficient injury-in-fact to raise Section 208 preemption claim where plaintiff nonprofit was forced to divert resources and the law frustrated and complicated its assistance to voters with limited English proficiency); *cf. Fla. State*

Conference of NAACP v. Browning, 522 F.3d 1153, 1165-66 (11th Cir. 2008) (finding organizational standing to raise VRA preemption claim). Defendants entirely ignore these well-reasoned opinions. Instead, Defendants cite two cases holding that only "disabled" individuals are entitled to the protections of the Americans with Disabilities Act, 42 U.S.C. § 12182. ECF-274 at 25. Those cases did not involve Section 208. Multiple courts have said organizations that assist voters can enforce Section 208, and neither of Defendants' cases suggests otherwise.

In any event, Plaintiffs also have third-party standing to enforce the rights of the voters to whom they provide the assistance guaranteed by Section 208. Defendants acknowledge that third-party standing is permissible where "enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights." ECF 274 at 25; *see also June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2118-19 (2020) (collecting cases). That is precisely the situation here. Section 29 prohibits Plaintiffs from providing assistance at the polls, including to voters who would choose their assistance. Enforcement of this provision against Plaintiffs results in the violation of protected voters' rights under Section 208 to assistance by a person of their choice.

B. There Is a Private Right of Action to Enforce Section 208

Defendants' assertion that there is no private right of action under Section 208 fares no better. Plaintiffs have brought parallel claims under the VRA *and* 42 U.S.C.

§ 1983. ECF 59 ¶¶ 212-13. Defendants provide no reason why Plaintiffs cannot bring a § 1983 claim asserting a violation of a federal statute.

Even if Plaintiffs had brought this claim exclusively under the VRA, numerous courts have allowed private challenges under Section 208. *See, e.g.*, *Ark. United*, 517 F. Supp. 3d at 790 (Section 208 "clearly contemplates" a private right of action); ECF 280 at 67 (collecting additional cases). These courts' holdings are entirely consistent with the broad range of private rights of action available under the VRA. *See generally Morse v. Republican Party of Va.*, 517 U.S. 186, 233-34 (1996). And they are consistent with the specific "rights-creating language" in Section 208. *See Schwier v. Cox*, 340 F.3d 1284, 1296 (11th Cir. 2003) (holding that private parties could enforce VRA provision despite "Congress's failure to provide for a private right of action expressly).

C. Section 208 Preempts Section 29's Restrictions on Language Assistance and Assistance to Disabled Voters

On the merits, Defendants do not dispute that Section 29 is preempted if it in fact bars voters from receiving assistance guaranteed by Section 208. Defendants instead contend that Section 29 does not have that effect. ECF 274 at 27-28. But as Plaintiffs have previously explained, that argument cannot be squared with either the language of the provision or the sweeping interpretation offered by several Supervisors. *See* ECF 280 at 68-69. Hays testified that "nobody is allowed to interact with" voters other than election workers; Doyle likewise stated that "[n]o

one is supposed to interact [with voters] within the no-solicitation zone." *Id.* It is impossible for a voter to receive assistance from the person of her choice—*e.g.*, a volunteer from a trusted organization—if that person is not allowed to "interact" with the voter within 150 feet of the polls. White testified similarly. ECF 241-1 SOF ¶18. Defendants criticize this interpretation as "absurd and overexpansive" (ECF 274 at 29), but it is precisely what the Supervisors testified.

Defendants identify a provision of Florida law that separately guarantees certain voters the right to receive assistance from a person of their choice. ECF 274 at 28 and 275 at 2-3, 8-9 (citing Fla. Stat. § 101.051).[2] That provision does not change the preemption analysis: A state law that conflicts with federal law is not saved from preemption by the fact that it *also* conflicts with other provisions of state law. There is no guarantee that officials will construe the statutes "harmoniously" to avoid a conflict. ECF 274 at 28-29.[3] In fact, the opposite is more likely to be the case given the breadth with which the three moving supervisors interpret the restriction. The provision Defendants cite makes it a crime to "*solicit* any elector in an effort to provide assistance to vote," Fla. Stat. § 101.051(2) (emphasis added),

[2] Florida law imposes additional restrictions and burdens on both the voters who need assistance and the individuals who provide that assistance. *See* Fla. Stat. § 101.051(4)-(5) (requiring sworn declarations).

[3] Indeed, the Supreme Court has warned against accepting as "authoritative" statutory interpretations offered by governmental entities mid-litigation which are not binding on the courts or on law enforcement. *See Stenberg v. Carhart,* 530 U.S. 914, 940-41 (2000).

and officials would likely look to Section 29's expanded definition of "solicit" in interpreting that language, *see id.* § 102.031(4)(b) ("[T]he terms 'solicit' or 'solicitation' include ... engaging in any activity with the intent to influence or effect of influencing a voter.").

In short, Defendants fail to explain how voters protected under Section 208 can continue to receive polling-place assistance from Plaintiffs or other trusted organizations in light of Section 29's sweeping prohibition. Section 29 is therefore preempted by federal law.

IV. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT AGAINST SUPERVISOR WHITE ON COUNTS V AND VI

Supervisor White's opposition does not dispute that Plaintiffs' line warming activities constitute protected speech or that Section 29 is impermissibly vague. Rather, she opposes summary judgment on the theory that Plaintiffs lack standing to pursue claims against her because of her mistaken view that none of the Plaintiffs conduct activities in Miami-Dade County that are impacted by SB90. White's belief appears to be predicated on her claim that prior to SB90, the policy in Miami-Dade County was to prohibit all activity—except for exit polling—within 150 feet of polling places. ECF 275 at 4-5. According to White, Section 29 will thus not change anything for any of the Plaintiffs in Miami-Dade County.

White does not dispute that as a general matter, prior to SB90, Plaintiffs provided assistance within 150 feet. ECF 241-1 SOF ¶ 6. Of the two Plaintiffs that

have provided assistance in Miami-Dade in the past, it is undisputed that Sant La provides language assistance to voters in Miami-Dade, including accompanying voters into the polls. *Id.* (citing ECF 238-21 at 52:19-53:19). While White now disputes that language assistance is barred by SB90 because of Fla. Stat. § 101.051(1), ECF 275 at 2-3, 8-9, that is not what she testified to at her deposition. Rather, she stated that Miami-Dade policy is that one can "never have non-partisan activity within the buffer zone ... because it's impossible for me to discern what is partisan and what is non-partisan." ECF 238-10 at 101:12-102:3. This is also the position she asserts in her opposition. ECF 275 at 7 ("all activity by organizations at polling places in Miami-Dade County will still occur outside of the 150-foot non-solicitation zone due to Miami-Dade's long-standing policy"). Accordingly, Sant La has standing. The mere fact that White has inconsistently asserted that another statute may carve out a limited exception to the absolute ban on voter assistance within 150 feet of the polling place does not alter this analysis. The court must decide whether SB90 improperly bars language assistance, and an injunction against White will be necessary to provide Plaintiffs relief.

In 2018 and 2020, Florida Rising volunteers handed out water and food to voters waiting outside of polling places in Miami-Dade County and generally did so "within the designated permissible space," *see* ECF 238-24 at 59:13-62:15, but volunteers may have handed items to voters standing in line within the 150-foot

radius. *Id.*; *see also* ECF 271-58 ¶¶ 13-14, 18-20. The fact that White's policy purportedly excluded people (improperly) from engaging in First Amendment activities cannot shield the Supervisor from Plaintiffs' claims. White has asserted that in the future her enforcement of the ban on any activity within 150 feet will be in part to implement SB90. *See* ECF 238-10 at 77:9-78:5 (agreeing that policy of banning all activity within 150 feet of polling place is based "both" on law before and after enactment of SB90). To the extent that Section 29 now creates a 150-foot area from which Plaintiffs will be barred unconstitutionally by statute, the statute should be invalidated. Because White is the official charged by law with enforcing Section 29 in Miami-Dade County, an injunction against her is necessary to provide Plaintiffs with the full relief they seek. *See Jacobson v. Florida Secretary of State,* 974 F.3d 1236, 1253-54 (11th Cir. 2020); *see also* ECF 201 at 31 (injunction against the SOEs will "have the practical effect of redressing Plaintiffs' alleged injuries" with respect to Section 29).

Accordingly, because at least two Plaintiffs have standing to pursue a claim against White challenging the validity of Section 29, and an injunction against White is needed to afford Plaintiffs full relief, there is a justiciable case or controversy with respect to whether Section 29 violates the First Amendment and whether Section 208 preempts Section 29 notwithstanding Fla. Stat. § 101.051(1).

CONCLUSION

For the foregoing reasons and the reasons set forth in Plaintiffs' opening memorandum, the Court should grant summary judgment in Plaintiffs' favor on Claims 5, 6, and 8.

Dated: December 10, 2021

Respectfully submitted,

s/ *Kira Romero-Craft*

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LOCAL RULE 7.1(F) CERTIFICATION

Pursuant to Local Rule 7.1(F), this memorandum contains 3,191 words, excluding the case style, table of authorities, table of contents, signature blocks, and certificate of service.

s/ *Kira Romero-Craft*
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was served on all counsel of record through the Court's CM/ECF system on the 10th of December, 2021.

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