UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

HARRIET TUBMAN FREEDOM FIGHTERS, CORP.,

Plaintiff,

v. Case No. 4:21cv242-MW/MAF

LAUREL M. LEE, Florida Secretary of State, and ASHLEY MOODY, Florida Attorney General,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE, *et al*.,

Intervenor-Defendants.
_____/

SECRETARY LEE AND ATTORNEY GENERAL MOODY'S MOTION FOR SUMMARY JUDGMENT

Defendant Laurel M. Lee, in her official capacity as the Florida Secretary of State, moves this Court to grant summary judgment in favor of Defendants on all remaining claims in the Amended Complaint, ECF No. 44, for the reasons set forth in the separately filed Supporting Memorandum, and Defendant Ashley Moody, in her official capacity as the Florida Attorney General, joins in this motion.

Respectfully submitted,

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CERTIFICATES OF SERVICE

I certify that on November 12, 2021, I served the foregoing on all counsel of record through this Court's CM/ECF system.

/s/ Mohammad Jazil

IN THE UNITED STATES DISTRICT COURT
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REPUBLICAN NATIONAL COMMITTEE, *et al*,

Intervenors.

Case No. 4:21-cv-00242-MW-MAF

DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF SUMMARY JUDGMENT

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INTRODUCTION

In Counts I, II, and III of its Amended Complaint, Plaintiff Harriet Tubman Freedom Fighters Corporation ("HTFF") alleges that Section 7 of Chapter 2021-11, Laws of Florida ("2021 Law") violates the First Amendment of the U.S. Constitution.[1] *See* ECF-44. Now codified at Subsection 97.0575(3)(a), Florida Statutes, that provision requires third-party voter registration organizations ("3PVROs") to share truthful, cautionary information with voters ("**notification provision**" or "**disclaimer"**). Defendants move for summary judgment on the HTFF's three remaining counts focused solely on that statutory provision.

RELEVANT LEGAL STANDARD

Summary judgment is appropriate when, as here, "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

[1] In its Order on Motions to Dismiss, the Court dismissed Count IV of the Amended Complaint, which related to Section 32 of the 2021 Law, now codified at Section 104.0616(2), Florida Statutes. See ECF-190 at 19-22. Plaintiffs Paralyzed Veterans of America Florida Chapter ("PVAFC"), Paralyzed Veterans of America Central Florida Chapter ("PVACFC"), Steve Kirk ("Kirk"), and Phyllis Resnick ("Resnick") were the only plaintiffs to bring Count IV and they were not parties to Counts I, II, or III. Further, Head Count, Inc., and Resnick voluntarily dismissed their claims. *See* ECF-97, ECF-111. Accordingly, PVAFC, PVACFC, Kirk, and Resnick are no longer parties to this lawsuit and HTTF is the only remaining Plaintiff. Additionally, the various Supervisors of Elections were only named defendants as to Count IV and, therefore, are no longer parties to this lawsuit.

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 nonmoving party also has an obligation to come forward with "specific facts showing there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "A mere 'scintilla' of evidence supporting the [nonmoving] party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990); *cf. Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 187 (2008) ("After discovery, District Judge Barker prepared a comprehensive 70-page opinion explaining her decision to grant defendants' motion for summary judgment.").

Defendants are entitled to summary judgment here.

STATEMENT OF FACTS

Plaintiff HTFF was incorporated in October 2020. *See* ECF 214-18 at 25:22–25. Florida approved HTTF as a 3PVRO in July 2021, and HTTF began collecting voter registration applications in late August or September of 2021—well after the 2021 Law went into effect. *Id.* at 88:16 – 89:12.

Plaintiff alleges that the notification provision "unlawfully compels them to engage in false speech, undermines the credibility they have established in the communities in which they work, and fails to provide them with proper notice as to

the penalties for any alleged violations of the law." ECF-44, at 13, ¶31. But the disclosure provision simply and indisputably requires 3PVROs to advise a potential registrant that the 3PVRO might not deliver the registrant's application on time and that he or she may deliver the application in person or by mail; how to register online; and how to determine whether an application has been delivered. *See* Fla. Stat. § 97.0575(3)(a). As the Director of the Division of Election confirmed in deposition, it is not uncommon that 3PVROs deliver voter registration applications late. *See* ECF 214-21at 134:20-136:25. And, it is indisputable that potential registrants can deliver their applications in person, by mail, or online; and they can track the status of their applications.

HTFF's own processing of collected voter registration applications adds to the likelihood of missed deadlines. According to the testimony of HTFF's corporate representative, collected applications are uploaded to a third-party that conducts a second quality check before HTFF ever turns in the applications to supervisors. *See* ECF 214-18 at 61:3-14 ("[c]anvassers are to turn in completed and blank applications at the end of the day, and the quality control will go over the applications, and then we submit it to – there's another process through Blocks, and then we submit it to the supervisor of elections…").[2] This "[t]otal QC process and

[2] This Court has already explained that a third party voter registration organization is only meant to "take[] back the completed application—together with other

internal timeline is completed within 10 days." Depo. Exh. 5, p.2. More alarming, however, is that the process involves uploading the voter's application to a third-party, without any idea of what that third-party does with that voter's data. *See* ECF 214-18 at 200:20—201:1 (Q. "Do you know what State Voices does with the data after the quality control check is complete…A. No, sir. I don't know."). HTFF does not tell voters any of this. *Id.* at 201:2-8.

Notwithstanding the fact that it was not an approved 3PVRO until after the enactment of the notification provision, Plaintiff also alleges that the notification provision "will require that HTFF divert time and resources to train its staff and volunteers to comply with SB 90, lengthen HTFF's interactions with each prospective registered voter (thereby making it harder to reach the same number of prospective voters in the same amount of time), and will necessitate HTFF diverting time and resources away from its other activities for SB 90-specific trainings and voter registration requirements." ECF-44, at 13, § 32.

applications obtained in the same way—to a proper voter registration office." *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1158 (N.D. Fla. 2012). And that, "[d]one properly, this serves the constitutional right of eligible citizens to register and vote." *Id.* That is not what HTFF does.

ARGUMENT

I. Plaintiff HTTF lacks standing to bring this action.

Plaintiffs "must prove (1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision," *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020) (citations omitted), "by affidavit or other evidence 'specific facts,' which for purposes of the summary judgment motion will be taken to be true." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Because "standing is not dispensed in gross," Plaintiff must establish injury, causation, and redressability for each of its claims. *Jacobson*, 974 F.3d at 1245.

HTFF cannot establish an injury in fact attributable to Section 97.0575's notification provision. Specifically, HTTF can provide no evidence to support its conclusory allegation that the notification requirement somehow "undermines the credibility they have established in the communities in which they work." Indeed, HTFF concedes that they are not aware of any voters who did not register as a result of the required notifications. *See* ECF 214-18 at 122:10-16. Furthermore, although HTTF alleges that enactment of the disclosure provision will require it to divert resources, that is not conceivably possible because HTTF was not approved as a 3PVRO in Florida until July 2021, and did not begin collecting voter registration applications until late August or September of 2021—well after the 2021 Law went

into effect. *See* ECF 214-18 at 88:16–89:12. Put more simply, the diversion theory cannot work when there exists no baseline to measure diversion against—there is no pre-2021 Law state for HTFF to compare with its post-2021 Law operations.

Accordingly, HTFF cannot establish standing to bring this action and the Defendants are entitled to summary judgment in their favor.

II. Plaintiff's Claims Fail on the Merits.

Assuming Plaintiff has standing, this Court should still enter summary judgment on the merits of the remaining First Amendment claims because they fail as a matter of law.

A. The Notification Provision is Not Vague.

In Count I of their Amended Complaint, Plaintiff argue that the notification provision is void for vagueness because it does not "specify the penalties." ECF-44 at ¶ 87. Not so. Subsection 97.0575(4) specifies:

> If the Secretary of State reasonably believes that a person has committed a violation of this section, the secretary may refer the matter to the Attorney General for enforcement. The Attorney General may institute a civil action for a violation of this section or to prevent a violation of this section. An action for relief may include a permanent or temporary injunction, a restraining order, or any other appropriate order.

(emphasis added). The reference to "section" in this subsection (which pre-existed the 2021 Law) is to the entirety of Section 97.0575. There is nothing vague about the consequences to 3PVROs for non-compliance with the notification provision.

They may be subject to a civil action brought to prevent the violation by means of a permanent or temporary injunction, restraining order, or other appropriate order—all well within the province and expertise of the courts. Indeed, when the constitutionality of subsection 97.0575(4) was challenged shortly after it was enacted in 2011, this Court found that it was "unobjectionable." *Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1166-1167 (N.D. Fla. 2012).

Accordingly, the Court should grant summary judgment denying Count II of Plaintiff's Amended Complaint.

B. The Notification Provision Satisfies the Requirements of the First Amendment.

In Count II, Plaintiff argues that the notification provision unconstitutionally compels Plaintiff "to speak for the government," and that the required notification "undermines a voter's confidence in their voter registration application form will result in a timely valid registration." *See* ECF-44 at 53-54. Plaintiff is wrong for two fundamental reasons. First, because the notifications that Plaintiff must provide to voters are non-controversial factual statements, they are subject to minimal scrutiny, which is easily satisfied here. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 650-52 (1985). Second, even if the required notifications warrant a more searching review, the State readily meets this burden because the required disclaimers advance the State's substantial—indeed compelling—interest in ensuring that 3PVROs fulfill their statutory obligation to

serve as fiduciaries to the voters they assist with registration. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980).

1. The notification provision satisfies minimal scrutiny.

Zauderer's two-part analysis applies to non-controversial factual statements like the ones required here. Under the *Zauderer* test, this Court must first "assess the interest motivating the" required disclaimers, and then "assess the relationship between the government's identified means and its chosen ends." *Am. Meat Inst. v. United States Dep't of Agric.*, 760 F.3d 18, 23, 25 (D.C. Cir. 2014) (holding that "*Zauderer* in fact does reach beyond problems of deception" to reach other disclosure mandates).

Florida's interest is simple but compelling: protecting its voters through the dissemination of truthful information so that as many voters as possible may register and vote. *See* ECF 214-43 at ¶¶17-21.

There is also a direct link between the means and chosen ends. It is undisputed that 3PVROs sometimes deliver forms late. *Id.* at ¶18. Late delivery can result in voters missing the deadline to register before an election. *Id.* Providing Florida voters more information about the registration process, including referring them to a website so that they can meet registration fast approaching deadlines, directly furthers the State's interests. *Id.*

The State's chosen means is also consistent with the statutorily imposed fiduciary duty that 3PVROs owe to voters and which HTFF does not challenge here. Specifically, the three disclosures from 3PVROs: (1) inform voters that the 3PVRO may fail to deliver the voter's registration application to the appropriate supervisor within 14 days or before registration closes, (2) inform voters how to register to vote online, and (3) inform voters how to check the delivery status of the voter's application. *See* Fla. Stat. § 97.0575(3)(a). All three disclaimers empower the voters to make informed decisions.

Yet Plaintiff contends that the required notifications are a form of compelled political speech. Although the speech of 3PVROs is not strictly commercial, their communications with voters in the process of helping them register to vote is information intended to help the *voters* exercise their own political speech rights rather than protected speech on the part of 3PVROs themselves. So, the additional disclosure required by the notification provision is not so "unduly burdensome" that it is "disproportionate to the end the government seeks." *See Borgner v. Brooks*, 284 F.3d 1204, 1214 (11th Cir. 2002). Again, Plaintiff does not and cannot contend that the information they must now provide is inaccurate; it is merely slightly more information than they wish to offer voluntarily.

Plaintiff attempts to analogize this case to *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), but that square peg will not fit in this

round hole. In *Becerra*, the State of California required pro-life pregnancy care centers to disseminate "a government-drafted script about the availability of state-sponsored services"—in that case, abortion services—"the very practice that petitioners [we]re devoted to opposing." 138 S. Ct. at 2371. Not only has Florida not prescribed any particular script or verbiage for communicating the required information to voters, it has not required 3PVROs to endorse any political position with which they disagree. 3PVROs ostensibly exist to ensure that all eligible voters are properly registered to vote through any available avenue; the State's required notifications further that very goal. The State's informational requirements and the registration activities of 3PVROs are therefore *complementary*, not diametrically opposed as in *Becerra.* In other words, the State is requiring 3PVROs to advance a goal that they already support (voter registration) in an additional manner (informing voters about the online registration option and how to check their status).

2. The notification provision satisfies heightened scrutiny because it directly advances the State's interest in enforcing the fiduciary duties of 3PVROs.

Even if this Court determines that more searching scrutiny is merited and applies the *Central Hudson* test rather than *Zauderer*, Florida's history of regulating each 3PVRO "as a fiduciary to the applicant," Fla. Stat. §97.0575(3)(a), underscores the State's interest in requiring disclaimers.

Specifically, as explained above, 3PVRO communications with voters are conceptually closer to commercial speech than to protected political expression, subjecting the notification provision to the intermediate scrutiny reserved for commercial speech rather than the strict scrutiny reserved for protected political speech. So if this Court rejects the *Zauderer* test for the disclosure of non-controversial factual information, then it should apply *Central Hudson*, asking: (1) Is the communication misleading or related to unlawful activity?; (2) If not misleading, is there a substantial state interest supporting the regulation?; (3) Does the regulation directly advance the asserted state interest?; and (4) Could the asserted interest be served as well by a more limited regulation of speech? See Central Hudson, 447 U.S. at 563-64.

As the State does not allege that Plaintiffs' communications with voters are misleading, the analysis begins with assessing the State's interest in requiring disclosure.

Florida has a long history in protecting voters by regulating voter registration activity. In 1995 Florida implemented the provisions of the National Voter Registration Act, permitting 3PVROs to collect applications. "Prior to 1995, only state officials and individuals deputized by supervisors of elections as registrars could collect voter registration applications in Florida." *League of Women Voters v. Cobb*, 447 F. Supp. 2d 1314, 1317 (S.D. Fla. 2006) (citation omitted). The 1995

rules included a number of requirements, such as an oath in writing that was required to be "acknowledged by the supervisor [or deputy] and filed in the office of the supervisor" and included "a clear statement of the penalty for false 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).[3]

The notification requirements at issue "directly advance" the State's substantial interest in enforcing the fiduciary duties that 3PVROs owe to voters. *Central Hudson*, 447 U.S. at 564. "Florida courts recognize a breach of fiduciary duty claim at common law." *Gochnauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1049 (11th Cir. 1987). Fiduciaries have a variety of enforceable duties to their beneficiaries, including the duty "the duty to disclose material facts." *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). This duty is particularly important when "one party has information which the other party has a right to know because" one party is a

[3] https://www.flsenate.gov/Session/Bill/2005/1567/Analyses/20051567HETEL_h1567b.ETEL.pdf

fiduciary. *Friedman v. Am. Guardian Warranty Servs., Inc*., 837 So. 2d 1165, 1166 (Fla. 4th DCA 2003). Section 97.0575 ensures that 3PVROs abide by each of these fiduciary duties when registering voters.

Notifications—disclaimers—in furtherance of fiduciary duties are not unusual. For instance, courts have recognized a fiduciary duty of airlines to warn their passengers of potential risks from flying with them, especially given the need for passengers to trust the airlines transporting them. *See, e.g., Fleming v. Delta Airlines*, 359 F. Supp. 339 (S.D.N.Y. 1973) (holding that airline was negligent in failing to warn passengers of forecasted turbulence).

3PVROs bear a similar responsibility. 3PVROs know, or should know, of the possibility of late-delivered applications based on historical experience, *see* Ex. 49 at 165-66, and thus have a duty to warn voters of that possibility when voters entrust them with their applications. To be sure, Florida has not prohibited 3PVROs from communicating with voters or collecting their applications; it has simply required them to notify voters of the possibility of late delivery and of the availability of the online registration option. The choice of which route to ultimately pursue still lies where it should—with the voter.

Thus, the disclosure requirement should be upheld under either minimal or intermediate scrutiny. And, therefore, the Court should grant summary judgment denying Count II of Plaintiff's Amended Complaint.

C. HTTF Has Failed to Plead and Cannot Establish that the Notification Provision Violates its Freedom to Associate or Right to Free Speech.

In Count III, Plaintiff alleges that "the disclaimer and disclosure provisions [of Section 97.0575(3)(a)] impair [its] ability to associate, help citizens register to vote, and express their collective views" by somehow "diminishing the value and nature of their expression through delegitimizing the content of their organizational message and their ability to communicate with their chosen audience." ECF-44 at 59-60, ¶148. Plaintiff also alleges that the disclosure provision "is an impermissible content-based restriction on speech" that is "not narrowly tailored to serve any compelling state interest." ECF-44 at 60, ¶149. Based on these allegations, Plaintiff claims that the notification provision violates the First and Fourteenth Amendments. These claims fail as a matter of indisputable fact and law.

Plaintiff cannot establish that the disclosure provision somehow "impair[s] its] ability to associate, help citizens register to vote, and express their collective views" by somehow "diminishing the value and nature of their expression through delegitimizing the content of their organizational message and their ability to communicate with their chosen audience." It in no way "delegitimizes the value and nature of [Plaintiff's] expression;" nor does it diminish Plaintiff's ability to communicate with potential registrants. Unlike the complete ban against the use of paid circulators of initiative petitions involved in *Meyer v. Grant*, 486 U.S. 414, 422-

3 (1988), the notification provision does not "limit[] the number of voices who will convey [Plaintiff's] message and the hours they can speak and, therefore, limit[] the size of the audience they can reach." Nor does it make it less likely that a voter will register. It simply provides more information to potential registrants as to how to ensure their registration applications will be received on time. Moreover, Plaintiff has the same ability to associate with potential registrants as it did before the enactment of the notification provision.

For the reasons discussed above, *supra* at 8-11, the notification provision is not "impermissible content-based speech" as Plaintiff alleges. That is because the notification provision simply requires disclosure of factually accurate, non-controversial information. Moreover, even if the notification provision were a content-based restriction subject to heightened scrutiny, which it is not, it furthers the State's compelling interest in ensuring that 3PVROs fulfill their statutory obligation to serve as fiduciaries to the voters they assist with registration. *See supra*, at 11-14. And, it is narrowly tailored to serve the State's interests because it only applies when 3PVROs have contact with potential registrants and it simply requires 3PVOs advises the potential registrants of truthful information. It does not prohibit 3PVROs from communicating with voters or collecting their applications.

Accordingly, the Court should grant summary judgment denying Count III of Plaintiff's Amended Complaint.

CONCLUSION

For the foregoing reasons, this Court should grant summary judgment in favor of the Defendants on all remaining counts in this case.

Dated: November 12, 2021

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 and, together with the accompanying memorandum of law, falls within the applicable word limits at 3512 words.

/s/ Mohammad Jazil

CERTIFICATES OF SERVICE

I certify that on November 12, 2021, I served the foregoing on all counsel of record through this Court's CM/ECF system.

/s/ Mohammad Jazil