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

League of Women Voters of Florida, Inc., et al., *Plaintiffs*, v. **Laurel M. Lee**, in her official capacity as Florida Secretary of State, et al., *Defendants*.	**Cases Consolidated for Trial:** Case No. 4:21-cv-00186-MW-MAF Case No. 4:21-cv-00187-MW-MAF Case No. 4:21-cv-00201-MW-MAF Case No. 4:21-cv-00242-MW-MAF

DEFENDANT CHRISTINA WHITE'S POST-TRIAL BRIEF

Defendant Christina White, in her official capacity as Supervisor of Elections for Miami-Dade County ("Supervisor White"), hereby files this trial brief.

I. Relevant Procedural Background

In this action, the plaintiffs in four separate cases have challenged various provisions of a recently enacted law ("SB 90") that revised Florida's Election Code (Chapters 97-107, Florida Statutes). In each of these cases, the plaintiffs have sued Florida's Secretary of State, Florida's Attorney General, and Florida's 67 Supervisors of Elections. *See generally* ECF No. 402. And, while the plaintiffs in each case sued all the same defendants and asserted certain overlapping claims, these

cases do not present identical claims and not all claims are asserted against all defendants. *See id.*[1]

In pre-trial proceedings, this Court has already dismissed certain claims that were asserted against the Supervisors of Elections and determined that certain plaintiffs in three cases were entitled to proceed to trial against the Supervisors of Elections on various claims that relate to three specific provisions of SB 90: "the drop box restrictions…, vote-by-mail application restrictions and 'line warming' ban." ECF No. 273 at 2. All four cases were subsequently consolidated for purposes of trial. *See* ECF No. 365.

For consistency, the parties agreed in the Joint Pretrial Stipulation to use the following common nomenclature in briefing: "Drop Box Provisions" refers to Section 101.69, Florida Statutes (2021), as amended by Section 28 of SB 90; "Vote-by-Mail ('VBM') Request Provision" refers to Section 101.62(1)(a), Florida Statutes (2021), as amended by Section 24 of SB 90; "Solicitation Definition" (previously described as "line warming") refers to Section 102.031(4)(a)-(b), Florida Statutes (2021), as amended by Section 29 of SB 90; "Registration Disclaimer Provision" refers to Section 97.0575(3)(a), Florida Statutes (2021), as

[1] For example, the Supervisors of Elections have been dismissed entirely from one of the cases—*Harriet Tubman Freedom Fighters v. Lee*, Case No. 21-cv-242-MW/MAF. *See id.* at 2 n. 3. Additionally, the plaintiffs in the three remaining cases have all asserted claims under the *Anderson-Burdick* framework, but only one plaintiffs' group has asserted a claim under the Americans with Disabilities Act ("ADA"). *See id.* at 7-13.

amended by Section 7 of SB 90; "Registration Delivery Provision" refers to Section 97.0575(3)(a)(1-3) (2021), as amended by Section 7 of SB 90; and "VBM Request Identification" refers to Section 101.62(1)(b), Florida Statutes (2021), as amended by Section 24 of SB 90. *See* ECF No. 402.

For ease of reference, Supervisor White provides the following chart to demonstrate (1) what claims have been asserted by each plaintiff group against the Supervisors of Elections, (2) which challenged provision (or combination thereof) each claim relates to, and (3) where in each respective complaint can each of those claims be found.[2]

	Solicitation Definition			VBM Request and Identification Provision			Drop Box Provisions		
	LWV	**NAACP**	**FRT**	**LWV**	**NAACP**	**FRT**	**LWV**	**NAACP**	**FRT**
Anderson-Burdick	I	II	IV	I	II	IV	I	II	IV
Free Speech	III	IV	V						
Vagueness/Overbreadth	IV	V	V						
VRA § 2 Discriminatory Results		I	I		I	I		I	I
VRA § 2 Discriminatory Intent		VIII	I		VIII	I		VIII	I
14th Amendment		VI	II		VI	II		VI	II
15th Amendment		VII	III		VII	III		VII	III
VRA § 208		IX	VI						
Title II ADA		III			III			III	

[2] "LWV" refers to the *League* Plaintiffs in Case No. 4:21-cv-00186-MW-MAF. "NAACP" refers to the *NAACP* Plaintiffs in Case No. 4:21-cv-00187-MW-MAF. And "FRT" refers to the *Florida Rising* Plaintiffs in Case No. 4:21-cv-00201-MW-MAF. The roman numerals refer to the relevant count in the corresponding complaint.

As evidenced in her pre-trial filings and positions at trial, Supervisor White does not intend to address every claim and issue depicted in this chart. Instead, she provides this Trial Brief to address certain claims and to apprise the Court of practical concerns that should be considered if relief is warranted. And for those issues left unaddressed—such as the stated governmental interest or legislative motive for SB 90—Supervisor White defers to Secretary Lee, as chief elections officer of the state under Fla. Stat. § 97.012, to defend SB 90 against those constitutional and statutory challenges.

II. Relevant Facts Established at Trial

The following are proposed factual findings that Supervisor White believes were established at trial and are relevant to the arguments she raises in this trial brief:

a. The Solicitation Definition does not impact how Miami-Dade conducts its elections or impose additional restrictions on solicitations at polling places because it has been a long-standing policy in Miami-Dade County to not permit **any** activity—except identified exit polling expressly authorized under Fla. Stat. § 102.031—to occur within the now 150-foot non-solicitation zone.[3] *See* Trial Tr. at 1373:9-15 (Q. What activity does your office allow within that buffer zone of 150 feet? A. We do not allow any activity within the 150 feet. Q. Except for exit polling; is that

[3] In prior elections, the non-solicitation zone described in Fla. Stat. § 102.031 was set at 100 feet from the entrance to a polling place rather than the current 150-foot line. *See, e.g.,* Fla. Stat. § 102.031 (2018).

right, Supervisor White? A. Oh, excuse me. I apologize. That is correct. If you identify yourself as an exit poller, then we do allow you within the 150 feet.).

b. This policy has been implemented in Miami-Dade County in order a create a "safe space for voters to not be intimidated, interfered with, approached, influenced in any way" when waiting in line at the polls. Trial Tr. at 1389:22-1389:1.[4]

c. The need for this policy, at least in Miami-Dade County, arises from a well-chronicled history of aggressive and intrusive campaign tactics at early voting and election day locations in Miami-Dade County.

1. Some of those tactics and corresponding complaints as well as Miami-Dade County's long-standing policy to address those issues are described in a 2019 memorandum to the Board of County Commissioners that was prepared by the Miami-Dade Supervisor of Elections' Office. *See* Ex. 382.
2. In addition, Supervisor White provided a few examples at trial of what she has personally observed throughout her tenure with the

[4] The need to maintain a 'safe space' for voters is supported by testimony from the plaintiffs themselves. For example, Plaintiff Cecille Scoon acknowledged that there is a need to ensure that voters have a positive experience when voting because "because voters who have a positive experience in the voting process are more likely to both continue the process of voting but also to vote again in the future." Trial Tr. at 178:22-179:1. *See also* Trial Tr. at 179:8-16 ("Q. So would you agree that when voters do not believe that they're safe or that they're being harassed during the voting experience, it would lead to a negative voting experience? A. Yes, sir. That's one of our concerns. Q. Okay. And you would agree with me that it would be a concern for a Supervisor, too, to limit negative voting experience to prevent voters being discouraged from voting; that's correct? A. Absolutely.").

> Miami-Dade Elections Department. *See* Trial Tr. at 1389:1 (describing "a constant battle with … campaigners"); Trial Tr. at 1376:17-23 ("People try to take advantage, right, and say, Oh, no, I'm just going to the bathroom, and then, … they start talking to voters. Or, another example is we have early voting sites in libraries and, … they pretend like they are just going to be a patron reading a book, … inside the early voting location, but then, … they leave campaign materials everywhere."); Trial Tr. at 1388:9-14 ("And, … it does get quite chaotic at points where, … cars are trying to pull in; the campaigners are obstructing the ability for the voters to pull in; campaigns are using bullhorns, loud music. They're trying -- they get in fights with each other. You know, the police do have to be called on each other, and sometimes we have to call the police.").

d. Miami-Dade County's policy of restricting activity within the 150-foot non-solicitation zone is not based exclusively on the non-solicitation provision in Fla. Stat. § 102.031(4)(a)—the only provision being challenged in this litigation. *See* Trial Tr. at 1373:16-19 (noting that Supervisor White relies on more than the non-solicitation provision for her policy to not allow any activity within the 150-foot zone).

e. Instead, Miami-Dade County's policy arises from two separate statutory provisions that are not being challenged in this litigation, specifically the authority under (a) Fla. Stat. § 102.031(1) to "maintain order at the polls and enforce obedience to … lawful commands during an election and the canvass of the votes"

and (b) Fla. Stat. § 102.031(4)(c) to "take any reasonable action necessary to ensure order at the polling places." *See* Trial Tr. at 1373:19-24 (describing her authority under "another statute … [that] provides us the ability to maintain order -- the responsibility, rather, to maintain order outside the polls"); Trial Tr. at 1394:13-21 ("Q: … In your experience, and in your administration of elections, do you believe that this safe zone of 150 feet for voters in Miami-Dade County is reasonably necessary to ensure order at the polls? A. Yes, I do.").

f. Supervisor White has deemed this policy to be reasonably necessary in Miami-Dade County because "in a county [of Miami-Dade's] size, with the number of locations that we administer, with the number of campaigners and just sheer activity that is occurring outside of these locations, if I did not provide what I want to call a safe zone for our voters, it would get very, very chaotic." Trial Tr. at 1373:25-1374:6. *See also* Trial Tr. at 1376:23-1377:11 ("And, … I have other examples where, … it is so impossible with the volume of sites and the volume of people that we are dealing with out there to discern who is engaging in activity to influence, who is not, … who is providing nonpartisan assistance, who is not. And so, … a good policy is one that is easy to understand, is easy to administer, and is easy to enforce. And so, … to put this type of interpretation on my essential poll workers who have … been to training for less than a day I think is something that can be handled wildly inconsistent in those locations. So, again, to keep our voters safe, we ask everybody to conduct all activity outside of the 150 feet."); Trial Tr. at 1389:2-8 ("And I think that's another thing that's widely known by anybody who's actually at these sites performing these activities, that my poll deputies are having to say, Get back. Get

back. They're trying to interfere with it, allegations that one group is trying to do something that we're not seeing or not being reported. You know, it's a lot of work for our poll deputies to try to maintain that safe zone for our voters.").

g. Although Miami-Dade County provides a "safe zone" for voters within the 150-foot non-solicitation zone, Miami-Dade County still provides voters waiting in line—even within the 150-foot zone—with the ability to obtain food, water, or other forms of assistance and relief from any group or individual. That is done through a procedure "called the proxy process, [whereby] any voter that's in line is able to leave line -- leave the line … if they have to go to the restroom or, you know, with your example, leave for food and water, or let's say they're elderly or disabled and they can't stand in line, we do have chairs that they can sit in," and the poll deputy will then ensure that the voter's position in the line is saved while they "do whatever it is that they need to do." Trial Tr. at 1391:16-25.

h. These policies to maintain order at the polls in Miami-Dade County were in existence prior to the passage of SB 90 and were not impacted by the enactment of SB 90. Therefore, nothing would change for voters in Miami-Dade County with respect to "line warming" activities if SB 90 were repealed tomorrow. *See* Trial Tr. at 1392:5-14.

i. Similarly, Supervisor White provided unrebutted testimony that the ability for voters to request assistance at polling places remains unchanged in Miami-Dade County following the passage of SB 90. *See* Trial Tr. at 1392:15-1394:1 ("Q. Did the enactment of SB 90 change th[e] process [to request assistance] at all? A. No. Q. If SB 90 were to be repealed tomorrow, would this process change at all in

Miami-Dade County? A. No. Q. Would the organizations or individuals who wish to provide assistance have a different experience in Miami-Dade County? A. No.").

j. Moreover, the ability for individuals or organizations to drop off voters at polling place parking lots in Miami-Dade County has been—and will continue to be—unchanged following the passage of SB 90. *See* Trial Tr. 1394:2-12 ("Q. ... If a voter was being dropped off in a parking lot in Miami-Dade County, and that parking lot was within the 150-foot zone, would they be allowed to be dropped off at the polling place in Miami-Dade County? A. Yes. Q. And did the enactment of SB 90 change that in any way? A. No. Q. If SB 90 were repealed tomorrow, would that change any way for the person who is dropping the voter off or the voter in Miami-Dade County? A. No.").

k. With respect to the challenged provisions of SB 90, Supervisor White has never received a request for a reasonable accommodation or modification under the ADA and then denied such request. *See* Trial Tr. 3205:3-5 ("Q. Have you ever had a voter make a request for an ADA accommodation and denied it? A. No.").

l. Notwithstanding Miami-Dade County's longstanding policy of providing a "safe zone" for voters within the 150-foot non-solicitation zone, Plaintiffs provided no evidence that Miami-Dade County's policies violated Plaintiffs or their members or constituents constitutional or statutory rights or injured them in any way. *See*, *e.g.,* Trial Tr. 182:10-11 ("I am not aware of any specific problems in Miami-Dade County with the way the elections were carried out.")

m. In Miami-Dade County, the use of manned drop boxes in the 2020 Primary and General Elections provided three benefits: (1) additional security; (2) increased voter confidence; and (3) a reduction in the rejection of unsigned vote-by-mail ballots. *See* Trial Tr. 3154:4-11 (manned drop boxes were "an added layer of security from our perspective … we believed was a visual deterrent through if something did happen, then there is a witness standing there to be able to observe and report anything.); Trial Tr. 3154:16 – 3155:11 ("I do believe that it aided in voter confidence. We heard many, many reports over the election cycle that our voters were very happy to be able to hand their ballot, essentially, to an elections worker [and] a staff member was there to provide the voter with an I Voted sticker, which they were very happy about."); Trial Tr. 3155:16 – 3156:2 ("There are multiple reasons why a ballot gets rejected, but the largest reason is for a voter not signing the ballot, just simply forgetting to sign or not realizing they have to do it. As much outreach that we do, it is missed… the staff member standing there reminding our voters to both make sure it's sealed and that it's signed by the voter, anecdotally by my staff members there, went a very long way, that it caught them before turning it in without it being signed, and in the end the rejection rates for people not signing their ballot did go down.").

III. Failure to Establish Subject Matter Jurisdiction

Article III of the Constitution limits the subject-matter jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. For that reason, "the first and fundamental question [in every case] is that of jurisdiction." *Steel Co.*

v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998) (internal quotation omitted). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex Parte McCardle*, 74 U.S. 506, 514 (1868).

"[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). "The Supreme Court has identified three constitutional requirements for standing, all of which must be satisfied: (1) an injury in fact, meaning an injury that is concrete and *particularized,* and actual or imminent, (2) a causal connection between the injury and the causal conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *Granite State Outdoor Advert., Inc. v. City of Clearwater, Fla.*, 351 F.3d 1112, 1116 (11th Cir. 2003) (emphasis in original). Each of these elements is "an indispensable part of the plaintiff's case" and "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan,* 504 U.S. at 561 (citation omitted).

In addition, the Supreme Court has recognized that "standing is not dispensed in gross" and, therefore, "a plaintiff must demonstrate standing separately for each form of relief sought" against each defendant that it has sued. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (internal citation

omitted).[5] For that reason, it is unsurprising that the standing analysis has predominated these proceedings where at least 16 different plaintiffs across four separate cases have asserted over a dozen overlapping—but not identical—claims against nearly 70 defendants.

Supervisor White is mindful that this Court is tasked with discerning whether there is any wheat amongst the chaff under its "independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *Summers v. Earth Island Institute*, 555 U.S. 488, 497 (2009); *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1273 (11th Cir. 2006). This Court must also re-assess the standing inquiry at each successive stage of litigation because, for example, "[t]he standing inquiry can be revisited at trial if it appears that facts necessary for standing are not supported by the evidence adduced at trial." *Jackson v. Okaloosa Cty., Fla.*, 21 F.3d 1531, 1536 n.5 (11th Cir. 1994). For that reason, Supervisor White will go through each element of the standing analysis and identify which plaintiffs failed to establish that element at trial against Miami-Dade County.

[5] At the close of Plaintiffs case-in-chief, Supervisor White moved for the entry of a judgment on partial findings in her favor pursuant to Rule 52(c) of the Federal Rules of Civil Procedure and argued that certain Plaintiffs have failed to demonstrate an injury in fact as to Supervisor White and all Plaintiffs have failed to demonstrate that an injunction relating to SB 90's Solicitation Definition will not redress Plaintiff's alleged injury in Miami-Dade County. Even if Plaintiffs had developed evidence to rebut Supervisor White's entitlement to relief under Rule 52(c), which they have not, such evidence may not be applied to this Court's deferred consideration of the Rule 52(c) Motion.

a. Injury in Fact

As stated above, the Plaintiffs were permitted to proceed to trial against the Supervisors of Elections on claims relating to three specific provisions of SB 90: (1) the Drop Box Provisions, (2) the VBM Request and Identification Provisions, and (3) the Solicitation Definition.

With respect to the claim raised by the *NAACP* Plaintiffs under Title II of the ADA (Count III), the plaintiffs have alleged that their injury relating to the Drop Box Provisions is that SB 90 "will limit the option to offer drop boxes outside" and "many election officials will place most or all drop boxes indoors where staff are already located, which may be less accessible to voters with disabilities." (Case No. No. 4:21-cv-00187-MW-MAF, ECF No. at ¶ 159). But Supervisor White testified that she offered outdoor or curbside drop boxes during the 2020 election and will continue to do so even after the passage of SB 90. Trial Tr. at 1395:8-1396:11 (describing how drop boxes were implemented in Miami-Dade County with a drive-up option and that neither SB 90 nor its repeal would affect how drop boxes are administered in Miami-Dade County). Accordingly, if the potential inability to have drive-up drop boxes serves as the basis for the *NAACP* Plaintiffs' ADA claim relating to the Drop Box Provisions, then they cannot establish that they will suffer any such injury in Miami-Dade County.

b. Causation

With respect to some of the individual and organizational plaintiffs in this case, the record at trial shows that Supervisor White cannot be the cause of any injury that they suffer from the enforcement of these provisions of SB 90 because those

plaintiffs either do not live or operate in Miami-Dade County. Specifically, all the individual plaintiffs in the *League* Plaintiffs' case (Cecille Scoon, Susan Rogers, Alan Madison, and Robert Brigham) are registered voters in other Florida counties.[6] Additionally, among the *Florida Rising* Plaintiffs, Equal Ground Education Fund and Poder Latinx testified that these organizations do not operate in Miami-Dade County. *See* Trial Tr. 384:5-11; 193:12-16. Accordingly, this Court should dismiss all claims by these plaintiffs against Miami-Dade County.

c. Redressability

Cognizant that "courts do not sit to determine questions of law *in thesi,*" plaintiffs seeking to invoke the subject matter jurisdiction of a federal court must establish that there is "a likelihood that the requested relief will redress the alleged injury." *Steel Co.*, 523 U.S. at 103, n.5. With respect to all of the Plaintiffs' claims concerning the Solicitation Definition, their purported injury is the inability to engage in certain activities within the 150-foot non-solicitation zone and their requested relief is an injunction barring the defendants from enforcing SB 90's Solicitation Definition. However, as shown at trial, Miami-Dade County has a long-standing policy to not permit any activity by outside organizations or individuals within the 150-foot non-solicitation to maintain order at the polls, and Miami-Dade implements that policy pursuant to additional statutory authority that is not being challenged by this litigation. *See generally supra* at II(a)-(h). Thus, an injunction

[6] Ms. Scoon, Ms. Rogers, Mr. Madison, and Dr. Brigham are registered voters in Bay County, Pinellas County, Indian River County, and Orange County, respectively. *See* Trial Tr. at 33:7-8; 1088:6-9; 694:5-6; 1596:10-13.

relating to SB 90's Solicitation Definition will not redress Plaintiff's injury in Miami-Dade County and this Court should dismiss all claims relating to the Solicitation Definition as to Miami-Dade County. *See Steel Co.*, 523 U.S. at 107 ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."); *Simon v. E. Kentucky Welfare Rts. Org.*, 426 U.S. 26, 45–46 (1976) ("Moreover, the complaint suggests no substantial likelihood that victory in this suit would result in respondents' receiving the hospital treatment they desire. A federal court, properly cognizant the Art. III limitation upon its jurisdiction, must require more than respondents have shown before proceeding to the merits.").

But this Court need not rely exclusively on the Supreme Court's general holdings on redressability to find that subject matter jurisdiction is lacking because a specific body of case law has developed concerning circumstances analogous to those here (i.e., when a litigant challenges a statute because it purportedly prohibits certain conduct, but the litigant's conduct would nevertheless be prohibited by a separate, unchallenged statutory provision). *See, e.g.*, 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.5 (3d ed. 2008 & Supp. 2018) (noting that "[i]ndependent causation may be found when a plaintiff's activity is independently proscribed by two different laws. One law alone does not cause the injury if the other law validly outlaws all the same activity.").[7]

[7] Supervisor White is aware that some of the cases that she cites below address this issue as one of redressability and others address this issue as one of causation. However, she has chosen to place them in this portion of her brief because the Eleventh Circuit has predominantly treated these as redressability cases and the

Notably, the Eleventh Circuit has applied this concept in published opinions in at least two different contexts. First, the Eleventh Circuit has twice held that "a plaintiff whose sign permit applications were denied on the basis of one provision in a county's sign ordinance, but which could have been denied on the basis of some alternate, but unchallenged regulation, does not have a redressable injury." *Maverick Media Grp., Inc. v. Hillsborough Cty., Fla.*, 528 F.3d 817, 820 (11th Cir. 2008). *See also KH Outdoor, L.L.C. v. Clay Cty., Fla.*, 482 F.3d 1299, 1303 (11th Cir. 2007) ("Any injury [plaintiff] actually suffered … is not redressible because [their actions] failed to meet the requirements of other statutes and regulations not challenged.").[8]

Second, the Eleventh Circuit has found redressability lacking in a First Amendment challenge to a provision of the Canon of the Florida Code of Judicial Conduct regarding judicial disqualification because a separate, unchallenged state statute could have led to the same outcome. *See Fla. Fam. Pol'y Council v. Freeman*, 561 F.3d 1246, 1257–58 (11th Cir. 2009) ("This means that granting [plaintiff] the relief it seeks against the enforcement of Canon 3E(1) and subpart (f) will do nothing to [remedy any chilling effect] because it does nothing to remove the asserted penalty. The chill wind from that asserted penalty will still blow in from [the unchallenged state statute]. Disqualification is disqualification no matter how it is

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Supreme Court has acknowledged that "the questions of causation and redressability overlap," *Massachusetts v. EPA*, 549 U.S. 497, 543 (2007).

[8] The Eleventh Circuit's redressability analysis in this context has also been endorsed by several sister circuits. *See Maverick Media Grp., Inc.*, 528 F.3d at 820-21 (collecting cases from the Eighth, Fourth, Seventh, and Ninth Circuits).

enforced. If disqualification is the actual injury, … the relief it seeks in this lawsuit would not redress that injury.").[9] *Accord Doe 1 v. Marshall*, 367 F. Supp. 3d 1310, 1332 (M.D. Ala. 2019) ("When two laws independently prohibit the same thing but a plaintiff challenges only one law, the plaintiff lacks standing. That is because the challenged law does not cause the plaintiff's injury (the unchallenged law does), and striking down the challenged law would not remedy the injury (because the unchallenged law would still apply)").

The Supreme Court has also suggested that plaintiffs cannot satisfy redressability when other unchallenged government action would likely cause plaintiffs to suffer the same injury. For example, in *Renne v. Geary*, the Supreme Court found that there were "serious questions … concerning the standing of respondents" when "[a] separate California statute, the constitutionality of which was not litigated in this case," arguably prohibited the same speech. 501 U.S. 312, 318-19 (1991). And, in *Clapper v. Amnesty Int'l USA*, the Supreme Court found that a plaintiffs' purported injuries were not fairly traced to the implementation of a newly enacted federal law when the government had already been taking similar action prior to the law's enactment. 568 U.S. 398, 417–18 (2013) ("Thus, because the Government was

[9] The Eleventh Circuit's holding in *Freeman* also undermines the Plaintiffs' suggestion during the argument on the Rule 52(c) motions that SB 90's Solicitation Definition is different in-kind because it carries criminal penalties. *See* Trial Tr. at 2891:17-2892:1. Putting aside that violating the non-solicitation clause or an order by the Supervisor of Elections (i.e., violations of different provisions of the ***same*** section of the Florida Statutes) carries the same penalty, *see* Fla. Stat. § 102.031(1), 102.031(4)(a-b), 102.031 (4)(c), and 104.41, *Freeman* stands for the proposition that what matters for purposes of standing is simply whether the chill winds from different statutes blow in the same direction, not their relative speed.

allegedly conducting surveillance of Mr. McKay's client before Congress enacted § 1881a, it is difficult to see how [plaintiff's injury] can be traced to § 1881a.").

Beyond the cited Eleventh Circuit and Supreme Court precedent, numerous circuit courts have reached similar conclusions in cases that have arisen in a variety of different contexts. *See, e.g., White v. United States*, 601 F.3d 545, 552 (6th Cir. 2010) ("Nor would these injuries be redressed by the relief plaintiffs seek, since the states' prohibitions on cockfighting would remain in place notwithstanding any action we might take in regard to the [challenged federal law]."); *Howard v. New Jersey Dep't of Civ. Serv.*, 667 F.2d 1099, 1101–02 (3d Cir. 1981) (holding that plaintiffs lacked standing to challenge the use of a physical agility test in employment hiring because they had also failed a required written examination); *Delta Construction Co. v. EPA*, 783 F.3d 1291, 1296 (D.C. Cir. 2015) ("Therefore, even were we to vacate the EPA standards, the NHTSA standards would still increase the price of vehicles. Accordingly, the California Petitioners cannot demonstrate either that EPA's standards cause their purported injury or that a favorable decision by this court would redress it.").

Consequently, this Court should find that all plaintiffs lack standing to challenge the SB 90's Solicitation Definition against Miami-Dade County because granting plaintiffs the relief they seek will do nothing to remedy any chilling effect.[10] To

[10] It is worth noting that the potential testimony this Court relied upon in denying Supervisor White's Motion for Summary Judgement on the issue of redressability did not materialize at trial. *See* ECF No. 379, Case No. 4:21-cv-00186-MW-MAF, p. 7, fn. 4; ECF No. 293, Case No. 4:21-cv-00201-MW-MAF, p. 8, fn. 4. For example, Andrea Mercado of Florida Rising Together testified that her organization conducted activities within 150 feet in counties other that Miami-

paraphrase Judge Carnes, "[prohibiting activity] is [prohibiting activity] no matter how it is enforced. If [not being allowed to conduct activities within 150-feet] is the actual injury, … the relief it seeks in this lawsuit would not redress that injury." *Freeman*, 561 F.3d at 1257–58.[11]

IV. Plaintiffs Failed to Establish a Claim under Title II of the ADA

One of the plaintiffs' groups—the NAACP Plaintiffs—has asserted a claim against the Supervisor Defendants under Title II of the ADA, 42 U.S.C. §§ 12131-34. To state a claim under Title II of the ADA, a plaintiff must demonstrate: "(1) that [he or she] is a 'qualified individual with a disability;' (2) that [he or she] was 'excluded from participation in or ... denied the benefits of the services, programs, or activities of a public entity' or otherwise 'discriminated [against] by such entity;'

Dade County; Cecile Scoon testified that she was unaware of any activity by the League of Women Voters within the 150 ft non-solicitation zone in Miami-Dade County during the 2020 election; and Gespie Mettellus did not testify at all. *See* Trial Tr. 2046:22-25 ("Q. Did Florida Rising Together ever provide these items to voters within 150 feet of the polls? A. We did. In Broward, Palm Beach, Duval"); Trial Tr. 180:10-12 ("Q. Ms. Scoon, are you aware of the League of Women Voters engaging in any activity within the 150-foot non-solicitation zone in Miami-Dade County in the 2020 election cycle? A. No, I'm not specifically aware of an instance in Miami.").

[11] The mere fact that Plaintiffs may point to an isolated instance where a violation of Miami-Dade County's long standing safety zone occurred does little to disprove the policy's existence or enforcement. In much the same way an unticketed driver who drives one hundred miles per hour on the interstate does not alter the posted speed limit, a single instance of a Plaintiff handing a slice of pizza to a voter within the 150-ft safe zone in Miami-Dade County does not alter Supervisor White's authority or enforcement of Sections 102.031(1) and (4)(c) of the Florida Statutes.

(3) 'by reason of such disability.'" *Shotz v. Cates*, 256 F.3d 1077, 1079 (11th Cir. 2001) (quoting 42 U.S.C. § 12132).

In addition, Title II of the ADA provides that "the Attorney General shall promulgate regulations" to implement Title II's provisions. And, in accordance with that directive, "the Department of Justice has promulgated regulations[, which …] provide that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1081–82 (11th Cir. 2007) (quoting 28 C.F.R. § 35.130(b)(7)).

In light of these regulations, "a successful ADA claim requires plaintiffs to 'propose a reasonable modification to the challenged public program that will allow them the meaningful access they seek.'" *People First of Alabama v. Merrill*, 467 F. Supp. 3d 1179, 1216–17 (N.D. Ala. 2020) (quoting *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 507 (4th Cir. 2016)). The reason plaintiffs must propose (and be denied) a reasonable modification prior to obtaining judicial relief is that the ADA "only requires reasonable modifications that would not fundamentally alter the nature of the service provided." *Nat'l Ass'n of the Deaf v. Fla.*, 980 F.3d 763, 773 (11th Cir. 2020).

Yet, in this case, the *NAACP* Plaintiffs did not propose any reasonable modification to the challenged provisions of SB 90 and did not establish that any request for a reasonable modification had yet been denied. *See, e.g.,* Trial Tr. at

3205:3-5 ("Q. Have you ever had a voter make a request for an ADA accommodation and denied it? A. No."). As a result, Plaintiffs have failed to establish a claim under Title II of the ADA against Miami-Dade County.

V. Plaintiffs Failed to Establish a Claim under Section 208 of the VRA

Plaintiffs argue that, following the passage of SB 90, voters can no longer receive the assistance required by Section 208 of the Voting Rights Act from Plaintiffs or other trusted organizations at polling places. However, there was no evidence adduced at trial that any voter assistance activities that occurred in Miami-Dade County prior to SB 90 will be impacted by SB 90's amendment to the definition of "solicit" in Fla. Stat. § 102.031. *See* Trial Tr. at 1392:15-1394:1 ("Q. Did the enactment of SB 90 change th[e] process [to request assistance] at all? A. No. Q. If SB 90 were to be repealed tomorrow, would this process change at all in Miami-Dade County? A. No. Q. Would the organizations or individuals who wish to provide assistance have a different experience in Miami-Dade County? A. No.").

And Plaintiffs cannot demonstrate that such activities will be impacted by SB 90 because the requirements of Section 208 of the Voting Rights Act, codified at 52 U.S.C. § 10508, are mirrored in a separate provision of Florida law. Specifically, Fla. Stat. § 101.051(1) states: "Any elector applying to vote in any election who requires assistance to vote by reason of blindness, disability, or inability to read or write may request the assistance of two election officials or some other person of the elector's own choice, other than the elector's employer, an agent of the employer, or an officer

or agent of his or her union, to assist the elector in casting his or her vote." Therefore, when read in *pari materia* with other relevant provisions of Florida's laws, the general non-solicitation provision in Fla. Stat. § 102.031 cannot be read to prohibit conduct that is expressly authorized by Fla. Stat. § 101.051(1). *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("It is a commonplace of statutory construction that the specific governs the general. … The general/specific canon is perhaps most frequently applied to statutes in which a general … prohibition is contradicted by a specific … permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one."). Additionally, there is no evidence in the record that Supervisor White will do anything other than comply with the requirements of Fla. Stat. § 101.051(1).

VI. Distinction Between Facial vs. As Applied Challenge

Prior to trial, this Court ordered the Plaintiffs "to include in their pretrial stipulation…, a list of each claim at issue and identify whether Plaintiffs are proceeding with an as-applied or facial challenge—or both—as to each claim." ECF No. 380 at 21. In response, Plaintiffs reflexively listed "Both" for every remaining claim at issue, even claims—like their overbreadth/vagueness claim—that this Court and all prevailing precedent acknowledge are exclusively facial in nature. *See id.* at 12, n.5 (describing Plaintiffs' overbreadth claim as "necessarily, a facial challenge under the First Amendment"); *Broadrick v. Oklahoma*, 413 U.S. 601, 612, (1973) (generally describing such claims as "facial overbreadth" claims).

As this Court has acknowledged, "the line between facial and as-applied relief is a fluid one, and many constitutional challenges may occupy an intermediate position on the spectrum between purely as-applied relief and complete facial invalidation." *Am. Fed'n of State, Cty. & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851, 865–66 (11th Cir. 2013) ("*AFSCME*"). However, while certainly fluid, the legal difference between a facial challenge and an as-applied challenge is critical because it fundamentally alters what Plaintiffs must prove to be entitled to their requested relief.

If Plaintiffs intend to mount a facial attack to a statute, then they must establish "that no set of circumstances exists under which the Act would be valid," *United States v. Salerno,* 481 U.S. 739, 745 (1987), or that the statute lacks any "plainly legitimate sweep," *Washington v. Glucksberg,* 521 U.S. 702, 740, n. 7 (1997). *Accord United States v. Stevens*, 559 U.S. 460, 472–73 (2010).[12] On the other hand, an as-applied challenge would only require Plaintiffs to demonstrate that the law is unconstitutional as applied to the Plaintiffs or to the specific circumstances that they may represent. *See, e.g., Doe #6 v. Miami-Dade Cty.*, 974 F.3d 1333, 1341 (11th Cir. 2020) ("But to refute an as-applied challenge, the County would have needed to show that the Ordinance's effect on the Does was not excessively punitive in relation to its purpose.") (emphasis in original).

[12] To add further fluidity, the Supreme Court has established a separate standard for facial overbreadth claims. There, Plaintiffs must prove that "a substantial number of [a law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 449, n. 6 (2008) (internal quotation marks omitted).

While an as-applied challenge is certainly less difficult to establish, the trade off is that the relief that the Court can order is restrained in proportion. Here, the only relief that Plaintiffs have sought is a complete invalidation of the challenged provisions of SB90 and an injunction barring the defendants from enforcing those provisions against ***any*** voter. That is necessarily a facial challenge because Plaintiffs unambiguously seek relief that reaches beyond their particular circumstances. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010) ("The label is not what matters. The important point is that plaintiffs' claim and the relief that would follow—an injunction barring the secretary of state 'from making referendum petitions available to the public,' …—reach beyond the particular circumstances of these plaintiffs. They must therefore satisfy our standards for a facial challenge to the extent of that reach.").

To better understand the interplay between the type of challenge and the relief awarded, the Eleventh Circuit's analysis in *AFSCME,* 717 F.3d 851, proves instructive. There, the plaintiffs challenged the constitutionality of an executive order that provided for mandatory drug testing of all new hires and random drug testing of existing employees that worked for the State of Florida. *Id.* When the district court invalidated the [Executive Order] across the board covering *all* 85,000 state employees," the Eleventh Circuit held that the district court "granted what effectively amounted to facial relief—or, at the very least, relief that had enough characteristics of facial relief to demand satisfaction of *Salerno*'s rigorous standard." *Id*. at 865. Because the Plaintiffs could not meet the facial challenge standard, the Eleventh Circuit held that the district court had abused its discretion by "grant[ing]

relief that is improperly or unnecessarily broad," vacated the injunction, and ordered "the district court to more precisely tailor its relief to the extent the Executive Order may be unconstitutional." *Id.* at 870.

Therefore, this Court may only consider an as-applied challenge if it awards relief that is more narrowly tailored than what Plaintiffs have thus far sought. As an example, if this Court were to find that SB 90's VBM Request Identification provision were unduly burdensome as applied to those voters who did not provide a Florida Driver's License or Social Security number at the time of their registration because, for those voters, there would be no information for a Supervisor of Elections to verify against, then the resulting injunction could only extend to that subset of individuals. But, if enforcement is enjoined as to all voters, then Plaintiffs must satisfy *Salerno's* rigorous standard for facial challenges.

VII. Additional Considerations Relating to Relief

At trial, this Court requested that Supervisors of Elections provide whatever relevant evidence they wished this Court to consider if it were to decide to award relief to the Plaintiffs. In addition, certain Supervisors of Elections provided testimony in response to questions from counsel and the Court under Fed. R. Evid. 614 about what impact, if any, would result if an injunction concerning certain challenged provisions were to be issued. Because Supervisor White was among those supervisors who already provided this testimony, *see generally* Trial Tr. at 3149-3189, she does not wish to retread a worn path and relies on her trial testimony. However, there are two issues that she wishes to bring to this Court's consideration.

First, based on prior experience with the procedural history in the litigation surrounding Amendment 4 before Judge Hinkle, there is one challenged provision that may merit unique practical concerns to avoid confusion in the administration of upcoming elections. In the event that this Court were to enjoin the enforcement of the VBM Request Identification provision (i.e., the requirement that voters provide—and Supervisors verify—a FL Driver's License number or Social Security number), Supervisor White requests that this Court delay the effective date of any injunction so that there is sufficient time for any party to seek a stay of that injunction with this Court and any appellate court. This is because, if (a) an injunction were to take effect immediately, (b) Supervisors were to begin to accept vote-by-mail requests without voters providing a FL Driver's License number or Social Security number, but (c) a subsequent court were to stay that injunction, there would be uncertainty as to whether the vote-by-mail requests received during that time frame (without the required information) would need to be resubmitted with the required information to allow the voters to receive the requested ballots. A brief delay in the effective date of an injunction to allow for the consideration of any motion to stay would provide certainty to the Supervisors and avoid further confusing voters with rapidly changing requirements.

The Amendment 4 litigation provides a concrete example. There, the district court issued its order following a bench trial on May 24, 2020. *See Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1234 (N.D. Fla.). That order directed the Supervisors of Elections to take certain immediate actions, *see id.* at 1250-52, and potential voters were able to submit voter registration information in reliance on that order. The

State of Florida then sought a stay to that injunction, which the district court denied based upon the fact that a prior interlocutory appeal had been affirmed by the Eleventh Circuit. *Jones v. DeSantis*, No. 4:19CV300-RH/MJF, 2020 WL 5646125, at *8 (N.D. Fla. June 14, 2020) ("The motion to stay is, in effect, a motion to stay implementation of the Eleventh Circuit's decision in *Jones I*. Fidelity to the standards governing stays pending appeal requires denial of the motion."). However, on July 1, 2020, the Eleventh Circuit subsequently stayed the district court's order thereby causing the Supervisors of Elections to have to reverse course a second time after initially complying with the district court's injunction. *See McCoy v. Governor of Fla.*, No. 20-12003-AA, 2020 WL 4012843, at *1 (11th Cir. July 1, 2020).

Because the VBM Request Identification is the only challenged provision where a request submitted by a voter could be invalidated by the issuance of a stay, Supervisor White requests that any order granting injunctive relief on this issue take that potential sequence of events into consideration. Also, since the deadline for requesting a vote-by-mail ballot for the 2020 Primary Election is six months away and current vote-by-mail requests will not expire until after the General Election, a brief delay in the effective date of any injunctive relief to avoid confusion should not prejudice any party.

Second, all parties in this litigation have agreed that the 2020 elections in Florida were successful because "the integrity of the election was upheld throughout the entire process; … voting was made accessible and convenient to our voters; … all of our policies and procedures were carried out accurately; … the results were

tabulated accurately, reported to the state on time, certified on time; … our postelection audit was accurate; and…, generally, our voters had a pleasant experience." Trial Tr. at 1333:18-1334:3. Therefore, to avoid any doubt as to the extent of any injunction, Supervisor White requests that any injunction relating to the enforcement of SB 90's provisions indicate that any actions that Supervisors of Elections took during the 2020 Election and prior to the passage of SB90 are not impacted by the injunction.

CONCLUSION

For the foregoing reasons, Supervisor White asks that this Court: (1) dismiss all claims against Supervisor White that were raised by Cecille Scoon, Susan Rogers, Alan Madison, Robert Brigham, Equal Ground Education Fund and Poder Latinx; (2) dismiss any claim relating to the Solicitation Definition against Miami-Dade County for lack of standing; (3) dismiss any claims raised under Title II of the ADA or Section 208 of the Voting Rights Act against Miami-Dade County; and (4) fashion any injunctive relief in accordance with the considerations expressed above.

Date: February 26, 2022

Respectfully submitted,
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served to all counsel of record through the Court's CM/ECF system on February 26, 2022.

/s/ Michael B. Valdes
Michael B. Valdes
Assistant County Attorney

Certificate of Compliance

The undersigned certifies that the foregoing complies with the size, font, and formatting requirements of Local Rules 5.1(C).

/s/ Michael B. Valdes
Michael B. Valdes
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