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

HARRIET TUBMAN FREEDOM FIGHTERS, CORP., *Plaintiff*, v. LAUREL M. LEE, in her official capacity as Secretary of State of Florida, *et al.*, *Defendants*, REPUBLICAN NATIONAL COMMITTEE, et. al., *Intervenor-Defendants.*	Case No. 4:21-cv-242 Consolidated with Case Nos. 4:21-cv-186, 4:21-cv-187, and 4:21-cv-201

HARRIET TUBMAN FREEDOM FIGHTERS' REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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I. Introduction

In their Response in Opposition to HTFF's Motion for Summary Judgment ("Defendants' Response"), Defendants fail to marshal any "affirmative evidence…to defeat [HTFF's] properly supported motion for summary judgment." *See United States v. Gilbert*, 920 F.2d 878, 882–83 (11th Cir. 1991) (quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 257 (1986)). Defendants also fail to identify any "genuine factual issues that properly can be resolved only by a finder of fact," *id.* at 883 (quoting *Anderson*, 477 U.S. at 250). Instead, as discussed in more detail below, Defendants' new arguments do nothing to alter the ineluctable conclusion that the record evidence and applicable law demonstrate that HTFF has suffered an injury and the Disclaimer and Disclosure Requirement cannot satisfy the applicable constitutional standards. Accordingly, HTFF is entitled to summary judgment on its compelled speech and vagueness claims.

II. Argument

A. Undisputed facts establish concrete and particularized injuries to HTFF's freedom of speech.

Defendants' Response asserts that HTFF "does not establish a 'concrete and particularized' injury in fact attributable to" the Requirement. Defs.' Resp., ECF 230 at 5 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Specifically, Defendant contends that, because HTFF was a nascent 3PVRO upon SB 90's

enactment, "it is simply not possible that Plaintiff 'diverted' funds to comply with it." *Id.* at 6; *cf.* Pl.'s Opp'n to Defs.' Mot. for Summ. J., ECF 232 at 4–11.[1]

As HTFF explained in its brief in opposition to Defendants' Motion, Defendants misstate the standard for diversion of resources standing and ignore that this court already found compelled speech to be an additional cognizable injury. *See* ECF 232 at 4–11; Op. on Mots. To Dismiss, ECF 190 at 14. HTFF therefore incorporates the relevant portion of its Opposition in the interest of brevity, *see* ECF 232 at 4–11, and focuses here on Defendant's new arguments.

First, Defendants claim that HTFF's own deposition and discovery responses are "not evidence at all" and constitute merely conclusory allegations about diversion of funds. ECF 230 at 6. Yet HTFF produced documentation demonstrating its diversion of resources and HTFF's representative testified at length about that very topic.[2] HTFF produced training materials reflecting time HTFF spent

[1] Large portions of Defendants' Response are copied and pasted from their own Motion for Summary Judgment ("Defendants' Motion"), which HTFF addressed in its own Response in Opposition to Defendants' Motion. *Compare* Mem. of Law in Supp. of Defs.' Mot. for Summ. J., ECF 215-1 at 5–8, 9–19 *with* Defs.' Opp'n to Pl.'s Mot. for Summ. J., ECF 230 2–4, 8–20; *see* Pl.'s Opp'n to Defs.' Mot. for Summ. J., ECF 232 at 4–11 (addressing HTFF's standing) & 11–27 (addressing HTFF's constitutional claims). Therefore, HTFF hereby incorporates its Response to Defendant's Motion for Summary Judgment, ECF 232, and the foregoing Reply will focus on those arguments and factual assertions newly advanced in Defendants' Response. *See* N.D. Fla. Loc. R. 56.1(D).

[2] *See, e.g.*, ECF 214-18 at 301, Ex. 3 to HTFF Dep. I, 302, Ex. 4 to HTFF Dep. I; ECF 227-1, HTFF Decl. ¶¶ 6, 10, 12, 15–19, 21, 23–32, 35; ECF 227-2, HTFF Dep. I, 43:3–16, 44:25–45:13, 45:21–47:7, 48:6–10, 50:2–18, 62:20–63:7, 70:25–71:6, 121:8–15, 122:10–16, 123:16–124:8; ECF 227-5 at 3, Pl.'s Supp. Resp. to SoS Interrogs., No. 8; ECF 227-6; ECF 227-7 at 4–5, 9–10, Pl.'s Resp. to Intervenor-Defs.' Interrogs., Nos. 3 (ii–iii), 10 (ii); ECF 212-24 at 3–5, Pl.'s Supp. Resp. SoS Request for Prod. (RFP), Nos. 5, 9, 12, 13.

conducting trainings specifically covering the Requirement.[3] This included material given to and discussed with its canvassers to help them educate and maintain the trust of prospective voters who have concerns as a result of the mandatory disclaimer and disclosures.[4] HTFF further produced—and was questioned in deposition regarding—the acknowledgment forms and a receipt it uses in its interactions with potential voters to ensure it has delivered—and can document delivering—the disclaimer.[5] This more than satisfies the standing requirement.

It makes no difference here that HTFF has relied on its deposition testimony, discovery responses and productions to establish this fact. The lone authority Defendants point to in support of their argument that this would be insufficient to prove standing, *City of Miami Gardens v. Wells Fargo, Inc.*, 956 F.3d 1319 (11th Cir. 2020) (Mem), does not advance any such proposition; rather, the court held that the plaintiff lacked standing because its alleged injury was too "attenuated" and speculative, 956 F.3d at 1321–22, and had failed to show how extended discovery pursuant to Fed. R. Civ. P. 56(d) would help it establish standing, *id.* at 1324. That is not the case here.

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[3] ECF 227-1 ¶¶ 15–19; ECF 240-1 ¶¶ 2–4, HTFF Reply Decl.; ECF 240-1, at 7, 12–14, Ex. A to HTFF Reply Decl. (New Hire Training materials), 19, Ex. B (training agenda email); ECF 214-19 at 116–17, Ex. 12 to HTTF Dep. II (SB 90 Rebuttal Form).

[4] ECF 214-19 at 116–17, Ex. 12 to HTFF Dep. II (SB 90 Rebuttal Form); ECF 240-3, HTFF Dep. II, 202:12–203:21, ECF 240-1 ¶ 3, HTFF Reply Decl.

[5] ECF 214-18 at 301, Ex. 3 to HTFF Dep. I; ECF 214-18 at 302, Ex. 4 to HTFF Dep. I; ECF 240-1 ¶ 4, HTFF Reply Decl.; ECF 214-18, HTFF Dep. I, 71:7–72:13; ECF 240-2, HTFF Dep. I, 72:20–74:9.

Defendants further argue that HTFF has not identified specific amounts diverted as a result of the Requirement. ECF 230 at 6. It does not have to. The Eleventh Circuit has not required organizations alleging injury for diversion of funds to identify specific amounts of diverted funding in order to prove standing. *See Ga. Latino All. for Hum. Rts. v. Governor of Ga.*, 691 F.3d 1250, 1260 (11th Cir. 2012) (no dollar amount identified); *Common Cause Ga. v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (accord); *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1166. (11th Cir. 2008) (accord). Defendants cite *Jacobsen v. Fla. Sec'y of State*, 974 F.3d 1236 (11th Cir. 2020), but that case helps HTFF. There, the court found that plaintiffs had not satisfied the injury-in-fact requirement under the diversion of resources theory because they failed to identify "what activities the [organizations] would divert resources away *from* in order to spend additional resources on combatting the [challenged law's] primacy effect." 974 F.3d at 1250 (emphasis in original). HTFF, by contrast, *has* identified activities from which it has diverted funds in order to provide trainings on the Requirement for canvassers and produce compliance forms for voters to acknowledge and sign. *See* Pl.'s Mem. of Law in Supp. of Mot. for Summ. J., ECF 216 at 14; Pl.'s Opp'n to Defs.' Mot. for Summ. J., ECF 232 at 9. Absent the Requirement, it would have used these funds "to

generate educational materials, hire more canvassers, and build community capacity to train staff and print additional forms."[6] ECF 216 at 14; ECF 232 at 9 (accord).

Defendants appear to ignore any other basis for HTFF's injury. But as this Court already held, a content-based government regulation compelling private speech creates its own cognizable injury separate and apart from a diversion of resources injury. ECF 190 at 14. Defendants admitted in their own opening brief, and appear to concede in their opposition brief, that the Requirement is a content-based regulation conveying government speech. *See* ECF 215-1 at 13; ECF 230 at 17. Therefore, by its very nature, the Requirement hinders HTFF's freedom of expression.

In sum, "the injury-in-fact requirement [is] applied most loosely where First Amendment rights are involved . . . ." *Harrell v. Fla. Bar*, 608 F.3d 1241, 1254 (11th Cir. 2010). The Supreme Court recognizes that the injury created by laws compelling speech is "at least as threatening" as that caused by laws restricting speech and that compelled speech in fact causes "additional damage." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018)). Such laws are "presumptively unconstitutional." *Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra*, 138 S. Ct. 2361, 2371 (2018). The nature of the First Amendment injuries asserted and the undisputed facts HTFF presented through documentation and

[6] ECF 227-2, HTFF Dep. I, 43:3–11, 46:1–11.

testimony demonstrate, as a matter of law, that it suffered an injury-in-fact sufficient to confer standing.

B. HTFF is entitled to summary judgment on its compelled speech claim because Defendants have not demonstrated evidence establishing a genuine dispute that must be resolved by a trier of fact.

Here, as in their Response to HTFF's Motion for Summary Judgment, Defendants rely on the *Zauderer* and *Central Hudson* cases to attempt to minimize HTFF's First Amendment claims. *See* ECF 230 at 8–17. For the reasons advanced in HTFF's Response, neither exception applies. *See* ECF 232 at 16–20. As discussed below, Defendants' analysis muddles the applicable standard and ignores undisputed material facts.

Since the civil rights era, voter registration drives have been a central means used by advocacy groups to fight voter apathy and disenfranchisement. In 1965, it was a voter registration drive in Selma, Alabama that led to Martin Luther King Jr.'s historic march and federal protections against discrimination in voting. *See generally Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 581–82 (2013) (Ginsburg, J., dissenting); *United States v. McLeod*, 385 F.2d 734, 737 n.1 (5th Cir. 1967). Yet Defendants attempt to turn the stringent First Amendment protections for core political speech on their head. At one point, they argue that professional fundraisers' speech warrants *more* protection than that of civic groups advocating for political change through

their voter registration activities. *See* ECF 230 at 12 ("Under *Riley*, advocacy and persuasion are part and parcel of solicitation: *i.e.*, persuading someone to financially support a cause because of agreement with its mission or message. The notification provision does not similarly implicate First Amendment protections in the way solicitation does with its quintessentially persuasive speech and advocacy.").

Defendants further assert, with no supporting case law or basis in the record evidence, that "the statement that 3PVROS may deliver registration applications late is not intertwined with core protected speech." *Id.* They attempt to slice and dice HTFF's voter registration activity into parts, claiming it consists of no more than filling out forms. *Id*. But HTFF's interactions with potential voters are far from transactional; they go the heart of its First Amendment right to engage in political speech free from government control. Like the petition circulation at issue in *Meyer v. Grant*, 486 U.S. 414 (1988), voter registration drives are "core political speech" which involves "interactive communication concerning political change." 486 U.S. at 418; *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1158 (N.D. Fla. 2012) ("[E]ncouraging others to register to vote" is "pure speech" and "core First Amendment activity."); *League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314, 1334 (S.D. Fla. 2006) (holding that "the collection and submission of" applications gathered in a voter registration drive "is intertwined with speech and association."). HTFF's description of its work confirms the nature of its speech:

> In beginning the conversation with potential voters about voter registration, HTFF gives them information about how voting works and how to use the democratic process to advocate for themselves and their community. We listen to people, explain the voter registration process, answer questions, and allay their concerns so they can trust the voter registration process and HTFF to help them navigate it.[7] Those conversations go beyond just discussing voter registration or handing out forms; they are also about why voting is important, how democracy works, and how people can advocate for changes in their community, which is all part of HTFF's integrated civic engagement mission.[8]

HTFF further notes that their ability and experience in helping voters fully complete the registration form and overcome the barriers and challenges to submitting it is critical to their message.[9] Indeed, their "message would not be complete or effective if [they] only told people to register to vote and handed them a form to complete themselves."[10] Instead, they "persuade the community members to register, help guide them through correctly completing the form, and develop their trust in HTFF to submit their application."[11] *See also* Pl.'s Opp'n to Defs.' Mot. Summ. J., ECF 232 at 28–29 (discussing authority confirming voter registration drives are core political speech). HTFF's activities are precisely the "quintessentially persuasive speech and advocacy" Defendants try to distinguish. Defs.' Opp'n to Pl.'s Mot. for Summ. J., ECF 230 at 12.

[7] ECF 227-1, ¶ 23.
[8] *Id.* ¶ 24.
[9] ECF 240-1 ¶ 7, HTFF Reply Decl.
[10] *Id.* ¶ 8.
[11] *Id.*

Defendants also make much of 3PVROs' fiduciary duty both as to their arguments for lesser scrutiny and as to the state's asserted interest, but concede that it is only at "the point at which the prospective voter decides whether or not to rely on the 3PVRO to deliver his or her registration application, [which] thereby impos[es] a fiduciary duty on it to do so timely." ECF 230 at 16 (citing Fla. Stat. § 97.0575(3)(a) (2021)). In other words, the fiduciary duty only attaches when an eligible voter entrusts the person's completed application to the 3PVRO. *See also* Pl.'s Opp'n to Defs.' Mot. for Summ. J., ECF 232 at 27. Defendants in effect argue that HTFF's speech enjoys full protection until an eligible voter submits a completed voter registration form to it, at which point its speech preceding that moment retroactively becomes subject to less protection. Again, they do not advance any case law to support this novel interpretation of the First Amendment. But HTFF must issue the required disclaimer and disclosures during each interaction, even to individuals who ultimately decide not to register through HTFF. The Requirement is therefore not narrowly tailored to satisfy the state's asserted interest in enforcing 3PVROs' compelled speech, because it reaches HTFF's speech with individuals to whom it does not owe a fiduciary duty.

Defendants also contend that Florida is not required here to use the least restrictive means to achieve its ends. ECF 230 at 16–17. But content-based regulations of protected speech such as this one must employ "the least restrictive or

least intrusive means" for accomplishing the State's compelling interests. *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 798 (1989)); *KH Outdoor*, 458 F.3d at 1269. The Requirement does not meet this standard. *See* ECF 216 at 17–27.

Defendants also attempt to defend the Requirement's constitutionality on the grounds that having 3PVROs serve as the State's mouthpiece "is the best way and time to communicate that information . . .". ECF 230 at 17. They do not cite to any precedent holding that the government may coopt a private party's speech if it determines that doing so is the best way to meet its interests. *Cf. Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015) ("[T]he Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech.").

Defendants further attempt to paint HTFF as similar to a state agent or licensee, in order to argue that its speech is entitled to less protection under *Zauderer*. ECF 230 at 12. It is true that HTFF must register with the state; but HTFF is a private actor that, unlike a deputy registrar, is not acting on the state's behalf and cannot make eligibility decisions to officially register a voter on the rolls. *See also NIFLA*, 138 S. Ct. at 2375 (designating the speech of a "wide array of individuals" as "professional speech" subject to lesser scrutiny would "give[] the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing

requirement. States cannot choose the protection that speech receives under the First Amendment . . .").

Finally, Defendants make much of allegations of small numbers[12] of voter registration applications where information was allegedly filled out by a canvasser rather than an applicant without an applicant's consent, or an unsigned, never-submitted form that was mailed to a now-deceased voter. ECF 230 at 2–3 (citing ECF 214-43, ¶¶ 19–20). These allegations, ECF 230 at 2–3 (citing ECF 214-43, ¶¶ 19–20), are a red herring. Crucially, a law that forces all 3PVROs to inform eligible voters of other registration options and that a voter's form might not be timely submitted is not narrowly tailored—or indeed even related—to preventing such activity. Defendants do not and cannot provide any basis for a trier of fact to determine that the Requirement would prevent misuse of voter registration forms or voters' information.

Accordingly, Defendants cannot show that a reasonable trier of fact could return a judgment for them on HTFF's compelled speech claim, and HTFF is entitled to summary judgment.

C. HTFF is entitled to summary judgment on its Due Process Claim.

[12] In comparison, as noted in HTFF's Memorandum in Support of Its Motion for Summary Judgment, 3PVROs have submitted more than 2 million voter registration applications since 2009. ECF 216 at 21 (citing 3PVRO Applications Database, ECF 212-29 at 100).

Defendants raise no new arguments regarding HTFF's vagueness claim in their Response. Accordingly, for the reasons discussed in HTFF's Memorandum of Law in Support of its Motion for Summary Judgment, ECF 216 at 27–33, and its Response to Defendants' Motion for Summary Judgment, ECF 232 at 10–14, Defendants cannot show a genuine issue of material fact remains for trial as to this claim.

III. Conclusion

This case represents one that is "so one-sided that one party must prevail as a matter of law." *Bowen v. Manheim Remarketing, Inc.*, 882 F.3d 1358, 1362 (11th Cir. 2018) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986)). The record and applicable law clearly establish HTFF as that party. The Court should grant HTFF's Motion for Summary Judgment.

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Respectfully submitted,

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CERTIFICATE OF WORD COUNT

The undersigned certifies on this 10th day of December, 2021, that this document complies with word limits set forth in Rule 7.1(F), N.D. Fla. Loc. R., and contains 3,031 words which includes the headings, footnotes, and quotations, but does not include the case style, table of contents, signature block or Certificates of Word Count and Service.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 10th day of December, 2021, a true and correct copy of the foregoing was electronically filed in the US District Court, Northern District of Florida, using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

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