IN THE UNITED STATES DISTRICT COURTFOR THE NORTHERN DISTRICT OF TALAHASSEE DIVISION

HARRIET TUBMAN FREEDOM FIGHTERS, CORP. *et al.*,

Plaintiffs,

v.

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

Defendants,

REPUBLICAN NATIONAL COMMITTEE, et. al.,

Intervenor-Defendants.

Case No. 4:21-cv-242

Consolidated with Case Nos. 4:21-cv-186, 4:21-cv-187, and 4:21-cv-201

PLAINTIFFS' OPPOSITION TO SECRETARY LEE'S MOTION TO DISMISS

Secretary Lee asks the Court to dismiss Count I of Plaintiffs' amended complaint, in which Plaintiff Harriet Tubman Freedom Fighters, Corp. ("HTFF") alleges that the disclaimer/disclosure requirement added by SB 90 to Florida Statute § 97.0575(3)(a) is void for vagueness because it fails to put HTFF and other community voter registration organizations on adequate notice of the statute's reach and the consequences of violating the new requirement. ECF. 79-1 at 3. In support of her request, she offers an interpretation of the statute that strains its plain language and ignores the continued risk of arbitrary enforcement, in violation of the

Fourteenth Amendment. The statute's language does not do the work that Secretary Lee ascribes to it.

Additionally, the Secretary asks the Court to dismiss Plaintiffs Paralyzed Veterans of America Florida, Paralyzed Veterans of America Central Florida ("PVA Plaintiffs"), and Steve Kirk's claim under Section 208 of the Voting Rights Act (VRA), because she believes Section 208 does not create a private right of action and does not preempt Florida law. *Id.* at 41–45. These defenses fly in the face of decades of case law recognizing private rights of action under the VRA and Congress's express intent to empower private litigants to enforce the Act.

Accordingly, the Court should deny the Secretary's request to dismiss HTFF's void for vagueness claim and the PVA Plaintiffs and Plaintiff Kirk's Section 208 claim.

I. Parties' Arguments

Although the Secretary attempts to characterize this case as a dispute over the Legislature's authority to enact election laws, pursuant to the Elections Clause, it clearly is not. *See id.* at 1. Plaintiffs' claims are premised on the fundamental, long-recognized principle that states may not pass or enforce laws which violate federal law, and that parties harmed by such state laws may seek relief in federal court. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land

. . .”); *Baker v. Carr*, 369 U.S. 186, 200–01 (1964); *Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958); *Marbury v. Madison*, 5 U.S. 137, 147 (1803). The Elections Clause does not grant states carte blanche to violate other parts of the Constitution. In *Tashjian v. Republican Party of Connecticut*, the Supreme Court explicitly stated that the legislative authority given to states by the Elections Clause, U.S. CONST. art. I, § 4, cl. 1, “does not extinguish the State’s responsibility to observe the limits established by the First Amendment rights of the State’s citizens.” 479 U.S. 208, 217 (1986). The Supreme Court has also tacitly confirmed this point in countless cases invalidating state election laws under the First, Fourteenth, Fifteenth, and Twenty-Fourth Amendments. *See, e.g.*, *Rice v. Cayetano*, 528 U.S. 495 (2000); *Norman v. Reed*, 502 U.S. 279 (1992); *Eu v. San Francisco Cnty. Dem. Cent. Comm.*, 489 U.S. 214 (1989); *Harman v. Forssenius*, 380 U.S. 528 (1965); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

Rather than challenging the Florida legislature’s authority to enact election laws, Plaintiffs allege that SB 90 violates the U.S. Constitution and federal law. Specifically, HTFF alleges that the disclaimer/disclosure requirement that Fla. Stat. § 97.0575(3) imposes upon it is unconstitutionally vague because the section fails to put it on notice regarding the consequences of failing to implement the disclaimer/disclosure requirement as added by SB 90 as well as whom the State may hold liable for this type of violation. ECF. No. 44, ¶¶ 115–20.

In response, the Secretary asserts that HTFF's vagueness claim should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. ECF. No. 79-1 at 29. Specifically, the Secretary argues that the aggregate fine mentioned in subsection (3)(a)'s final sentence sets a maximum penalty of $1,000 for any violation of that paragraph, including a violation of the disclaimer/disclosure requirement. *Id.* at 35. Accordingly, she argues, "[t]here is nothing vague about the consequences to third-party voter registration organizations for non-compliance." *Id.* at 36. She also points to the paragraph which makes 3PVROs solely liable for untimely submitted registration forms to prove that "individual volunteers, including for such organizations, are not subject to penalties at all." *Id.* at 36 n.22.

Secretary Lee also seeks dismissal of the PVA Plaintiffs and Plaintiff Kirk's Section 208 claim pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing that the federal statute does not create a private right of action or preempt Fla. Stat. § 104.0616.[1] *Id.* at 41–45.

II. Applicable Legal Standards

[1] Additionally, Secretary Lee asserts that she is an improper defendant and asks the Court to dismiss the VRA Section 208 claims in these consolidated cases pursuant to Federal Rule of Civil Procedure 12(b)(1), ECF. No. 79-1 at 40, but her analysis on this point only addresses the *Florida Rising Together* Plaintiffs' claim and entirely fails to respond to the PVA Plaintiffs and Plaintiff Kirk's challenge to Fla. Stat. § 104.0616. As such, the PVA Plaintiffs and Plaintiff Kirk construe this portion of her Memorandum as conceding that she is a proper defendant with respect to their Section 208 claim against Section 104.0616.

In the Eleventh Circuit, when determining whether to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), district courts

> accept the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff. In determining whether a complaint survives a Rule 12(b)(6) challenge, [the court] ask[s] whether the complaint contains enough facts to state a claim to relief that is plausible on its face. A claim is plausible on its face when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Bilal v. Geo Care, LLC, 981 F.3d 903, 911 (11th Cir. 2020) (internal citations and quotation marks omitted).

III. Plaintiffs' Amended Complaint Pled Sufficient Facts to State a Plausible Void-for-Vagueness Claim.

Laws are void for vagueness when they "fail to put potential violators on notice that certain conduct is prohibited, inform them of the potential penalties that accompany noncompliance, and provide explicit standards for those who apply the law." *Harris v. Mex. Specialty Foods, Inc.*, 564 F.3d 1301, 1311 (11th Cir. 2009) (citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972)). "[S]tandards of permissible statutory vagueness are strict in the area of free expression." *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1320 (11th Cir. 2017) (quoting *NAACP v. Button*, 371 U.S. 415 (1963)) (alteration in original). The "'government may regulate in the area' of First Amendment freedoms 'only with narrow specificity.'" *Id.* (quoting *Button*, 371 at 433).

Here, HTFF's void-for-vagueness claim is plausible on its face because Section 97.0575 neither informs community voter registration organizations registered as 3PVROs of the potential penalties that accompany noncompliance with the disclaimer/disclosure provisions nor provides explicit standards for Defendants to enforce it. Specifically, the only penalties Section 97.0575 explicitly sets forth for a 3PVRO's non-compliance are fines for untimely delivery of registration applications, but the statute also allows the Secretary to refer matters to the Attorney General to institute a civil action seeking relief including an injunction, a restraining order, "or any other appropriate order." Fla. Stat. Ann. § 97.0575(4). Taken together, this creates uncertainty for HTFF and other 3PVROs about what penalties, if any, they face for non-compliance with Section 97.0575's new disclaimer/disclosure requirement and invites arbitrary enforcement by Defendants. Thus, Section 97.0575 was not drafted with the precision that the Due Process Clause and the First Amendment demand.

A. Subsection 97.0575(3) only specifies fines for a violation of the untimely delivery of voter registration applications while the consequences for noncompliance with the disclaimer/disclosure requirement remain unclear.

Questions of statutory interpretation "begin where all such inquiries must begin: with the language of the statute itself, giving effect to the plain terms of the statute." *Paresky v. United States*, 995 F.3d 1281, 1285 (11th Cir. 2021) (quoting *United States v. Henco Holding Corp.*, 985 F.3d 1290 (11th Cir. 2021)) (internal

quotation marks omitted). To ascertain a statute's meaning, the Court must "consider the particular statutory language at issue as well as the language and design of the statute as a whole." *Id.* (quoting *Wachovia Bank, N.A. v. United States*, 455 F.3d 1261 (11th Cir. 2006)) (internal quotation marks omitted).

Here, paragraph (3)(a), which contains the disclaimer/disclosure requirement, reads in whole:

> A third-party voter registration organization must notify the applicant at the time the application is collected that the organization might not deliver the application to the division or the supervisor of elections in the county in which the applicant resides in less than 14 days or before registration closes for the next ensuing election and must advise the applicant that he or she may deliver the application in person or by mail. The third-party voter registration organization must also inform the applicant how to register online with the division and how to determine whether the application has been delivered. *If a voter registration application collected by any third-party voter registration organization is not promptly delivered to the division or supervisor of elections in the county in which the applicant resides, the third-party voter registration organization is liable for the following fines*:
>
> 1. A fine in the amount of *$50 for each application received by* the division or the supervisor of elections in the county in which the applicant resides *more than 14 days after* the applicant delivered the completed voter registration application to the third-party voter registration organization or any person, entity, or agent acting on its behalf. A fine in the amount of $250 for each application received if the third-party voter registration organization or person, entity, or agency acting on its behalf acted willfully.
>
> 2. A fine in the amount of *$100 for each application* collected by a third-party voter registration organization or any person, entity, or agent acting on its behalf, before book closing for any given election for federal or state office and *received by* the division or the supervisor of elections in the county in which the applicant resides *after the book-*

> *closing deadline for such election*. A fine in the amount of $500 for each application received if the third-party registration organization or person, entity, or agency acting on its behalf acted willfully.
>
> 3. A fine in the amount of *$500 for each application* collected by a third-party voter registration organization or any person, entity, or agent acting on its behalf, which is *not submitted* to the division or supervisor of elections in the county in which the applicant resides. A fine in the amount of $1,000 for any application *not submitted* if the third-party voter registration organization or person, entity, or agency acting on its behalf acted willfully.
>
> The aggregate fine pursuant to this paragraph which may be assessed against a third-party voter registration organization, including affiliate organizations, for violations committed in a calendar year is $1,000.

Fla. Stat. § 97.0575(3)(a) (emphases added).

For over a decade, the fines enumerated in paragraph 3(a) applied to 3PRVOs for untimely submittal of voter registration forms and the final sentence—establishing an aggregate fine—capped the amount that a 3PVRO can be fined in a single year *only* for the untimely delivery of registration forms. Now, when confronted with the fact that paragraph 3(a) has no accompanying penalties for its newly-added disclaimer/disclosure provisions, the Secretary's asserts that these fine amounts also apply to the disclaimer/disclosure provision. The Secretary's Motion, therefore, underscores the risks of arbitrary enforcement arising from the disclaimer/disclosure provision and the necessity of enjoining it.

1. *Textual Analysis Using Canons of Statutory Interpretation Show Section 97.0575(3)(a)'s Fines Only Apply to Untimely Submittal of Voter Registration Applications.*

The Secretary's reading flouts the punctuation canon of statutory interpretation, which dictates that statutes follow accepted punctuation standards. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 161 (2012); WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY, ELIZABETH GARRETT, & JAMES J. BRUDNEY, CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1196 (5th ed. 2014); *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 454 (1993) ("[T]he meaning of a statute will typically heed the commands of its punctuation"); *Jama v. ICE*, 543 U.S. 335, 344 (2005) ("Each clause is distinct and ends with a period, strongly suggesting that each may be understood completely..."). Here, the disclaimer/disclosure requirement is contained in two separate sentences that include no mention of fines. Fla. Stat. § 97.0575(3)(a). The first reference to fines in 97.0575(3)(a) is in its third sentence, which is an introductory clause referring to "the following fines" for a "voter registration application collected by any third-party voter registration organization [that] is not promptly delivered." This clause contains a colon followed by an enumerated list of specific fines increasing based on untimeliness of delivery. *Id*. Each fine is in its own fully punctuated sentence. *Id.* § 97.0575(3)(a)(1-3).

Another unenumerated sentence directly succeeding the final enumerated fine amount refers to "aggregate fines." *Id.* A colon is "typically a mark of introduction,

used to let the reader know that what follows the colon has been pointed to or described by what precedes the colon . . . used to introduce a clause or a phrase that explains, illustrates, amplifies, or restates what precedes them." *See A Guide to Using Colons*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/words-at-play/when-to-use-colon-guide (last visited Aug. 13, 2021). Applying standard principles of punctuation to Section 97.0575(3)(a), the colon introducing the "following fines" for untimely delivery of applications, succeeded by an enumerated list of specific fines for each type of untimely delivery and an aggregate cap of fines, signals that the fines (and their aggregate) only apply to the untimely delivery of applications.[2]

The Secretary's interpretation also contravenes the *expressio unius* canon, which dictates that the expression of one thing implies the exclusion of others, particularly "when the items expressed are members of an 'associated group or

[2] The Secretary's interpretation also flouts the *ejusdem generis* canon, which dictates that when general words follow an enumeration of two or more things they apply only to those things of the same general kind or class specifically mentioned. *See Gooch v. United States*, 297 U.S. 124, 128 (1936); *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) ("Under that rule [of ejusdem generis], when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows."); *see also* Scalia & Garner at 199 and Eskridge et al. at 1195. Here, the general terms of "aggregate fines" following the enumerated list of specific fines for specific violations of the timely submission of voter registration applications signals that the aggregate applies only to those specific fines, and not any penalties (or fines) for other violations not in the previously enumerated list.

series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *See* Scalia & Garner at 107; Eskridge et al. at 1195; *Barnhart v. Peabody Coal Co*., 537 U.S. 149, 168 (2003) ("…items not mentioned were excluded…" (quoting *United States v. Vonn*, 535 U.S. 55 (2002))). The omission of specific fines for non-compliance with the disclaimer/disclosure provision coupled with clear delineation of the fines for delivery delays creates a gap in the penalty provision of Section 97.0575(3)(a) that invites enforcement agencies—such as the Secretary in her Motion here—to impose fines that are not apparent to 3PVROs based on the text of the statute itself.

For the same reason, the Secretary's assertion that paragraph (3)(a) limits liability to 3PVROs—and does not apply their agents or volunteers—is equally unavailing. Although Fla. Stat. § 97.0575(3)(a) sets forth "[t]he aggregate fine pursuant to this paragraph which may be assessed *against a third-party voter registration organization*", the sentence only provides notice that it governs penalties for the untimely submission of application forms. Fla. Stat. § 97.0575(3)(a) (emphasis added). It does not by its terms apply to penalties for failing to provide the disclaimer/disclosure, and thus, the consequences to individual volunteers are unclear.

2. *The Secretary's interpretation of the "aggregate fine" limit as applicable to the disclaimer/disclosure provision contradicts the ordinary meaning of "aggregate."*

Despite the fact that no penalties are specified for a violation of the disclaimer/disclosure requirement, the Secretary urges the Court to interpret Fla. Stat. § 97.0575(3)(a), identifying the "aggregate fine pursuant to this paragraph which may be assessed against a third-party voter registration organization," as setting a maximum penalty for any violation of subsection (3)(a), not solely for failure to timely submit application forms. ECF No. 79-1 at 36. This approach erroneously gives the term "aggregate fine" the same meaning as maximum penalty, which is not in accordance with the typical understanding of the term.

"Generally, [w]ords are to be understood in their ordinary, everyday meanings. To determine the ordinary meaning of a term, courts often turn to dictionary definitions for guidance." *See Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 868 n.1 (11th Cir. 2017) (internal citations and quotation marks omitted) (alteration in original). The word "aggregate" refers to something "[f]ormed by combining into a single whole or total." *Aggregate*, Black's Law Dictionary (11th ed. 2019). It therefore makes sense that the term "aggregate fine" would immediately follow a list of fines for the untimely submission of forms: it creates a ceiling for the total amount of such fines that a court may assess against a 3PVRO per year when it finds that the 3PVRO has committed multiple violations (with each untimely form constituting a separate violation). By contrast, a "maximum penalty," which is not referenced in the text of Section 97.0575, merely

sets the highest amount which a party may be fined for a single offense. *See, e.g.*, Fla. Stat. § 775.083(1)(d) ("A person who has been convicted of a noncriminal violation may be sentenced to pay a fine. Fines for designated crimes and for noncriminal violations *shall not exceed*: . . . (d) $1,000, when the conviction is of *a* misdemeanor of the first degree." (emphasis added)). Therefore, the aggregate limitation of Section 97.0575(3)(a), as drafted, cannot apply to violations other than delivery delays because there are no other specified amounts to be "aggregate[d]" as that term is commonly understood.

3. The Textual History of Section 97.0575 Supports HTFF's Interpretation

A review of SB 90, which the Secretary includes as an exhibit to her Motion, bolsters this reading. Section 7 of the Law shows that the previous version of Section 97.0575 established the fine and aggregate fine amounts for untimely submission of forms, and that the Legislature simply tacked the disclaimer/disclosure requirement on to this existing language in 2021. *See* ECF No. 79-2 at 9. The specified fine amounts, and the referenced aggregate fine amount, have only ever referred to fines imposed for untimely delivery of registration forms. Therefore, the statute does not give 3PVROs notice that it could encompass fines for other violations, which it does not enumerate and which the Secretary now asserts are authorized.

This creates the risk of arbitrary enforcement of assessed fines. *See Beckles v. United States*, 137 S. Ct. 886, 892 (2017) ("[T]he void-for-vagueness doctrine

requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." (quoting *Kolender v. Lawson*, 461 U.S. 352 (1983))); *Wollschlaeger*, 848 F.3d at 1319 (A law is void for vagueness when "it authorizes or even encourages arbitrary and discriminatory enforcement." (quoting *Hill v. Colorado*, 530 U.S. 703 (2000))). Whereas subsections (3)(a)(1) through (3) establish a framework for imposing fines for the untimely submission of registration forms, instructing a court as to when a particular amount applies, subsection (3)(a) provides no such guardrails for assessing penalties for violations of the disclaimer/disclosure requirement.

At present, there is nothing to stop a new Secretary from interpreting the fines differently than the Defendant Secretary or, worse still, applying different penalties to 3PVROs associated with a particular viewpoint or racial or religious community while another group associated with a viewpoint more in line with the Secretary's own beliefs may receive a lesser fine for the same violation. Thus, even if the term "aggregate fine" as it appears in Section 97.0575(3)(a) did refer to fines for not providing the disclaimer/disclosure—of which it provides no notice—application of such fines would invite arbitrary enforcement in violation of the Due Process Clause.

B. The Secretary ignores HTFF's allegations that the threat of unspecified civil enforcement consequences renders the disclaimer/disclosure requirement impermissibly vague.

The Secretary did not address HTFF's allegation that Section 97.0575(4)[3] also fails to put 3PVROs on notice as to the consequences of failing to comply with the disclaimer/disclosure requirement because it authorizes the Attorney General to pursue an unspecified civil enforcement action, including for a "restraining order" and to seek as relief "any other appropriate order." Subsection (4)'s overly broad language, including the potential for essentially any civil outcome, is sufficiently vague as to potentially encompass suspension of an organization's 3PVRO status, or another consequence that would prevent Plaintiffs from conducting further voter registration activities. And unlike paragraph (3)(a), which makes fines for untimely delivery of registration forms applicable only against "a third-party voter registration organization," subsection (4) contains no such limiting language. Fla. Stat. § 97.0575(3)(a); *see id.* § 97.0575(4).

IV. Plaintiffs' Amended Complaint Pled Sufficient Facts to State a VRA § 208 claim.

The Secretary also moves the Court to dismiss the PVA Plaintiffs and Plaintiff Kirk's Section 208 claim against SB 90's new mail ballot return restriction, codified at Fla. Stat. § 104.0616, by asserting that there is no private right of action under

[3] "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." Fla. Stat. § 97.0575(4).

Section 208 and that Section 208 does not preempt Section 104.0616. These arguments also fail.

A. Congress has explicitly stated that voters may sue to enforce the VRA and its protections.

Congress indisputably intended to create a private right of action to enforce Section 208. Although the Secretary relies on the four-part test established in *Cort v. Ash*, 422 U.S. 66 (1975) to reach the conclusion that it did not, the Eleventh Circuit looks to the test articulated in *Alexander v. Sandoval*, 532 U.S. 275 (2001) when determining whether a federal statute contains an implied right of action. *See In re Wild*, 994 F.3d 1244, 1255 (11th Cir. 2021) ("In determining whether any federal statute empowers a would-be plaintiff to file suit to vindicate her rights, our lodestar is *Alexander v. Sandoval* . . .".); *Love v. Delta Air Lines*, 310 F.3d 1347, 1351–52 (11th Cir. 2002). That test requires a court to "interpret the statute Congress has passed to determine whether it displays" Congressional intent to create a private right of action and a private remedy. *In re Wild*, 994 F.3d at 1255 (quoting *Sandoval*, 532 U.S. at 286).

As an initial matter, the Supreme Court has recognized a private right of action under VRA §§ 2, 5, and 10, even though each of these provisions "provides no right to sue on its face." *Morse v. Republican Party of Va.*, 517 U.S. 186, 232 (1996). The Eleventh Circuit has recognized a private right of action under Section 1, *see Schwier v. Cox*, 340 F.3d 1284, 1297 (11th Cir. 2003), and adjudicated at least one claim

brought by private parties under Section 201, which bans tests and devices. *See Greater Birmingham Ministries v. Sec'y of St. of Ala.*, 992 F.3d 1299 (11th Cir. 2021). The Fifth Circuit recently struck down a Texas law that conflicted with covered voters' right under Section 208. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 615 (5th Cir. 2017).

But even ignoring these cases, and regardless of whether this Court applies the *Sandoval* test or the *Cort* test, Section 208 provides an implied right of action.

i. Section 208 creates a private right of action and private remedies.

Interpreting a statute under *Sandoval* involves three steps. *First,* the court must ascertain whether the statute contains "rights-creating language," that is, "language explicitly confer[ing] [sic] a right directly on a class of persons that include[s] the plaintiff in [a] case, or language identifying the class for whose especial benefit the statute was enacted." *Love*, 310 F.3d at 1352 (internal quotation marks and citations omitted) (alterations in original). *Second,* it must "examine the statutory structure within which the provision in question is embedded." *Id.* at 1353. *Third,* if the first two inquiries do not "conclusively" answer "whether a private right of action should be implied," the court must "turn to the legislative history and context within which a statute was passed." *Id*. Here, all three inquiries point to a private right of action and private remedies under Section 208.

Section 208 contains rights-creating language that identifies a clear class of

voters whom it was intended to benefit. The statute reads in whole: "Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508. It therefore grants a specific class of voters—those who require assistance in casting their ballots by reason of blindness, disability, or an inability to read or write—a specific right to receive assistance from almost anyone of their choice. Here, Section 208 applies to Plaintiff Kirk because he requires assistance in voting due to a spinal cord injury that resulted in him losing the use of his hands. ECF No. 44, ¶ 53. It equally applies to the PVA Plaintiffs' members who, like Plaintiff Kirk, require assistance in voting due to spinal cord injuries or dysfunction impairing their ability to collect their mail ballot, mark it, and return it on their own. *Id.* ¶¶ 51–52, 158.

The broader statutory scheme in which Section 208 is situated remains admittedly silent as to the full range of remedies available for Section 208 violations, but nonetheless reflects Congress's intent to give voters private recourse under the VRA. Section 3 of the Act repeatedly references "proceeding[s] under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision" initiated by "the Attorney General or an aggrieved person." 52 U.S.C. § 10302(a); *see id.* § 10302(b)–(c); *Morse*, 517 U.S. at 233. Another

section prohibits a district court from requiring "a person asserting rights under the provisions of chapters 103 to 107 of this title" to exhaust all other legal and administrative remedies before it assumes jurisdiction over the case. 52 U.S.C. § 10308(f). Such a rule would hardly be necessary if individual voters could not bring lawsuits to enforce the VRA's provisions, and it applies to claims under Section 208, which appears in Chapter 105 of Title 52. Finally, another provision authorizes a court to "allow the prevailing party, *other than the United States*, a reasonable attorney's fee, reasonable expert fees, and other reasonable litigation expenses as part of the costs." *Id.* § 10310(e) (emphasis added); *Morse*, 517 U.S. at 234 ("Obviously, a private litigant is not the United States, and the Attorney General does not collect attorney's fees."). That Section 208 is a "statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision," 52 U.S.C. §§ 10302(a)–(c), and that Section 10308(f)'s anti-exhaustion rule applies to claims brought pursuant to Section 208, drive the conclusion that Congress intended Section 208 to be enforced through private action.

But the VRA's legislative history also forcefully establishes that Congress intended for private persons to seek enforcement of its provisions, including Section 208. When Congress amended the VRA in 1975, the accompanying Senate Report repeatedly emphasized the importance of private lawsuits. It wrote:

> In enacting remedial legislation, Congress has regularly established a dual enforcement mechanism. It has, on the one hand, given

> enforcement responsibility to a governmental agency, and on the other, has also provided remedies to private persons acting as a class or on their own behalf. The Committee concludes that it is sound policy to authorize private remedies to assist the process of enforcing voting rights.

S. Rep. 94-295 at 40; *see also id.* ("Such a provision [authorizing attorney's fees] is appropriate in voting rights cases because there, as in employment and public accommodations cases, and other civil rights cases, Congress depends heavily upon private citizens to enforce the fundamental rights involved."); *id*. at 43 ("Section 403 is thus needed to achieve consistency in the Congressional policy of enabling private enforcement of important Federal rights.").

As to the remedies available to private litigants, the Report noted that "[c]ourts have been instructed since the passage of our first civil rights laws, to use the broadest and most effective remedies available to achieve the goals of these laws…". *Id.* at 42. These remedies presumably include the types of relief sought here, declaratory and injunctive relief. After all, it would be nonsensical for a court to have the power to grant attorney's fees to a VRA plaintiff's counsel, 52 U.S.C. § 10310(e), but not to issue an order declaring the challenged law unlawful, blocking its enforcement, or otherwise granting relief to the *plaintiff*.

Specifically addressing Section 208, Congress described the statute as a means to better effectuate the VRA's ban on voting tests and devices. In 1975, it amended Section 201 to prohibit the use of tests or devices, *see* Pub. L. 94-73, 89

Stat. 400, which it defined as:

> any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

52 U.S.C. § 10501(b). When Congress added Section 208 in 1982, s*ee* Pub. L. 97-205, 96 Stat. 134, it regarded the provision as part and parcel of the ban on tests and devices, explaining:

> As Louisiana recognized for 150 years, if an illiterate is entitled to vote, he is entitled to assistance at the polls that will make his vote meaningful. We cannot impute to Congress the self-defeating notion that an illiterate has the right to pull the lever of a voting machine, but not the right to know for whom he pulls the lever.
>
> The 1970 temporary suspension of literacy tests nationwide, made permanent in 1975, means that a denial of assistance to illiterate voters in any jurisdiction is now in conflict with the Voting Rights Act. As an independent source of the right of illiterate voters to assistance in many cases is [sic] that it must be provided wherever such assistance is available to other groups such as the blind or disabled.
>
> Therefore, this amendment does not create a new right of the specified class of voters to receive assistance; rather it implements an existing right by prescribing minimal requirements as to the manner in which voters may choose to receive assistance.…Section 4 of the bill simply extends this right to blind, disabled and illiterate citizens in all states.

S. Rep. 97-417 at 63–64. In other words, denying meaningful assistance at the polls to a person who requires assistance due to a disability or inability to read or write is the functional equivalent of a test or device. Through Section 208, Congress

empowered covered voters to receive assistance from almost anyone of their choice because it was "the most effective method of providing assistance", *id.* at 64, and "the only way to assure meaningful voting assistance and to avoid possible intimidation or manipulation of the voter." *Id.* at 62.

As mentioned above, the Eleventh Circuit has implicitly recognized a private right of action to enforce Section 201's ban on tests and devices. *See Greater Birmingham Ministries v. Sec'y of St. of Ala.*, 992 F.3d 1299 (11th Cir. 2021). Given Section 208's history and intended purpose, such recognition should apply equally to it. Accordingly, the *Sandoval* test demonstrates that Section 208 affords both a private right of action and private remedies.

ii. The Cort *test does not dictate a different outcome.*

Even analyzing Section 208 under the *Cort* test, it remains clear that the statute provides an implied right of action. That test requires courts to ask:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Love, 310 F.3d at 1351 (quoting *Cort v. Ash*, 422 U.S. 6 (1975)). Here, these factors militate in favor of a private right of action under Section 208.

As discussed above, Section 208 entitles voters like Plaintiff Kirk and the PVA Plaintiffs' other members who require voting assistance to receive that assistance from a person of their choice, except their employer, employer's agent, union officer, or union agent. 52 U.S.C. § 10508. When Congress amended the VRA in 1975, it explicitly expressed an intent to give private litigants the power to sue under the VRA, and that it deemed such actions critical to enforcing the Act and achieving its purpose. S. Rep. 94-295 at 40.

To the last inquiry, although the Elections Clause of the federal Constitution largely left it to states to regulate elections, the VRA was enacted pursuant to the Fourteenth Amendment and Fifteenth Amendment, *Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1227 (11th Cir. 2005), each of which empowers Congress to enforce its mandates through "appropriate legislation." U.S. Const. amend. XIV, § 5; U.S. Const. amend. XV, § 2. That is because, just as states have traditionally regulated elections, so they have historically denied equal access to the franchise, necessitating federal intervention. *See Brnovich v. Dem. Nat'l Comm.*, 141 S. Ct. 2321, 2330–31 (2021). Recognizing a private right of action under Section 208 would therefore not inappropriately intrude on an area of law traditionally relegated to the states.

The *Cort* test thus confirms that Section 208 contains an implied right of action.

B. VRA § 208 preempts Fla. Stat. § 104.0616.

The Secretary's argument that Section 208 does not preempt Fla. Stat. § 104.0616 is also unavailing. As a general matter, the Eleventh Circuit has articulated the following standards with respect to preemption:

> The Supreme Court has identified three types of preemption: (1) express preemption; (2) field preemption; and (3) conflict preemption. …[E]xpress preemption, occurs when Congress has explicitly indicated its intention to preempt state law in the text of the statute. If Congress does not explicitly preempt state law, however, preemption still occurs when federal regulation in a legislative field is so pervasive that we can reasonably infer that Congress left no room for the states to supplement it, known as field preemption. Even when Congress has neither expressly preempted state law nor occupied the field, state law is preempted when it actually conflicts with federal law. Conflict preemption arises either when it is impossible to comply with both federal and state law or when state law "stands as an obstacle" to achieving the objectives of the federal law.

Pace v. CSX Trans., Inc., 613 F.3d 1066, 1068 (11th Cir. 2010) (internal citations omitted). At minimum, Fla. Stat. § 104.0616 creates a situation where voters and their assistors cannot comply with both the state law and Section 208 and creates an obstacle to achieving the VRA's purpose. *Id.*

Section 208 provides that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508. The term "vote" as it appears in the VRA encompasses "all action necessary to make a vote

effective in any primary, special, or general election, including, but not limited to…[an] action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast…" *Id.* § 10310(c)(1). Any registered Florida voter may cast a mail ballot, *see* Fla. Stat. § 101.62, meaning that the VRA's requirements apply with equal force to mail voting.

By contrast, the state statute, as modified by SB 90, reads:

> (1) For purposes of this section, the term "immediate family" means a person's spouse or the parent, child, grandparent, grandchild, or sibling of the person or the person's spouse.
>
> (2) Any person who distributes, orders, requests, collects, delivers, or otherwise physically possesses more than two vote-by-mail ballots per election in addition to his or her own ballot or a ballot belonging to an immediate family member, except as provided in ss. 101.6105-101.694, including supervised voting at assisted living facilities and nursing home facilities as authorized under s. 101.655, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Fla. Stat. § 104.0616. It leaves terms like "delivers" and "physically possesses" undefined. *See generally* Fla. Stat. § 104.011 et seq. It also does not create an exception allowing voters who require assistance to receive help from a person of their choice, placing it in direct conflict with Section 208.

As a result, a Section 208-covered voter who votes by mail may only receive assistance from an immediate family member within the meaning of the statute, or another person who has assisted no more than one other voter to whom the person is

not related. Given Section 104.0616's use of broad, undefined terms like "physically possesses," it appears to govern even simple acts like carrying a voter's mail ballot from the mailbox to the voter, or delivering a sealed, voted mail ballot to the mailbox for the voter.

Congress expressed that under Section 208, "a procedure *could not deny the assistance at some stages of the voting process during which assistance was needed*…". S. Rep. 97-417 at 63 (emphasis added). That is precisely what Section 104.0616 does. It denies Section 208-covered voters assistance—which, under Section 208, necessarily means assistance provided by someone of the voter's nearly unfettered choice—by restricting who may "physically possess" the ballot for the voter including at the start (receiving the mail ballot through assistance with carrying a voter's mail ballot from the mailbox to the voter) and at the final stage of the vote by mail process (returning a voted ballot). Covered voters have the right under Section 208 to receive assistance from virtually anyone of the voter's selection—which Florida violates by limiting whom covered voters may consult for assistance, beyond the four exceptions listed in Section 208.

This case presents similar facts to those at issue in *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017), where the Fifth Circuit determined that Section 208 preempted a state law limiting when and from whom covered voters could receive assistance. Texas law permitted voters who require assistance due to a

physical disability rendering the voter unable to write or see or due to an inability to read the language in which the ballot is written, to receive help from a person of their choice, but only in the presence of the ballot or a mail ballot envelope, and only to read and mark the ballot. 867 F.3d at 607–08. In the case of language assistance, the voter could only receive assistance from another voter registered in the same county. *Id.* at 608. The Fifth Circuit affirmed the district court's order granting summary judgment to the plaintiffs. Noting the broad definition of the terms "vote" or "voting" under the VRA, it held that Texas law "expressly limit[ed] the right to the act of casting a ballot" and "impermissibly narrow[ed] the right guaranteed by Section 208 of the VRA." *Id.* at 615.

Section 104.0616 commits similar errors. It narrows the category of who may help a covered voter from anyone of the voter's choosing, save the voter's employer, employer's agent, union officer, or union's agent, to certain family members or a person who has handled the mail ballot of no more than one other voter to whom the person is not immediately related. And while Florida law allows voters to receive help from anyone of their choice during other stages of the vote-by-mail process, *see* Fla. Stat. § 101.661(1) (marking the ballot), Section 104.0616 seeks to narrow the right to assistance granted under Section 208 as it concerns distributing, ordering, requesting, collecting, delivering, or otherwise physically possessing a mail ballot.

In this way, Section 104.0616 also frustrates the VRA's objectives. Congress

stated that giving Section 208-covered voters the right to receive assistance from a person of their choice was "the most effective method of providing assistance", S. Rep. 97-417 at 64, and "the *only* way to assure meaningful voting assistance and to avoid possible intimidation or manipulation of the voter." *Id.* at 62 (emphasis added). It was Congress's expressed preference through the language of Section 208 that covered voters are entitled to nearly unfettered discretion in choosing their trusted assistant because it is the *only* way to ensure meaningful voting assistance and avoid undue influence. Thus, further restricting whom the voter may choose—as Section 104.0616 does—necessarily undermines Section 208's purpose and its critical role in effectuating Section 201's prohibition on tests and devices.

As such, Section 208 preempts Section 104.0616, and the PVA Plaintiffs and Plaintiff Kirk have pleaded a Section 208 claim that is plausible on its face.

CONCLUSION

For the foregoing reasons, Plaintiffs have met Rule 12(b)(6)'s requirements, and the Court should deny Secretary Lee's motion to dismiss their void for vagueness claim in Count I and VRA § 208 claim in Count IV of Plaintiffs' amended complaint.

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Respectfully submitted,

/s/ Emma Bellamy
Nancy G. Abudu (Fla. Bar No. 111881)
Emma C. Bellamy
Southern Poverty Law Center
P.O. Box 1287
Decatur, Ga 30031-1287
Tel: 404-521-6700
Fax: 404-221-5857
nancy.abudu@splcenter.org
emma.bellamy@splcenter.org

Michelle Kanter Cohen
Jon Sherman
Cecilia Aguilera
Fair Elections Center
1825 K Street NW, Suite 450
Washington, DC 20006
Tel.: (202) 331-0114
mkantercohen@fairelectionscenter.org
jsherman@fairelectionscenter.org
caguilera@fairelectionscenter.org

Attorneys for Plaintiffs

NORTHERN DISTRICT OF FLORIDA
LOCAL RULE 7.1(F) CERTIFICATION

Pursuant to Local Rule 7.1(F), the attached Memorandum in Opposition to the Secretary's Motions to Dismiss contains 7,145 words, excluding the case style, signature block, and any certificate of service.

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 the 14th of August, 2021.

/s/ Emma Bellamy
Attorney for Plaintiffs