UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FLORIDA STATE CONFERENCE OF BRANCHES AND YOUTH UNITS OF THE NAACP, COMMON CAUSE, and DISABILITY RIGHTS FLORIDA, et al.,

Plaintiffs,

v.

LAUREL M. LEE,

in her official capacity as Florida Secretary of State, et al.,

Defendants,

REPUBLICAN NATIONAL COMMITTEE and NATIONAL REPUBLICAN SENATORIAL COMMITTEE,

Intervenor-Defendants.

Case 4:21-cv-00187-MW-MAF

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PLAINTIFFS' CORRECTED RESPONSE AND MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

*This corrected memorandum only amends the list of Defendants in the first paragraph. The exhibits Plaintiffs filed as ECF Nos. 306-1 to 306-65, and 307-1, support this memorandum.

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Plaintiffs Florida State Conference of Branches and Youth Units of the NAACP, Common Cause, and Disability Rights Florida oppose the Motion for Summary Judgment of Secretary of State Laurel Lee; Supervisors of Elections Alan Hays and Tommy Doyle; and Defendant-Intervenors Republican National Committee and National Republican Senatorial Committee ("Defendants"). ECF Nos. 285, 286 (the "Motion"). For the reasons explained in detail below, Defendants' Motion should be denied.

INTRODUCTION

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On April 26, 2021, the Florida Legislature passed Senate Bill 90, An Act Relating to Elections, 2021 Fla. Sess. Law Serv. ch. 2020-11 (West) ("SB 90"). Plaintiffs challenge SB 90's burdensome and discriminatory curtailment of the availability of drop boxes in future elections (Section 28), its new requirement forcing voters to apply for vote-by-mail ("VBM") ballots twice as often (Section 24), and its restrictions against volunteers providing basic relief, including food and water, to voters waiting in line (Section 29) (the "Challenged Provisions").[1]

In 2020, voters of color in Florida cast VBM ballots in record numbers, and almost one-third of all VBM ballots were deposited in drop boxes. Black

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[1] Plaintiffs' First Amended Complaint also challenged Section 32, which restricts third-party ballot return. ECF No. 45. This Court dismissed that claim for lack of standing. *See Fla. Conf. NAACP v. Laurel L. Lee*, 2021 WL 4818913, at *11 (N.D. Fla. Oct. 8, 2021).

Floridians' reliance on VBM more than doubled from the 2016 election; the number of Hispanic VBM voters also nearly doubled. The overwhelming majority of Florida's Supervisors of Elections ("SOEs") believe that drop boxes in their counties were well-monitored during the 2020 election, and not one SOE detected or received reports of tampering or voter fraud involving drop boxes.

Nevertheless, the Florida Legislature rushed to pass SB 90, which introduced a raft of new voting restrictions without plausible justification and without regard for the burden these restrictions would impose on voters. Section 28 will significantly curtail access to drop boxes in future elections compared to 2020. Section 24 imposes unnecessary hurdles for access to VBM ballots, and Section 29 threatens individuals providing food or water to voters waiting in lines with criminal penalties. These restrictions will disproportionately affect voters of color and voters with disabilities.

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Defendants attempt to rationalize the new discriminatory restrictions on Floridians' right to vote by proffering vague assertions about "election integrity," without factual foundation or demonstrable nexus to the Challenged Provisions. Indeed, the State officials directly responsible for Florida's elections—including Governor Ron DeSantis, Secretary of State Laurel Lee, and the Florida Supervisors of Election ("FSE"), an association

representing all SOEs—hailed the 2020 election's efficiency, security, and integrity.

Summary adjudication is inherently inappropriate for the fact-driven balancing analyses that govern review of voting restrictions. Here, the evidentiary record demonstrates genuine issues of material fact appropriate for trial on Plaintiffs' claims for each of the Challenged Provisions. Defendants' motion, therefore, must fail.

STATEMENT OF FACTS

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Florida Legislators Rushed to Pass SB 90 Despite "Safe, Secure and Orderly" 2020 Elections.

In December 2020, Secretary Lee declared that Florida ran three "safe, secure, and orderly" elections in 2020.[2] The SOEs responsible for administering those elections also praised their security and success. *See*, *e.g.*, ECF Nos. 306-21, 306-2 at 3; *see also* ECF No. 306-3 (RFA 23).

Even the Florida legislators sponsoring the new voting legislation agreed that the 2020 General Election was secure. Representative Blaise Ingoglia—who sponsored SB 90's companion House Bill ("HB") 7041—

[2] Press Release, Florida Sec'y of State Laurel M. Lee Credits Governor DeSantis for Successful Election Year, (Dec. 23, 2020), https://dos.myflorida.com/communications/press-releases/2020/florida-secretary-of-state-laurel-m-lee-credits-governor-desantis-for-successful-election-year/.

praised the 2020 election as a model for how future elections should be run. ECF No. 306-8 at 24, ECF No. 306-4 at 1:51:14. Senator Dennis Baxley—who sponsored SB 90—thanked Secretary Lee for an exceptional election. ECF No. 306-6 at 2:55 to 3:02. And Governor DeSantis, who signed SB 90 into law, had previously touted the 2020 election in Florida as the "smoothest, most successful election day in the union." ECF No. 306-7 at 1.

Nevertheless, in the wake of this highly acclaimed 2020 Florida election, the Florida Legislature rushed to enact new and unnecessary restrictions on Floridians' voting rights.

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The Legislature Passed SB 90 Without Adequate Opportunity for Input or Debate.

SB 90's legislative process, and that of its companion bill HB 7041,[3] exhibits an unusual rush to pass new voting restrictions without informed testimony or reasonable debate.

SB 90 Was Hastily Enacted.

The Senate curtailed debate and passed SB 90 less than three months after it was introduced. Public comment was severely reduced during

[3] A companion bill is one that is introduced in one house and is identical or very similar to a bill introduced in the other house. This practice enables concurrent analysis of and deliberation about the bills by both houses. ECF No. 306-8 at 49 n.37, (citing *FAQ*, Fla. Senate, https://www.flsenate.gov/Reference/FAQ). Accordingly, the two bills and their legislative processes should be considered together.

Committee hearings. During a hearing on the Committee on Rules, over 70 members of the public sought to provide input. ECF No. 306-8 at 51. However, Senator Passidomo admonished those wishing to comment to limit their remarks to one minute. *Id.* at 51-52. Ultimately, the Committee permitted only 18 people to speak. *Id.* at 52.

The House Senate Affairs Committee similarly rushed deliberation on HB 7041. In an April 2021 House State Affairs Committee Meeting, Committee Chair Ralph E. Massullo limited questions and debate, citing the many amendments and witnesses, as well as a "time crunch." ECF No. 306-4 at 1:50:53 to 1:51:12. Final debate on the bill in Committee was limited to thirty seconds per member. ECF No. 306-4 at 3:18:48. Many members noted that the Committee was "rushed for time" and could not adequately study the legislation. ECF No. 306-4 at 2:50:13 to 2:50:32, 2:53:44 to 2:53:57.

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Ratcheting up this artificial emergency, Representative Ingoglia submitted a strike-all amendment at 1:33 a.m. on April 27, 2021—one day after the Senate had passed SB 90. ECF No. 306-8 at 49. The strike-all amendment, which spanned more than 1,300 lines of new text, made substantial changes to the version of the bill the Senate had just passed. *Id.* at 50. This late introduction of a major strike-all amendment precluded

meaningful debate on the bill. *See* ECF No. 306-9 at 0:47:11 (Representative Smith said, "Yesterday I couldn't even debate on the strike all because there was no more time[,] no more questions."). Representative Davis also called attention to the rushed process, stating that "there are a lot of things that have changed in this bill," but "the problem [is] that I'm having . . . less than an hour or two to prepare adequately." ECF No. 306-10 at 1:50:39 to 1:50:51.

SOEs Were Denied Adequate Input on the Merits of the Bill.

Neither the Senate nor the House sought substantive input from the SOEs. Historically, SOEs are consulted when the Legislature considers election-related laws. ECF No. 306-8 at 46. Here, FSE leadership created a workgroup of SOEs to make recommendations about SB 90's provisions and disseminate them to Legislators. *See* ECF Nos. 306-11 and 306-12. SOEs voiced near universal criticism of many provisions of the bill, including the Challenged Provisions. *See e.g.*, ECF No. 306-13 at 2 (FSE talking points calling the drop box provisions "an unnecessary barrier for voters"); ECF Nos. 306-11, 306-15.

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Notwithstanding significant concerns from SOEs about SB 90—and despite past practice—the Legislature largely excluded SOEs from the process. *See* ECF No. 306-16 at 101:11-20, ("[T]his session, unlike other sessions, there was a lot of reticence from the legislature . . . to listen to our

objections."). Rather than relying on the opinions of experts such as SOEs, SB 90's proponents hastily pushed the bill forward, relying on false nationwide rumors of voter fraud. *See* ECF No. 306-8 at 35. And, ultimately, Governor DeSantis signed the SB 90 into law on May 6, 2021, live on "Fox & Friends."

The Challenged Provisions Will Impair the Right to Vote.

Plaintiffs challenge three restrictive provisions of SB 90 on statutory and constitutional grounds. The Challenged Provisions will burden Plaintiffs' members and will injure each Plaintiff organization by requiring them to divert time, money, and resources from their ordinary activities to mitigate the provisions' most harmful impact. ECF No. 306-17 ¶¶5, 12-15; ECF No. 306-18 ¶10; ECF No. 306-19 ¶¶9, 14-18.

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Drop Box Restrictions (Section 28)

Section 28 mandates that "[e]xcept for secure drop boxes at an office of the supervisor, a secure drop box may only be used during the county's early voting hours of operation and must be monitored in person by an employee of the supervisor's office." Fla. Stat § 101.69. Moreover, "[a] secure drop box at an office of the supervisor must be continuously monitored in person by an employee of the supervisor's office when the drop box is accessible for deposit of ballots"; and "[i]f any drop box is left accessible for

ballot receipt other than as authorized by this section, the supervisor is subject to a civil penalty of $25,000." *Id.*

During the 2020 General Election, approximately one-third of the ballots cast in Florida were deposited into drop boxes. ECF No. 306-20 ¶¶123, 220-21. According to expert analysis, the drop box restrictions will reduce the availability of one in four of the drop boxes provided during the 2020 General Election. *Id.* ¶125. Indeed, SB 90 has already forced several SOEs to limit drop box availability in their counties. ECF No. 306-21 ¶24 ("As a result of SB 90 . . . I will limit the hours of operation during which voters will be able to drop off ballots at drop boxes . . ."); ECF No. 306-22 at 126:24-127:13. Section 28 will deprive voters of more than 40,000 hours of drop box availability, as compared to the 2020 General Election. ECF No. 306-20 ¶¶127-30 (calculating hours lost considering the number of drop boxes that are now impermissible because they were not previously continuously monitored or located at an SOE or permanent branch office).

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Moreover, during the 2020 General Election, more than 500,000 Black Voters and more than 700,000 Hispanic voters cast VBM ballots. ECF No. 306-20 ¶28. Black voters were less likely than other racial groups to return VBM using USPS, instead opting to use drop boxes. ECF No. 306-8 at 22; *see also* ECF No. 306-23 at 125:1–13, 129:13–17. Furthermore, voters

of color were more likely to drop off VBM ballots outside the mandated periods for drop box availability under SB 90. ECF No. 306-20 ¶223. Black and Hispanic voters were more likely to rely on VBM ballots and drop boxes—particularly outside normal business hours—because they are less likely to have cars, more likely to use public transportation, and more likely to have longer commutes to work. ECF No. 306-24 ¶¶23-24. Also, many voters from migrant communities work jobs with long hours and little flexibility, making it difficult to return their ballots during business hours. ECF No. 306-17 ¶¶6-8. Thus, restrictions limiting drop box availability will fall more heavily on Black voters and other voters of color.

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Furthermore, drop box restrictions disproportionately burden voters with disabilities in the form of time, transportation, information, and health costs. ECF No. 306-20 ¶26. Even before SB 90's enactment, "voters with disabilities face[d] higher barriers to casting a ballot." ECF No. 306-20 ¶105. The Challenged Provisions place additional hurdles on voters with disabilities. For example, Palm Beach County's SOE stated SB 90 "removes a safe and secure option for outdoor voting" and will "particularly burden voters with mobility limitations [and] other voters with disabilities." ECF No. 306-21 ¶23; *see also* ECF No. 306-18 ¶6; ECF No. 306-19 ¶7.

VBM Application Restrictions (Section 24)

Section 24 of SB 90 cuts the lifespan of VBM requests in half, eliminating standing requests to vote by mail and requiring voters to submit new VBM applications every general election cycle.

Approximately 2.7 million voters cast VBM ballots in the 2016 General Election, and that number grew to over 4.8 million in 2020. ECF No. 306-20 ¶¶25, 98. During the 2020 election, 41% of Black Floridians used VBM ballots—a record, more than doubling their 19% rate in the 2016 General Election. ECF No. 306-8 at 21–22. Similarly, the percentage of Hispanic voters who used VBM increased from approximately 27% to 41%. ECF No. 306-20 ¶29.

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Multiple SOEs confirm that the VBM application restrictions will unduly burden voters who choose to vote by mail. ECF No. 306-21 ¶26; ECF No. 306-34 at 25: 17-23. Indeed, Miami Dade SOE Christina White testified that this restriction may reduce the number of VBM voters. ECF No. 306-38 at 88:6-24. SOE Earley testified that voters who cast VBM ballots often rely on standing VBM requests to continue receiving VBM ballots for future elections, ECF No. 306-16 at 126:23-127:9; and that Section 24 "invalidates the primary mechanism that voters have—and a very efficient mechanism for

voters to request a vote-by-mail ballot for upcoming elections." *Id.* at 130:14-21.

The costs of this restriction will "fall most heavily on racial and ethnic minorities" and voters with disabilities, because these groups have become increasingly more reliant on VBM ballots, and SB 90 forces them to request those ballots twice as often. ECF Nos. 306-20 ¶¶10, 105 ; 306-18 ¶7; 306-17 ¶9; 306-19 ¶¶12-13; 306-25 ¶10; 306-26 ¶¶9-11.

Voting-line Relief Restrictions (Section 29)

Section 29, which prohibits solicitation within 150 feet of a drop box or polling location, expands the definition of "solicit" to include "engaging in any activity with the intent to influence or effect of influencing a voter." Fla. Stat. § 102.031(4)(a)-(b). Organizations that provide voting-line relief, including Plaintiffs, will be forced to curtail future line relief activities for fear of violating this provision. *See, e.g.*, ECF No. 306-26 ¶¶ 10-12.

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Long lines at the polls are commonplace in Florida. ECF No. 306-20 ¶230. They are particularly prevalent in urban and more populous counties, which are "strongly associated with the residency of racial and ethnic minorities." *Id.*; *see also* ECF No. 306-8 at 22-23. Long lines at the polls, in turn, lead to reduced voter turnout. ECF Nos. 306-20 ¶233; 306-27 ¶295.

Line relief efforts provide support to voters at the polls and help "ensure all voters have access to the political process." ECF No. 306-28 ¶3. These efforts include providing refreshments, such as bottled water or food, and other support items like fans, chairs, and umbrellas, to those waiting to vote. *Id.* ¶¶3-7. Section 29's restrictions will increase the difficulty of voting by decreasing assistance to voters in long lines. ECF No. 306-20 ¶¶13, 27. Plaintiff NAACP, for example, intends to curtail its future line relief activities for fear of violating Section 29. ECF No. 306-28 ¶¶ 10-12.

The impact of these restrictions will be more pronounced for minority voters, in part because voter assistance has historically been most prevalent in predominately Black and Hispanic communities, where lines tend to be longer. ECF No. 306-20 ¶¶13, 27, 225, 231. These restrictions will also severely burden voters with disabilities and may lead some voters to forgo casting a ballot. ECF No. 306-28 ¶¶4, 7, 16.

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The Evidence Contradicts Defendants' Proffered Justifications for SB 90's Voting Restrictions.

Defendants argue that the Challenged Provisions further Florida's interests in "election integrity, preventing voter fraud, and promoting uniformity, efficiency, and confidence in the electoral system." Mot. at 35. But the very officials who administered the 2020 election saw no voter fraud and confirmed that the election was "smooth, safe, and transparent." ECF

No. 306-21 ¶¶5, 18; *see also* ECF No. 306-29 ¶5. 43 out of 67 SOEs admitted that they "did not detect, or receive reports of, any alleged, suspected, or confirmed vote buying, unlawful voter solicitation, voting under false identity, or any other type of voter fraud or unlawful conduct in [their] county in connection with the 2020 general election." ECF No. 306-30 (RFA 2). Of the 24 SOEs who did not unequivocally admit this request for admission, 15 admitted that any alleged, suspected, or confirmed voter fraud they detected had nothing to do with drop boxes. ECF No. 306-30 (RFA 2). Florida voters also expressed high confidence in the 2020 election. ECF No. 306-8 at 21.

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Indeed, many SOEs deny that the Challenged Provisions are necessary, or that they address any existing problems. ECF No. 306-31 at 41:19-22 (SB 90 is a "solution looking for a problem"), 49:4-10, 59:2-4 ("[N]o one has pointed me out the specific issues that Senate Bill 90 addressed."), 82:11-13, 158:22-23; ECF No. 306-32 at 44:20-45:4, 73:16-74 (VBM application restrictions do not "solve a problem" and are unnecessary), 74:2-10; ECF No. 306-22 at 48:15-22, 55:5-12, 72:9-17; ECF No. 306-33 at 40:21-23, 106:5-8. Indeed, several SOEs believe that pre-SB 90 laws adequately addressed the purported problems cited to justify SB 90. *See, e.g.*, ECF No. 306-34 at 189:4-5 ("There's a lot of provisions that are in place already to keep [VBM]

safe and secure."). SOEs also dispute "any instance of voter fraud or other improper or illegal conduct" that the Challenged Provisions purportedly address. ECF Nos. 306-29 ¶¶22, 24; 306-21 ¶¶25, 27. Others, including the Office of the Attorney General, also testified that they are unaware of any unlawful voting conduct relating to vote-by-mail and drop boxes. ECF No. 306-35 at 61:10-62:3.

Ultimately, no objective evidence of meaningful fraud during the 2020 election exists, and the Challenged Provisions will not reduce the sporadic allegations of fraud that may be reported in any election. *See* ECF No. 306-8 at 36-37.

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LEGAL STANDARD

Summary judgment is only appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). At the summary judgment stage, the Court does not weigh conflicting evidence or make credibility determinations. *Wate v. Kubler*, 839 F.3d. 1012, 1021 (11th Cir. 2016). Instead, it "must construe all facts and draw all rational inferences" in favor of the non-moving party. *Ga. State Conf. of NAACP v. Fayette Cty. Bd. of*

Comm'rs, 775 F.3d 1336, 1343 (11th Cir. 2015). In voting rights litigation, moreover, the Eleventh Circuit has held that summary judgment is rarely appropriate due to the fact-driven nature of the inquiry. *See id.* at 1348.

ARGUMENT

I. Plaintiffs Have Established Their Standing to Sue.

To establish standing, a litigant must show that it has suffered: (1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant, and that is (3) likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Defendants only contest whether Plaintiffs have sustained an injury-in-fact. Mot. at 6. But their arguments, based on incomplete, cherry-picked deposition excerpts, do not withstand scrutiny.

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A. Each Plaintiff Has Organizational Standing to Sue Under the Diversion of Resources Principle.

An organization can establish injury-in-fact sufficient to sue on its own behalf under a "diversion of resources" principle "if the defendant's illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts." *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1165-66 (11th Cir. 2008). An organization has standing to challenge voting-related laws if it establishes that it would "divert

personnel and time" away from its activities "to educating volunteers and voters on compliance with" the voting law. *Id.* at 1166.

Plaintiffs here need only show that the Challenged Provisions "impair" their ability to complete their work "by forcing [them] to divert resources to counteract [the Challenged Provisions]." *Id.* at 1165. Indeed, as this Court has held in denying Defendants' Motion to Dismiss, "[t]he slightness of burden . . . is not dispositive," and "a small injury, 'an identifiable trifle,' is sufficient to confer standing." *Fla. Conf. NAACP v. Laurel L. Lee*, 2021 WL 4818913, at *8 (N.D. Fla. Oct. 8, 2021) (quoting *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009) (internal citation omitted)) ("Order on MTD"). The evidence here demonstrates organizational standing as to each Plaintiff.

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1. The Florida Conference of the NAACP

The Florida NAACP is a membership-based organization with approximately 12,000 members statewide. ECF No. 306-17 ¶ 3. Its mission is to ensure the political, social, educational, and economic equality of all persons and to eliminate race-based discrimination. *Id.* Florida NAACP's voting-related activities include voter registration drives, get-out-the-vote programs, and "Souls to the Polls" events. *Id.* ¶4. Because of the Challenged Provisions, Florida NAACP must divert some of its limited resources to

educate its members and all voters about the new requirements under SB 90, including the Challenged Provisions. *Id.* ¶12-14. Among other things, Florida NAACP is expending resources to design flyers detailing and explaining the Challenged Provisions. *Id.* ¶13. Since SB 90's passage, the Florida NAACP's executive leadership has also dedicated significant meeting time to plan new efforts to educate voters about the law. *Id.* ¶14. But for SB 90's passage, those resources would have been used to advance the Florida NAACP's broader mission of eliminating academic and educational inequities and expanding political, social and economic opportunities for African Americans. *Id.* ¶15.

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Defendants' contention that the Florida NAACP "will continue its voter education efforts as before and is 'not going to use [the 2021 Law] as an excuse' to halt those efforts," plucks the organization's testimony out of context. Mot. at 9. In fact, the Florida NAACP explained in that deposition that "SB 90 is problematic and a deterrent" that presents "obstacles . . . to our clientele, but no, we're not going to use that as an excuse. We have continu[ed], as a disenfranchised group, to find ways to get to the voting booth." ECF No. 306-36 at 19:20-20:5. The Florida NAACP's determination to fulfill its mission despite the additional difficulties imposed by SB 90 does not undermine, but rather supports, a conclusion that the Florida NAACP

will have to divert significant resources to counteract the Challenged Provisions. *See* ECF No. 306-17 ¶¶10, 13-15.

2. Common Cause

Common Cause is a nonpartisan, nonprofit organization dedicated to electoral reform, ethics in government and the protection of citizen's rights in national, state and local elections. ECF No. 306-18 ¶2. With approximately 55,000 Florida members, *id.* ¶3, the organization encourages voter participation through voter education and outreach efforts and is the lead coordinator of Florida's nonpartisan Election Protection Coalition. *Id.* ¶2.

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As a result of the Challenged Provisions, Common Cause will need to hire at least five new community organizers in Florida responsible for ensuring that voters understand the changes precipitated by SB 90, including the Challenged Provisions, and to determine what assistance they need to overcome SB 90's restrictions. *Id.* ¶10. It must also spend resources to develop new voter education materials to explain the new voting restrictions resulting from the Challenged Provisions. *Id.* These expenditures on new community organizers and SB 90-specific education materials will divert funds that Common Cause otherwise would allocate to its general voter education and election protection efforts. *Id.*

Contrary to Defendants' suggestion, it is irrelevant to Common Cause's standing that the organization is still developing its 2022 budget and therefore "could not provide 'an exact number' detailing resources allegedly diverted" or "quantify[ing] the harm allegedly caused by the 2021 Law." Mot. at 8. *Crawford v. Marion Cnty Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) ("[T]hat the added cost has not been estimated . . . does not affect standing, . . ."). Common Cause's substantial added expenses for new community organizers and new voter education materials self-evidently establish an injury-in-fact.

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3. Disability Rights Florida

Disability Rights Florida ("DRF") is a nonprofit corporation designated by law as Florida's federally funded protection and advocacy system. DRF is authorized to pursue legal, administrative, and other appropriate remedies to protect and advocate for the rights of people with disabilities. All Floridians with disabilities are considered DRF constituents. ECF No. 306-19 ¶3. DRF works to increase the political participation of people with disabilities, including by advocating for increased election accessibility. *Id.* ¶4.

In direct response to SB 90, DRF is already diverting time and financial resources away from its normal voting advocacy work. Due to the VBM

application restriction, DRF must prioritize an accessibility audit of all SOE websites, generate a report of those results, and advocate for SOEs to remediate any accessibility issues. *Id.* ¶12-14. DRF anticipates this audit project will cost at least $50,000 and as much as $100,000 in vendor fees. *Id.* ¶14. These resources would otherwise be used to engage with SOEs to expand all aspects of election accessibility, not just those implicated by the Challenged Provisions. *Id.* DRF is also developing, printing, and distributing statewide at least 25,000 packets to educate voters with disabilities about the new restrictions in SB 90, including the Challenged Provisions. *Id.* ¶15. DRF estimates these efforts will cost between $5,187 and $9,000, plus additional staffing expenses. *Id.*

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DRF has organizational standing to sue here regardless of whether DRF's total federal grants have increased in recent years or whether DRF "will have the capacity to continue making the commitments it has made previously." Mot. at 7. DRF's overall budget is irrelevant because only a small fraction of that budget is even eligible for Protection and Advocacy for Voting Access work. *See* ECF No. 306-37 at 11: 6-9. Nor does DRF's supposedly "collaborative relationship" with the Division of Elections and SOEs, *see* Mot. at 7, have any legal bearing on the standing analysis. The sole relevant inquiry is whether DRF has diverted or will divert resources away

from its normal operations due to the Challenged Provisions. *See Browning*, 522 F.3d at 1165; Order on MTD, 2021 WL 4818913, at *8 (N.D. Fla. Oct. 8, 2021) ("a small injury . . . is sufficient to confer standing."). DRF has made that showing. ECF No. 306-19.

B. Plaintiffs' Members Have Also Suffered Injury-in-Fact Sufficient to Establish Associational Standing.

An organization has associational standing to sue on its members' behalf when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Greater Birmingham Ministries v. Sec'y of State of Ala.*, 992 F.3d 1299, 1316 (11th Cir. 2021) ("*GBM*"). A request for "prospective relief weigh[s] in favor of finding that associational standing exists." *Id.* at 1316 n.29.

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As further detailed in Section II below, the Challenged Provisions will directly burden members of all three Plaintiff organizations. ECF No. 306-17 ¶¶6-9; 306-18 ¶¶5-7; 306-19 ¶¶6-8, 12-13. Defendants incorrectly argue that because Plaintiffs' members can still vote despite the Challenged Provisions, they are not injured by SB 90. *See* Mot. at 7, 9. But the injury that Plaintiffs' members will suffer is not the inability to vote at all; it is the unlawful added *burden* that the Challenged Provisions place on their right to

vote. For standing purposes, the purported "slightness" of that burden is immaterial: even an "identifiable trifle" is enough. *See Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009) (noting "[t]he slightness of [the voters'] burden . . . is not dispositive"). Plaintiffs have more than met this standard. *See* Sections II.A.1-3; II.B; II.C.

II. The Challenged Provisions Present a Triable Issue Under the Fact-Intensive *Anderson-Burdick* Test.

Claim II of the First Amended Complaint ("FAC") contends that the Challenged Provisions violate Plaintiffs' rights under the First and Fourteenth Amendments. The well-established *Anderson-Burdick* test applies to such challenges, weighing "the character and magnitude of the asserted First and Fourteenth Amendment injury against the state's proffered justifications for the burdens imposed." *See Democratic Exec. Comm. of Fla. v. Lee* ("*DEC*"), 915 F.3d 1312, 1318 (11th Cir. 2019) (citing *Anderson*, 460 U.S. at 789; *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). *Anderson-Burdick* employs a sliding scale: the greater the burden imposed, the greater the scrutiny courts will apply. *Id.* at 1319. A law that severely burdens the right to vote must be narrowly drawn to serve a compelling state interest. *Burdick*, 504 U.S. at 434. Moreover, "even when a law imposes only a slight burden on the right to vote, relevant and legitimate

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interests of sufficient weight must still justify that burden." *DEC*, 915 F.3d at 1318-19 (citing *Common Cause/Ga.*, 554 F.3d at 1352).

The record here contains a wealth of evidence that the Challenged Provisions impose severe burdens on the fundamental right to vote; it simultaneously exposes the pretextual nature of Defendants' alleged justifications for the Challenged Provisions, which cannot plausibly outweigh their burdens. Because the Defendants have offered no countervailing weighty state interest to justify the burdens of the Challenged Provisions, there is, at least, a genuine issue of material fact precluding summary judgment on this claim.

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A. The Drop Box Restrictions Impose an Unconstitutional Burden on Many Floridians' Right to Vote.

Section 28's draconian drop box restrictions impose severe burdens on Floridians' access to voting. Section 28 will cut the availability of one in four drop boxes previously offered to voters in 2020. ECF No. 306-20 ¶125. These cutbacks are confirmed by the many SOEs who testified in this case. *See*, *e.g.*, ECF Nos. 306-21 ¶24; 306-22 at 126:24-127:13; 306-32 22:2-5; 306-33 90:9-21; 306-27, Table 24 (showing at least 24 counties plan to reduce drop box availability).

The record demonstrates that Section 28 will deprive Florida voters of more than 40,000 hours of drop box access statewide compared to the 2020

General Election. *See* ECF No. 306-20 ¶¶127–30. The 65 round-the-clock ("24/7") drop boxes available to voters in Florida during the 2020 General Election—which provided an important option to many voters—will be substantially reduced in the future. *Id.* ("conservative" estimate that in-person monitoring requirement alone will result in loss of over 32,000 hours of drop box access). Additionally, Section 28's restriction on drop box placement will further reduce drop box availability. *Id.* ¶¶130-31 (57 drop boxes that were available during the 2020 election, and accounted for over 11,000 hours of availability, are impermissible under SB 90).

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In addition to severely burdening all voters, the drop box restrictions will impose disproportionate impacts on particular subsets of Florida voters, including (1) voters who prefer to vote by mail shortly before the election; (2) minority voters; and (3) voters with disabilities. *Id.* ¶¶7, 137, 223. Section 28 imposes an unconstitutional burden on each of these subgroups.

1. Voters Who Return Ballots Just Before Election Day

The drop box restrictions jeopardize the votes of those who choose to cast a VBM ballot closer to Election Day. VBM ballots must arrive by 7 pm on Election Day to be counted, which—given the time necessary to return

ballots by mail[4]—means that drop boxes are the primary mechanism for voters to return VBM ballots in the days shortly before the election.[5] Voters understand—and courts have acknowledged—that "the candidates and the issues simply do not remain static over time." *Vote Forward v. DeJoy*, 490 F. Supp.3d 110, 126 (D.D.C. 2020). Voters therefore have an "essential interest" in making "informed choices among the candidates for office," which, for some voters, requires that they "take the time available to consider the issues and candidates in an election." *Id.* (internal quotations omitted). *Accord, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-47 (1995) (explaining that "the ability of the citizenry to make informed choices among candidates for office is essential").

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Evidence shows that hundreds of thousands of VBM voters in Florida chose this course during the 2020 General Election. In Leon County, Election Day was "far and away" the most popular day for voters to drop ballots in drop boxes. ECF No. 306-39. Leading up to the 2020 General Election, SOEs provided over 400,000 VBM ballots to voters between October 13 and Election Day, November 3, 2020. *See* ECF No. 306-20 ¶100.

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[4] USPS and the Secretary of State recommend that voters give at least one week for the USPS to return a ballot. ECF No. 306-20 ¶ 100.

[5] Voting a Mail Ballot, Florida Supervisors of Elections, available online at: https://www.myfloridaelections.com/Voting-Elections/Ways-to-Vote/Vote-by-Mail-Absentee-Ballots; accessed Nov. 21, 2021.

Curtailing the availability of drop boxes across the state will force voters to choose between their "essential" interest in awaiting as much information as possible before casting their ballot, and the fundamental right to have their ballot counted.

2. Voters of Color

The evidence shows that the burdens imposed by SB 90 will fall most heavily on voters of color. ECF No. 306-20 ¶12. Experts' analyses of voting patterns reveal how drop box restrictions will disproportionately burden this group. *See, e.g.*, ECF No. 306-20 ¶¶18, 26, 148, 157, 223; ECF No. 306-24 ¶¶23(d), 24, 34. It is well-documented that Black and Latino voters "face ballot access barriers beyond those experienced by non-Hispanic White voters." ECF No. 306-24 ¶¶10, 11, 23; ECF No. 306-20 ¶26. Critically, voters of color are more likely to rely on VBM and drop boxes to cast their ballot, because they are more likely to rely on public transit, which directly affects their ability to vote during normal business hours, ECF No. 306-24 ¶¶23–24, 34, or to work jobs with long hours and minimal flexibility, again making it difficult to vote during business hours. ECF No. 306-17 ¶¶6-8. And there is evidence suggesting voters of color are more likely than white voters to drop off their VBM ballots outside the days that VBM drop boxes must be made available under SB 90. ECF No. 306-20 ¶223. Moreover, even before

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the new restrictions on drop boxes, "[r]ejected VBM ballots [we]re disproportionately higher among minority voters than white voters in Florida." ECF No. 306-20 ¶135. As the evidence shows, decreasing the availability of drop boxes—as Section 28 does—will not only impose severe burdens on voters of color, but will exacerbate the already-existing disparities in VBM access.

3. Voters with Disabilities

Record evidence demonstrates that the drop box restrictions will also disproportionately burden voters with disabilities. Even before the new provisions reducing the availability of drop boxes, "voters with disabilities face[d] higher barriers to casting a ballot." ECF No. 306-20 ¶105. As detailed below, SB 90 exacerbates those burdens by imposing disproportionately greater time, transportation, information, and health costs on disabled voters. ECF No. 306-20, ¶26; *see infra* Sec. V.A.

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B. The State's Proffered Interests Are Tenuous and Cannot Justify the Burdens of the Drop Box Restrictions.

As an initial matter, Defendants argue that the Court must treat the State's interest as legislative fact, implying that courts can never question purported legislative justifications. Mot. at 41-42. That cannot be right: under Defendants' theory, courts could never properly probe the genuineness of the State's interest under the *Anderson-Burdick* test or

scrutinize a legislature's intent under the *Arlington Heights* factors discussed in Section II below. Evaluating whether the State's purported reasoning outweighs the burdens on voters falls squarely within the Court's domain, *see e.g., DEC*, 915 F.3d at 1321-24 (closely examining each of the State's purported interests); it is a critical facet of constitutional jurisprudence that cannot be left to state legislatures to pronounce or to hide behind. The record demonstrates that Florida's purported justifications for SB 90 do not outweigh the significant burdens imposed on voters.

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First, the 2020 General Election in Florida was widely praised as safe, secure, and transparent. *E.g.*, ECF No. 306-52 at 145: 15-17 ("Yes [the 2020 election was secure]. And the governor himself even complimented the election system on running a flawless election in 2020."); *see also* ECF No. 306-21 ¶5. Even proponents of SB 90 believed that Florida's election provided a model for the country. ECF Nos. 306-7; 306-8 at 20-21; *see also* ECF No. 306-27 ¶¶88-89; ECF No. 306-40 at 28:21-29:10.

As described above, there is no evidence of widespread voter fraud in Florida's 2020 election. ECF No. 306-41. SOEs agreed that the very voting methods restricted by SB 90—particularly, drop boxes—were used effectively and safely in 2020. *See, e.g.*, ECF No. 306-42 (Pasco County SOE explaining that he was "befuddled" by the need for SB 90's changes to VBM given "[t]he

current [VBM] statutes (e.g., policies and procedures), as well as the established security procedures . . . worked extremely well in Pasco County[,] and to my knowledge, all of Florida."). All 67 SOEs admitted they "did not detect, or receive reports of, any tampering or voter fraud involving Drop Boxes, including 24/7 Drop Boxes, in [their] county in connection with the 2020 general election." ECF No. 306-30. Out of 67 SOEs, 65 admitted that "in [their] county, [m]onitoring of Drop Boxes was sufficient to ensure the integrity of the 2020 general election with respect to vote-by-mail ballots deposited in Drop Boxes in [their] county in the 2020 general election." ECF No. 306-30 (RFA 1). Many SOEs testified about the safety, security, and success of the 2020 election, confirming that they were unaware of any widespread voter fraud. *See, e.g.*, ECF No. 306-29; *see also* ECF No. 306-21 ¶18; ECF No. 306-31 at 36: 5-9; ECF No. 306-43 at 28: 17-29:1; ECF No. 306-22 at 48:8-22, 55:5-12; ECF No. 306-33 at 40:21-41:2; ECF No. 306-32 at 22:2-5, 23:6-12. And Florida voters' confidence in the election was among the highest in the nation. ECF No. 306-8 at 21.

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Second, there is ample evidence that SB 90's drop box restrictions are unnecessary to address the State's purported reason for enacting the statute. Robust safeguards already existed pre-SB 90 to address purported voter fraud concerns, including signature-matching requirements and video

surveillance; they have proven more than sufficient to ensure the integrity of elections. ECF No. 306-21 ¶20; ECF No. 306-32 at 44:20-45:4; ECF No. 306-33 at 103:11-104:1. Several SOEs testified that SB 90 does not address any problems or otherwise improve election security or administration. *See, e.g.*, ECF No. 306-31 at 41:19-22; 59:2-4 (Manatee County SOE Michael Bennett describing SB 90 as a "solution looking for a problem" and noting that "[t]o this day, no one has pointed me out the specific issues that Senate Bill 90 addressed."); ECF No. 306-22 at 54:20-25 (explaining that SB 90 did nothing to improve any preexisting safeguards). SOEs explained that they are "not aware of any instance of voter fraud or other improper or illegal conduct that has occurred in" their counties "that would have been prevented by SB 90's changes to drop boxes." ECF No. 306-29 ¶22; 306-21 ¶25; *see also* ECF No. 306-29 ¶24 (explaining he is unaware of any instances of voter fraud or illegal conduct that has occurred in his county "that would have been prevented by SB 90's changes to the vote-by-mail request validity period"); ECF No. 306-21 ¶27 (same).

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SB 90's differential treatment of USPS boxes and drop boxes lays bare the pretext behind the State's proffered interests. Although Florida voters can either mail VBM ballots in USPS boxes or drop ballots directly in an SOE drop box, SB 90 *only* restricts drop box usage. The State has offered no

legitimate explanation for imposing drop box restrictions when voters can drop their ballots off at unmonitored and unregulated USPS mailboxes. *See, e.g.*, ECF No. 306-33 at 144:21-24; ECF No. 306-44 at 3; ECF No. 306-31 at 49:21-25, 102:1-7. Further, as explained above, the Legislature passed SB 90 without soliciting the input of SOEs. *Supra* Statement of Facts ("SOF") at 6-7.

C. The Other Challenged Provisions Also Fail the Anderson-Burdick Test.

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Record evidence demonstrates that the VBM application and voting-line relief restrictions also significantly burden voters by making it harder for millions of Floridians to vote. At a minimum, Plaintiffs' evidence creates a genuine dispute of material fact as to the weight of the burden these provisions place on the right to vote.

1. VBM Application Restrictions

Voters are increasingly reliant on standing requests to receive their VBM ballots. ECF Nos. 306-16 at 126:23-127:9; 306-38 at 87:20-23. SB 90 restricts the availability of this safe, secure, and increasingly popular method of voting, and will therefore burden voters who wish to cast their ballots by mail. ECF No. 306-21 ¶26; ECF No. 306-34 at 25:17-19.[6] SB 90's VBM

[6] The VBM application restriction will also place significant financial burdens on SOE offices. Those costs will ultimately be passed onto the voters. *See, e.g.*, ECF No. 306-43 at 102:24-103:5 (testifying that the VBM application

application restrictions will be especially burdensome because municipal elections often quickly follow the end of general election cycles, and voters who rely on standing VBM requests will be left with a short time window to renew their VBM applications before the next election. *See e.g.,* ECF No. 306-38 at 88:6-24.

The burdens associated with requesting a VBM ballot will "fall[] most heavily on persons of color and individuals with disabilities," ECF No. 306-20 ¶10, as who will more frequently face hurdles "procuring, filling out, or returning a VBM ballot request application." *Id.* ¶105; ECF No. 306-19 ¶¶12-13; *see also* ECF No. 306-25 ¶9. SB 90 forces voters with disabilities "to endure inaccessibility parameters twice as often." ECF Nos. 306-37 at 92:6-97:4; 306-25 ¶10; 306-26 ¶¶10-11.

Shortening the duration of standing VBM requests does not address any security concerns. Numerous existing safeguards ensure VBM integrity, including signature match requirements, ballot receipt deadlines, voter registration validation requirements, prohibitions on forwarding VBM ballots, and post-election vote-by-mail audits. ECF No. 306-32 at 31: 7-20; ECF No. 306-16 at 107:22-109:5; ECF No. 306-34 at 25:19-23, 33:1-13,

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restrictions will "certainly" increase costs); ECF No. 306-38 at 90:8-15 (explaining that the VBM application restrictions will result in an increased "financial cost").

40:12-14, 105:22-25; 155:17-156:9; ECF No. 306-33 at 39:10-40:20; *see also* ECF No. 306-27 ¶¶57, 115.

2. Voting-Line Relief Restrictions

Section 29 will also have a disproportionate impact on particular groups. Florida voters regularly face long wait times to vote, particularly in more populous counties with larger racial and ethnic minority populations. ECF No. 306-20 ¶230 (in 2012, Florida voters waited, on average, 39 minutes to vote—approximately three times the national average); *see also* ECF Nos. 306-28 ¶5; 306-45 ¶10. Long voting lines reduce voter participation. *See* ECF No. 306-20 ¶233 (in the 2012 General Election, long voting lines resulted in an estimated loss of 500,000 to 700,000 votes); *accord* ECF No. 306-27 ¶295.

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In past elections, volunteers eased the burden of long lines by providing aid, particularly at polling places serving large Black and Hispanic populations, where voters routinely encounter long wait times. ECF No. 306-28 ¶¶3-9; ECF Nos. 306-20 ¶13; 306-45 ¶10. By deterring line relief, Section 29 will increase the costs of voting, including time, information, and health risks, for voters waiting in long lines. ECF No. 306-20 ¶27. As a result, the line relief restrictions will disproportionately affect voters of color, and may ultimately reduce their turnout. *Id.* ¶¶ 27, 225, 231. The line-relief

provisions will also significantly burden voters with disabilities. *Id.* ¶27, 233; *see also* ECF No. 306-28 ¶¶4, 7, 15 ("Elderly and disabled voters will surely struggle without the physical assistance of our volunteers.").

To the extent electioneering is an issue, the State could have addressed it without potentially banning the provision of necessary aid like food and water. Indeed, record evidence suggests that the presence of line-support volunteers may actually reduce voter intimidation. ECF No. 306-28 ¶9.

D. Cumulatively, the Challenged Provisions Exacerbate the Barriers to Voting.

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The Challenged Provisions each place significant burdens on voters. Together, they create a cumulative effect that exacerbates those burdens.

Defendants argue that Plaintiffs cannot assert a "cumulative impact" theory. Mot. at 40-41. They are wrong: courts have emphasized the cumulative impacts of restrictive election laws. *See League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 242 (4th Cir. 2014) (noting the importance of the cumulative impact theory in the context of the Voting Rights Act). Furthermore, in arguing that a person using one voting method is unaffected by burdens imposed on other methods, Mot. at 40-41, Defendants ignore how barriers to particular voting methods may foreclose multiple voting options due to the cumulative effect of the restrictions. ECF No. 306-20 ¶231.

Here, the restrictive drop box and VBM provisions will likely have the cumulative effect of forcing more voters to cast their ballots in person, exacerbating Florida's already lengthy lines. *Id.* ¶231; *see also* ECF No. 306-27 ¶321 ("as SB 90 has increased the cost" of VBM in Florida, voters "shift to in-person voting, all things equal" and more in-person voters increase the risk of "polling place congestion and voting lines"); *see also* ECF No. 306-22 at 33:14-34:5 (reduced drop box accessibility risks longer lines and wait times).

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Voters forced to vote in-person will therefore face increased wait times and may be deterred from voting altogether. The voting-line relief restriction, in turn, will exacerbate the burdens on those who do join lengthened lines, but who will be denied the aid necessary to wait them out.

In sum, ample evidence demonstrates that the Challenged Provisions impose new and significant burdens on the right to vote. At a minimum, genuine factual issues regarding these burdens preclude summary judgment.

III. Whether the Legislature Acted With Discriminatory Intent Presents a Triable Issue of Fact.

Plaintiffs have adduced evidence sufficient to present a genuine dispute of material fact regarding their intentional discrimination claims under the Fourteenth Amendment, Fifteenth Amendment, and Section 2 of the Voting Rights Act ("VRA")("Section 2") (FAC, Counts VI-VIII).

In analyzing legislative intent, courts apply the *Arlington Heights* factors. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *see also Veasey v. Abbott,* 830 F.3d 216, 230 (5th Cir. 2016) (*Arlington Heights* framework applies to Fourteenth Amendment, Fifteenth Amendment, and Section 2 claims). Under *Arlington Heights*, a claim of intentional racial discrimination "does not require direct evidence." *United States v. Marengo Cnty. Comm'n.*, 731 F.2d 1546, 1552 (11th Cir. 1984). Rather, the *Arlington Heights* analysis "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Young Apartments, Inc. v. Town of Jupiter*, 529 F.3d 1027, 1045 (11th Cir. 2008). Accordingly, summary judgment is generally inappropriate in intentional discrimination cases because the "legislature's motivation is itself a factual question." *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999); *see also Ga. State Conf. of NAACP*, 775 F.3d at 1348.

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A. The Challenged Provisions Disproportionately Burden Voters of Color.

"[A]n important starting point" under *Arlington Heights* is "[t]he impact of the official action [and] whether it 'bears more heavily on one race than another.'" *Arlington Heights*, 429 U.S. at 266 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

As further detailed in Section II.A.2. above, ample evidence demonstrates how the burden of the drop box restrictions will "fall disproportionately on voters of color." ECF No. 306-20 ¶ 26. *See id.* ¶¶7, 28 ("[A] large fraction of the more than half-a-million Black voters and more than 700,000 Hispanic voters who cast VBM ballots in the 2020 General Election will likely be disproportionately burdened by the [Challenged Provisions]."); ECF No. 306-27 ¶¶ 81, 109-10, 112.

Voters of color will face added barriers because, among other factors, transportation barriers and inflexible work schedules will make it harder for these voters to access drop boxes during the reduced timeframes required by Section 28. *See* ECF No. 306-24 ¶¶ 23(d), 24, 34.

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The VBM application restriction also disproportionately affects minorities. It "decrease[s] the opportunities for thousands of registered voters to request their VBM ballots, . . . [and] the costs associated with requesting a VBM ballot, which already fall most heavily on racial and ethnic minority voters[,] . . . will be exacerbated under this law." ECF No. 306-20 ¶ 10; ¶¶ 96, 105-6.

Likewise, the voting-line relief restrictions will disproportionately impact voters of color by preventing them from accessing needed relief while waiting in line to vote. *Id.* ¶ 27. The VBM restrictions discussed above will

exacerbate lengthy voting lines for voters of color, where already "Black and Hispanic voters face longer wait times when casting a ballot in person." *Id.* ¶ 230; *see also* ECF No. 306-8 at 22. For example, in Miami-Dade County, "[o]ver 23 percent of all Black voters, nearly 24 percent of Hispanic voters, but only 17 percent of white voters faced wait times of 30 minutes or more across the five days of early voting." ECF No. 306-20 ¶¶ 243-44.

Defendants misguidedly argue that "[b]ecause this is not the 'rare' case where impacts alone are determinative . . . this factor weighs strongly in favor of dismissal." Mot. at 12. To the contrary, the disparate impact inquiry is "an important starting point" under the *Arlington Heights* analysis. *Arlington Heights*, 429 U.S. at 266. "[A]n invidious discriminatory purpose may [] be inferred from the totality of the relevant facts, including . . . that the law bears more heavily on one race than another." *Davis*, 426 U.S. at 242. Plaintiffs need not, and do not, claim that discriminatory impact alone establishes a finding of discriminatory intent, but rather that sufficient evidence shows the Challenged Provisions "bear[] more heavily on one race than another." *Id.* In conjunction with other factors, this disparate impact evidence presents a genuine question of fact as to discriminatory intent.

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B. Florida's History of Discriminatory Voting Legislation Supports an Inference of Intent.

Defendants wrongly suggest that historical evidence of Florida's discriminatory voting practices is irrelevant. Mot. at 13-14. This Court rejected that argument in denying Defendants' Motion to Dismiss: "Plaintiffs' allegations draw a straight, shameful line from the discriminatory laws of the 1880s to today." Order on MTD, 2021 WL 4818913, at *21 (N.D. Fla. Oct. 8, 2021). In evaluating intentional discrimination claims, courts look for a "historical pattern of laws producing discriminatory results." *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 223–24 (4th Cir. 2016); *see also League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 439-40 (2006) ("*LULAC*") (considering the prior 40 years of discrimination relevant); *McCrory*, 831 F.3d at 223-24 (prior 36 years); *Veasey*, 830 F.3d at 239-40 (prior 40 years). Evidence of historical discrimination is particularly relevant when, as here, it shows "that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo." *Rogers v. Lodge,* 458 U.S. 613, 625 (1982).

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Plaintiffs have provided ample evidence of Florida's shameful history of "passing legislation that is designed to roll back practices that remove

barriers to voting when they are used disproportionately by Black Floridians." ECF No. 306-8 at 6, 8-19; *see also* ECF No. 306-23 at 30:15-20.

In arguing that history has no relevance to SB 90, Defendants ignore the connection between Florida's history of discrimination, including recent history, and SB 90. For example, Senator Baxley, SB 90's sponsor, is the same legislator who, in 2011, proposed and advocated for HB 1355, which curtailed early voting days disproportionately used by Black voters. HB 1355 has been cited as a prime example of Florida's ongoing pattern of discrimination. *See* ECF No. 306-8 at 10-11, 16-17. After a federal court declined to preclear HB 1355 under Section 5 of the Voting Rights Act, *Brown v. Detzner*, 895 F. Supp. 2d 1236, 1239 (M.D. Fla. 2012), Florida added more early voting hours in some counties. ECF No. 306-8 at 10. Even after these changes, however, HB 1355's changes to early voting were still held to have a disproportionate effect on minority voters. *Brown*, 895 F. Supp. at 1246.

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The Florida Legislature also recently attempted to change signature-matching rules that would have disproportionally affected minority voters. ECF No. 306-8 at 11-12. This Court halted the signature-matching scheme in 2018 because it allowed "county election officials to reject vote-by-mail and provisional ballots for mismatched signatures—with no standards, an illusory process to cure, and no process to challenge the rejection."

Democratic Exec. Comm. of Fla. v. Detzner, 347 F. Supp. 3d 1017, 1022 (N.D. Fla. 2018).

As Professor Burch's report explains, Florida's discriminatory actions towards minority voters are far-reaching. This includes, for example, discrimination in redistricting, ECF No. 306-8 at 11-13, and in purging minority voters from voter rolls. *Id.* at 15-16. This evidence, especially given its recency, raises powerful inferences of present discriminatory intent, and at a minimum presents a triable issue of fact.

C. The Legislative Sequence of Events Demonstrates Substantive and Procedural Departures from the Ordinary Lawmaking Process.

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"The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes." *Arlington Heights*, 429 U.S. at 267. Here, the sequence of events shows that, after a fraud-free election widely praised as successful, against the backdrop of historic turnout and use of VBM and drop boxes by Black voters, and without the critical support of the SOEs, legislators pushed through a restrictive election law—despite evidence that the changes were not necessary and would disproportionately impact Black voters and other voters of color.

1. Substantive Departures

Substantive departures from the ordinary lawmaking process exist when "factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *Id.* at 267. Thus, when a legislature passes a bill that violates federal law, addresses an imaginary concern, or has no connection to its stated purpose, those substantive departures support an inference of discrimination. *See McCrory*, 831 F.3d at 235-37; *Veasey*, 830 F.3d at 238-39. Here the legislators' purported problem—voter fraud—was "imaginary," and their purported solution had no connection to its stated purpose. *Id.*

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As detailed above, in December 2020 Florida officials touted the 2020 Florida elections as a model of security and accessibility. *Supra* SOF at 12-14. But a mere three months later, legislators aggressively progressed a law purporting to address voter fraud—without evidence that any widespread voter fraud actually existed. Indeed, as a result, Florida's SOEs concluded that the Challenged Provisions did not address any existing problems.

For example, when Senator Baxley was asked directly whether he believed VBM fraud occurred in the last election, he could not answer the question. ECF No. 306-8 at 28. Likewise, while Senator Baxley stated that SB 90's changes to VBM standing applications were necessary to address

issues caused by transiency, Secretary Lee testified that the SOEs were able to keep voting files up to date when voters moved to a different address. *Id.* at 37. Moreover, while citing concerns about the accuracy of voters' addresses to justify more frequent VBM applications, the bill's sponsors opposed amendments that would update voters' addresses automatically after changing it on their drivers' licenses, rejecting at least four such amendments. *Id.* at 37-38.

The Legislature also recognized, however, that the number of Black Floridians using VBM more than doubled during the 2020 election and that they tended to use drop boxes, rather than mail, to return their VBM ballots. *See supra* SOF at 2. Thus, SB 90 was passed in the face of warnings about its disparate vote-suppressing impact on minorities. In this context, where SB 90 addresses an imaginary concern, and "factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached," these substantive departures evidence discriminatory intent. *See Arlington Heights*, 429 U.S. at 267.

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2. Procedural Departures

As Professor Burch testified, "SB 90 was adopted under an unusual process that was designed to stifle debate." ECF No. 306-23 at 31:18-21. There were multiple procedural departures, including SOEs' lack of support

for SB 90, the major eleventh-hour strike-all amendment, and the extreme limitations on public comment. *Id.* at 31:18-32:3; ECF No. 306-8 at 45-53. Under *Arlington Heights*, such procedural departures are probative of discriminatory intent. 429 U.S. at 267.

a) Lack of Support from SOEs

Historically, SOEs have worked collaboratively with the Legislature on election laws to pass legislation reflective of the realities of election administration and voting. *Supra* SOF at 6. In progressing SB 90, however, bill sponsors proceeded without the support of the FSE. ECF No. 306-8 at 46. The lack of buy-in from experts is curious and could be considered a factor "usually considered important" that would "strongly favor" a contrary decision." *Brown*, 895 F. Supp. 2d at 1246.

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Instead, the Legislature drafted a sweeping election law with no meaningful input from the SOEs, Florida's experts in election administration. Of the 67 SOEs in Florida, 57 admitted that "the Secretary of State did not consult [them] about the Challenged Provisions prior to their enactment." ECF No. 306-3 (RFA 23). SOE criticism of the bill was widespread. ECF No. 306-8 at 47-48; *see also* ECF No. 306-34 at 115:5-15 (reiterating that "sweeping election reform" was neither "needed in Florida" nor requested by the SOEs); ECF No. 306-31 at 41:19-22 (SB 90 is "a solution

looking for a problem"). The FSE's lack of support for SB 90 continued through the passage of the bill. ECF No. 306-8 at 48; *see also* ECF No. 306-22 at 45:25-46:12; *see also* ECF No. 306-31 at 41:19-22, 59:2-4.

This failure to seek the SOEs' advice and support was a significant departure from the normal process for election legislation. *See, e.g.,* ECF No. 306-22 at 24:16-19 (in the past, "the Florida Legislature respected the expertise of the FSE"); ECF No. 306-16 at 120:10-23 ("In the past, in most sessions . . . [the SOEs are] involved from the beginning and we get to vet a lot of the language[.]").

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b) Other Significant Procedural Departures

As detailed above in Section II.A, SB 90 was passed via a rushed process that stifled opportunities for debate. For example, the Legislature limited the time allowed for public comment and debate of SB 90 and HB 7041. *See supra* SOF at 5-6. Final debate on HB 7041 was limited to a mere 30 seconds per member. ECF No. 306-8 at 49. This proved to be insufficient time for debate and consideration of these bills.

In addition, Representative Ingoglia's last-minute strike-all amendment, submitted at 1:33 AM on April 27, the day of debate, stands out as anomalous. *Id.* at 49-50. While strike-all amendments themselves are not uncommon, Representative Ingoglia's strike-all amendment was highly

unusual because of its length (more than 1,300 lines of changed text), timing (the early morning hours on the day of the debate), and the substantial alterations it made to the Senate version of the bill that had just passed. *Id.* at 50; ECF No. 306-23 at 31:18-32:3.

As Defendants note, strike-all amendments were used hundreds of times in during the 2021 legislative session. Mot. at 17. However, of the 227 bills that were on the Senate calendar around the same time, only 7 times were major strike-all amendments submitted less than 24 hours before debate. ECF No. 306-8 at 50. Several legislators, including Representatives Davis and Driskell, also complained about the timing of the strike-all amendment. ECF No. 306-8 at 50-51. As a result of this lengthy eleventh-hour amendment, legislators and advocacy organizations were left unsure of which provisions had made it into the bill at the time of its passing. *See* ECF No. 306-37 at 24:1-10, 29:25-30:1-11, 26:24-27:5. "[T]he extent that several legislators complained about the strike-all on the record shows that the process violated a norm or expectation of courtesy." ECF No. 306-8 at 50; *see also* ECF No. 306-16 at 119:5-121:22 (the SB 90 legislative session was "different" from normal sessions in part because of "[t]he speed and massive changes during the middle of the night.").

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The Legislature also curtailed public input on the bill. *See supra*; ECF No. 306-8 at 51-53. Such efforts to restrict input or criticism are precisely the kind of departures from a deliberative process that may prove discriminatory intent. *See, e.g., McCrory*, 831 F.3d at 228 (unusual legislative speed may indicate discriminatory intent even if no procedural rules were broken, because "legislature need not break its own rules to engage in unusual procedures" and "the process for the 'full bill' was, to say the very least, abrupt.").

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Notwithstanding this ample evidence, Defendants argue that Plaintiffs' evidence fails to establish racial discrimination because the alleged irregularities would have affected "all individuals" equally, not some "identifiable minority group." Mot. at 16. But the question under *Arlington Heights* is not how the procedural irregularities affected different demographic groups' participation in the legislative process. The *fact of irregularities* is what creates an inference of discrimination. *Arlington Heights*, 429 U.S. at 267 ("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role.").

c) Defendants' Pretextual Justifications

Defendants claim that these procedural irregularities directed at curtailing any debate, input, or criticism regarding SB 90 "do[] not matter"

because the Legislature allegedly had "valid neutral justifications" for the law. Mot. at 15. Defendants' "neutrality" arguments fail for at least two reasons.

First, under *Arlington Heights*, the state's proffered "neutral justifications" must be weighed against the available evidence to determine whether this "race-neutral reason . . . offered by the State is pretextual" and is really "mask[ing] racial intent." *See Veasey*, 830 F.3d at 236-37 (evidence that the bill was subject to procedural departures "could support a finding that the Legislature's race-neutral reason of ballot integrity offered by the State is pretextual."); *see also City of S. Miami v. DeSantis*, 508 F. Supp. 3d 1209, 1232 (S.D. Fla. 2020) (conducting *Arlington Heights* analysis of a bill that the legislature claimed was adopted for public safety purposes, and finding that deposition testimony indicating that crime rates had been decreasing in the years leading up to enactment "could reasonably suggest that this stated nondiscriminatory purpose was pretextual" and was sufficient to raise triable questions of fact about the bill's purpose). If reciting a neutral justification for a challenged action could end the inquiry against the weight of evidence suggesting the Legislature acted with discriminatory intent, as Defendants propose, it would "essentially give legislatures free rein to racially discriminate so long as they do not overtly

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state discrimination as their purpose and so long as they proffer a seemingly neutral reason for their actions." *Veasey*, 830 F.3d at 235–36.

Second, Florida's failure to take rational steps to address its purported interests is further evidence that the stated interests may not be legitimate. *See McCrory*, 831 F.3d at 214 (finding intentional discrimination where the bill's provisions "constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist."); *cf*. ECF No. 306-31 at 41:19-22 (SB 90 is "a solution looking for a problem"). Here, the State has failed to provide any evidence of how the Challenged Provisions would improve election fraud-prevention. *See, e.g.*, ECF No. 306-33 at 144:21-24, 144:25-145:3; ECF No. 306-31 at 41:19-22, 59:2-4. This is evidence "that the cloak of ballot integrity could be hiding a more invidious purpose." *Veasey*, 830 F.3d at 238-41. Overall, this presents a disputed factual question that cannot be properly resolved at summary judgment.

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D. Contemporaneous Statements of SB 90's Proponents Reflect Discriminatory Intent.

While no "smoking gun" is required, contemporaneous statements by SB 90's key sponsors offer considerable insight into the Legislature's purpose in passing the bill. *City of Carrolton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1552 (11th Cir. 1987); *see also Cooper v. Harris*, 137 S. Ct. 1455, 1468-69 (2017); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1266-

67 (2015); *Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227, 1241-42 (11th Cir. 2016).

Multiple proponents of SB 90 made statements "consistent with racial resentment . . . in the course of the legislative debate and outside." ECF No. 306-23 at 32:4-14. "Racial resentment posits that contemporary racial animosity is characterized by particular beliefs about the character flaws of African Americans: 'at its center are the contentions that blacks do not try hard enough to overcome the difficulties they face and that they take what they have not earned.'" ECF No. 306-8 at 57. For example, while discussing whether SB 90's burdens would be racially disproportionate, Senator Baxley acknowledged that certain voters would have to change their behavior as a result of the new law. *Id.* at 55. These comments echo his statements in 2012 discussing HB 1355, which eliminated early voting on the Sunday before election day: "I'm saying that if some people somehow don't show the initiative to complete that opportunity, then that may be a risk factor in having a secure system." *Id.* at 57.

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Other Senators similarly invoked "personal responsibility," essentially blaming Black Floridians who may fail to vote due to restrictive voting laws. *Id.* at 57-58. For example, Senator Hutson, responding to criticism that SB 90 would suppress minority votes, asserted that "[t]he only excuse you have

is that you're lazy if you do not vote." *Id.* at 58. Similarly, when Senator Powell expressed concerns that SB 90 would make voting more difficult for Black Floridians like himself, Senator Boyd countered with personal responsibility: "as our right to vote, is also our responsibility to prepare to vote." *Id.* As Professor Burch explained, "blaming racial disparities on a lack of effort on the part of African Americans in these ways fits the textbook definition of racial resentment." *Id.*; *see also* ECF No. 306-23 at 198:9-18 (explaining how several senators, especially Senator Baxley, expressed racial resentment during debate on SB 90).

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Defendants argue that these legislators' statements are consistent with principles of initiative and individualism and dismiss Plaintiffs' racial resentment explanation. Mot. at 18-19. But, as Professor Burch has explained, racial resentment is indicated when language concerning an individual's initiative is specifically raised in the context of race, as it was here. *See* ECF No. 306-8 at 57-58; ECF No. 306-23 at 198:9-199:13. In any event, the parties' disagreement over the interpretation of these legislators' statements is a question of fact for trial.

E. Legislators Knew the Challenged Provisions Had a Racially Disparate Impact.

The disparate racial impact of the Challenged Provisions was not only foreseeable, the Legislature was expressly informed about this impact and

therefore would have reasonably expected it to result from SB 90's passage, further supporting the inference of discrimination. *Jean v. Nelson*, 711 F.2d 1455, 1485-1486 (11th Cir. 1983).

SB 90's proponents were explicitly and repeatedly warned of the disparate impact SB 90 would have on Black voters. *See e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 236 (5th Cir. 2016) (en banc). For example, multiple advocacy groups submitted letters highlighting the bill's racially discriminatory impacts. ECF No. 306-8 at 54; *see also, e.g.,* ECF Nos. 306-46; 306-47; 306-50; 306-49, 306-50, 307-1. Legislators also highlighted data showing Black voters had the greatest increase in VBM usage in 2020. ECF No. 306-8 at 54. Indeed, SB 90's sponsors "made statements that show that they were aware of the racially disparate impact that SB 90 would have." ECF No. 306-23 at 32:4–10. For example, Senator Baxley, when asked about racially disparate impact, stated that voters would not be disenfranchised but that "look[ing] at the patterns of use" there would be "a learning curve" for particular voters. ECF No. 306-8 at 55. Several members and outside interest groups brought the potential of the disparate impact to the attention of the legislators. ECF No. 306-23 at 32:4–10. The bill's sponsors did not dispute this evidence, present counter-evidence, or meaningfully engage with this problem. ECF No. 306-8 at 54-55. Instead, as in *Veasey*, SB 90's

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proponents "were aware of the likely disproportionate effect of the law on minorities, and . . . nonetheless passed the bill without adopting a number of proposed ameliorative measures that might have lessened this impact." 830 F.3d at 236.

Further, SB 90's proponents were explicitly told that due to existing socioeconomic conditions, the bill would disproportionately burden Black voters.[7] Moreover, even without these explicit warnings, SB 90's sponsors could have reasonably anticipated this disparate impact, given Black voters' widely reported high rate of VBM voting. *See, e.g.*, ECF No. 306-8 at 19-23; ECF No. 306-20 ¶¶9-10, 29; *see also* ECF No. 306-51 (news clip demonstrating that Secretary Lee and senior officials were aware of racial disparities in VBM voting); *cf. NAACP v. McCrory*, 831 F.3d 204, 227–28 (4th Cir. 2016) ("a reasonable legislator would be aware of the socioeconomic disparities endured by African Americans" that affect their likelihood of possessing identification documents).

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Defendants' argument that SB 90 may have been motivated by partisanship, rather than race, does not warrant dismissal at this summary judgment stage. Defendants have no support for their conclusory assertion that "[e]very bit of Plaintiffs' evidence implicating race is equally consistent

[7] *See* ECF Nos. 306-46; 306-47; 306-48, 306-49, 306-50, 307-1.

with partisanship" or the conclusion they draw that "partisan motives are the predominant explanation." Mot. at 22. Further, Defendants misconstrue *Brnovich* in suggesting that it is acceptable to discriminate on partisan grounds simply because "partisan motives are not the same as racial motives." *Brnovich v. DNC*, 141 S. Ct. 2321, 2349 (2021). The *Brnovich* Court, in making this statement, cited to a passage in *Cooper v. Harris*, 137 S.Ct. 1455, 1473-74 (2017), which acknowledged a distinction between racial and partisan considerations in gerrymandering, but also noted that gerrymandering based on race is still suspect where race is meant to serve as a "proxy" for political motives. *See id.* at n.7 ("[I]f legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests . . . their action still triggers strict scrutiny.") (internal citation omitted). *Brnovich* also relied heavily on *Crawford*, which indicated that partisan motives can sink an election law, at least where other neutral justifications for the law are lacking. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 203 (2008) ("If [partisan] considerations had provided the only justification for a photo identification requirement, we may also assume that SEA 483 would suffer the same fate as the poll tax at issue in *Harper*."); *see also* Statement of Interest of the United States, No. 187, ECF No. 304, pp. 16-17.

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Moreover, under *Arlington Heights*, if partisanship were a significant or even primary motivation behind the bill, Plaintiffs "do[ ] not have to prove that racial discrimination was a 'dominant' or 'primary' motive, only that it was a motive." *United States v. Dallas Cnty. Comm'n.*, 739 F.2d 1529, 1541 (11th Cir. 1984).[8] The record provides ample evidence to present a question of fact whether race was at least *a* motivating factor behind SB 90.

F. Less Discriminatory Alternatives Were Available.

The final *Arlington Heights* factor in this Circuit is the "availability of less discriminatory alternatives." *Jean*, 711 F.2d at 1486. Here, the Legislature had the option of adopting multiple less discriminatory alternatives but chose not to.

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First, the Legislature voted down several amendments designed to mitigate the racial impact of SB 90. ECF No. 306-8 at 58-59; *see also Veasey*, F.3d at 237 (explaining that a legislature's rejection of "ameliorative

[8] Defendants also confusingly assert that Plaintiffs' decision to challenge particular provisions proves that there is no discriminatory intent because "[i]f discrimination were the motivation behind SB 90, then that motivation would taint the entire bill." Mot. at 21. However, many bills, especially massive bills like SB 90 which contain a wide array of provisions may contain unremarkable provisions alongside harmful discriminatory provisions. Acknowledging this reality, "Florida law clearly favors (where possible) severance of the invalid portions of a law from the valid ones." *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1347 (11th Cir. 2004); *see also* Statement of Interest of the United States, No. 187, ECF No. 304, p. 19 ("When it comes to intentional discrimination in voting, an isolated provision of law cannot 'sanitize' the discriminatory design of a system of voting.").

measures" is relevant under *Arlington Heights*). For example, five amendments designed to expand the list of people eligible to submit VBM ballots were rejected, as were three amendments that would make VBM ballot submission easier. ECF No. 306-8 at 61. Representative Valdez proposed an amendment specifically requested by SOEs, which would allow a voter, when returning a valid VBM ballot (verified using signature-matching), to simply check a box to continue receiving VBM ballots. ECF No. 306-8 at 59-60. In response, Representative Ingoglia declared that the amendment "undercuts our language on election integrity," and it was rejected. ECF No. 306-8 at 59-60. Similarly, three amendments to make using drop boxes easier and four amendments to expand drop box hours were rebuffed. ECF No. 306-8 at 61-62.

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Another significantly less discriminatory alternative was available to the Legislature: maintaining the status quo. Defendants have provided no evidence that the Challenged Provisions improve Florida's election security over the status quo. *See* Section II.B. To the contrary, several SOEs have testified that preexisting safeguards and procedures already struck the proper balance between ensuring safe and fair elections and making voting more accessible. *See, e.g.*, ECF No. 306-43 at 26:15-23; ECF No. 306-22 at 54:20-25.

In summary, considering each of the *Arlington Heights* factors, weighing all of the corresponding record evidence, and drawing all reasonable inferences in favor of Plaintiffs, as is required at this phase, Defendants' motion for summary judgment on Plaintiffs' intentional racial discrimination claims should be denied.

IV. Plaintiffs' Section 2 "Results" Claim Under the VRA Presents Triable Issues of Fact.

Section 2 of the VRA prohibits states from imposing any voting qualification or practice that "results in a denial or abridgment of the right of any citizen . . . to vote on account of race or color." 52 U.S.C. § 10301(a). A violation of subsection (a) results where, "based on the totality of circumstances," a class of citizens has "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(a)–(b). Consideration of all relevant facts is essential: "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).[9]

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[9] Defendants have indicated that they will argue Section 2 does not provide a private right of action. However, countless courts, including the U.S. Supreme Court, have recognized and entertained Section 2 claims brought

In a Section 2 vote-denial claim, the Supreme Court has instructed courts to evaluate, among other factors, (1) "the size of the burden imposed by a challenged voting rule," (2) "the degree to which a voting rule departs" from standard practice in 1982, (3) "[t]he size of any disparities in a rule's impact on members of different racial or ethnic groups," (4) "the opportunities provided by a State's entire system of voting," and (5) "the strength of the state interest served by the challenged rule." *Brnovich*, 141 S.Ct. at 2338-40. The factors set out in *Gingles* also remain relevant—especially "that minority group members suffered discrimination in the past . . . and that effects of that discrimination persist." *Brnovich*, 141 S.Ct. at 2340; *see also id.* ("We do not suggest that these factors should be disregarded."). This list is not exhaustive, and no one factor controls. *Id.* at 2338.

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Brnovich also affirmed "that an 'abridgement' of the right to vote under § 2 does not require outright denial of the right; that § 2 does not demand proof of discriminatory purpose; and that a 'facially neutral' law or practice may violate that provision." *Id.* at 2341. Because Section 2 claims are fact-intensive, resolution at the summary judgment stage is inappropriate. *See*

by private parties. *See, e.g.*, *Morse v. Republican Party of Va.*, 517 U.S. 186, 209 (1996); *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1288 (11th Cir. 2020); *Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021).

Brooks v. Miller, 158 F.3d 1230, 1238 (11th Cir. 1998) ("[T]he test for § 2 violations is generally flexible and fact-intensive[.]").

Here, Plaintiffs' evidence creates material issues of fact sufficient to preclude summary judgment on their Section 2 "results" claims.

A. The Challenged Provisions Impose Severe Burdens.

The Supreme Court emphasized that the size of the burden imposed on voters is "highly relevant" for Section 2 claims. *Brnovich*, 141 S. Ct. at 2338. Even at this pre-enforcement stage, Plaintiffs' evidence shows the Challenged Provisions will impose substantial burdens on voters. As discussed above Section 28 will result in 40,000 fewer hours of drop box availability in future elections, even as drop boxes become a preferred method for voting in Florida. *See* Section II.A. Section 29 will exacerbate the burden of waiting in line to vote by reducing access to aid from third-parties. *See* Section II.C.2. Section 24 burdens voters who rely on VBM, forcing them to re-apply twice as often and creating the risk they will not have time to re-apply before certain elections. *See* Section II.C.1. The Challenged Provisions' interacting burdens may foreclose access to VBM, requiring more voters to wait in line to vote, while at the same time Section 29 chills voting line relief. *See* Section II.D. These burdens are unnecessary, unwarranted, and serve no legitimate purpose. It is, at least, a genuine issue

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of material fact whether these burdens are more than a "mere inconvenience" and exceed the "usual" burdens voters must tolerate. *See Brnovich*, 141 S.Ct. at 2338.

B. The Challenged Provisions' Disproportionate Impact on Voters of Color Is Significant.

Section II.A explains how Black and Latino voters experience more difficulty accessing the franchise. As this Court has noted, Plaintiffs made extensive allegations explaining how the Challenged Provisions will have a disproportionately heavy impact on voters of color. Order on MTD, 2021 WL 4818913, at *18. Plaintiffs now proffer evidence to support those allegations. For example, evidence shows the Challenged Provisions exacerbate the burdens of voting and result in disparate impacts on voters of color given their heightened use of drop boxes outside of normal business hours, their increasing reliance on standing VBM applications, and their dependence on line relief efforts. Sections II.A, III.A; ECF Nos. 306-24 at 11-12; 306-20 ¶¶10, 27, 148, 225, 231. This evidence goes to the first and third factors under *Brnovich* and should be considered at trial as part of the Court's totality of the circumstances analysis.

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C. The State Interests Purportedly Served by the Challenged Provisions Are Minimal.

Plaintiffs submit that no genuine state interest is served by the Challenged Provisions. *See* Section III.C, III.D. Plaintiffs presented ample evidence that the purported state interest in preventing voter fraud is pretextual. *See* Section II.B. Given this, and the State's lack of evidence that the Challenged Provisions will prevent any voter fraud, a genuine dispute exists about the validity of the State's alleged interest in passing SB 90.

D. Other Factors are Not Outcome Determinative at Summary Judgment.

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Plaintiffs proffer more than enough evidence for this Court to deny Defendants' motion. *See Ga. State Conference of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336, 1343 (11th Cir. 2015); Order on MTD, 2021 WL 4818913, at *18. ("Even at trial, failure on some factors is not dispositive."). Defendants' efforts to highlight other available methods of voting, ignores the numerous, interdependent burdens the Challenged Provisions impose on voters, particularly the growing number of voters of color who utilize VBM—an integral part of Florida's election administration—as compared to the relatively discrete provisions challenged in *Brnovich*. Consideration of this fourth factor should occur alongside all of the relevant evidence.

Defendants rely heavily on *Brnovich*'s suggestion that courts consider the degree to which a voting rule departs from standard practice in 1982. This is but one factor, the importance of which should be assessed at trial.

Further, Defendants fail to grapple with other factors the Supreme Court recognized as relevant, such as the fact that "minority group members suffered discrimination in the past" and that "effects of that discrimination persist." *Brnovich*, 141 S.Ct. at 2340. Plaintiffs present ample evidence of Florida's long history of invidious discriminatory voting practices. *See* ECF No. 306-8 at 8–19, and its lasting effects, *see* ECF No. 306-24 ¶¶ 11, 12, 23-24, 34.

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Thus, there is a genuine dispute of material fact, appropriate for trial, under Plaintiffs' Section 2 "results" claim.

V. Whether the Challenged Provisions Discriminate Against Individuals with Disabilities in Violation of the ADA Presents Triable Issues of Fact.

To state a claim under the ADA, a plaintiff must demonstrate "(1) that he is a qualified individual with a disability; (2) that he was excluded from participation in or denied the benefits of a public entity's services, programs, or abilities, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial or benefit, or discrimination was by reason of the plaintiff's disability." *Am. Ass'n of People with Disabilities v. Harris*, 647

F.3d 1093, 1101 (11th Cir. 2011); *see also* 42 U.S.C. § 12132. Whether a person with a disability is discriminated against in the voting context depends on whether they have access to a particular mode of voting, not whether they are precluded from voting altogether. *See Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 503–04 (4th Cir. 2016); *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1158–59 (N.D. Ala. 2020). If a state provides voters choices for casting a ballot, under the ADA each option must be accessible to voters with disabilities. *See People First of Ala.*, 491 F. Supp. 3d at 1158.

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A. The Drop Box Restrictions Will Deny Individuals with Disabilities Equal Access to Voting.

As discussed above, the drop box restrictions will decrease drop box availability by placing limitations on their locations, dates, and hours of operation which will burden voters with disabilities. *See* ECF No. 306-20 ¶¶223, 157; Section II.A. Plaintiff DRF testified that "any curtailment of the availability of drop boxes in terms of where they are located . . . [and] the hours of operation" can be a barrier for voters with disabilities. ECF No. 306-37 at 67:7–68:2. The Palm Beach County SOE recognized that "[t]he limited availability of drop boxes, as a result of SB 90" will "particularly burden voters with mobility limitations, other voters with disabilities, and voters who are immunocompromised." ECF No. 306-21 ¶23; *see also* ECF No. 306-

52 at 159:5–12 ("people who are -- might have mobility issues, those are the type of people that are being impacted by SB 90").

Defendants misguidedly claim that Plaintiffs' conclusion relies on "layers of speculation"; to the contrary, the evidentiary record supports it. First, *numerous* SOEs have stated they will remove outdoor drop boxes in favor of placing them indoors. ECF No. 306-53 at 3; ECF No. 306-54 at 2–3. Shortly after SB 90 became law, Bay County removed the drop box outside of the SOE office. *See* ECF No. 306-55. Given that many more SOEs have yet to determine their plans for future elections, the number of counties that remove outdoor drop boxes is only expected to increase. *See, e.g.*, ECF No. 306-56 at 2-3.

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Second, indoor drop boxes are less accessible to many voters with disabilities, especially those with limited mobility. Mr. Hahr, a voter who has cerebral palsy and uses a wheelchair, explained that his aide usually drives him to drop off his VBM ballot into the drop box outside his local library. ECF No. 306-25 ¶¶4, 7-8. This is because "it is much easier to drop the ballot in the box from the car than to make it into the library." *Id.* ¶8. Similarly, Ms. Zukeran stated that if the drop box she uses to drop off her VBM ballot is moved indoors, her ability to vote would be significantly impaired. ECF No. 306-57 ¶¶4-5; *see also* ECF No. 306-37 ¶7; ECF No. 306-18 ¶6. As this

Court has acknowledged, "even the most accessible building in the world is more difficult to access than a drive-through drop box," Order on MTD, 2021 WL 4818913, at *24; *see also* ECF No. 306-21 ¶23. This evidence creates a triable issue of fact regarding the drop box restrictions' burden on voters with disabilities.

B. The VBM Application Restriction Will Deny Individuals with Disabilities Equal Access to Voting.

Similarly, Defendants wrongly argue that Plaintiffs have not put forth evidence that the VBM application request requirements will deny Plaintiffs' rights protected by the ADA. Mot. at 49. Testimony from declarants and expert testimony, however, demonstrate that these requirements will make it more difficult for people with disabilities to vote.

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As discussed in Section II.C.1, because of this restriction voters with disabilities who get assistance requesting a ballot will need help twice as often. *See* ECF Nos. 306-26 ¶¶9-11; 306-25 ¶¶9-10; 306-58 ¶¶7-9. Many voters with disabilities face challenges with making repeated requests, and maintain that it will be difficult to remember and track requesting their ballots more frequently. *See* ECF Nos. 306-25 ¶10; 306-57 ¶10.

For example, Mr. Hahr must request his ballot in person at the Marion County SOE's office because the SOE's website is not accessible. ECF No. 306-25 ¶9. He uses a wheelchair and needs his aid to drive him to the SOE's

office, which will make it difficult for him to complete the request form in person more frequently. *Id.* ¶¶8-10. Similarly, Ms. Susan Rogers, a legally blind woman, testified regarding the VBM application restriction that "[a]nything that requires additional work for me, whether it's online or by telephone or by fax or something else, requires me to expend a lot of energy and time and sometimes pain inducing processes to provide all the information requested." ECF No. 306-59 at 20:6-22.

Other voters with disabilities encounter similar challenges. "[C]reating a system that requires voters with disabilities to twice as often engage with it, in my estimation, requires them to endure inaccessibility parameters twice as often." ECF No. 306-37 92:21-24.

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Some SOEs have recognized that voters with disabilities will be disproportionately affected by the VBM application restriction. A March 2021 memorandum on the impact of SB 90 from SOE White to the Miami-Dade County Mayor stated, "[t]he elderly, voters with disabilities, and our overseas military would be most affected, with potential limited access to re-enroll." ECF No. 306-60.

C. The Voting-line Relief Restrictions Will Deny Individuals with Disabilities Equal Access to Voting.

The voting-line relief restrictions will make in-person voting less accessible to individuals with disabilities. As discussed in Section II.C.2, long

lines are common at polling places in Florida which will be further exacerbated by the likely increase in in-person voting resulting from the other Challenged Provisions. Long lines will disproportionately affect voting sites where voters with disabilities are in line to vote, as evidenced by experiences during the early voting period in the 2020 General Election. *See* ECF No. 306-20 ¶267. Further, due to the ongoing COVID-19 pandemic, long lines and wait times will also jeopardize the health of voters with disabilities or underlying medical conditions, creating additional barriers to the franchise. *Id.* ¶232. The voting-line relief restrictions greatly limit the aid that these vulnerable individuals can receive. *See* ECF No. 306-28 ¶4.

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Defendants first claim that Plaintiffs' reading of the restrictions is "expansive." If Defendants are willing to concede that the definition of "solicit" excludes line relief activities, including providing refreshments, fans, and chairs to voters, they could have settled the claim. They have not done so. Second, Defendants maintain that the SOE's employees are allowed to "giv[e] items to voters," and that SOEs plan to do so going forward. Mot. at 49–50 (quoting Fla. Stat. § 102.031(4)(b)). However, the fact that the SOEs would not *refuse* to provide assistance does not mean that they will in fact do so, or in a manner equivalent to Plaintiffs. Whether SOE assistance would be sufficient to counteract any barriers the voting-line relief

restrictions impose on voters with disabilities remains a triable question of fact.

Because there is a genuine dispute of fact as to whether the challenged provisions create impermissible barriers for voters with disabilities, Defendants' motion for summary judgment on the ADA claim should be denied.

VI. Section 208 Preempts the Voting-line Relief Restrictions.

Section 208 of the VRA provides that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508. Defendants claim they are entitled to summary judgment because Section 208 does not provide a private right of action and because Plaintiffs lack evidence that the voting-line relief restrictions unduly burden the rights of voters with disabilities. Defendants' arguments fail on both fronts.

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A. Section 208 Provides a Private Right of Action.

The plain text of Section 208 belies Defendants' contention that it affords no private right of action: it provides that "the Attorney General or *an aggrieved person*" may institute a proceeding "under any statute to enforce the voting guarantees of" the Fourteenth or Fifteenth Amendments

(emphasis added). 52 U.S.C. § 10302(a). Because Section 208 "is, by its terms, a statute designed for enforcement of the guarantees of the Fourteenth and Fifteenth Amendments, Congress must have intended it to provide private remedies." *See Morse v. Republican Party of Va.*, 517 U.S. 186, 233-34 (1996) (citation omitted); *see also Ark. United v. Thurston*, 517 F. Supp. 3d 777, 790 (W.D. Ark. 2021) (holding Section 10302 "explicitly creates a private right of action to enforce the VRA"); *Navajo Nation Hum. Rts. Comm'n v. San Juan Cnty.*, 215 F. Supp. 3d 1201 (D. Utah 2016).

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Additionally, the Supreme Court has recognized Congress's intent to create private rights of action to enforce similar provisions of the VRA. *See* Statement of Interest of the United States, No. 187, ECF No. 304, p. 19-20. In reviewing a poll tax, the Court found that a private right of action had not been foreclosed even though the enforcement scheme of the provision at issue gave the Attorney General the right to sue. *See Morse*, 517 U.S. at 193; *see also Perez-Santiago v. Volusia Cnty.*, 2009 WL 2602461, at *2 (M.D. Fla. Aug. 25, 2009) ("The United States Supreme Court has recognized a private right of action under other sections of the Voting Rights Act[.]").

Defendants' reliance on *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), a case about the Securities Exchange Act of 1934, is inapposite, given the Supreme Court's holding in *Morse*. Additionally, Defendants ignore the

many courts that have entertained private suits to enforce Section 208. *See, e.g.*, *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017); *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 816 (E.D. Mich. 2020); *Nick v. Bethel*, 2008 WL 11456134, at *5 (D. Ala. July 30, 2008).

B. Whether The Challenged Provisions Unduly Burden Voters with Disabilities Presents a Triable Issue of Fact.

"The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise," which necessitates the regulation, and sometimes the preemption, of state election procedures. *Adamson v. Clayton Cnty. Elections & Registration Bd.*, 876 F. Supp. 2d 1347, 1356 (N.D. Ga. 2012). Conflict preemption under Section 208 "occurs . . . where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as expressed in the VRA. *Priorities USA*, 462 F. Supp. 3d at 816 (internal marks omitted).

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Section 208 was added to the VRA because voters with disabilities "must be permitted to have the assistance of a person of their own choice." S. Rep. No. 417, 97th Cong., 2d Sess. at 62. Specifically, Section 208 provides: "Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice." 52 U.S.C. § 10508.

Section 29—absent a narrowing or clarifying construction—prevents voters with disabilities from receiving assistance to remain in line to vote, *see supra*. Because this restriction necessarily limits who a voter may choose to assist them, it is impossible for the restriction to coexist with Section 208. *See* 52 U.S.C. §10508; *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 816 (E.D. Mich. 2020) (finding a conflict with Section 208, which "provides that a voter may be given assistance by anyone of that voter's choice," where the regulation did "not permit a voter to request just anyone to assist them"); Statement of Interest of the United States, No. 187, ECF No. 304, p. 26 ("Limiting a voter's 'choice' of assistors to agents of the election supervisor is inconsistent with the letter and the intent of Section 208.").

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Pointing to an excerpt from a Senate Report stating that "State provisions would be preempted only to the extent that they unduly burden" voters, Defendants claim that there is no evidence showing the voting-line relief restriction unduly burdens the rights of voters with disabilities. Mot. at 53. This is not true. As discussed in Section V.C, there is significant evidence that individuals with disabilities are more likely to experience, and be vulnerable to, long lines and wait times. There is also evidence that Section 29 will unduly burden these voters by limiting the aid they can receive. *See supra*; *see also* ECF No. 306-28 ¶4; ECF No. 306-45 ¶10. SOEs

have corroborated that Section 29 may prevent voters with disabilities from receiving assistance in the form of food or water from anyone of their choice. *See, e.g.*, ECF No. 306-34 at 170:9–22.

VII. Section 29 Is Unconstitutionally Vague and Overbroad.

Defendants incorrectly argue that Section 29 does not violate the First Amendment because it does not restrict expressive conduct and it is not vague or overbroad. Mot. at 54–60. Plaintiffs' relief to people waiting to vote is constitutionally protected expressive conduct. *See Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1243 (11th Cir. 2018). By supplying food and water to help individuals waiting in long lines, the NAACP and its members are communicating that it is important to stay in line to exercise the most fundamental right in a democracy—the right to vote. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); ECF No. 306-28 ¶¶3, 9.

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A. Section 29 Is Unconstitutionally Vague.

A law may be vague because (1) "regulated parties [do not] know what is required of them so they may act accordingly" or (2) "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *FCC v. Fox Television Stations*, 567 U.S. 239, 253 (2012) (citing *Grayned v. City of Rockford,* 408 U.S. 104, 108–109 (1972)) ("[S]tandards of permissible statutory vagueness are strict in the area

of free expression."); *NAACP v. Button*, 371 U.S. 415, 432 (1972). Section 29 prohibits activities carried out with the intent to influence voters, and those that have the "effect of influencing a voter." Fla. Stat. § 102.031(4)(b). The provision's vague wording, as well as testimony from Plaintiffs, SOEs, and Defendants, highlight its failure to provide reasonable notice of what activities are prohibited.

Section 29 contains no guidance on what activities *may* have the effect of influencing a voter. As such, Plaintiffs are refraining from engaging in constitutionally protected line-relief activities, for fear of violating this unclear provision. *See* ECF No. 306-28 ¶¶4-9. SOEs also lack guidance on the provision and have differing understandings of its import. SOE Latimer noted that there is an "aspect of judgment involved in enforcing the non-solicitation provision" and that it "would depend on the situation" whether "every contact with a voter within the 150-foot zone would constitute solicitation." ECF No. 306-34 at 169:17–170:22. Division of Elections Director Matthews interprets the provision to mean that a nonpartisan organization could hand out water within the no solicitation zone "as long as the activity is not . . . with the intent of influencing or affecting the influence of a voter." ECF No. 306-62 at 158:3-163:17. Leaving conduct with potential criminal implications to SOEs' "judgment" evidences the potential for

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arbitrary and discriminatory enforcement, hallmarks of impermissible vagueness. *See Button*, 371 U.S. at 432-433 (1963).

Legislative history provides no further clarity. Section 29 was specifically criticized by legislators for being "too vague, too subject to somebody's point of view." ECF No. 306-9 at 1:25:02 (Statement of Rep. Joe Geller). Even SB 90's sponsors disagreed about the reach of this provision. Senator Baxley stated that "[his] motivation [was] to protect votes . . . [and] ensure, unlike other states, that a glass of water [that] is given in sincerity is not a violation of the law." ECF No. 306-5 at 15:25. On the other hand, Representative Ingoglia thought this provision broadly prohibits anyone who did not work for a SOE from providing anything to voters in line. ECF No. 306-65 at 5:40:38 through 5:43:24. Further, the National Republican Senatorial Committee, represents having no specific understanding "of how the changes to the definition of solicitation affect what is or is not permitted within the buffer zone." ECF No. 306-63 at 22:10–22:14. Considering the ambiguous wording of Section 29, and the many different interpretations offered by Plaintiffs, Defendants, and others, this provision fails to provide adequate notice of what is prohibited, and is thus impermissibly vague as a matter of law.

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B. Section 29 Is Overbroad.

The overbreadth doctrine prohibits the regulation of substantially more protected speech than is necessary. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Here, Section 29 is broad enough to be interpreted as encompassing Plaintiffs' protected speech activities, including the provision of non-partisan voter relief. *See* ECF No. 306-28 at 10-12; ECF No. 306-34 at 169:17–170:22; *see also* ECF No. 306-64 at 84-86 ("[M]y understanding is that the effects may be construed that any interaction that a volunteer may have with someone who is standing in line could influence a voter . . . [and] may make organizations reticent to participate in these sorts of what I have called line-warming activities."). Because of the provision's broad language and potential application to prohibit anyone other than an election official from assisting voters, it regulates more expressive conduct than necessary to achieve its purported goal—securing elections. Therefore, the law is overbroad as a matter of law.

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CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion for summary judgement in its entirety.

Dated: December 3, 2021

Respectfully submitted,

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LOCAL RULE 7.1 CERTIFICATION

The foregoing complies with the size and font requirements, contains 15,969 words, excluding the case caption, signature blocks, certificate of service, and this certification. Therefore, this motion complies with the enlarged word limitation of 16,000 words granted by this Court on November 12, 2021. ECF No. 287.

/s/P. Benjamin Duke
Counsel for Plaintiffs

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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 December 3, 2021.

/s/ P. Benjamin Duke
Counsel for Plaintiffs