FILED
2024 Jun-20 PM 02:18
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. | ) | Case No. 2:24-cv-420-RDP |
| STEVE MARSHALL, in his official capacity as Attorney General of Alabama, *et al.*, | ) | |
| *Defendants*. | ) | |

RETRIEVED FROM DEMOCRACYDOCKET.COM

**DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS**

Alabama "has the power to prescribe the qualifications of its officers, and the manner in which they shall be chosen." *Boyd v. State of Nebraska*, 143 U.S. 135, 161 (1892). This power follows from the State's "obligation … to preserve the basic conception of a political community." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973). And "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

SB1 is one such election regulation. Designed to protect the integrity of the absentee ballot application process, SB1 establishes commonsense safeguards against fraud and public confusion. Plaintiffs claim SB1 violates the U.S. Constitution and federal statutory law. In a 173-paragraph shotgun pleading, they complain that the meaning of the law is beyond them, that it violates their rights to speak and associate freely, and that it conflicts with two federal statutes—one that reads identically to a provision in SB1, and one that provides funding to private organizations to ensure full participation in the franchise by disabled voters. These claims crumple under the weight of Plaintiffs' own allegations.

Fundamentally, Plaintiffs pursue a federal takeover of Alabama's absentee voting process, one in which paid ballot harvesting agents are free to exert undue influence over vulnerable voters.[1] This cannot be reconciled with the Supreme Court's repeated recognition that "evenhanded restrictions that protect the integrity and reliability of the electoral process itself" are not constitutionally suspect. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189-90 (2008) (plurality op.) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)); *see also Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2347 (2021) (A "State indisputably has a compelling interest in preserving the integrity of its election process."); *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 33 (2020) (Kavanaugh, J., concurral) ("The Court has long recognized that a State's reasonable deadlines for registering to vote, requesting absentee ballots, submitting absentee ballots, and voting in person generally raise no federal constitutional issues ….").

Plaintiffs' Complaint should be dismissed.

## ARGUMENT

### I. Plaintiffs' Complaint Is A Shotgun Pleading.

The fact that Defendants filed a "lengthy Motion to Dismiss" does not absolve Plaintiffs' Complaint of its shotgun pleading sins. Doc.50 at 13. Plaintiffs' response highlights only certain aspects of Defendants' motion in order to sidestep Defendants' broader arguments that: (1) their counts' incorporation of "relevant allegations in the preceding paragraphs" provides no notice to Defendants and the Court as to *which* allegations they are incorporating; (2) the complaint alleges many "conclusory, vague, and immaterial facts" (with Plaintiffs' racial allegations simply being the most prominent example); and (3) the breadth of the Complaint prejudices Defendants and the Court by compounding the harms just mentioned. Doc.42 at 9-13. Plaintiffs' refusal to seriously

[1] *Cf.* Federalist No. 59 ("Suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the State governments?").

RETRIEVED FROM DEMOCRACYDOCKET.COM

engage with those points confirms that their Complaint is a shotgun pleading and is due to be dismissed.

## II. Secretary Allen Is Not A Proper Defendant.

Plaintiffs point to Secretary Allen's rulemaking authority as the basis of their standing to sue him. This ignores binding precedent rejecting that theory. *See* Doc.42 at 16 (citing *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1256-57 (11th Cir. 2020)). As *Jacobson* opined, an official's rulemaking authority—even where other officials "might well be obliged to follow" such rules—"says nothing" about the Secretary's authority "to *enforce* the complained-of provision" as required for traceability. *Id.* at 1257 (quoting *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1310 (11th Cir. 2019) (en banc)). And to the extent Plaintiffs imply the Court should order Secretary Allen to exercise his rulemaking authority in a particular way, that would "raise[] serious federalism concerns, and it is doubtful that a federal court would have authority to order it." *Id.* At any rate, the Secretary cannot by rule set aside the plain meaning of the challenged provisions. *See id*. Because Secretary Allen lacks prosecutorial authority (or any other relevant enforcement authority) regarding the challenged provisions, Plaintiffs cannot establish standing to sue him.

RETRIEVED FROM DEMOCRACYDOCKET.COM

## III. SB1 Does Not Violate Plaintiffs' First Amendment Rights.

Plaintiffs fail to state a claim under any theory of First Amendment liability. First, they argue that SB1 infringes their "core political speech," but then they describe their speech exclusively in terms of *conduct*. Plaintiffs backtrack and insist that this conduct is inherently communicative, but they fail to plausibly allege that someone would perceive something as rote as distributing an absentee ballot application, for example, as communicating any message at all. They round things out by contending that even if SB1 does not infringe their free speech rights, it abridges their right to associate with others in order to engage in criminal activity. Happily, the freedom to associate is not quite that broad. SB1 prohibits dangerous, non-communicative, non-

symbolic conduct. The First Amendment is not implicated, so Plaintiffs' freedom of speech and association claims should be dismissed.[2]

**A. SB1 does not burden Plaintiffs' core political speech.**

On a positive note, Plaintiffs and Defendants agree that "speaking about absentee ballot applications" is protected speech—even "core political speech." Doc.50 at 19; *see also* Doc.42 at 18, 22, 26. Plaintiffs initially describe the contours of this speech as "encouraging eligible voters to apply for absentee ballots, disseminating information about the absentee voting process, and … discussing with voters how to obtain and complete their absentee ballot applications." Doc.50 at 17. SB1 does not prohibit, curb, or burden any of this speech. Plaintiffs remain free to speak with voters and may continue to pay their employees to do the same.

Plaintiffs then try a different tack by creatively arguing that their speech actually takes the form of conduct while somehow remaining pure speech. They call this speech-conduct hybrid "absentee ballot application assistance." *Id.* at 16. ("Absentee ballot application assistance is communication about voting, and as such is core political speech."); *see generally* 16-32 (using the general term "assistance" at least 40 times as a blanket term covering speech and conduct alike). Such assistance allegedly includes "distributing the application, helping a voter fill out the application, and helping the voter submit the application." *Id.* Missing from that list of three activities is any reference to "speech." To the extent Plaintiffs have in mind verbal instructions relayed from volunteer to voter, SB1 already envisions that type of help, permitting "[a]ny applicant [to] receive *assistance* in filling out the application as he or she desires," consistent with Alabama law. Ala.

RETRIEVED FROM DEMOCRACYDOCKET.COM

[2] Notably, Plaintiffs do not challenge Defendants' argument that the *Anderson-Burdick* balancing test is inapplicable here. Doc.42 at 24 n.11.

Code §17-11-4(b)(1) (emphasis added). Plaintiffs continue to ignore this provision, failing to cite it in their Complaint or in any brief filed to date.

Nevertheless, in an attempt to remain in the protective realm of "core political speech," Plaintiffs conflate SB1 with the speech-throttling law enjoined in *Meyer v. Grant*, 486 U.S. 414 (1988). There, the Supreme Court reiterated that the First Amendment protects a person's "right freely to engage in discussion concerning the need" for political change. *Id.* at 421. Addressing Colorado's ban on paying petition circulators, the Court stated that the "circulation of an initiative petition *of necessity* involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id.* In other words, "circulators needed to *speak* to voters to convince them to sign the petition." *Lichtenstein v. Hargett*, 83 F.4th at 575, 585 (6th Cir. 2023). Colorado's ban violated the First Amendment because it had "the inevitable effect of reducing the total quantum of speech on a public issue." *Id.* at 423.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Here, in contrast, SB1 does not burden anything that "*of necessity* involves" speech. *Meyer*, 486 U.S. at 421. Plaintiffs neither allege nor argue that they *need* to engage in political speech in order to distribute prefilled applications or pay someone to distribute another person's absentee ballot application. Any allegations that they do would defy "common sense." *Kornegay v. Baretta USA Corp.*, 614 F. Supp. 3d 1029, 1033-34 (N.D. Ala. 2022). The application harvesting conduct banned by SB1 is categorically distinct from paying someone to solicit signatures for an initiative petition.

The panel majority in *Lichtenstein* understood this distinction when considering a materially identical challenge to Tennessee's law banning the distribution of absentee ballot applications by anyone other than a State official. The court found that, unlike initiative petitions, absentee ballot applications are not "use[d] to create oral speech." 83 F.4th at 586. Plaintiffs here half-

heartedly try to distinguish *Lichtenstein* by stating the obvious, that Tennessee's law bans distributing the application while Alabama's SB1 bans distributing in addition to other compensated harvesting conduct, like prefilling, completing, and submitting. Doc.50 at 19. That's a distinction without a difference, because nowhere do Plaintiffs allege that these additional activities "*of necessity* involv[e]" speech. *Meyer*, 486 U.S. at 421. Tennessee bans one type of conduct, and Alabama bans that and a bit more. Plaintiffs' fundamental disagreement is with the *Lichtenstein* court's understanding and application of the First Amendment. *See* Doc.50 at 19 n.4 ("*Lichtenstein* … was wrongly decided."). Fair enough. Defendants respectfully disagree and posit that *Lichtenstein* is on point and that the court's reasoning is sound. Like the court in *Lichtenstein*, this Court should dismiss Plaintiffs' First Amendment claims on the pleadings. *See* 83 F.4th at 579, 601.

RETRIEVED FROM DEMOCRACYDOCKET.COM

**B. SB1 does not target inherently expressive conduct.**

Alternatively, Plaintiffs recast their speech-conduct hybrid as "inherently expressive" conduct and then fault Defendants for "fail[ing] entirely to engage with the Eleventh Circuit's well-established test for determining whether an activity is expressive." Doc.50 at 25. Plaintiffs refer to the multi-factor balancing test first employed six years ago in *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale ("Food Not Bombs")*, 901 F.3d 1235, 1242-43 (11th Cir. 2018) and reprised in *Burns v. Town of Palm Beach*, 999 F.3d 1317, 1343-45 (11th Cir. 2021). When moving to dismiss, Defendants noted both the relevance of this test and Plaintiffs' utter failure to plead any "factual allegations going to the five contextual factors." Doc.42 at 24 n.10. Plaintiffs now try to make up for that oversight by mustering for the first four factors a grand total of four paragraphs from their 173-paragraph Complaint, *see* Doc.50 at 22-23 (citing Doc.1 ¶¶125, 127-29), followed by some irrelevant allegations about "Alabama's history of enacting voting restrictions" for the fifth factor, *see id.* at 17 (citing Doc.1 ¶¶36-51). This is insufficient to plausibly state a claim.

Before addressing the factors, a quick comparison of the "expressive conduct" at issue in *Food Not Bombs* and *Burns* demonstrates how this test ought to apply here. In *Food Not Bombs*, a Fort Lauderdale regulation stated, in relevant part, that food providers could not operate in public parks without a permit. 901 F.3d at 1239. A non-profit organization (FLFNB) hosted "weekly events at a public park … sharing food at no cost with those who gather[ed] to join in the meal." *Id.* at 1237. FLFNB challenged the ordinance under the First Amendment, arguing that their food sharing events constituted inherently expressive conduct. *Id.* at 1239. The district court granted summary judgment in favor of the City. *Id.* The Eleventh Circuit reversed, holding that the "district court … failed to consider the *context* of FLFNB's food sharing events and instead relied on the notion that the conduct must be 'combined with other speech' to provide meaning." *Id.* at 1242 (emphasis added). The court then used a five-factor balancing test to unpack what it means to examine "context." *Id.* at 1242-43.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Here, Plaintiffs analogize FLFNB's food sharing events to their "voter assistance drives," but that is the wrong comparison. Doc. 50 at 22. The parties agree that Plaintiffs' drives contain "actual political speech." *Lichtenstein*, 83 F.4th at 586; *see also* Doc. 42 at 20 n.7. But it does not follow from that common ground that everything taking place at one of their drives is expressive conduct. Take food sharing as an example; is it inherently expressive to use a propane grill or distribute alcohol at a public food event? Almost certainly not. A city could ban the use of propane or the consumption of alcohol in public parks without implicating the First Amendment. The same goes here. While helping and engaging with voters at a voter assistance drive might be inherently expressive conduct, it does not follow that handling another voter's absentee application taken in return for compensation is as well. That specific activity, not voter assistance drives more broadly, must be inherently expressive in order to receive First Amendment protection.

The Eleventh Circuit in *Burns* confirmed that the contextual analysis must be conducted at the particular, rather than "mile-high," level. 999 F.3d at 1345. Mr. Burns brought a First Amendment challenge against "the criteria the architectural review commission used to deny the building permit for his new beachfront mansion." *Id.* at 1336. He claimed his home was "expressive conduct protected by the First Amendment." *Id.* at 1335. The Eleventh Circuit thoroughly examined his claim under the *Food Not Bombs* factors before concluding that to the "reasonable observer, [Burns's mansion] is nothing more than another big beachfront house." *Id.* at 1345. At several points, the Court clarified that the question was not whether "architecture" could be inherently expressive, nor even "residential" architecture more specifically. *Id.* at 1335-36. But rather, whether Mr. Burns's particular mansion of the "residential midcentury modern" style has a "communicative element." *Id.* at 1337, 1344. In short, a "First Amendment expressive conduct claim … requires a great likelihood that the *particular* conduct convey some message to those who view it." *Id.* at 1347 (emphasis added).

RETRIEVED FROM DEMOCRACYDOCKET.COM

Defendants, therefore, are right to focus on the specific conduct prohibited by SB1 when arguing that those particular acts—prefilling, distributing, completing, and submitting an application—are not communicative, even in the context of Plaintiffs' voter assistance drives. *Contra* Doc.50 at 23 (faulting Defendants for examining the "*specific conduct* prohibited by SB1").

A spry walk through the multi-factor balancing test shows that Plaintiffs have not plausibly alleged that their application harvesting conduct is inherently expressive.[3] **First,** Plaintiffs point to one paragraph in the Compliant, alleging that they "provid[e] information to voters and offering provisions to encourage and facilitate absentee voting." Doc.50 at 22 (citing Doc.1 ¶125). A vague

[3] To paraphrase, the factors examine whether the allegedly expressive conduct is: 1) accompanied by public displays; 2) open to everyone; 3) in a traditional public forum; 4) on a matter of public concern; and 5) with a history of being perceived as expressive. *Food Not Bombs*, 901 F.3d at 1242-43; *Burns*, 999 F.3d at 1343-45.

reference to "providing information" does not paint the picture of the "public display" envisioned in *Burns*, 999 F.3d at 1338, or *Food Not Bombs*. 901 F.3d at 1242. **Second and third**, Plaintiffs cite three paragraphs of the Complaint containing no allegations whatsoever that their conduct is "open to everyone" or takes place in a "traditional public forum." Doc.50 at 22-23 (citing Doc.1 ¶¶127-29). **Fourth**, Plaintiffs cite the same three paragraphs for the allegation that "discussing the right to vote and urging participation in the political process is a matter of societal concern." Doc.50 at 23 (citing Doc.1 ¶¶127-29). That takes a "mile-high view." *Burns*, 999 F.3d at 1345. Missing are allegations that distributing, completing, or submitting absentee ballot applications are matters of public concern. **Fifth**, Plaintiffs utterly fail to allege that the conduct prohibited by SB1 "has been used" throughout history "to convey a message." *Burns*, 999 F.3d at 1345. Plaintiffs posit that their meandering allegations about Alabama's "long history of criminalizing voter assistance" tell this story. Doc.50 at 23 (citing Doc.1 ¶¶36-51). To the contrary, based on Plaintiffs' own narrative, absentee ballot application harvesting appears to have no "historical association with communicative elements that would put a reasonable observe on notice of a message from" Plaintiffs' conduct. *Id.*

RETRIEVED FROM DEMOCRACYDOCKET.COM

Ultimately, all of this must be examined in light of the fundamental distinction between *disclosure* and *symbolism*. All conduct discloses something. But not all conduct conveys a symbolic meaning. Only the latter receives some protection under the First Amendment. The Supreme Court articulated this principle in *Nevada Commission on Ethics v. Carrigan*, a case about whether Nevada's conflict-of-interest law for public officers violated the First Amendment. 564 U.S. at 119-20. Carrigan argued that his vote to approve his campaign manager's hotel/casino consulting project was expressive conduct. *Id.* at 120. In no uncertain terms, the Court stated that "the act of voting symbolizes nothing." *Id.* at 126. To clarify, the Court reasoned that voting "*discloses*, to be

sure, that the legislator wishes (for whatever reason) that the proposition on the floor be adopted, just as a physical assault discloses that the attacker dislikes the victim. But neither the one nor the other is an act of communication." *Id.* at 126-27.

Here, distributing an application to a voter, while perhaps disclosing the distributor's desire that the voter vote absentee, is unlikely to carry by itself any "symbolic meaning." *Carrigan*, 564 U.S. at 126. The federal courts overwhelmingly agree that other kinds of ballot harvesting conduct are not symbolic acts. *See* Doc.42 at 24-25. Plaintiffs try to distinguish a few of these cases to no avail and all but throw up their hands at the rest. *See* Doc.50 at 24-25. The various State laws at issue in these cases regulate the handling of ballots, ballot requests, absentee ballot requests, absentee ballot applications, and voter registration applications. Far from "factually distinct," *id.* at 25, they are highly analogous and further demonstrate that there is no "great likelihood" distributing, completing, or submitting absentee ballot applications conveys "some message to those who view it." *Burns*, 999 F.3d at 1347. Plaintiffs have not plausibly alleged that their conduct is inherently expressive.[4]

RETRIEVED FROM DEMOCRACYDOCKET.COM

**C. SB1 does not burden Plaintiffs' freedom to associate.**

Because the application harvesting conduct prohibited by SB1 is not "protected by the First Amendment," Plaintiffs have no constitutional right to associate for the "purpose" of engaging in that conduct. *McCabe v. Sharrett*, 12 F.3d 1558, 1563 (11th Cir. 1994). Plaintiffs see things differently, going so far as to state that "even if the activities were non-expressive, because SB 1 restricts Plaintiffs' ability to associate with voters in order to conduct the restricted activities,

[4] As an addendum, Plaintiffs' sporadic accusations that SB1 is content-based and viewpoint discriminatory are borderline frivolous. *See* Doc.50 at 18, 28 n.6. SB1 does not prohibit distributing or completing a voter's application "only when" those acts "include speech endorsing certain ideas." *Honeyfund.com Inc. v. Governor*, 94 F.4th 1272, 1278 (11th Cir. 2024). And even assuming the conduct SB1 targets is inherently expressive, it is "banned because of the *action* it entails, not because of the idea it expresses." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992) (emphasis added); *see also* Doc.42 at 18, 27 n.12.

Plaintiffs' associational rights are implicated." Doc.50 at 27. By "restricted," Plaintiffs mean "criminalized." That misunderstands and misstates Supreme Court precedent on the freedom of association.

To be clear, Plaintiffs *do* have a "right to associate with others in pursuit of" the legitimate goals of educating voters and encouraging them to vote absentee, if eligible. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). But Plaintiffs *do not* have an associational right to pursue those ends by means of non-symbolic or criminal activity. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 993 ("[O]ne of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal *by lawful means*.") (emphasis added); *see also City of Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989) (freedom of association does not protect right to associate for activities not protected by First Amendment).

Further, even if Plaintiffs' harvesting conduct enjoys some free speech protection, and even if SB1 incidentally burdens Plaintiffs' associational rights, their hardship pales in comparison to that recognized by the Supreme Court as infringing the First Amendment right to associate with others. SB1 does not force Plaintiffs to disclose their membership, prohibit Plaintiffs from growing their membership rolls, punish membership itself, cease all voter participation drives, or ban Plaintiffs from educating voters. *See* Doc.42 at 30-32 (collecting cases); *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 641 (2000) (inquiring whether the official act "would significantly burden" the group's ability to express its message). Plaintiffs have failed to state a freedom of association claim as a matter of law.

RETRIEVED FROM DEMOCRACYDOCKET.COM

## IV. SB1 Is Not Vague.

As Defendants argued in their motion to dismiss, "Plaintiffs' vagueness challenge can be rejected as a matter of law based on statutory text alone." Doc.42 at 33. Plaintiffs' response persists

in its muddled vagueness standard, ignores bedrock principles of statutory interpretation, and fails to respond to many of Defendants' arguments.

*First*, Plaintiffs ignore Defendants' argument that the incriminating facts of the Challenged Provisions are clear even if there could be close cases. "[W]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." Doc.42 at 34 (quoting *United States v. Williams*, 553 U.S. 285, 306 (2008)). "A law is not vague because it may at times be difficult to prove an incriminating fact." *see Jones v. Governor of Fla.*, 975 F.3d 1016, 1046-47 (11th Cir 2020). "Instead, a law is vague when it is unclear as to what fact must be proved." *Id*. at 1047.

The Prefilled-Application provision makes it a misdemeanor for anyone to "distribute" (give out or deliver) absentee applications with a voter's information already "prefilled" ("filled in advance of" the voter obtaining the form for himself). Ala. Code §17-11-4(b)(2).[5] The Submission provision makes it a misdemeanor for anyone to submit *another* applicant's absentee application (by putting them in the mail service or by dropping them off at the absentee election manager's office). *Id.* §17-11-4(c)(2). Finally, the Compensation Prohibition bars any person from "knowingly" "receiv[ing]" or "provid[ing]" "a payment or gift"—i.e., compensation—"for distributing, ordering, requesting, collecting, completing, prefilling, obtaining, or delivering a voter's absentee ballot application." *Id.* §17-11-4(d)(1)-(2) (emphasis added). On its face, the Compensation Prohibition applies to a payment or gift—of any size—knowingly provided or received in

RETRIEVED FROM DEMOCRACYDOCKET.COM

[5] This provision must be read harmoniously with the immediately preceding subsection, which Plaintiffs also completely ignore: "[A]ny applicant may receive assistance *in filling out* the application as he or she desires …." Ala. Code §17-11-4(b)(1). While (b)(2) does not specify that the prefilled application must be unsolicited to be illegal, (b)(1) makes clear that "any applicant" who "desires" assistance navigating the one-page form may receive it.

exchange for specific action toward "a voter's absentee ballot application."[6] "Because there is no uncertainty about 'what fact[s] must be proved' to convict a defendant under" any of these provisions, its Challenged Provisions "are not vague." *Jones*, 975 F.3d 1016, 1047 (11th Cir. 2020) (quoting *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)).

It is Plaintiffs who have attempted "to blanket SB 1's actual wording," Doc.50 at 34, with a litany of hypotheticals always involving grandparents (and often pies). Doc.1 ¶2; Doc.50 at 32–35, 37–38; *see also* Doc.57 at 15. To be clear, nothing in SB 1's "actual wording" indicates that the incriminating facts turn on familial relationship or whether the "payment or gift" is edible. But (d)(1) and (2) clearly prohibit an absentee-application quid pro quo: this (money or something of value) *for* that (e.g., collecting a voter's application). The incriminating fact is that the party knowingly gives or receives compensation to cause or in return for specific actions on an absentee ballot application. In Plaintiff's hypothetical, did the grandfather give his grandson money *for* delivering an absentee ballot application or because he loves his grandson and knew he needed gas money? Under SB1, the incriminating fact would be satisfied under the former circumstance, but the prosecutor will have a hard time *proving* anything other than the latter. This does not illustrate vagueness.

RETRIEVED FROM DEMOCRACYDOCKET.COM

*Second*, Plaintiffs fault Defendants for "extraneous explanations" and "inappropriately insert[ing] definitions that simply are not in the plain language of SB 1." *E.g.*, Doc.50 at 33, 38. But Defendants ripped the definition of "submit" directly from the text. Doc.42 at 38. Similarly, the text of (d)(1) and (2) demonstrates that the "third party" is plainly the recipient of the "payment or gift" that is given in exchange"for distributing, ordering, requesting, collecting, completing,

[6] "Token gifts" freely given and received are thus not part of a specific transaction.

prefilling, obtaining, or delivering a voter's absentee ballot application." Ala. Code §17-11-4(d)(1)-(2).

It is absurd for Plaintiffs to criticize Defendants for "insert[ing] definitions" from dictionaries after alleging words not defined in the statute are vague. "Without a statutory definition, [courts] look to the common usage of words, including dictionary definitions, for their meaning." *United States v. Silvestri*, 409 F.3d 1311, 1333 (11th Cir. 2005). The dictionary definitions corroborate that citizens of ordinary intelligence know what it means to "distribute" an application, "prefill" a form before distributing it, or provide or receive a "payment" in exchange for the completion of those services. Doc.42 at 35, 39. "Plaintiffs fail to identify any 'confusing and misleading terms,'" Doc.42 at 32 (quoting Doc.1 ¶149), not for failing to try, but because the words they allege to be incomprehensible are *in fact* defined by their common usage.

RETRIEVED FROM DEMOCRACYDOCKET.COM

*Third*, Plaintiffs ignore that the Compensation Prohibition's *mens rea* requirements guard against future "arbitrary" enforcement. Under (d)(1) and (2), "there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for" an enumerated harvesting service. *See United States v. Sun-Diamond Growers of Ca.*, 526 U.S. 398, 404–05 (1999) (interpreting federal bribery statute to "require intent and a specific official act").[7] This "narrow[s] the scope of the" Compensation "[P]rohibition and limit[s] prosecutorial discretion." *Gonzalez v. Carhart*, 550 U.S. 124, 150 (2007). Based on the text of the statute, "[i]t cannot be said that the Act 'vests virtually complete discretion in the hands of law enforcement to determine whether'" someone has violated any of SB1's provisions. *Id*. (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)) (alterations adopted).[8] Both (d)(1) and (d)(2) "define[] the line between potentially

[7] "Whoever … directly or indirectly gives … or promises anything of value to any public official … for … any official act performed" commits a quid pro quo felony under federal law. 18 U.S.C. §201(c)(1)(A).

[8] *Contra* Doc.50 at 38 ("Defendants do not appear to contest that Plaintiffs will be subject to arbitrary and discriminatory enforcement under SB 1.").

criminal conduct on the one hand and lawful" assistance "on the other" by whether a person has knowingly given or received compensation *for* handling a voter's absentee ballot application in a *specific* manner. *Gonzalez*, 550 U.S. at 149.[9]

*Fourth*, Plaintiffs respond with *no precedent* to support their Due Process Claim outside of "the First Amendment context." Doc.50 at 33 ("In the First Amendment context …"); *id*. at 34; *id*. at 36-37. Their primary case, *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1320 (11th Cir. 2017) (en banc), is inapposite. The law at issue in *Wollschlaeger* banned doctors from "unnecessarily *harassing* a patient about firearm ownership during an examination." *Id*. at 1321 (emphasis added); FL ST §790.338. Thus, the anti-harassment provision, on its face, directly burdened pure speech. *Wollschlaeger*, 848 F.3d at 1307 (first majority opinion interpreting harassment in the "medical setting to refer to questions or advice to patients concerning the subject of firearm ownership"); *id*. at 1319 (second majority opinion explaining that anti-harassment provisions "plainly target core First Amendment speech"); *see id.* at 1328 (William Pryor, J., concurring) ("If we upheld the Act, we could set a precedent for many other restrictions of potentially unpopular speech."). The Eleventh Circuit's holding that content-based restrictions on speech must be drawn with "narrow specificity" does not apply to SB1, which indisputably regulates only the handling of absentee voter forms.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Unlike the doctors in *Wollschlaeger* who risked being punished if they *talked* about firearms with their patients, Plaintiffs may say whatever they want about absentee voting, whenever they want, to whomever they want. In other words, they may "annoy persistently" with their discussion or advocacy of absentee voting. *See Wollschlaeger*, 848 F.3d at 1321 (citing dictionary to

[9] As a result of Plaintiffs failure to recognize the *quid pro quo* inherent in the Compensation Prohibition, they miss that the salary of a prison guard is "not linked to any identifiable act" that has been specified as a harvesting service. *Sun-Diamond*, 526 U.S. at 406. By contrast, paying one's staff to distribute absentee ballot applications is prohibited. Doc. 50 at 36.

determine ordinary meaning of "harass"). But they are not free to submit other voters' absentee applications, send or give out absentee applications that already contain voters' personal information, or provide or receive compensation for transporting or completing a voters' absentee application. Plaintiffs' exclusive reliance on First Amendment precedent is misplaced and verges on abandonment of their *Due Process* vagueness claim.

*Finally*, Plaintiffs err by ignoring the preenforcement posture of this case and resorting to legislative history to argue SB1 invites discriminatory enforcement. As Defendants stated in their motion to dismiss, "[t]his is a preenforcement challenge, where 'no evidence has been, or could be, introduced to indicate whether the [Act] has been enforced in a discriminatory manner or with the aim of inhibiting [constitutionally protected conduct].'" Doc.42 at 33 (quoting *Gonzalez*, 550 U.S. at 150). Thus, Plaintiffs' frequent references to legislative committee statements are only relevant to show SB1's *text* is allegedly "so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). Courts do not "consider legislative history when the text is clear." *CSX Corp. v. United States*, 18 F.4th 672, 680 (11th Cir. 2021). Legislative debates in particular do not change a law's standards and are a shoddy tool by which to interpret them. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 377 (2012) ("Legislative history creates mischief both coming and going—not only when it is made but also when it is used.").

RETRIEVED FROM DEMOCRACYDOCKET.COM

Indeed, Plaintiffs' favorite snippet of the committee debates reveals a legislator reassuring his colleagues that there is no need to "worry about [a] grandfather given [*sic*] the grandson $5 for gas money" because of his bill's "[w]illing, knowing intent" requirement. Doc.34-2 at 28. The manner in which Plaintiffs strip this statement of its context, *see e.g.*, Doc.50 at 38, simply highlights how "[l]egislative history greatly increases the scope of manipulated interpretation."

SCALIA, READING LAW at 378. Plaintiffs' reliance on legislative history does not change that the text of SB1 provides citizens with fair notice of what is prohibited and sufficiently defines the standards for criminal liability so as to avoid *future* arbitrary enforcement.

Plaintiffs' vagueness claim is meritless and should be dismissed.

## V. SB1 Is Not Overbroad.

If the Court holds that SB1 does not violate Plaintiffs' free speech rights, then Plaintiffs' facial overbreadth challenge automatically fails because SB1 would not, as alleged, "criminaliz[e] a substantial amount of protected expressive activity." *Williams*, 553 U.S. at 293 (2008). Likewise, by Plaintiffs' own framing, if their vagueness claim falls, then so does their overbreadth claim. *See* Doc.50 at 39 (the two claims are "closely tied").

Independently of those scenarios, the Court should dismiss Plaintiffs' overbreadth challenge because SB1's plainly legitimate sweep, as apparent from its "text" "and from actual fact," renders any incidental and isolated infringement on expressive conduct insubstantial. *Virginia v. Hicks*, 539 U.S. 113, 122 (2003). Plaintiffs assert that SB1 "only relates to absentee applications and does not advance any governmental interest in regulating absentee ballots." *Id.* at 40. This defies text, fact, and common sense. By "[l]imiting … who may handle early ballots to those less likely to have ulterior motives," Alabama advances legitimate interests like deterring "potential fraud and improv[ing] voter confidence." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2348 (2021) (citing *Report on the Comm'n on Fed. Election Reform, Building Confidence in U.S. Elections* 46 (Sept. 2005)). Those same interests are served by regulating who handles applications for those ballots. Alabama is only the most recent state of many to guard more closely the distribution and collection of absentee ballot applications. *See* Doc.42 at 29 (collecting State laws). These laws are not unconstitutional on their face if they encompass allegedly expressive conduct

RETRIEVED FROM DEMOCRACYDOCKET.COM

like paying ballot harvesting volunteers with "Get Out The Vote" t-shirts. Doc.50 at 41.[10] That would not amount to "a substantial amount of protected expressive activity" sufficient to state a facial overbreadth claim. *Williams*, 553 U.S. at 297.

## VI. Plaintiffs Fail To State A Claim Under §208 of the VRA.

According to Plaintiffs, "Section 208 permits the voter to receive assistance from *any voter* of their choosing, except the explicit exceptions of the voters' employer or union." Doc. 50 at 42 (emphasis added). But this is not what §208 says.

If it did, §208 would preempt a state law that barred persons convicted of fraud generally or voter fraud specifically from requesting ballots on behalf of the most vulnerable voters. But §208's text does not create a fixed "universe of those who can assist voters," *id*., or indicate that permitting paid agents to "distribute, order, request, collect, prefill, complete, obtain, or deliver" the absentee ballot applications of blind, disabled, or illiterate voters "was the clear and manifest purpose of Congress," *Marrache v. Bacardi U.S.A., Inc.*, 17 F.4th 1084, 1095 (11th Cir. 2021).

SB1's disability provision provides: "Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by an individual 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." Ala. Code §17-11-4(e); *See* 52 U.S.C. §10508 (§208) (replacing "a person" with "an individual"). Plaintiffs ignore the Supreme Court's interpretive advice cited in Defendants' motion: "When used as an indefinite article, 'a' means some undetermined or unspecified particular." *McFadden v. United States*, 576 U.S. 186, 191 (2015) (quotations omitted). By contrast, *any* "has an expansive meaning, that is, one or some indiscriminately of whatever kind."

RETRIEVED FROM DEMOCRACYDOCKET.COM

[10] Curiously, Plaintiffs decry the so-called T-shirt payment prohibition as going "to the heart of [their] constitutionally protected activities." Doc.50 at 41. With respect, Defendants question whether the compensatory exchange of expressive T-shirts—as opposed to absentee ballot applications—is what they're after. In any event, *no one* has the First Amendment right to exchange goods for the collection of voters' absentee ballot applications, and everyone in Alabama is subject to prosecution if they do.

*United States v. Gonzales,* 520 U.S. 1, 5 (1997). The article adjective *the* refers to an identified particular. If §208 allowed a voter to choose "any person" or "the person of the voter's choice," then Plaintiffs would have stated a claim. But Congress didn't use *any* or *the*, instead stating that the voter could select "a person of the voter's choice." §208.[11] Then, the text identifies voters' employers, employers' agents, unions, and union agents as inappropriate assistors because of their potential to exercise undue influence on a voter. *Id*. Congress clearly and manifestly contemplated that some assistors pose too much of a risk, and by using the word *a* instead of *any*, Congress only started the list of risky assistors for every stage of the voting process.

Plaintiffs argue that the ordinary meaning of terms like "distribute" and "submit" in the context of voter forms is unconstitutionally vague, and yet insist that the ordinary meaning of the article adjective *a* is clearly *any*. Doc.50 at 45. The article adjective *a* simply cannot be substituted for *any*. When someone requests *a* ride to the store, they have not necessarily requested *any* sort of ride regardless of hazards, duration, or mode of transportation. Instead, that person is asking for *appropriate* transportation calculated to get him where he wants to go. He means *a* ride, not any ride. Blind, disabled, and illiterate persons are similarly entitled to *an* assistor appropriately situated to help obtain a ballot for *the* disabled person to cast.

RETRIEVED FROM DEMOCRACYDOCKET.COM

The legislative history of §208 in fact strengthens Defendants' interpretation of its text. As revealed in the Senate Report, §208 was enacted in light of concerns that voters were "discourage[d] ... from voting for fear of intimidation or lack of privacy." S. Rep. No. 97-417, at 62 n.207 (1982). The drafters explicitly recognized that blind, disabled, and illiterate voters are "more susceptible than the ordinary voter to having their vote unduly influenced or manipulated."

[11] Plaintiffs invoke the negative-implication cannon (expressio unius) without explaining how Congress's use of the word "a" indicates that this article adjective should have a different meaning from *the* or *any*. *See* Doc.50 at 44-45.

*Id*. at 62. The overall objective was "to assure meaningful voting assistance and to avoid possible intimidation or manipulation of the voter." *Id*. But Plaintiffs read §208 to codify a right for paid ballot harvesters to target the most vulnerable voters in the stage of the process "more susceptible to pressure, overt and subtle, or to intimidation." *Brnovich*, 141 S. Ct. at 2348.

"[A]dditional exceptions are not to be implied" "to a general prohibition," *Hillman v. Maretta*, 569 U.S. 483, 496 (2013), but §208 is not a "general prohibition" on State legislation regulating the absentee voting process. Moreover, Plaintiffs turn the implied preemption standard on its head by asserting that "[n]othing in the congressional record indicates a 'legislative intent' that 'additional exceptions may be implied.'" Doc.50 at 45. The Court should assume "the historic police powers of the States are not superseded," *Marrache*, 17 F.4th at 1095, unless Plaintiffs can meet the "high threshold" for conflict preemption. *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011).

Plaintiffs incorrectly assert that "Defendants do precisely what the Fifth Circuit forbade" in *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017). In that case, the Fifth Circuit found a State law preempted where it defined the word "vote" more narrowly than its federal counterpart. *Id*. at 614. Defendants do not dispute that the word "vote" in SB 1's disability provision carries the meaning that federal law provides, but this definition does not resolve whether §208 impliedly creates a fixed universe of absentee application handlers that the State may in no way modify.

Thus, Plaintiffs' Count V should be dismissed for failure to state a claim.

RETRIEVED FROM DEMOCRACYDOCKET.COM

## VII. Plaintiffs Fail To State A Claim Under HAVA.

Without rehashing the cause of action and equitable preemption issues,[12] Plaintiff ADAP's HAVA claim fails outright for the straight-forward reason that any alleged conflict between SB1 and HAVA is not "irreconcilable." *Rice v. Normal Williams Co.*, 458 U.S. 654, 659 (1982). Simultaneous compliance with the two laws is not a "physical impossibility," and SB1 does not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (internal quotation marks omitted).

ADAP has not plausibly alleged that SB1 makes it impossible to work toward Congress's goal of ensuring "full participation in the electoral process for individuals with disabilities." 52 U.S.C. 21061(a). Quite the contrary, ADAP's description of how it fulfills its mission of "empowering its disabled constitutes to vote" demonstrates that any alleged conflict between SB1 and HAVA is "hypothetical." *Rice*, 458 U.S. at 659. ADAP states that one of its paid staff "educates" "disabled and blind individuals" "and assists them with the registration and voting process. This voter assistance includes helping voters apply for absentee ballots by navigating the Secretary of State's website, printing out the application, and filling it out" with the voters. Doc.1 ¶30. Also, "ADAP's staff assist individual voters … with requesting and completing absentee ballot applications and ballots." *Id.*

RETRIEVED FROM DEMOCRACYDOCKET.COM

Based on this description, complying with both SB1 and HAVA are possible; the two need not "actually conflict." *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990). First of all,

[12] Casting further doubt on ADAP's cause of action and *Armstrong v. Exceptional Child Center* arguments is the fact that this seems to be the first time a "protection and advocacy program" like ADAP has sued a State for declaratory and injunctive relief under 52 U.S.C. §21061, a 22-year-old law. Perhaps ADAP's lawyers have found a hitherto hidden path into federal court, or perhaps they are flouting the Eleventh Circuit's holding that "HAVA creates no private cause of action." *Bellitto v. Snipes*, 935 F.3d 1192, 1202 (11th Cir. 2019).

SB1 twice contemplates that some voters, including disabled voters, will need assistance. *See* Ala. Code §7-11-4(b)(1), 4(e). Further, ADAP's paid staff can continue to help blind and homebound voters exercise the franchise without prefilling, distributing, completing, or submitting their ballot applications. For example, ADAP's staff can help disabled voters make use of the State's "process for a voter who has a permanent disability to be placed on an absentee voter list and have a ballot automatically mailed to him or her before each election." Ala. Code §17-11-3.1(b). In sum, ADAP's work of helping voters can and should continue. SB1 prohibits only conduct that crosses the line from help to harvesting.[13] That being said, if it was ADAP's practice up until now to harvest the ballot applications of disabled Alabama voters, that behavior will need to change.

When promulgating HAVA, Congress did not mandate that "protection and advocacy programs" like ADAP pay their employees to control the absentee voter forms of blind, disabled, or illiterate voters to achieve the goal of "full participation in the electoral process for individual with disabilities." 52 U.S.C. §21061. Plaintiffs' conclusory allegations about a "potential conflict," *Rice*, 458 U.S. at 659, are insufficient to overcome the presumption against preemption, which "particularly applies in a case in which Congress has legislated in a field which the States have traditionally occupied," like regulating elections. *Marrache*, 17 F.4th at 1094 (cleaned up); *see also Storer v. Brown*, 415 U.S. 724, 730 (1974) ("there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process"). Plaintiffs fail to state a claim of conflict-preemption between SB1 and HAVA.

RETRIEVED FROM DEMOCRACYDOCKET.COM

## CONCLUSION

The Court should dismiss Plaintiffs' Complaint.

[13] In contrast to the other Plaintiffs, ADAP seems to understand that SB1 prohibits specific types of "conduct," not speech. *See* Doc.50 at 50; *see also* Doc.1 ¶170.

Respectfully submitted,

Steve Marshall
*Attorney General*

*s/ Charles A. McKay*

Edmund G. LaCour Jr. (ASB-9182-U81L)
*Solicitor General*

James W. Davis (ASB-4063-I58J)
*Deputy Attorney General*

Soren Geiger (ASB-0336-T31L)
Dylan Mauldin (ASB-3281-Z11M)
*Assistant Solicitors General*

Brenton M. Smith (ASB-1656-X27Q)
Charles A. McKay (ASB-7256-K18K)
*Assistant Attorneys General*

OFFICE OF THE ATTORNEY GENERAL
STATE OF ALABAMA
501 Washington Avenue
P.O. Box 300152
Montgomery, Alabama 36130-0152
Telephone: (334) 242-7300
Fax: (334) 353-8400
Edmund.Lacour@AlabamaAG.gov
Soren.Geiger@AlabamaAG.gov
Dylan.Mauldin@AlabamaAG.gov
Jim.Davis@AlabamaAG.gov
Brenton.Smith@AlabamaAG.gov
Charles.McKay@AlabamaAG.gov
***Counsel for Defendants***

RETRIEVED FROM DEMOCRACYDOCKET.COM

**CERTIFICATE OF SERVICE**

I certify that on June 20, 2024, I electronically filed the foregoing notice with the Clerk of the Court using the CM/ECF system, which will send notice to all counsel of record.

*s/ Charles McKay*
*Counsel for Defendants*

RETRIEVED FROM DEMOCRACYDOCKET.COM