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U.S. DISTRICT COURT
N.D. OF ALABAMA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

ALABAMA STATE CONFERENCE OF THE NAACP, *et al.*,

Plaintiffs,

v.

STEVE MARSHALL, in his official capacity as Alabama Attorney General, *et al.*,

Defendants.

Civil Action No. 24 Civ. 420 (RDP)[1]

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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[1] Plaintiffs' Motion for Preliminary Injunction requested a hearing on its caption page. Plaintiffs respectfully clarify that they do not seek an evidentiary hearing but request the opportunity to present oral argument to the extent the Court deems it appropriate.

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INTRODUCTION

Plaintiffs respectfully submit this Reply in Further Support of their Motion for Preliminary Injunction (Doc. 34). As set forth in Plaintiffs' Opening Brief (Doc. 34-1),[2] Plaintiffs are substantially likely to succeed on the merits of their claims and all equitable considerations weigh in favor of a preliminary injunction. Defendants' Opposition Brief (Doc. 46) does not in any way undermine Plaintiffs' entitlement to relief from SB 1's sweeping and heavy-handed provisions.

ARGUMENT

I. PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

A. Plaintiffs are Substantially Likely to Succeed on Their Speech and Association Claims (Counts 1 and 2).

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As Plaintiffs have explained in their Opening Brief and Opposition to Motion to Dismiss, Plaintiffs' absentee ballot application assistance constitutes pure speech, expressive conduct conveying a message, and associational activity—conduct that is squarely protected by the First Amendment. Doc. 34-1 at 14-19; Doc. 50 at 10-22. Moreover, because SB 1 burdens the freedoms of speech and association, it is subject to strict scrutiny. *See, e.g.*, *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002). Its flimsy and untethered justifications fail under any level of judicial review. Doc. 34-1 at 20-22; Doc. 50 at 22-23.

Defendants' (and their declarants') attempts to cast aside the First Amendment are unavailing and misapprehend both the law and facts. Defendants' Opposition Brief insists that the First Amendment does not protect absentee ballot application assistance because such assistance

[2] In light of the multiple pending motions before the Court, Plaintiffs refer to their Opening Brief in Support of their Preliminary Injunction Motion (Doc. 34-1) as "Opening Brief" and to Defendants' Opposition Brief to the Motion for Preliminary Injunction (Doc. 46) as "Opposition Brief." Plaintiffs refer to Defendants' Opening Brief in Support of their Motion to Dismiss (Doc. 42) as "Motion to Dismiss" and Plaintiffs' Opposition Brief to Defendants' Motion to Dismiss (Doc. 50) as "Opposition to Motion to Dismiss."

"conveys a message only if accompanied by explanatory speech." Doc. 46 at 8. But, as explained, Plaintiffs assert not that speech accompanies or explains their assistance, but rather that they accomplish their assistance through direct, one-on-one communication with voters. Doc. 34-1 at 15–16; *see Meyer v. Grant*, 486 U.S. 414, 424 (1988) (explaining that "direct one-on-one communication" is "the most effective, fundamental, and perhaps economical avenue of political discourse"). SB 1 restricts actual speech because Plaintiffs cannot, for example, explain how to correctly fill out an absentee ballot application without speaking to voters. *See* Ala. Code § 17-11-4(d)(1)-(2) (apparently prohibiting a third-party from assisting a voter to "complete" their absentee ballot application). Moreover, Plaintiffs have thoroughly explained why Plaintiffs' conduct is expressive: a reasonable observer would understand Plaintiffs' provision of an absentee ballot and assistance in its completion as conveying "some message" without the need for explanatory speech, especially as it is intertwined with direct communication with Plaintiffs' specific message about the importance of voting, often occurs in public spaces open to everyone, and is part of a long history of using voter assistance, including the provision of and assistance with official forms, to encourage others to participate in the political process. *See Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale* ("*Food Not Bombs*"), 901 F.3d 1235, 1245 (11th Cir. 2018); Doc. 34-1 at 17–18; Doc. 50 at 15-20; Doc. 45-1 (expert declaration of Alabama historian Dr. Joseph Bagley detailing history of voter assistance to encourage political participation).[3]

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[3] The amicus brief submitted by the Republican National Committee and Alabama Republican Party (together, "RNC") (Doc. 49) largely retreads arguments made by Defendants to which Plaintiffs have responded, so Plaintiffs do not again address all of those arguments here. However, Plaintiffs note that the RNC's contention that conduct is expressive only if "'the likelihood [is] great' that observers would infer 'a particularized message' from Plaintiffs' conduct" misstates the law. Doc. 49 at 6. The Supreme Court and Eleventh Circuit have made clear that "'we ask whether the reasonable person would interpret [the conduct] as some sort of message, not whether an observer would necessarily infer a specific message." *Burns v. Town of Palm Beach*, 999 F. 3d 1317, 1336–37 (11th Cir. 2021); *Food Not Bombs*, 901 F.3d at 1245 ("We decline the City's invitation to resurrect the . . . requirement that it be likely that the reasonable observer would infer a particularized message. The Supreme Court rejected this requirement . . . and it is not appropriate for us to bring it back to life."). The RNC's arguments that Plaintiffs' assistance fails to meet the

1. Plaintiffs' Absentee Application Assistance is Plainly Protected by the First Amendment, and Dr. Grimmer's Declaration is Irrelevant and Unpersuasive.

Defendants' Declaration from Dr. Justin Grimmer (Doc. 46-2) in no way bolsters their arguments.[4] Instead, Dr. Grimmer's declaration displays a fundamental misunderstanding of the absentee ballot assistance activities that Plaintiffs perform and is irrelevant to the inquiry before the Court. For starters, Dr. Grimmer relies on the incorrect premise that Plaintiffs provide voters with "unsolicited" absentee ballot applications. This is not what is at issue: before SB 1, Plaintiffs would speak to voters, one-on-one, encouraging them to vote by helping them to fill out and submit their absentee ballot applications and SB 1 now restricts their right to do so. *See* Doc. 34-4 ¶¶ 8, 9, 11; Doc. 34-5 ¶ 14; Doc. 34-3 ¶ 11; Doc. 34-7 ¶ 5. Perhaps due to his misguided focus on unsolicited applications, Dr. Grimmer spends seven pages discussing the Center for Voter Information ("CVI") and Voter Participation Center ("VPC")—groups that are not parties in this case and that apparently use entirely different modes to reach voters.[5]

Moreover, the bulk of Dr. Grimmer's report is dedicated to arguing that Plaintiffs have not demonstrated that SB 1's restrictions have a "causal effect" on Plaintiffs' abilities to increase voter turnout. *See, e.g.*, Doc. 46-2 ¶¶ 9, 19, 21, 24, 37.[6] But in a First Amendment case, success in

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Food Not Bombs factors also strain credulity: For example, the RNC argues that Plaintiffs' activities are not open to all despite the fact that Plaintiffs routinely offer assistance in public places to all interested individuals they meet, including parks, sidewalks, libraries, food pantries, and other community events. Additionally, the RNC insists that one-on-one communication about the political process is somehow outside the realm of First Amendment protection, but this is squarely contrary to settled law. *See Meyer*, 486 U.S. at 424.

[4] Plaintiffs note that they have not had the opportunity to evaluate Dr. Grimmer's credentials due to Defendants' failure to include Dr. Grimmer's CV or otherwise disclose any of the information required under Federal Rule of Civil Procedure 26(a)(2).

[5] Dr. Grimmer mistakenly refers to VPC as "the Center for Civic Participation (CPC)" despite citing to an article that refers to the organization by its correct name. Doc 46-2 ¶ 13. Moreover, VPC and CVI do not run their absentee ballot application assistance program in Alabama, making Dr. Grimmer's discussion of them all the more irrelevant.

[6] To the extent this portion of Dr. Grimmer's declaration are offered to rebut Dr. Bagley, it is improper because it does not "rebut evidence *on the same subject matter* identified" in Dr. Bagley's expert report. *See* Fed. R. Civ. P. 26(a)(2)(D)(ii) (emphasis added). Dr. Bagley analyzed whether absentee ballot assistance is and has been relied on, historically, as a means of political expression and political speech. Doc. 45-1 at 2. Dr. Grimmer's opinions on causation or turnout are beside the point.

increasing voter turnout does not determine the effectiveness of a plaintiff's *ability to communicate*, because the First Amendment protects a speaker's right "to select what they believe to be the most effective means" of expressing their message. *Meyer*, 486 U.S. at 424. And here, the record establishes that SB 1 prevents what Plaintiffs believe to be their most effective means of communicating that voters can and should exercise their right to vote, including by voting absentee, and assisting them to do so. *See* Doc. 34-4 ¶¶ 6, 16; Doc. 34-5 ¶¶ 1-2, 26; Doc. 34-3 ¶¶ 3, 24; Doc. 34-6 ¶¶ 1-2, 12; Doc. 34-7 ¶ 1, 11. Yet under Dr. Grimmer's theory, the First Amendment would only protect the receipt/effect of speech, not the act of speech itself. This obviously is not the law. *See Meyer*, 486 U.S. at 428.

Dr. Grimmer's criticism of Dr. Bagley is likewise unavailing. Dr. Bagley is a highly qualified historian, whose opinions have repeatedly been accepted and relied upon by courts. *See, e.g.*, *Singleton v. Merrill*, 582 F. Supp. 3d 924, 1021–22 (N.D. Ala. 2022); *see also People First of Ala. v. Merrill*, No. 20-CV-619 (N.D. Ala. 2020). As Dr. Bagley's declaration makes clear, it focuses only on the history of voter (including absentee application) assistance in Alabama, as relevant to the historical factor of the expressive conduct test under *Food Not Bombs*.[7] Dr. Bagley's report provides a detailed historical analysis to reach his conclusion that, since Reconstruction, "not only has absentee ballot application assistance—and voter assistance, generally—been relied upon as a means of political expression and speech" in Alabama, "such assistance has, historically and recently, been the target of state action seeking to curtail said assistance." Doc. 45-1 at 2.

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[7] Defendants also attempt to recharacterize Dr. Bagley's opinions as a "legal conclusion." Doc. 46 at 2, 9. But Dr. Bagley proffers an expert analysis relating to the historical context of a particular symbol in understanding whether a reasonable observer would understand some message from that symbol. Expert testimony on this matter has been accepted as relevant to determining whether conduct is expressive. *See* Decl. of Richard Wilk, *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, No. 15-CV-60185, Doc. 40-28 (S.D. Fla. Dec. 16, 2015).

Yet Dr. Grimmer argues variously that "Dr. Bagley never explains how the message of the Plaintiff groups would be changed if the voter assistance . . . had to comply with SB 1" and "[a]bsent from Dr. Bagley's report . . . is a systematic analysis showing that the regulations in SB 1 . . . disproportionately targets any racial group." Doc. 46-2 ¶¶ 42, 45. As discussed, Dr. Bagley's opinion is limited to the historical factor under the *Food Not Bombs* test for expressive conduct; he was not asked to, and does not, opine on how SB 1 "would change[]" Plaintiffs' message. Moreover, racially discriminatory intent is not at all relevant to whether Plaintiffs' activities are speech or expressive conduct, let alone within the scope of Dr. Bagley's declaration. Dr. Grimmer thus misapprehends both the import of Dr. Bagley's opinions and the issues before the Court.

Dr. Grimmer's other attempts to discredit Dr. Bagley also have no merit. Dr. Bagley analyzes absentee ballot assistance in Alabama through a historical lens, using the standard methodology for historians, which requires, *inter alia*, reviewing applicable "sources for scholars in the humanities and social sciences to reference" and "weigh[ing] all of these against one another, objectively, as is common in the field." Doc. 45-1 at 2. Dr. Grimmer's cherry picking of a handful of the sources weighed by Dr. Bagley does not undermine Dr. Bagley's overall conclusions. Although not required, Plaintiffs attach as Exhibit A hereto a Reply Declaration of Dr. Bagley further addressing these flaws in Dr. Grimmer's criticism.

Finally, Dr. Grimmer puzzlingly states that "Plaintiffs fail to provide a single piece of evidence from any research design that shows they have any effect at all on how individuals in Alabama cast their votes." Doc. 46-2 ¶ 24. This again misconstrues the relevant First Amendment inquiry. And more fundamentally, Plaintiffs are lay witnesses who credibly testify about their collective decades of experience speaking to voters through their absentee ballot application

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assistance to describe how SB 1 would affect their ability to communicate. *See* Doc. 34-4 ¶ 1; Doc. 34-5 ¶¶ 1-2; Doc. 34-3 ¶¶ 1-2; Doc. 34-6 ¶¶ 1-2; Doc. 34-7 ¶ 1. Plaintiffs need not provide "analysis or data" or a "randomized experiment" about their personal knowledge. Doc 46-2 ¶ 24.

2. SB 1 Fails Under Any Level of First Amendment Scrutiny, and Mr. Biggs' Declaration is Again Irrelevant and Unpersuasive.

As explained, SB 1 must satisfy strict scrutiny to justify its serious intrusions on First Amendment rights. *See Weaver*, 309 F.3d at 1319. It is Defendants' burden to prove that the law is narrowly tailored to serve a compelling state interest; they must demonstrate "that the recited harms are real, not merely conjectural, and that the regulation [of speech] will in fact alleviate the harms in a direct and material way." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). Despite Defendants' suggestion, there is no blanket exemption for state election laws.[8]

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Defendants have not met their "well-nigh insurmountable" burden. *Meyer*, 486 U.S. at 425. As in their Motion to Dismiss, they claim a generalized interest in "reducing voter confusion, deterring fraud, preventing undue influence, and instilling voter confidence." Doc. 46 at 9. Plaintiffs do not dispute that the State may very well have such interests, but it already has many other ways to advance them,[9] and Defendants fall far short of justifying the extreme First Amendment restrictions imposed by SB 1. Critically, to permit such incursion under the First Amendment, the Eleventh Circuit requires the State to "establish a nexus" between the challenged restrictions and the interests they purport to serve. *Zeller v. Fla. Bar*, 909 F. Supp. 1518, 1526

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[8] Amicus RNC similarly suggests that the State need not substantiate its asserted justifications because SB 1 is a state election law. Doc. 49 at 11-12. Even if Defendants may face a lesser burden with respect to "ordinary election restriction[s]," an election law that directly regulates and limits political expression is still "subject to the highest scrutiny." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345-46 (1995) (quoting *Meyer*, 486 U.S at 420); *see Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 207 (1999) (Thomas, J., concurring) ("When a State's election law directly regulates core political speech, we have always subjected the challenged restriction to strict scrutiny and required that the legislation be narrowly tailored to serve a compelling government interest.").

[9] *See* Opening Br. at 22 & n.38 (discussing Ala. Code §§ 17-17-33, 38, 39, which have long criminalized vote buying, voter intimidation, and voter bribery).

(N.D. Fla. 1995) (citing *Meyer*, 486 U.S. at 426-47); *id.* at 1526-27 ("In light of the [challenged provision's] restrictions on political expression and association protected under the First Amendment," courts "cannot cavalierly accept without proof that the means being used achieve the legitimate ends being sought.").

Defendants attempt to conjure such a nexus through the Declaration of Gregory Biggs, who worked as an Assistant Attorney General between 1995 and 2001. Doc. 46-1 ¶ 3. But Mr. Biggs's Declaration only underscores Defendants' failure of proof. At the outset, Defendants do not assert that Mr. Biggs's opinion or speculation played any part in the Legislature's drafting of SB 1, so his opinions are irrelevant to understanding the State's interests. Even assuming the prosecutions cited by Mr. Biggs are accurately described (and were considered by the Legislature more than twenty years later, which Defendants do not assert), they amount to just four in total during his entire tenure. This can hardly be said to establish that absentee voter fraud is an active problem, let alone support SB 1's severe and wide-ranging incursions on absentee application assistance. *See People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1107 (N.D. Ala. 2020) (finding that "[t]he record shows that voter fraud rarely occurs today," despite defendant's citation to "two instances of voter fraud convictions secured in Alabama since the 1990s").

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Mr. Biggs goes so far as to suggest "[i]n my experience, when absentee ballots comprise a double-digit percentage of total votes cast in a county in Alabama, fraud should be suspected and is likely involved." Doc. 46-1 ¶ 6. This naked speculation cannot come close to meeting Defendants' burden. He provides no evidentiary support for this assertion, and moreover, his experience prosecuting four cases over 20 years ago can provide no relevant information about the necessity of restricting First Amendment rights today.

Under these circumstances, as explained in Plaintiffs' Opposition to Motion to Dismiss (Doc. 50 at 22, n.5), SB 1 fails even under the lesser *O'Brien* standard, which still requires that restrictions be "narrowly tailored to serve a significant governmental interest." *Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1292 (11th Cir. 2021) (citation omitted). As discussed *infra* pp. 8-11, SB 1 also is unconstitutionally vague and overbroad—meaning by definition it is not narrowly tailored. Defendants thus cannot meet their burden under any level of scrutiny.

B. Plaintiffs are Substantially Likely to Succeed on Their Vagueness and Overbreadth Claims (Counts 3 and 4).

Defendants offer only cursory arguments regarding Plaintiffs' vagueness and overbreadth claims. But for the reasons detailed in both Plaintiffs' Opening Brief and Opposition to Motion to Dismiss, Plaintiffs are substantially likely to succeed on both.

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1. SB 1 is Unconstitutionally Vague.

As to vagueness, Plaintiffs have explained that SB 1 is void-for-vagueness for two independent reasons: (i) because its broad and undefined terms leave Plaintiffs wholly uncertain of what conduct runs afoul of the law; and (ii) because it authorizes or encourages arbitrary enforcement. *See* Doc. 34-1 at 22-26; Doc. 50 at 27-33; *see also Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1319 (11th Cir. 2017).

First, SB 1 is unconstitutionally vague because it hinges on the ambiguous words "payment," "gift," "third-party," "prefill," "submit," and "distribute," which lend themselves to varying interpretations as to what conduct is and is not prohibited. Defendants' arguments only underscore SB 1's fatal deficiencies: in both their Motion to Dismiss and Opposition Brief here, Defendants can only attempt to explain the scope and meaning of SB 1 by inferring words and meaning that do not exist anywhere in the statute or conjuring their own definitions from thin air. Taking "payment" and "gift" as examples, Defendants have variously posited in this litigation that

they mean "compensation" and "something of value," Doc 42 at 33; Doc. 46 at 8—despite neither of these additional terms appearing anywhere in the statute. More concretely, the lack of any reasonable clarity under SB 1 as to whether, *inter alia*, a grandmother who gives a pie to their grandchild as a token of appreciation could face decades in prison for doing so. Likewise, based on Defendants' unsupported "quid pro quo" theory, they previously have argued (without any statutory basis to warrant this distinction) that prison staff who receive a general salary and engage in absentee application assistance cannot be liable under SB 1 whereas nonprofit staff receiving the exact same type of general salary and engaging in the exact same type of absentee application assistance could commit a crime. *See* Doc. 42 at 34.[10]

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Second, SB 1 is unconstitutionally vague because it presents a serious risk of arbitrary enforcement. This is an independent reason why the law is void, and Defendants do not contest it anywhere in either their Motion to Dismiss or their Opposition Brief here. This is not surprising. The record plainly establishes that SB 1 is susceptible to arbitrary enforcement. During the legislative process, bill sponsor Senator Gudger testified that the provision of a "stamp [or] sticker" could be considered an impermissible "gift" under the statute but stated "we're not going after people that are trying to stamp." Doc. 34-2, Ex. A at 33:18-20. He also acknowledged that SB 1 raised concerns about criminalizing "the grandfather giving the grandson $5 for gas money," but proposed that Alabamians simply "not . . . worry about [that]" because "I don't think anybody's going after that." *Id.* at 28:7-9. But "clarity [cannot be found] in a wholly ambiguous statute simply by relying on the benevolence or good faith of those enforcing it." *Wollschlaeger*, 848 F.3d at

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[10] Defendants also contend that SB 1's "'scienter requirements' remove any plausible claim that SB 1 is unconstitutionally vague" (Doc. 46 at 8)—yet the term "knowing" as used in SB 1 does not provide any clarity beyond that the prohibited conduct must be made consciously. It does not explain, for example, whether one's "knowing" receipt of a general salary runs afoul of the law or why prison staff would be different from nonprofit staff in this regard. *See* Doc. 50 at 30 n.11.

1322-23.

Further, in these same proceedings, SB 1 was touted by Senator Gudger as responding to higher rates of absentee voting in certain Black Belt counties during the 2022 primary election, while offering no cogent argument indicating any wrongdoing connected with this higher usage. *See* Doc-34-2, Ex. A at 28:11-29:12. This too suggests a serious risk of selective enforcement in these regions and on those like Plaintiffs who assist voters there. Defendants' own litigation arguments underscore this risk. Their "quid pro quo" argument discussed above, based on the source of compensation, is nowhere to be found in the statute and smacks of arbitrary enforcement based on who the assistor is rather than the actual act of assistance. Given SB 1's legislative history, and the extensive ambiguity in its terms, the danger that SB 1 will be selectively enforced is substantial.

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In short, it is Defendants who "misunderstand[] the Due Process standard for vagueness." Doc. 46 at 8. When First Amendment freedoms are implicated, as here, "standards of permissible statutory vagueness are strict." *NAACP v. Button*, 371 U.S. 415, 432–33 (1963). The public cannot reasonably be expected to infer and apply meanings not evident on the face of the statute or take their chances at arbitrary enforcement, especially not with the specter of serious criminal liability. To do so would violate "the first essential of due process." *United States v. Davis*, 588 U.S. 445, 451 (2019) (quotation marks omitted). Plaintiffs are therefore substantially likely to succeed on their vagueness claim.

2. SB 1 is Unconstitutionally Overbroad.

SB 1 is also unconstitutionally overbroad, as it restricts a sweeping amount of protected speech and conduct without any reasonable bounds in doing so. *See* Doc. 34-1 at 27-28; Doc. 50 at 33-35; *see also United States v. Stevens*, 559 U.S. 460, 473 (2010) (holding that laws restricting

First Amendment freedoms "may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep") (citation and internal quotation marks omitted).

In their Opposition Brief, Defendants make essentially no substantive argument regarding overbreadth. Their primary Motion to Dismiss argument on this claim was premised on their incorrect assertion that SB 1 only criminalizes non-expressive conduct. But as discussed, SB 1 places significant and untenable burdens on Plaintiffs' core political speech, expressive conduct, and freedom of association, and these harms are only compounded by its extreme vagueness. *See supra* pp. 1-10; *see also* Doc. 34-1 at 14-26; Doc. 50 at 10-33. Moreover, SB 1 does not have a "plainly legitimate sweep": it is premised on nebulous assertions of "ballot harvesting" fraud but is focused only on absentee *applications* (which would not address any "ballot harvesting" issue), and it sweeps in broad forms of protected, and even legally required, conduct like assisting voters entitled to such assistance under Section 208 of the VRA and Plaintiff ADAP's duties under HAVA. It even appears to sweep in employees or volunteers of political campaigns, contradicting the Supreme Court's admonition that the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Fed. Election Comm. v. Cruz*, 596 U.S. 289, 302 (2022) (quotation marks and citation omitted). Plaintiffs are also therefore likely to succeed on their overbreadth claim.

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C. Plaintiffs are Substantially Likely to Succeed on their Claim Under Section 208 of the VRA (Count 5).

Plaintiffs also are substantially likely to succeed on their claim under Section 208 of the VRA, which codifies the right of blind, disabled, and low-literacy voters to receive assistance from "a person of their 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. Congress unambiguously empowered these voters

with the right to decide for themselves whom to choose to assist them with voting, because this is "the only way to assure meaningful voting assistance." S. Rep. No. 97-417, 62 (1982).

As Plaintiffs have explained—and as the United States explains in their recently-filed Statement of Interest in this case (Doc. 51)—SB 1's criminal scheme violates and is preempted by Section 208 because it impermissibly narrows the right of Section 208-eligible voters to assistance from "a person of their choice." *See* Doc. 34-1 at 28-31; Doc. 50 at 36-40; Doc. 51. Because SB 1 "stands as an obstacle to" Congress's "full purposes and objectives" in enacting Section 208, it is federally preempted by Section 208. *Gade v. Nat'l. Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (quotation marks and citations omitted); *see, e.g.*, *Ark. United v. Thurston*, 626 F. Supp. 3d 1064, 1085 (W.D. Ark. 2022) (finding state law limiting assistors' conduct preempted by Section 208).

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As in their Motion to Dismiss, Defendants first suggest that "Plaintiffs have failed to even show tension between SB 1 and § 208," since SB 1 reproduces Section 208's text. Doc. 46 at 11. Yet in the same breath, Defendants agree that SB 1 dramatically narrows the universe of assistors from that which Congress delineates in Section 208. *Id.* Both the text and legislative history of Section 208 confirm that this is a direct, and unconstitutional, conflict with federal law. *Cf. OCA-Greater Houston v. Texas*, 867 F.3d 604, 615 (5th Cir. 2017) ("[A] state cannot restrict this federally guaranteed right [under Section 208] by enacting a statute tracking its language, then defining terms more restrictively.").

Defendants' argument that a state may nonetheless remove broad categories of assistors from Section 208 voters hinges on the fact that Section 208 refers to "a" instead of "any" assistor in its text. Doc. 46 at 11-12. But as Plaintiffs and the United States have explained, Defendants' position is contrary to the overwhelming weight of authority—including canons of construction,

Section 208's legislative history, and case law from the Supreme Court, this Circuit, and many other courts around the country. *See* Doc. 50 at 38-40 (cataloguing authority); Doc. 51 at 4-6 (same).

It is well settled that "where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Hillman v. Maretta*, 569 U.S. 483, 496 (2013). Here, Congress clearly intended to create an expansive right for eligible voters to receive assistance from a person of their own choosing, with only these two exceptions (for a voter's employer or union). *See* S. Rep. No. 97-417, 2 (1982) (the "purpose" of Section 208 is to prescribe "the method by which voters who are blind, disabled, or illiterate are entitled to have assistance in a polling booth from a person of their own choosing, with two exceptions"). And courts consistently hold that the indefinite article "a" ordinarily means "any." *See, e.g.*, *United States v. Alabama*, 778 F.3d 926, 932–33 (11th Cir. 2015) (holding that "[t]he plain meaning of the term 'an election' is 'any election'") (collecting Fifth and Eleventh Circuit cases). Thus, within that broad universe of "persons" in Section 208, "Congress only included two categories of excluded assistants in the statutory text, and if Congress intended to exclude more categories, or to allow states to exclude more categories, it could have said so." *Disability Rts. N.C. v. N.C. State Bd. of Elections*, 602 F. Supp. 3d 872, 878 (E.D.N.C. 2022) ("[T]he use of the indefinite article "a" does not show intent by Congress to allow states to restrict a federally created right.").

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Defendants do not acknowledge any of this authority and instead invoke just two outlier, out-of-circuit district court cases (and can point to no other statute that has been interpreted in the way they urge). *See* Doc. 46 at 11-12 (citing *Priorities USA v. Nessel*, 628 F. Supp. 3d 716, 732 (E.D. Mich. 2022) and *Ray v. Texas*, No. 06-CV-385, 2008 WL 3457021, at *7 (E.D. Tex. Aug. 7,

2008)). Both *Priorities* and *Ray* are clearly against the weight of authority. As the United States explains, "*Nessel* flouts the settled canon that enumerated statutory exceptions are presumed to be exclusive and overlooks the importance of voter choice as Congress's chosen remedy." Doc. 51 at 6. And since the district court decision in *Ray*, the Fifth Circuit has clarified that states may not "[impose] a limitation on voter choice"; to do so "impermissibly narrows the right guaranteed by Section 208 of the VRA." *OCA-Greater Houston*, 867 F.3d at 615. *Ray* also is distinguishable as it did not broadly exclude large swaths of assistors as SB 1 does here. *See Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 236 (M.D.N.C. 2020) ("In *Ray*, only a few people were off-limits to voters leaving nearly everyone else available to witness an absentee ballot, whereas here, everyone but a few people are off limits. The court therefore finds *Ray* unpersuasive.").

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Additionally, Defendants' contention that Plaintiffs should have furnished a declaration from a voter who will be entirely disenfranchised by SB 1 falls flat. Doc. 46 at 13-14. Total disenfranchisement is not necessary to show a Section 208 injury, nor is an individual impacted voter; the conflict preemption inquiry is whether the statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade*, 505 U.S. at 98; *see, e.g.*, *Disability Rts. N.C. v. N.C. State Bd. of Elections*, No. 5:21-CV-361, 2022 WL 2678884, at *7 (E.D.N.C. July 11, 2022) (granting summary judgment, in pre-election challenge, for organizational plaintiff on claim that state law limiting absentee voter assistance was preempted by Section 208); *Ark. United*, 626 F. Supp. 3d at 1087 (granting summary judgment to organizational plaintiff and its Executive Director on Section 208 claim challenging state law imposing limit on assisting six voters per person); *OCA-Greater Houston*, 867 F.3d at 614-15 (affirming, in relevant part, summary judgment for organizational plaintiff on Section 208 claim

challenging state law restricting the interpretation assistance organization could provide). And in any case, because Alabama does not provide electronic or Braille absentee ballot applications, blind voters *necessarily* require assistance to complete the form. *See* Doc. 34-7 ¶ 4.[11]

SB 1's conflict with Section 208 is not excused by Defendants' claimed interest in preventing fraud. Instead, in enacting Section 208, Congress expressly "recognize[d] the legitimate right of any state to establish necessary election procedures, subject to the *overriding principle* that such procedures shall be designed *to protect the rights of voters*." S. Rep. 97-417 at 473 (emphasis added). Alabama can and does regulate its elections through other "election procedures," *see, e.g.*, Ala. Code §§ 17-17-33, 38, 39, but SB 1's direct conflict with Section 208 cannot stand.

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D. Plaintiff ADAP is Substantially Likely to Succeed on its Preemption Claim Under HAVA (Count 6).

Finally, Plaintiff ADAP is substantially likely to succeed on its HAVA preemption claim. Defendants reprise their prior argument that ADAP lacks a cause of action for this claim and that SB 1's restrictions somehow do not conflict with the voter-assistance that HAVA obligates ADAP to undertake. Doc. 46 at 12-13. But as explained in Plaintiffs' Opposition to Motion to Dismiss, this is simply wrong. Doc. 50 at 41-44.

With respect to ADAP's cause of action, one of its many rights as a Protection and Advocacy grantee is the right to bring suit to enforce rights protected by the Developmental Disabilities Assistance and Bill of Rights Act of 2000 ("DDA"). 52 U.S.C.A. § 21061(a); *see Disability Rts. Tex. v. Hollis*, No. 23-20171, 2024 WL 2836594, at *2 (5th Cir. June 5, 2024). And here, ADAP has no alternative avenue for relief to prevent Defendants from prosecuting their staff

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[11] Defendants also vaguely fault Plaintiffs' declarations for including "hearsay." Doc. 46 at 13-14. Plaintiffs do not concede that this evidentiary characterization is correct. However, in addition to Plaintiffs' own statements which establish a Section 208 violation, it is of course entirely proper for a court to consider hearsay evidence at the preliminary injunction stage. *Levi Strauss & Co. v. Sunrise Int'l. Trading, Inc.*, 51 F.3d 982, 985 (11th Cir. 1995).

under SB 1. *Cf.* 52 U.S.C.A. § 21111 (providing a cause of action for the U.S. Attorney General to remedy violations of HAVA's unrelated "list maintenance" provisions). It would be perverse indeed if, despite Congress's creation of an affirmative-duty statute, no one could seek to enforce it when a state blatantly thwarts the federal mandate.

Defendants simply skate past the clear conflict between SB 1 and HAVA. They have no response at all to the fact that SB 1 apparently criminalizes voter assistance that ADAP is federally mandated (and pays an employee) to provide. *Compare* Ala. Code § 17-11-4(d)(2) (criminalizing ADAP's assistance to "distribute, order, request, collect, prefill, complete, obtain, or deliver a voter's absentee ballot application") *with* 52 U.S.C. § 21061 (mandating ADAP "to ensure full participation in the electoral process for individuals with disabilities, *including registering to vote, casting a vote and accessing polling places*") (emphasis added). Despite Defendants' suggestion, the fact that ADAP also engages in other work not implicated by SB 1 does not obviate its conflict with HAVA (setting aside the extreme vagueness in the law which makes it impossible to discern what it prohibits).

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Defendants also absurdly suggest that ADAP's claim means that something like a vote buying ban would be preempted under HAVA, since vote buying could generate "fuller participation." Doc. 46 at 12. This is a contortion of the law and an insult to the importance of empowering disabled voters in the political process: the purpose of HAVA is to assist voters in their full electoral participation, not force or bribe them to vote. ADAP does not contend that states are unable to set the contours of permissible conduct regarding elections, such as Alabama's long-standing prohibition on paying people to vote. *See* Ala. Code. § 17-17-34. But when the State bans conduct expressly provided for by Congress, federal law must prevail.

II. ALL REMAINING FACTORS COMPEL THE ISSUANCE OF A PRELIMINARY INJUNCTION

Should this Court agree that Plaintiffs are substantially likely to prevail on one or more of their claims, there can be no doubt that all remaining factors weigh in favor of a preliminary injunction. *See* Doc. 34-1 at 33-35.

A. Plaintiffs Unequivocally Will Suffer Irreparable Harm Absent Preliminary Relief.

As explained in their Opening Brief, Plaintiffs will suffer irreparable harm absent preliminary relief. *See* Doc. 34-1 at 33. As an initial matter, "[t]he loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury." *Food Not Bombs*, 11 F.4th at 1286 (citation omitted); *Otto v. City of Boca Raton*, 981 F.3d 854, 870 (11th Cir. 2020) (the "direct penalization" of First Amendment rights is "per se irreparable"). Moreover, burdens on the right to vote are also irreparable—both where someone is unable to vote without Plaintiffs' assistance to vote absentee, and also where they may ultimately find a way to vote but face additional hurdles to do so. *See, e.g.*, *Gonzalez v. Governor of Ga.*, 978 F.3d 1266, 1272 (11th Cir. 2020); *Westchester Disabled on the Move, Inc. v. Cnty. of Westchester*, 346 F. Supp. 2d 473, 477-78 (S.D.N.Y. 2004). And the fear of criminal prosecution is itself irreparable. *See Ga. Latino All. for Human Rts. v. Governor of Ga.*, 691 F.3d 1250, 1269 (11th Cir. 2012). So too is the frustration of Plaintiffs' missions.

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Defendants can offer no substantive response to these undeniable harms. Instead, they suggest that Plaintiffs' First Amendment harm is somehow "self-inflicted" and "incidental"—citing Plaintiffs' cessation of conduct that Defendants claim is not restricted by SB 1. Doc. 46 at 15-16. But of course, when confronted with vague laws—especially when they carry up to 20 years in prison—speakers will "steer far wider of the unlawful zone." *Wollschlaeger*, 848 F.3d at 1320 (cleaned up). Defendants' own examples only highlight SB 1's vagueness and irreparable harm.

For example, with respect to Alabama NAACP's attestation that fear of prosecution under SB 1 has caused it to refrain "from sending a link to the [absentee] application to [its] members or voters who join [its] mailing list," Defendants state that this is "needless discontinuation of actual speech not plausibly prohibited by SB 1." Doc. 46 at 16. But as Plaintiffs have explained, the term "distribute" as used in SB 1 is so vague that it leaves unclear whether sharing a web link to the absentee ballot application would qualify as "distribut[ion]."

To try to minimize the obvious burdens that SB 1 imposes on the right to vote, Defendants again argue that Plaintiffs have not furnished a declaration from an individual voter who "will lose the opportunity to vote without an injunction." Doc. 46 at 17. This is unnecessary, as discussed *supra* pp. 14-15. Burdening the right to vote under Section 208 is plainly irreparable, even if a voter manages to overcome these burdens and find a way to vote. *See Westchester Disabled on the Move, Inc.*, 346 F. Supp. 2d at 477-78; *Disability Rts. N.C.*, 2022 WL 2678884, at *7 ("For plaintiff, the harm includes continued diversion of resources, frustration of its mission, and an inability to address other voting rights needs of constituents. For plaintiff's constituents, the irreparable harm is the continued deprivation of their rights under Section 208."). And as mentioned, Plaintiffs also suffer other forms of irreparable harm, none of which Defendants appear to dispute.

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B. The Balance of the Equities and Public Interest Require the Issuance of a Preliminary Injunction.

It is well settled that the State can have no legitimate interest in defending provisions that violate federal law. *See United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012) ("Frustration of federal statutes and prerogatives are not in the public interest."); *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) (holding that neither city nor public had any interest in "enforcing an unconstitutional ordinance"); *see also* Doc. 34-1 at 35.

Despite this, Defendants echo their contention that the State should nonetheless be allowed to go forward with SB 1's enforcement, to further general goals of "preventing and ferreting out voter fraud and voter confusion." Doc. 46 at 18. This turns the equities analysis on its head. Plaintiffs do not dispute that the State has an interest in implementing reasonable restrictions on election conduct. And in fact, the State has many laws on the books which already do that. However, the State cannot brandish a nebulous interest in election integrity to outweigh SB 1's infringement on Plaintiffs' rights. There is not, and cannot be, a public interest in allowing individuals to be prosecuted under an unconstitutional and preempted law.

Defendants' status quo argument does not undermine Plaintiffs' entitlement to relief. Defendants contend that preliminary relief cannot issue because it would purportedly disturb the status quo, which they describe as "enforcement of a statute currently in force." Doc. 46 at 20. But Defendant Secretary of State Allen has informed the public that the law will only go in effect for the November 5, 2024 general election.[12] Defendants muddle this in their Opposition Brief by stating that nonetheless absentee applications could be sent at any time so SB 1 is in effect "now." Doc. 46 at 20. Tellingly, they do not argue that they would face any challenges in implementing a preliminary injunction—nor could they, since such an injunction would simply require them not to enforce the law. Their own confusion about the status of the law only makes preliminary relief all the more urgent.

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In any event, the status quo discussion is a red herring. Although "[t]he chief function of a preliminary injunction is to preserve that status quo until the merits of the controversy can be fully and fairly adjudicated," *Powers v. Sec'y, Fla. Dep't of Corr.*, 691 Fed. App'x 581, 583 (11th Cir.

[12] *See* Mike Cason, AL.com, "Sec'y of State Wes Allen Says Alabama's New Absentee Voting Law in Effect for November Election" (Mar. 23, 2024), https://www.al.com/news/2024/03/secretary-of-state-wes-allen-says-alabamas-new-absentee-voting-law-ineffect-for-november-election.html.

2017) (quotation marks omitted), this is not absolute. If the "existing status quo itself is causing . . . irreparable injury, it is necessary to alter the situation so as to prevent the injury." *Melendez v. Sec'y, Fla. Dep't of Corr.*, No. 21-13455, 2022 WL 1124753, at *18 (11th Cir. 2022) (quoting *Canal Auth. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974)). "The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo." *Canal Auth.*, 489 F.2d at 576. Status quo or not, a preliminary injunction is required to address Plaintiffs' ongoing, irreparable harm. And here, such an injunction would impose minimal burdens on Defendants: it does not require them to do anything but refrain from enforcing an unlawful law.

III. THE REQUESTED PRELIMINARY INJUNCTION IS NECESSARY TO PROVIDE "COMPLETE RELIEF"

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Finally, Defendants suggest that the Court would "abuse[] its discretion" if it issues the requested "universal injunction." Doc. 46 at 20-21. This is meritless. Under the circumstances of this case, Article III *requires* rather than strips this Court's authority to enjoin Defendants from enforcing SB 1 against anyone.

As Defendants themselves acknowledge, Article III entitles a plaintiff to "complete relief." Doc. 46 at 21 (quoting *Georgia v. President of the United States*, 46 F.4th 1283, 1306 (11th Cir. 2022)). Here, particularly because Plaintiffs are employers and membership organizations,[13] they can only obtain "complete relief" through an injunction that bars the State from enforcing SB 1 against anyone. This is because the limited, haphazard injunction that Defendants propose, which would permit Alabama to enforce SB 1 against non-parties, could not fully redress the harm to Plaintiffs. Such a limited injunction would still force Plaintiffs "to divert resources to educate and respond to SB 1's changes to the law" in the state. Doc 34-1 at 13. It also would offer essentially no protection for Plaintiffs' employees, volunteers, and many thousand (if not more) members and

[13] Defendants do not dispute Plaintiffs' organizational or associational standing.

constituents,[14] who would remain vulnerable to—and fearful of—prosecution despite technically being part of the group entitled to injunctive relief. For example, would individuals be required to risk prosecution and then try to raise their affiliation with Plaintiffs as an affirmative defense in the criminal proceeding? Not to mention the utter lack of certainty such a limited injunction would have for any of Plaintiffs' future employees, volunteers, members, and constituents who are not currently considered part of Plaintiffs but would be in the future. Likewise, it would be unadministrable if the scope of an injunction required analyzing, for example, whether someone's membership dues had lapsed or, for organizations where payment is not a means to membership, whether someone is sufficiently connected to be considered a member/constituent of such organization. All of this would render illusory the benefits of preliminary relief.

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Moreover, it is well settled that "complete relief" often does require an injunction that "will affect nonparties." *Georgia*, 46 F.4th at 1306; *see Florida. v. Dep't of Health & Hum. Servs.*, 19 F.4th 1271, 1282 (11th Cir. 2021) (noting that universal relief is warranted where "necessary to provide complete relief to the plaintiffs [or] to protect similarly situated nonparties"); *City of Chicago v. Barr*, 961 F.3d 882, 920–21 (7th Cir. 2020) ("It is widely accepted—even by self-professed opponents of universal injunctions—that a court may impose the equitable relief necessary to render complete relief to the plaintiff, even if that relief extends incidentally to non-parties."). Indeed, such injunctions are routine. *See, e.g.*, *Honeyfund.com Inc. v. Governor, Ga.*, 94 F.4th 1272, 1275 (11th Cir. 2024) (affirming injunction barring state ban on workplace diversity trainings against anyone in the state—plaintiffs and non-parties alike); *NetChoice, LLC v. Att'y*

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[14] Plaintiff ADAP alone counts all Alabamians with disabilities as constituents. Doc 34-6 ¶ 2; *see Doe v. Stincer*, 175 F.3d 879, 886 (11th Cir. 1999) (explaining that a P&A like ADAP may sue on behalf of the constituents they serve "like a more traditional association may sue on behalf of its members"). Plaintiff Alabama NAACP has nearly 5,000 members, Doc. 34-4 ¶ 2, Plaintiff GBM has over 2,700 members, Doc. 34-3 ¶ 9, and Plaintiff LWVAL has approximately 475 members, Doc. 34-5 ¶ 4.

Gen., 34 F.4th 1196 (11th Cir. 2022) (affirming injunction barring enforcement of portions of state content-moderation regulation against any social-media providers); *Odebrecht Const., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1273 (11th Cir. 2013) (affirming preliminary injunction prohibiting state from enforcing Cuban sanctions law against any businesses); *see also Georgia*, 46 F.4th at 1306 (noting the "instructive" example of redistricting orders that affect non-party voters).

What Defendants otherwise urge—that this Court allow piecemeal enforcement of a likely unconstitutional criminal statute—is simply untenable. In addition to being a wholly deficient remedy for Plaintiffs, such a scheme would invite "chaos and confusion" through a flood of suits and a "patchwork of injunctions." *Florida*, 19 F.4th at 1282 (quoting *Barr*, 961 F.3d at 916-17); *see also Barr*, 961 F.3d at 917 (observing that a desire to avoid a "multiplicity of suits has long been a consideration in equity, which even the opponents of universal injunctions acknowledge"). Fortunately, this Court need not broach that scenario—because "complete relief" in this case is the injunction that Plaintiffs have sought.

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CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction should be granted.

Dated this 17th day of June, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 2024, I electronically filed the foregoing with the Clerk of Court for the United States District Court for the Northern District of Alabama using the CM/ECF system thereby serving all counsel of record.

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