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

FLORIDA RISING TOGETHER, et al., Plaintiffs, v. LAUREL M. LEE, in her official capacity as the Secretary of State of Florida, et al., Defendants.	Case No. 4:21-cv-201-MW-MJF

FLORIDA RISING PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT LEE, HAYS, AND DOYLE'S "CORRECTED" MOTION FOR SUMMARY JUDGMENT (ECF 245-1)

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INTRODUCTION

Defendants Lee, Doyle, and Hays ("Defendants") have filed a summary judgment motion (ECF 245-1) ("Mot.") that misapplies the Rule 56 standard and ignores a vast evidentiary record about the circumstances of SB90's enactment and the impact it will have on individual voters and on organizations like Plaintiffs. That record demonstrates that summary judgment is inappropriate, as there are genuine disputes of material fact on issues critical to resolving Plaintiffs' claims.

Rather than complying with Local Rule 56.1, Defendants offer a statement of facts that cites to only *two* documents: their expert report and the SB90 legislative history. Mot. 3-4. That is consistent with their general approach to the extensive record Plaintiffs have compiled. Where that evidence is adverse to their position, Defendants simply gloss over it, citing out-of-context snippets of deposition transcripts. Mot. 7-22. Egregiously, Defendants repeatedly claim that Plaintiffs failed to present quantitative evidence of SB90's impact, Mot. 24,35,41-45,55-57, without *once* acknowledging Dr. Daniel Smith's 171-page expert report that does exactly that, ECF 271-27. Other examples of willful blindness abound.

Defendants' motion is also littered with incorrect statements and applications of law, many of them reprised from Lee's motion to dismiss. This Court already considered and rejected many of those misguided arguments. ECF 201. Defendants do not acknowledge this ruling, let alone provide any reason for the Court to revisit these issues.

In short, Defendants' brief is, in realty, a trial brief masquerading as a Rule 56 motion. It should be denied.

LOCAL RULE 56.1(B) STATEMENT OF FACTS ("SOF")

A. Historical Background to SB90

1. Florida's Long History of Racially Discriminatory Voting Laws and Practices

1. *Discrimination Prior to the Voting Rights Act of 1965 ("VRA")*: Following the Civil War, Reconstruction created a brief period when congressional mandates allowed Black male Floridians to vote, and Black candidates were successfully elected to office. ECF 271-24 ¶¶19,21. As soon as federal protections ended after Reconstruction, Florida instituted racially discriminatory voting laws and practices such as annual re-registration requirements, a poll tax, an "eight-box" law (a functional literacy test), a grandfather clause, the white primary, and laws requiring elected officials to post high bonds before being allowed to take office, to ensure white control of state and local government. No Black legislator was elected in Florida again until 1969. ECF 271-26 ¶¶7,30-33,35; ECF 271-24 ¶¶22-23. Political candidates ran on segregation platforms through 1970. ECF 271-26 ¶36-37.

2. *Voting Discrimination After 1965*: Despite passage of the VRA in 1965, no Black person was subsequently elected to Congress from Florida until 1993. ECF 271-26 ¶35; ECF 271-24 ¶2. From 1983 through 2020, at least 64 voting rights lawsuits or Section 5 proceedings resulted in findings or admissions of racial

discrimination. Such proceedings have involved discrimination against Latinos as well as Blacks. ECF 271-26 ¶¶9,39-45; 271-24 ¶¶28-34. Election practices struck down as discriminatory or resolved with consent decrees during this period include: the use of at-large elections to dilute minority voting strength (ECF 271-26 ¶¶40-41, 271-24 ¶¶31-33,46); poll worker hostility and discrimination toward Hispanic voters (ECF 271-26 ¶42); the failure of 32 counties to provide election materials in Spanish, not remedied until a 2018 lawsuit (ECF 271-26 ¶43, ECF 271-24 ¶34); and ill-conceived purges of the voter rolls that have disproportionately affected Black and Latinx voters (ECF 271-26 ¶¶44-45, citing examples in 2000, 2004, and 2012; ECF 271-24 ¶48).

3. Another example of discriminatory legislation was HB1355, which was sponsored by then-Rep. Dennis Baxley, the Senate sponsor of SB90. Passed in 2011, HB1355 was a reaction to two key facts: (1) Barack Obama had carried Florida, greatly assisted by an upsurge in early in-person ("EIP") voting, especially among Blacks; and (2) registration by third-party voter registration organizations ("3PVROs") reached about twice as many Black and Latino voters as non-Latino white voters. ECF 271-35 ¶26; ECF 271-26 ¶¶67,69; ECF 271-24 ¶¶65-72. HB1355 cut the number of required EIP voting days from 12-14 down to 8 and banned EIP voting on the weekend before Election Day, when Black churches had made the practice of "Souls to the Polls" widespread. ECF 271-26 ¶67; ECF 271-24 ¶¶68,70-72. It also reduced the amount of time for 3PVROs to submit voter registration

applications from 10 days to "within 48 hours" of receipt, and imposed other onerous requirements difficult for non-profit and volunteer organizations to meet. ECF 271-26 ¶69; ECF 271-24 ¶66. The three-judge district court refused to grant preclearance, finding that provisions disproportionately harmed minority voters. ECF 271-26 ¶73. HB1355's onerous requirements on 3PVROs led the League of Women Voters to suspend its voter registration work until that aspect of the law was enjoined. *Id.* ¶¶69,72.

2. The 2020 Election

4. Over 11 million ballots were cast in the 2020 general election (74% of registered voters), including over 1.3 million and 1.7 million ballots by Black and Hispanic voters respectively—more than in any prior election. ECF 271-56 RFAs 4-8; ECF 271-26 ¶84. This included 4.8 million vote-by-mail ("VBM") ballots, of which more than 500,000 and 700,000 were cast by Black and Hispanic voters respectively—all more than in any prior election, and twice the rate of prior VBM voting. ECF 271-56 RFAs 9-16; ECF 271-26 ¶62; ECF 271-27 ¶54. 1.5 million ballots were returned to drop boxes. ECF 271-56 RFA 17.

5. Florida's 2020 election was widely praised—by, among others, Defendant Lee, Governor DeSantis, and the legislative sponsors of SB90—as having run "smoothly" and as a "model" for the rest of the country. ECF 271-56 RFAs 33-34,41,64; ECF 271-1 at 2:15-18,19:8-22 (Secretary Lee: election "ran as smoothly as possible and inspired confidence on the part of Florida's voters"), 2:16-

2:18,2:5,30:5-6 (Baxley: "an exceptional election process this year …we have a very high customer satisfaction rate"). *See also id.* at 46:21,19:8-11; ECF 271-6 at 9:9-10 (Baxley: "Florida was a model for the Nation"); (4/22/21 Tr. 2:10-15) (Baxley: same); ECF 271-3 at 2:18-19, ECF 271-5 at 2:6-7, ECF 271-7 at 2:10-12; ECF 271-12 at 2:23-3:3 (Ingoglia: "Florida administered one of the smoothest elections. It was heralded as the standard on how elections should be run across the United States"); ECF 271-26 ¶149. Accordingly, there was no need to change Florida's election laws.

B. Legislative Deliberations Over SB90

6. SB90 was introduced by Baxley on February 3, 2021; the House version was introduced by Representative Blaise Ingoglia. The legislation was considered at four Senate and three House committee hearings. ECF 271-56 RFAs 35-36,120 & ECF 271-1 to 271-8.

7. As initially proposed, SB90 was a narrow bill that focused on requiring voters to request a VBM ballot each year. ECF 271-1 at 43:14-14:20. The bill grew to a major revision of Florida's election laws with over 33 sections. ECF 271-19.

8. Throughout deliberations, legislators and witnesses repeatedly testified that the challenged provisions would suppress voter turnout and have a racially discriminatory impact. *See infra* SOF 19-20,33-34,47,59; ECF 271-26 ¶¶153-155. *See also* ECF 271-2 at 48:12-17,50:19-51:4,62:5-15,81:1-81:23,84:7-23, 87:22-88:21); ECF 271-2 at 33:1-34:8,24:22-24:12,29:18-30:8,34:12-35:9; ECF 271-3 at

72:9-73:9,89:7-94:2,); ECF 271-5 at 45:8-46:10); ECF 271-6 at 5:16-6:2,64:7-14,106:20-107:17,109:13-110:2,121:1-122:6,122:8-124:12,124:15-129:21; ECF 271-7 at 78:19-79:6,81:17-82:4; ECF 271-8 at 5:3-19); ECF 271-9 at 100:6-13; ECF 271-11 at 2:18-6:2,6:6-21,7:6-8:13,8:18-11:4,11:10-13:9,13:14-15:24,16:6-19:8,21:18-24:18,31:17-32:6,32:9-33:8; ECF 271-13 at 2:22-6:18,7:3-8:11,8:18-10:4,12:21-15:5,15:12-18:7,18:14-21:10,23:14-26:18,27:1-29:2,29:8-32:17,35:18-38:8,39:21-42:2,48:20-49:16,49:22-52:6,52:13-57:16,61:1-64:12,64:20-66:12,66:18-69:16,80:20-84:18,88:17-89:11,91:2-96:8; ECF 271-14 at 33:14-35:13,35:16-38:5,42:5-43:18; ECF 271-15 at 30:5-31:22,33:9-34:2,34:7-35:6,35:10-39:8,39:12-44:8,44:12-45:20,45:23-46:3. In response to statements that the law would have a racially discriminatory impact, Baxley acknowledged "I can understand why there's a sensitivity, because we do have a history that's frightening[.]" ECF 271-6 at 83:22-84:1.

9. During debate, the bill was criticized numerous times for having no purpose, being a "solution in search of a problem," and fixing something that "ain't broke." *See, e.g.*, ECF 271-1 at 81:1-16,89:9-17; ECF 271-2 at 33:1-4; ECF 271-3 at Tr. 27:14-19; ECF 271-6 at 96:2-3, 135:21-136:2; ECF 271-11 at 12:6-11,14:1-2,33:1-7, ECF 271-12 at 112:2-6; ECF 271-13 at 8:19-9:2,50:14-17,64:20-65:10; ECF 271-14 at 39:7-10; ECF 271-15 at 30:17-18,34:7-9. In particular, Defendants, sponsors, and other legislators affirmatively stated they were not aware of any fraud, and when challenged, could not identify any fraud that had occurred in Florida that

would be addressed by the legislation. *See* SOF 9,49; ECF 271-26 ¶¶18-19,83-92,146-151; ECF 271-1 at 17:2-17:7 (Secretary Lee states she is not aware of voter fraud where people received a VBM ballot not intended for them), 85:20-86:2,87:8-87:18, ECF 271-2 at 6:10-14,12:4-10. Baxley represented that preventing VBM fraud was "not the purpose of our bill." ECF 271-9 at 64:5-10. Ingoglia stated that the legislature "should never rest on our laurels"; that he was making "a good thing even better"; and that the legislation was intended to address "problems that happened in other states." ECF 271-3 at 2:18-3:2,28:11-12. He responded no when asked if "any supervisor of elections … reported to you that there has been a problem with integrity, fraud, et cetera." ECF 271-12 at 42:19-43:1.

10. The legislative process was marred by significant irregularities. ECF 271-26 ¶144.

a. *Limitations on Hearings*: Many of the hearings on SB90 were unusually abbreviated. ECF 271-1 (58 minutes), ECF 271-5 (76 minutes), ECF 271-7 (97 minutes), ECF 271-8 (15 minutes). In particular, the amount of time allotted for legislative debate was limited at certain hearings. ECF 271-5 at 23:19-21, 44:18-23 (one minute per member), ECF 271-6 at 105:6-8 (one minute per member)); ECF 271-7 at 78:7-8 (30 seconds per member); *id.* at 51:22-24,55:1-2,55:11-13 (15 minutes to consider 21 amendments), 78:9-16; ECF 271-12 at 59:7-14 (90 minutes to consider 18 amendments).

b. *Restrictions on Testimony*: Despite the pandemic, witnesses were required to testify in person in Tallahassee. ECF 271-26 ¶144. At certain hearings, witness testimony was strictly limited in time or even cancelled. ECF 271-6 at 105:6-8,109:13-110:5 (testimony limited to one minute), ECF 271-7 at 77:5-77-8 (cancelling testimony). At other hearings, the testimony of witnesses or Representatives against the bill was cut off (ECF 271-6 at 102:1-13 (cutting off Earley's testimony about "likelihood of disenfranchising voters"),109:13-110:5, ECF 271-7 at 64:17-65:9,80:12-81:10), or not permitted at all. ECF 271-7 at 77:4-8 (reading witnesses' positions into the record in lieu of public testimony).

c. *Substantive Revisions without Adequate Consideration*: "Strike all" amendments were repeatedly introduced with little notice; these amendments rewrote the bill and were pushed through with little debate. In committee, separate "strike alls" were introduced on April 8 and 14. ECF 271-5 at 2:16-6:5; 4/14/21 Tr. 8:12-12:18. On April 27, another "strike all" was submitted at 1:33 am and passed the following evening in the House. ECF 271-12 at 2:8-8:7,15:7-10, ECF 271-13 at 17:24-18:7. And on April 29, a substantially revised bill was released in the House just prior to the hearing and passed in 64 minutes over numerous complaints about the "rushed" process. ECF 271-14 at 13:23-14:4,15:23-16:2,30:20-31:2,38:10-20,40:1-4. In the Senate, a "delete most" amendment was

introduced and passed in 79 minutes, again over complaints. ECF 271-15 at 5:9-6:10. Even the sponsors were confused what was in the bill. ECF 271-12 at 20:21-21:6 (Ingoglia representing (incorrectly) that Section 29 had been dropped).

d. *Failure to Consider Views of Supervisors*. Traditionally, election legislation is drafted in conjunction with the Supervisors of Elections. ECF 271-31 at 121:4-122:10 ("we're usually consulted to help address early on). But SB90 was drafted without consulting the Supervisors, who vocally complained that their views had not been considered. ECF 271-1 at17:17-18:17; ECF 271-39 at 42:11-43:11,139:2-15; ECF 271-31 at 121:4-122:10, 189:1-9, 191:1-12; 201:24-202:17) ("we should be consulted carefully.").

e. *Passage Over Opposition of Supervisors*. The Supervisors voiced strong opposition to the bill. ECF 271-1 at 10:20-11:13 (noting 66 of 67 supervisors opposed bill); *id*. at 15:1-18:17 (Hays: urging legislature to "take advice of the election professionals … before making significant changes," referring to bill as a "travesty," and noting the bill did not reflect any Supervisors' Association recommendations); *id*. at 22:10-24:4 (Earley: "I have heard of no supervisors who are in support of this bill…we are against this bill vehemently"); ECF 271-6 at 99:10-11 (Earley: "significant areas of concern"). On April 23, the Supervisors released a one sentence statement reiterating their opposition to the bill. ECF 271-10. And after

the bill passed, Supervisors continued to oppose the bill. ECF 271-32 at 111:7-15) (Latimer: "this legislation still makes requesting Vote By Mail ballots and returning those ballots harder"); ECF 271-18 (Hays: "perhaps between now and [the next legislative session] each of you will make time to SPEAK DIRECTLY WITH YOUR LEGISLATOR to let them know how SB 90 has negatively effected [sic] your operations."); ECF 271-16 (Hays: "disingenuous and lame").

f. *Misrepresentation of Supervisors' Support*: Ingoglia lied about the lack of support from the Supervisors, stating on April 19 that he wanted to "highlight that SOEs have said that they support the bill." ECF 271-7 at 83:4-83:13. This was refuted the following day when Senator Brandes stated that "not one Republican supervisor of election in the State of Florida supports this bill." ECF 271-8 at 8:16-9:10. And it was directly refuted by the Supervisors' April 23 statement. ECF 271-10.

11. Throughout the legislative debates, the Florida legislature consistently rejected proposed amendments to the legislation that would have reduced the burden and/or the discriminatory impact on voters. *See* ECF 271-35 ¶¶37-40. *See infra* SOF 20,35,57,67.

C. The Challenged Provisions and Their Impact on Plaintiffs

1. SB90's Voter Registration Provisions ("Section 7")

12. Plaintiffs Florida Rising (FRT), Unidos, Equal Ground (EG), Hispanic Federation (HF), Poder, and Mi Familia (MF) are all nonprofit, nonpartisan organizations that run voter registration programs as part of their efforts to empower all eligible citizens, including marginalized communities, to participate in the democratic process. ECF 271-42 at 28:16-23,36:20-37:5,42:20-43:1; ECF 271-43 at 19:11-20:8,34:17-35:5,40:1-41:9,75:23-76:6; ECF 271-44 at 14:18-23,35:10-13; ECF 271-48 at 32:12-23,33:23-34:6,43:8-11,45:12-23,46:6-11,63:8-64:19; ECF 271-49 at 29:9-11, 30:22-31:4,31:11-13,32:6,36:6-14,42:21-22; ECF 271-51 at 42:18-23,43:11-17,53:18-55:6. For example, in 2020, the organizations collected 71,160 (Unidos), 40,516 (Poder), 31,464 (FRT), 12,896 (HF), 4,186 (MF), and 2,800 (EG) applications. ECF 271-44 at 19:13-14; ECF 271-49 at 32:6; ECF 271-53 at ¶22; ECF 271-58 ¶7.

13. As of August 2021, an estimated 763,240 individuals who had registered to vote in Florida had registered through a 3PVRO. ECF 271-27 ¶¶39-40. This number is likely an undercount. ECF 271-27 ¶¶40-41.

14. Black and Hispanic voters "disproportionately rely on 3PVROs when registering to vote," and are "much more likely to bear the brunt of additional restrictions placed on the activities and speech of 3PVROs under SB90." ECF 271-27 ¶¶37-50. Third-party registration is a particularly important method to register Black and Hispanic voters; approximately 10.9% of Black and 9.6% of Hispanic

voters registered through a 3PVRO, compared to only 1.87% of white voters. ECF 271-27 ¶46 & tbl.2.

15. As relevant here, Section 7 requires 3PVROs to:

> notify the [voter registration] applicant at the time the application is collected that the organization might not deliver the application to the division or the supervisor of elections in the county in which the applicant resides in less than 14 days or before registration closes for the next ensuing election.

Fla. Stat. § 97.0575(3)(a). In addition, the provision requires 3PVROs to "advise the applicant that he or she may deliver the application in person or by mail," and to "inform the applicant how to register online with the division and how to determine whether the application has been delivered." *Id.*

16. Section 7 fines 3PVROs if they fail to deliver registration applications to the "supervisor of elections in the county in which the applicant resides" within 14 days. Fla. Stat. § 97.0575(3)(a)(1-3). Prior to Section 7, 3PVROs could return applications to any Supervisor of Elections, who could process the application and register the voter using the Florida Voter Registration System (FVRS). ECF 271-34 at 94:14-95:18; ECF 271-29 at 174:11-175:17; ECF 271-32 at 182:10-182:24.

17. There was little discussion of Section 7 during legislative debate.

18. Upon introduction, Ingoglia stated that the purpose of the provision was to "clean[] up statutes that have been ruled unconstitutional." ECF 271-3 at 4:22-5:4. When challenged to explain the provision, Baxley similarly stated that Section 7

> has to do with codifying a federal court order into our statute. These things go on over time. As different court actions are taken, different decisions are released, we have to do some updates. And that's basically what that's about.

ECF 271-6 at 89:5-89:23. Ingoglia and Baxley were presumably referring to this Court's 2012 decision in *League of Women Voters of Florida v. Browning*, 863 F. Supp. 2d 1155 (N.D. Fla. 2012), which enjoined the provision of HB1355 requiring 3PVROs to submit voter registration forms within 48 hours. There is nothing in *Browning*, however, requiring 3PVROs to make the compelled disclosure or send applications to the applicant's county of residence. *Id.*; *see also* ECF 271-26 ¶125).

19. Supervisors recognized that the required disclaimer hinders third-party registration efforts. For example, Leon County Supervisor Earley testified Section 7 would make third-party registration more difficult, explaining: "You're asking somebody to entrust your voter registration form to me -- to them but you're telling them that I might not turn it in. What the hell? That's crazy." ECF 271-31 at 175:5-176:5; *see also id.* (recognizing "it makes it harder for those groups to provide the services"); ECF 271-33 at 32:21-33:3; *id*. at 155:5-13 ("I think it was designed to make it so that more often than not people will just walk away and not get registered"). Representative Thompson similarly stated during floor debate that the provision would "shak[e] confidence in voter registration by having to inform people that the ballot might not get there in time." ECF 271-13 at 83:11-23.

20. The legislature rejected an amendment that would have ameliorated Section 7's discriminatory impact. In explaining Amendment 348670, Senator Jones noted that "minorities are more likely to register to vote through third party organizations," that "this language is misleading to those who might be potentially voting to scare them," and that it "will likely have a chilling effect on the willingness of potential electors to participate in voter registration drives." ECF 271-9 at 14:21-15:8,16:4-9,17:7-12. Baxley opposed the amendment, and it was rejected. ECF 271-26 ¶126.

21. Defendants have now identified a different interest purportedly served by Section 7. The Secretary's response to written discovery states that the provision "serves to remind voters that they can register directly through various means, including online and, that by registering through a third-party group, the voters run the risk of their registration not being processed in time for book closing before an upcoming election." ECF 271-22 at No. 1. But the Secretary's 30(b)(6) witness admitted during deposition that she could not identify any voter "who was unable to vote in an election as a result of an untimely filed application by a 3PVRO." ECF 271-45 at 138:23-139:5.

22. Numerous Supervisors similarly testified they either were not aware of any voter applications being turned in late, ECF 271-30 at 106:4-107:4; ECF 271-34 at 96:23-97:2; ECF 271-29 at 129:4-129:20; ECF 271-33 at 86:25-87:4, or were aware of only small numbers of applications being turned in sufficiently late that the

applicant was not able to vote, ECF 271-38 at 165:6-21 ("approximately eight"); ECF 271-31 at 92:17-24 ("I would say it's rare"); ECF 271-32 at 147:25-148:10 (unaware of any voter prevented from voting because 3PVRO turned in form late); ECF 271-28 at 31:5-8 (same); ECF 271-36 at 90:20-25 (same); ECF 271-47 at ¶¶30-31 (same); ECF 271-41 ¶¶33-34 (same). In discovery, 63 supervisors admitted they are unaware of any voter who was unable to vote in 2020 because a 3PVRO returned their application late. *See generally* ECF 271-60.

23. Since the passage of SB90, EG has concluded that it will "no longer provide any voter registration program" in-person and cancelled a voter registration campaign scheduled to start in June 2021; it did so because the compelled disclosure "would tarnish the organization's reputation" and because the delivery restrictions were "cost prohibitive." ECF 271-42 at 53:2-18,58:16-59:5,59:12-60:3,68:18-71:2,72:14-73:4; ECF 271-52 ¶¶3,4,14-16. Other Plaintiffs have made significant modifications and put substantial additional resources into their programs:

a. Unidos expects to hire new staff and incur significant expenditures to comply with the new registration requirements, including "require[ing] additional staff to go through everything and figure out which counties they belong to" and will incur additional expenses to deliver applications to the correct counties. It further expects the registration disclaimer to cause voter confusion and deter people from registering. ECF 271-48 at 104:6-106:25, 112:17-114:25,118:9-23,122:1-6,123:15-17,135:6-137:25,139:4-24; ECF 240-5 at ¶¶3-4,8-9,11-19.

b. FRT has had "to rework [its] trainings and [its] model to account for the chilling effect" of the mandatory disclosure and to "ensure that there is enough time to mail the forms that we collect in one county … without incurring any penalties," because it "is onerous" and makes "it cost

prohibitive to do our work." ECF 271-43 at 33:4-34:15,43:2-48:7,54:3-55:2,75:23-76:6; ECF 271-46 at 33:25-35:5,41:3-8,43:2-48:7; ECF 271-58 ¶¶ 24-28.

c. HF is "currently not doing voter registration" and must develop a strategy to comply with Section 7 before resuming its in-person program, but is "very concerned ... we will have to mail it or transport personally to [the voter's] supervisor of election" and expects to hire additional staff to help with compliance. ECF 271-51 at 56:18-57:6, 67:4-17,69:15-21,75:10-76:8,98:9-25,99:25-100:15,105:1-16; ECF 271-53 at ¶¶6,12,23.

d. MF reports that applicants feel "insecure" after hearing the disclaimer; that it may not be able to comply with the delivery requirements (they previously delivered all applications to Orange County); and that it revamped its quality control and delivery protocols and incur additional costs to comply with SB90. ECF 271-44 at 10:22-11:22,30:7-17,30:21-31:24,35:4-13,36:3-38:3,42:17-20.

e. Poder has received feedback from its staff that the registration disclaimer "is disengaging voters," that voters have declined to register after being confused by the disclaimer; that it makes the organization seem "unreliable," and that the new delivery restrictions are a "large additional burden." Specifically, it projects over $15,000 in staff cost, $1,400 in postage, and other costs associated with driving forms to additional counties. ECF 271-49 at 32:4-13,53:4-20, 57:1-22,58:23-60:25; ECF 271-54 ¶19.

2. Vote-By-Mail Application Restrictions ("Section 24")

24. As part of their overall voter mobilization and turnout programs, Plaintiffs FRT, Unidos, Poder, MF, and Sant La have educated, encouraged, and assisted voters in requesting vote-by-mail ballots. ECF 271-48 at 85:19-86:1); ECF 271-40 at 46:16-47:1, 79:14-80:23); ECF 271-49 at 41:1-41:9); ECF 271-44 at 44:2-22; ECF 271-58 ¶¶8,19; ECF 278-1 ¶7; ECF 271-57 ¶6.

25. During the 2020 general election, over 4.8 million voters cast VBM ballots—more than in any prior election. This represented an increase in VBM ballots of over 70 percent as compared to 2016. ECF 271-27 ¶¶98-99; ECF 271-56 RFAs 9-10.

26. During the 2020 election, more than 500,000 and 700,000 VBM ballots were cast by Black and Hispanic voters, respectively—more than in any prior election, and roughly twice the numbers cast in 2016. ECF 271-27 ¶¶53-54;112;Tab.5; ECF 271-56 RFAs 11-16.

27. Section 24 requires a VBM applicant to "provide the elector's driver license number, the elector's Florida identification card number, or the last four digits of the elector's social security number, whichever may be verified in the supervisor's records." Fla. Stat. § 101.62(1)(b). This provision requires an exact match between the information provided in the VBM ballot application and the information in FVRS. In providing guidance on this exact-match restriction, Secretary Lee directed there are "no exceptions," ECF 271-20 at SoS000054, and the Secretary's 30(b)(6) witness confirmed that voters requesting VBM ballots "have to provide" the identifying information. ECF 271-45 at 198:15-199:3.

28. The exact-match requirement is likely to cause the denial of many voters' requests for VBM ballots. ECF 271-27 ¶¶55-95.

29. First, there are hundreds of thousands of Florida registered voters who "do not have [the] requisite ID on file in the FVRS." ECF 271-27 ¶93. Voters can

register in Florida without providing a social security or driver's license number. ECF 271-56 RFA 22; ECF 271-45 at 186:3-186:20 (acknowledging that over 600,000 registered voters had neither number); ECF 271-6 at 84:22-85:8. Black and Hispanic voters are less likely to have the identification necessary to request a VBM ballot. ECF 271-27 ¶¶55-56 (only 79 percent of Black respondents had a driver's license, compared to 93 percent of all respondents). As of May 2021, a total of 622,998 registered voters in the FVRS did not have a driver's license, state identification number, or social security number on file, and 681,481 registered voters either have no identification number or an invalid identification number on file. ECF 271-56 RFA 23; ECF 271-27 ¶¶64-95. Voters who have registered since 2006 without providing a identification number "are much more likely to be persons of color": 30.2% Black, 21.5% Hispanic, and 13.6% white. ECF 271-27 ¶87.

30. Second, voters who do have the requisite ID on file may not be able to successfully request a VBM ballot. There are data errors in the FVRS. And voters do not necessarily recall which form of identification they provided at the time of registration, which may result in voters providing a non-matching number and having their applications rejected. ECF 271-27 ¶¶57-59. The Secretary has acknowledged these issues. ECF 271-45 at 181:19-182:3.

31. Third, voters may be deterred from requesting VBM ballots if they have to provide personal identification information. ECF 271-40 at 79:14-80:23; ECF 271-49 at 53:1-54:21. *See also* ECF 271-27 ¶59.

32. There was little debate over Section 24. Secretary Lee testified that there are already "safeguards in place to ensure that vote-by-mail ballots are going to voters who are on the voter registration rolls," and that she was not aware of "any instance of fraud where people received the mailed ballot and voted even though it wasn't intended for them." ECF 271-1 at 16:6-8,17:2-7. Ignoring this, Ingoglia falsely asserted three times that "there are almost no safeguards" concerning VBM ballots. ECF 271-3 at 103:14-19; ECF 271-5 at 9:10-15; ECF 271-7 at 8:12-9:2.

33. Baxley initially denied that Section 24 introduced any requirements for VBM applications, and stated he was not aware of "widespread complaints" concerning VBM. ECF 271-1 at 7:11-21,11:23-12:12. On April 14, Senator Brandes questioned the provision, noting:

> [T]here is no exception made for those who have been verified by the state that don't have a driver's license, or Florida ID card, or Social Security number. In Pinellas County alone, that would be 28,000 voters who would be unable to update their voter registration records for their mail-in ballot because either they don't [sic] a driver's license, a Social Security card, or an ID card.

In response, Baxley responded (inaccurately) that those individuals would be "exempt." ECF 271-6 at 74:22-75:9. This is not how the Secretary interprets the provision. ECF 271-20 ("no exceptions"); ECF 271-26 ¶99-100.

34. Similarly, Senator Gibson asked Baxley who provides the necessary identifier number, as it is not on individuals' voter registration cards. Baxley responded (again inaccurately) that individuals could use "whatever identifying

numbers." ECF 271-6 at 23:13-23 ("What we're trying to do is broaden the number of things you could use in case you didn't have one of those forms of identity.").

35. Four separate amendments that would have mitigated the burden of Section 24 were summarily rejected. *See* ECF 271-12 at 71:16-73:17 (proposal to allow VBM by providing name, address, and birthdate), 69:16-71:14, ECF 271-1 at 47:12-51:14, ECF 271-2 at 3:20-4:13 (proposals to allow standing VBM requests).

36. Behind the scenes, staff for Ingoglia and the Secretary realized there was a significant "problem" with Section 24. On April 6, Don Rubottom, the lead legislative aide on SB90, wrote to Lee's Legislative Director that a "problem" with the provision "is that Supervisors cannot verify DL# or SSN if not previously provided" and "a voter could not be expected to know which number they provided at registration." ECF 271-4. The Secretary has acknowledged this is a problem because "a voter is not going to necessarily recall whether they provided their driver's license or their Social Security number, and it depends on when they registered to vote; may not have been required at that point." ECF 271-45 at 181:19-182:3.

37. Three days later, Rubottom reiterated the concern that the bill:

> create[d] a disconnect. I don't know if I gave SOE my last four SSN or my Florida Driver license … [I]f I send in writing with DL but they have ssn on file, they can't verify …

ECF 271-4.

38. Defendants have advanced a justification for Section 24 different than that identified by the legislative sponsors. The Secretary's response to written discovery states that the provision "serve[s] the State's interest in preventing fraud and promoting uniformity (as much as practicable) during the vote-by-mail process; these provisions ensure that the people requesting ballots are who they say they are [and] that people know to expect a vote-by-mail ballot when they request one." ECF 271-22 at No. 1. But the Secretary testified there were "safeguards," SOF 32, and the Secretary's 30(b)(6) witness admitted that there were safeguards in place prior to SB90 "to ensure that the person [who asks for a ballot] is indeed getting the ballot and isn't somebody else." ECF 271-45 at 30:25-32:20,58:5-61:25. Moreover, when Baxley was asked if he believed there was VBM fraud in the last election, he responded: "That's not the purpose of [the] bill." ECF 271-9 at 64:5-10.

39. Assisting voters with requesting VBM ballots will be far more difficult as a result of SB90 even if their identification is in FVRS. Voters may be reluctant to provide sensitive information on the application form; as a result, the organizations expect to have to spend more time and money educating voters about the process and getting them comfortable requesting a mail ballot. ECF 271-49 at 53:1-55:9 ("[i]t is now a more onerous process to get voters to provide their Social Security number … whereas this process was very simple before"); ECF 271-48 at 101:21-103:2; ECF 271-44 at 37:17-38:3; ECF 271-40 at 79:14-80:2 (we "spend more time … with

clients who need to be assured and reassured that, for example, providing a Social Security number is not the end of the world").

3. Drop Box Restrictions ("Section 28")

40. Florida has a history of long voting lines, particularly in predominantly Black and Hispanic neighborhoods. ECF 271-26 ¶¶12-16,22,64-68,76-79; ECF 271-27 ¶¶225,230,233,242-44; ECF 271-24 ¶73; ECF 271-37 ¶¶27-32. Nonwhite voting locations are associated with wait times approximately twice the length of those in predominantly white locations; another study found that in the 2016 election, voters in predominantly Black neighborhoods were 74 percent more likely to wait in line for over a half-hour than those in predominantly white neighborhoods. ECF 271-27 ¶230. *See also* ¶ 243.

41. Drop boxes have been used in Florida since 2008. By 2013, they were sufficiently widely used that the Secretary issued statewide guidelines on their deployment. Kousser Rep. ¶¶17,81-82. As Defendant Doyle acknowledges, the availability of drop boxes is particularly important to address long lines to vote. ECF 271-34 at 33:24-34:5 ("If we have those 95,000 voters [who previously voted through drop-offs] showing up at the polls, you can expect very long lines."), Kousser Rep. ¶¶22,23.

42. As part of their voter mobilization and turnout programs, Plaintiffs FRT, EG, HF, MF, and Sant La have educated and/or encouraged voters to return ballots using drop boxes. For example, EG organized its "Souls to the Polls" program to

have events "centered around" locations with drop boxes to encourage voters to return their ballots. ECF 271-42 at 51:8-54:21. FRT, Poder, MF, and HF all integrate drop boxes into their turnout programs. ECF 271-43 at 50:14-51:13 (discussing importance of drop boxes "because of the amount of distrust that we've encountered in communities about voting by mail"), 55:24-56:11; ECF 271-49 at 44:22-45:5; ECF 271-51 at 77:1-22; ECF 278-1 ¶¶12-14.

43. During the 2020 general election, the Supervisors deployed 485 drop boxes. ECF 271-27 ¶¶125-127; ECF 271-26 ¶22. 1.5 million ballots were returned to a drop box—*i.e.*, 29 percent of all VBM ballots. ECF 271-27 ¶¶123,220; ECF 271-26 ¶84; ECF 271-56 RFA 17.

44. Drop boxes are more likely to be used by Black and Hispanic voters to return VBM ballots because of concerns over the reliability or timeliness of postal deliveries. ECF 271-27 ¶¶135,137.

45. As relevant here, Section 28 added the following requirements:

> [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. 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.

Fla. Stat. § 101.69(2)(a). Supervisors are subject to a $25,000 civil penalty "[i]f any drop box is left accessible for ballot receipt other than as authorized." *Id.* § 101.69(3).

46. Section 28 at all times required drop boxes to be limited to early voting sites and supervisor offices, but other aspects of the provision were modified several times. At introduction, the bill allowed video surveillance. ECF 271-3 at 3:19-22. However, that provision was subsequently dropped in the April 8 "strike all" to require in-person supervision by an employee of the Supervisor's office. ECF 271-5 at 2:16-6:5.

47. From the earliest debates, the provision was criticized for making voting more difficult. ECF 271-26 ¶¶106-114; ECF 271-2 at 24:22-25:12,27:20-29:2, ECF 271-6 110:14-111:11, ECF 271-7 15:2-11,19:7-16,80:12-81:10, ECF 271-9 at 100:22-102:14. And the provision was criticized for having a disproportionate impact on Black and Hispanic voters and eliminating hundreds of hours of drop box availability. *See, e.g.*, ECF 271-2 at 26:1-26:21, ECF 271-9 at 100:6-13, 101:1-4, ECF 271-13 at 15:12-16:14,27:1-28:20,36:16-37:19,91:4-95:17. In response, sponsors acknowledged they had not studied the issue, but nonetheless promised that no disenfranchisement would occur. ECF 271-9 at 100:16-17,101:6-11.

48. Various Supervisors criticized Section 28, including Defendant Hays, who referred to a draft of the provision as a "travesty" that would wreak "havoc":

> [T]he rule promulgated by the Division of Elections requires every drop box in the State of Florida to be monitored. To the best of my knowledge, that rule was followed to the letter in this past election. There have been all sorts of allegations about this or that or the other, but I have yet to see anybody who can give us concrete evidence that that rule was violated.

ECF 271-2 at 16:7-15, 19:1-7. *See also* ECF 271-6 at 99:10-100:11, 101:17-102:2.

49. When asked whether there had been any fraud or other issues with drop boxes, Baxley acknowledged there was no evidence of fraud. ECF 271-2 at 5:22-6:16 ("I don't know that I would have the evidence chain to present to you"), 13:3-13:16 ("the challenge is that you don't know what you don't know"); ECF 271-6 at 63:13-64:15 ("It's not that I found something terrible that we need to fix a debacle."), 64:20-66:6 (agreeing "there is not a problem, there never has been, that is what the supervisors of elections have said"), 94:8-95:7 ("I'm not trying to present a case that there's a problem").

50. When the provision was on the floor, Baxley asserted that it would prevent vandalism of ballots deposited in boxes, but then conceded he had no evidence of vandalism either. ECF 271-9 at 66:11-67:9,73:12-74:6 ("I assure you, that is a regular phenomenon that happens"), 74:8-20 (when challenged to identify a single place where there was vandalism, Baxley responded "No sir"). *Cf.* ECF 271-6 at 63:13-19 (Bracey noting that the SOE association "has said there has been no vandalism whatsoever"); ECF 271-32 at 43:4-6, 132:21-133:2; ECF 271-34 at 72:9-11.

51. During the course of debate, the legislature rejected ten separate amendments that would have mitigated Section 28. *See* ECF 271-9 at 49:7-23, ECF 271-12 at 85:16-87:5, ECF 271-15 at 17:5-12 (proposals allowing video surveillance), ECF 271-9 at 52:11-18,53:6-10 (proposal allowing drop boxes to be

designated less than 30 days before election), *id.* at 54:5-8,55:15-24,56:3-11 & ECF 271-14 at 8:5-22 (proposals eliminating SOE penalty); ECF 271-12 at 88:6-17 (funding for SOE to increase staff), 91:16-95:23 (proposals to remove identification requirements), ECF 271-14 at 20:9-21 (SOEs can provide additional locations and hours during emergency). The legislature also rejected amendments that would promote postal service returns, such as providing prepaid return envelopes and counting ballots postmarked by election day. ECF 271-9 at 40:5-46:12, 46:23-49:1.

52. Defendants have not identified a specific interest for Section 28 distinct from the overall purpose of SB90. ECF 271-22 at No. 1.

53. Section 28's restrictions will significantly curtail the use of drop boxes. In particular, SB90 prohibits Supervisors from redeploying the 65 drop boxes that were open 24/7 during the 2020 election, as well as the 57 additional drop boxes that were available before or after the early-in-person voting period. ECF 271-27 ¶¶126-133.

54. Since the passage of SB90, Plaintiffs have either abandoned their drop box programs or planned significant modifications to their programs. For example:

a. EG will no longer organize its Souls to the Polls program around drop boxes and did not run that program for the 2021 elections. It will have to invest substantially more resources in its voter mobilization efforts. ECF 271-42 at 51:8-53:1; 72:14-74:14; ECF 271-52 at ¶¶7-8.

b. FRT will have to modify its program to educate voters as to the reduced hours and availability of drop boxes and to "empower people to feel more comfortable" because in-person monitoring is "intimidating." ECF 271-43 50:14-54:1,55:24-57:25.

c. Poder expects to have to expend staff time and resources to research drop box hours of operation and to "coordinate transportation for those voters" to be able to access drop boxes when they are open. The restricted hours "will be impact to voter engagement" and have a "financial impact." ECF 271-49 at 53:1-55:9,64:9-66:21.

d. MF expects to incur additional expense from its "Rides to the Polls" program because drop boxes are less convenient and further away. ECF 278-1 ¶11.

4. SB90's Polling Place Assistance Restriction ("Section 29")

55. As another response to Florida's history of long lines, particularly in heavily Black and Hispanic precincts, Plaintiffs FRT, Equal Ground, Hispanic Federation, Poder Latinx, Sant La, and Mi Familia run programs to assist voters at polls. ECF 271-40 at 51:19-53:19,56:5-21; ECF 271-42 at 45:12-46:8,66:17-67:11; ECF 271-43 at 59:13-62:8,75:23-80:12; ECF 271-44 at 23:23-24:6,27:17-28:1,44:23-45:19; ECF 271-49 at 45:19-46:24; ECF 271-51 at 79:10-80:15,81:19-82:6,115:8-117:19; ECF 271-52 ¶¶19-22; ECF 271-53 ¶¶5,10-11. Some Plaintiffs provide language assistance. ECF 271-40 at 51:19-53:19,56:5-21; ECF 271-49 at 45:24-46:24,; ECF 271-51 at 79:21-80:10,115:8-117:3; ECF 271-53 ¶5; ECF 271-54 ¶¶7-9,11-13. MF and HF provide assistance to voters with disabilities. ECF 271-55 at ¶21; ECF 271-53 ¶5. And some Plaintiffs provide assistance to voters in line, such as water, food, chairs, or umbrellas. ECF 271-42 at 45:12-46:8; ECF 271-43 at 59:13-62:12,76:17-77:6; ECF 271-44 at 23:23-24:6,27:17-28:1,44:23-45:6; ECF 271-51 at 79:10-80:15,81:13-82:17,117:5-19; ECF 271-53 ¶¶5,10-11; ECF 271-58 ¶¶13-15. Plaintiffs previously conducted voter

assistance activities within 150 feet of polling places and other voting sites. ECF 271-40 at 52:19-53:19 (language assistance in polling site); ECF 271-43 at 61:12-62:12 (assistance within 150 feet of polling place); ECF 271-44 at 27:17-28:1 (assistance provided 100 feet from polling center); ECF 271-49 at 45:24-46:24 (assistance provided 50 feet from polling location); ECF 271-51 at 81:19-82:6,116:22-117:19 (providing refreshments and language assistance within 100 and 150 feet of polling location, respectively); ECF 271-53 ¶¶ 10-11 (providing refreshments taken inside the non-solicitation zone by voters in line); ECF 271-54 at ¶¶ 7-9,11 (language assistance within 50 feet of polling location); ECF 271-55 at ¶¶ 17-18 (providing food 100 feet from polling location).

56. Plaintiffs engage in this voter assistance to encourage individuals to vote and to communicate the importance of participating in the political process. ECF 271-40 at 54:12-20; ECF 271-42 at 46:18-25; ECF 271-43 at 59:22-60:1; *id*. at 65:3-9; ECF 271-49 at 46:4-8 55:10-21 ("[W]e are influencing voters to stay in line in a nonpartisan manner."); ECF 271-51 at 80:11-15 ("[W]e help people to stay in line.").

57. While Florida previously prohibited the "solicitation" of voters at a polling location, "solicitation" was defined as "seeking or attempting to seek any vote, fact, opinion, or contribution; distributing or attempting to distribute any political or campaign material, leaflet, or handout; conducting a poll except as specified in this paragraph; seeking or attempting to seek a signature on any petition;

and selling or attempting to sell any item." Fla. Stat. §102.031(4)(b) (2020). The prohibition did not encompass the provision of nonpartisan assistance at the polls, and many Plaintiffs provided various forms of nonpartisan assistance prior to SB90's enactment. *See* SOF 5.

58. Section 29 expanded the definition of "solicitation" to include "engaging in any activity with the intent to influence or effect of influencing a voter." Fla. Stat. §102.031(4)(b).

59. Section 29 was repeatedly criticized for making voting more difficult, *see, e.g.*, ECF 271-3 at 65:11-66:6; ECF 271-6 at 36:23-37:9,38:12-39:2,107:7-21; ECF 271-7 at 5:3-19; ECF 271-12 at 40:13-41:6,49:17-50:12; ECF 271-13 at 40:20-41:21; for disproportionately impacting Black and Hispanic voters who face long lines, ECF 271-26 ¶¶128-29; ECF 271-7 at 21:7-23:7; ECF 271-9 at 100:6-22; ECF 271-11 at 16:18-19:8,52:17-57:16,81:5-84:5; ECF 271-14 at 35:14-38:19; and for being "too vague," ECF 271-13 at 40:20-41:2.

60. During debate, sponsors took shifting—and conflicting—positions on what the provision means. Baxley displayed his confusion on April 14 when asked whether the bill would prohibit giving a bottle of water. He responded: "I would say not. But yeah, I guess it could be. I guess I should answer that yes … I guess technically yes." ECF 271-6 at 70:7-23. A week later, Baxley changed his mind and stated that he could "ensure, unlike other states, that a glass of water given in sincerity is not a violation of the law." ECF 271-8 at 10:3-16.

61. Similarly, when asked whether the law would ban giving water, Ingoglia initially seemed to indicate the answer was no; he stated that the provision "boils down to" a prohibition on "campaigning on line." ECF 271-7 at 23:13-24:14. At other times, he took a harder line, emphasizing that only Supervisor employees were allowed to provide *anything* to voters in line. *See, e.g.*, ECF 271-12 at 5:4-14; *id*. at 39:10-41:6 (only "an elections office can hand out that stuff"); ECF 271-3 at 2:18-2:13) ("Extends the no solicitation zone to 150 feet, and prohibits giving anything like food or beverage to voters"). And he stated that this assistance could be an attempt to "influence" voters in line. ECF 271-12 at 43:16-44:11 ("I think [providing water and pizza to voters] would run afoul of the language"); *id*. at 54:19-55:9 ("My only worry is people trying to influence voters").

62. The Supervisors—the parties responsible for enforcing Section 29[1]—largely testified that they understood this statute to require broad restrictions on polling-place assistance, including a ban on *all* interactions between nonpartisan organizations and voters within 150 feet of the polls. For example, Defendant Hays stated: "[I]nside that 150-foot radius, nobody is allowed to interact with them except the election workers themselves." ECF 271-29 at 130:16-131:8. Defendant Doyle similarly testified: "No one is supposed to interact within the no-solicitation zone." ECF 271-34 at 82:7-14; *see also* ECF 271-28 at 77:9-21,101:18-102:3 (calling

[1] *See* ECF 201 at 25-26.

provision "vague" and stating that all activity is banned "because it's impossible … to discern what is partisan and what is non-partisan activity"); ECF 271-32 at 170:9-18 (all activity banned because he does not "have any idea what that person is talking to the voter about"); ECF 271-39 at 57:4-58:14 (same).

63. When explaining the purpose of Section 29, Ingoglia initially stated that his concern was with *candidates* "giving and soliciting voters in the line," since voters are "more apt to think about voting for [those candidates]." ECF 271-3 at 101:23-102:7). Baxley also emphasized the purpose was to prevent electioneering—*i.e.*, "to protect voters from unwanted solicitation or intimidation as they approach the polls." ECF 271-9 at 4:12-23. He further stated: "[T]his bill is not Georgia 2.0. All we're doing in this bill is clarifying that seeking votes, distributing campaign materials, and giving or attempt[ing] to give items to voters is prohibited within 150 of polling places, early voting sites, and drop box locations." *Id*.

64. Secretary Lee stated in discovery that Section 29 "serves the State's interest in curbing harassment, intimidation, and undue influence at the polls; it seeks to *prevent* a chilling effect on the exercise of the franchise." ECF 271-22 at No. 1. But during debates, Ingoglia was unable to identify any instance where a voter was "getting harangued or harassed around the boxes." ECF 271-12 at 50:14-51:14.

65. The Secretary's representative similarly did not testify to any complaints from voters about polling-place assistance, despite her stated purpose for Section 29. Neither did Defendant Hays. By contrast, Defendant Doyle and other

supervisors testified to the lack of fraud, intimidation, or undue influence from nonpartisan groups or individuals conducting line warming activities. ECF 271-29 at 83:18-86:11 (Defendant Doyle testifying to a lack of problems or issues with nonpartisan line warming relief in his county); ECF 271-28 at 80:21-81:2 (Defendant White "unaware" of any problems with non-partisan groups handing out water at polling places or any other disruptions).

66. The Secretary's representative testified that the provision should be construed more narrowly than the sponsors or Supervisors construe it. Specifically, she stated the provision should be interpreted as barring only activities that constitute "harassment, intimidation and undue influence." ECF 271-45 at 160:2-5, 161:4-12. When asked whether "encouraging a voter to stay in line to vote without discussing any candidate or issue" would be prohibited, she said the answer was no—"as long as it's not intending, it's not harassing them, you are not trying to solicit them in any way." *Id.*

67. During debates, the legislature rejected three amendments that would have mitigated the effect of Section 29. *See* ECF 271-6 at 36:18-39:9, ECF 271-14 at 9:1-18 (proposing Good Samaritan amendments to allow nonpartisan civic organizations to provide assistance, food, or water to people on line), ECF 271-9 at 33:7-35:11 (proposing to keep zone at 100 feet).

68. Since the passage of SB90, all Plaintiffs have revisited their poll assistance programs and concluded that they can no longer provide certain forms of assistance previously provided:

a. FRT believes that SB90 prevents "organizations from handing out water and food and other items." It will have to "make some real assessments" about whether they can provide assistance, and will have to "develop" "new strategies and technologies" to encourage voters to stay in line to vote. ECF 271-43 at 67:7-25,76:17-80:12; ECF 271-46 at 67:10-23; ECF 271-58 ¶¶ 18-22.

b. HF is "reassessing" whether it will engage in voter assistance activities (language assistance, disability assistance, and distributing refreshments) and is "not sure if [they] will be able to continue" providing any assistance. It is assessing alternative strategies, such as expending more money on voter education to promote its assistance activities outside the zone. It has had to "shift resources away from other programmatic activities and required it to overhaul, and in some cases, dismantle its programming as a result of new restrictions on assisting voters." ECF 271-51 at 67:4-17,69:15-21,99:25-100:15,105:1-16; ECF 271-53 at ¶¶6,12,23.

c. MF has not handed out food or water in any elections since SB90 passed, and is concerned that Section 29 will "not allow us to help the voters like we did in 2020." ECF 271-44 at 30:7-17,35:4-9,42:17-20.

d. EG has concluded that providing food and water is "not something we'd be able to do," has "majorly pull[ed] back [their] musical and live entertainment" events at polls, and has been "hindered" in providing other types of assistance because they have "to stay much further away from polling locations." ECF 271-42 at 45:12-46:8,53:2-18,58:16-59:5,68:18-71:2,72:14-73:4; Burney-Clarke 1st Decl. ¶¶19-20,23.

e. Poder has concluded that it is "no longer able to provide language access support to voters that are in line" and is less able to provide voting rights support; it has also had to update its training and outreach materials. ECF 271-49 at 54:22-24,55:10-56:10,69:12-24; Garces 1st Decl. ¶13.

LEGAL STANDARD

Summary judgment is appropriate where the moving party demonstrates that "there is no genuine dispute as to any material fact" and the moving party is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In determining whether summary judgment is appropriate, courts may not "weigh the evidence," "find facts," or "make credibility determinations." *Ga. State Conf. of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336, 1343 (11th Cir. 2015).

ARGUMENT

I. PLAINTIFFS HAVE STANDING

A plaintiff establishes standing if they have (1) suffered an injury-in-fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Defendants do not challenge traceability or redressability, and this Court has concluded these elements are established. *See* ECF 245-1 at 6-22; ECF 201 at 25-28 & n.5 (traceability analysis), *id.* at 31 (redressability analysis).

Defendants articulate an unduly narrow standard for injury-in-fact, insisting that organizational injury can only be shown if the organization identifies the specific activities it "would divert resources away from in order to spend additional resources on combatting" illegal acts. ECF 245-1 at 6. That is incorrect. An organization can demonstrate an injury-in-fact when the challenged conduct "impedes its ability to attract members, to raise revenues, or to fulfill its purposes." *Florida Democratic*

Party v. Hood, 342 F. Supp. 2d 1073, 1079 (N.D. Fla. 2004) (emphasis added) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). Injury can also be established where the defendant's actions "impair the organization's ability to engage in its own projects." *Arcia v. Florida Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014); *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1165 & n.14 (11th Cir. 2008) (standing established when an organization's "ability to conduct specific projects during a specific period of time will be frustrated").

As the Eleventh Circuit has emphasized, even a small impairment—an "identifiable trifle"—is sufficient to confer standing. *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009).

In addition to organizational standing, a membership organization, such as FRT, has associational standing to sue "on behalf of its members." *Greater Birmingham Ministries v. Sec'y of State of Ala.* ("*GBM*"), 992 F.3d 1299, 1316 (11th Cir. 2021).

Plaintiffs may establish standing at summary judgment by affidavit or other means specific facts to support their standing claim. *See Lujan*, 504 U.S. at 563 (emphasis added) (citing *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972)). Despite Defendants' selective citation of the record and precedent, Plaintiffs have established standing as to each of the challenged statutory provisions.

A. Plaintiffs Have Standing to Challenge Section 7

As this Court recognized, "both the Plaintiffs' diversion of resources and First Amendment injuries are cognizable injuries-in-fact" for standing purposes. ECF 201 at 16. Here, as established at deposition and through declarations, the Plaintiffs that run voter registration programs identify how they each are injured by Section 7. *See* SOF 23(a-e). Each describes impairment of its registration programs because of the compelled disclosures. SOF 23(a-e). FRT, Unidos, HF, MF, and Poder have all had or expect to have to overhaul their programs, including hiring additional compliance staff to ensure timely delivery to the correct location and/or additional outreach staff to counteract the disclaimer's chilling effect on registration activities. SOF 23(a-e). Poder and MF have confirmed that the disclaimer is "disengaging voters" and have budgeted for extra costs, SOF 23(d,e); Unidos, FRT, and HF did not run registration programs for the 2021 election and anticipate it will be much more difficult to run programs and will require additional staff, SOF 23(a-c); EG has concluded that it will no longer conduct its registration program because of the chill and cost, SOF 34(f). Each organization has faced an unwanted demand on resources, which has frustrated their programming and required them to shift or add resources to meet their goals. *See Fla. State Conference of NAACP v. Browning*, 522 F.3d at 1165.

B. Plaintiffs Have Standing to Challenge Section 28

The Plaintiffs that ran voter education, mobilization, and turnout programs (SOF 42) have standing on the grounds that they need to cancel or overhaul elements

of their programs because of the drop box restrictions in Section 28. *See* SOF 54(a-c). EG had organized its signature Souls to the Polls program with events around drop boxes, but suspended it for 2021. EG instead shifted substantially more resources into its voter education efforts, starting its campaign two months earlier than planned. SOF 54(a). FRT will conduct more intensive education and turnout programs because of the potential chill from in-person supervision. SOF 54(b). Poder expects to incur additional expenses, including more staff time to identify when drop boxes are open and to transport voters during the reduced hours. SOF 54(c). The diversion of resources and the cancellation of previous programming are paradigmatic injuries. *See Arcia,* 772 F.3d at 1341 ("Under the diversion-of-resources theory, an organization has standing to sue when a defendant's illegal acts impair the organization's ability to engage in its own projects by forcing the organization to divert resources in response"); *Fla. State Conference of NAACP v. Browning*, 522 F.3d at 1165 ("[A]n organization suffers an injury in fact when *a* statute 'compel[s]' it to divert more resources to accomplishing its goals.") (emphasis added) (citation omitted).

C. Plaintiffs Have Standing to Challenge Section 24

The Plaintiffs that included VBM campaigns in their education, mobilization, and turnout programs (SOF 24) have standing to sue on the grounds that they need to overhaul those campaigns due to the potential chill and difficulty of complying with Section 24. SOF 39. Separately, FRT has identified members whose voter

registration records do not include a required identification number and who therefore will not be able to request VBM ballots. ECF 271-58 ¶29. Each of the Plaintiffs that runs VBM campaigns noted voters may be hesitant to provide personally identifying information and, accordingly, they will expend additional resources to encourage voters to request ballots. SOF 34 (*e.g.*, Sant La anticipates that a process that previously took 10 minutes will now take 30-45; Poder reports it is "now a more onerous process to get voters to provide their Social Security Number, last four of their social or their Florida ID or their driver's license number"). Section 24 thus frustrates Plaintiffs' VBM campaigns and requires them to add resources to meet their goals, which is sufficient to establish standing. *See Fla. State Conference of NAACP v. Browning*, 522 F.3d at 1165.

D. Plaintiffs Have Standing to Challenge Section 29

The Plaintiffs that run at-poll voter assistance programs (election protection, language assistance, and "line warming," SOF 55) have standing because they need to cancel or overhaul these programs and plan to divert resources into other voter education and alternative assistance measures because of Section 29. EG has stopped providing food and water, suspended its Souls to the Polls events, and has been "hindered" in providing other forms of assistance because of the increased distance from polling locations. SOF 68(d). FRT believes it can no longer hand out "water and food and other items" and has had to develop "new strategies and technologies" to encourage "people [to] stay in line and vote." SOF 68(a). HF is "reassessing" all

of its at-poll activities (language assistance, disability assistance, and providing refreshments) and examining alternative strategies, including investing more on voter education. SOF 68(b). And Poder has concluded that it is "no longer able to provide language access support to voters that are on line." SOF 68(e). All of this constitutes cognizable injury-in-in fact under *Arcia* and *Browning*, since it "frustrates" these organizations' purposes and "impairs [each] organization's ability to engage in its own projects." *Arcia*, 772 F.3d at 1341. These injuries far exceed the "small injury" and "identifiable trifle" the Eleventh Circuit has held is sufficient to confer standing. *Common Cause/Ga.*, 554 F.3d at 1351.

II. THERE ARE DISPUTED ISSUES OF MATERIAL FACT ON PLAINTIFFS' INTENTIONAL DISCRIMINATION CLAIMS

A law that has a racially discriminatory purpose and discriminatory effect violates the Fourteenth and Fifteenth Amendments, as well as Section 2 of the VRA, even if the law is facially neutral. *See GBM*, 992 F.3d at 1321; *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 220 (4th Cir. 2016) (facially neutral laws can be "just as abhorrent, and just as unconstitutional, as laws that expressly discriminate on the basis of race"). Racial discrimination need not be the "dominant" or "primary" reason for the law's enactment; if it was a "motivating" factor, the law is unconstitutional. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

Defendants concede the *Arlington Heights* framework governs Plaintiffs' intentional discrimination claims. Mot. 23. But they incorrectly suggest that *Brnovich v. DNC*, 141 S. Ct. 2321 (2021), somehow modified this standard by making discriminatory intent impossible to prove where the challengers "mostly complain[] about the 'usual burdens of voting.'" Mot. 23 n.6. *Brnovich* held only that the size of the burden imposed by a voting rule is relevant to assessing a discriminatory *results* claim under Section 2. 141 S. Ct. at 2338. As this Court has recognized, nothing in the Court's "abbreviated discussion of section 2 *intent* claims" altered the *Arlington Heights* standard. ECF 201 at 50 n.10 (emphasis added). Similarly, Defendants rely heavily on *GBM*'s suggestion that proving legislative intent is a "near-impossible challenge." Mot. 28. But the Supreme Court has long recognized that even if the task is "inherently complex," it is not insurmountable. *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999). *Brnovich* itself reaffirms that a factfinder, reviewing all the record evidence, can determine whether a law was enacted with discriminatory intent. 141 S. Ct. at 2348-50.

Accordingly, this case "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266; *see also City of Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1552 (11th Cir. 1987).

A court must consider at least the following factors:

> (1) the impact of the challenged law; (2) the historical background; (3) the specific sequence of events leading up to its passage; (4) procedural and substantive departures; ... (5) the contemporary statements and actions of key legislators[;] ... (6) the foreseeability of the disparate impact; (7) knowledge of that impact, and (8) the availability of less discriminatory alternatives.

GBM, 992 F.3d at 1322 & n.33; *see* ECF 201 at 50-51 (recognizing these factors are non-exhaustive). Because "[l]egislative motivation or intent is a paradigmatic fact question," *Veasey v. Abbott*, 830 F.3d 216, 230 (5th Cir. 2016) (en banc), "summary judgment is not often granted" in cases alleging racially discriminatory intent, *GBM*, 992 F.3d at 1317.[2] Here, because there is ample evidence to support a finding of discriminatory intent and material issues of fact abound, summary judgment is inappropriate.

1. The contemporaneous statements of key legislators provide evidence that SB90 serves no valid state interest.

Proof that a defendant's non-discriminatory justification for his or her actions "is unworthy of credence" is "one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000). In the voting context, courts have inferred discriminatory intent where the state offered "unpersuasive non-racial explanations" for a challenged provision. *McCrory*, 831 F.3d at 230, 238; *see also*

[2] In *GBM*, the court ruled on a motion for summary judgment, but did so in reliance on a voluminous set of "Undisputed Material Facts" filed jointly by the parties. 992 F.3d at 1318. Here there are disputes of material facts as to each of Plaintiffs' claims.

Stout by Stout v. Jefferson Bd. of Educ., 882 F.3d 988, 1008-09 (11th Cir. 2018) (finding discrimination despite proffered nondiscriminatory justification).

Statements by Florida legislators are probative of discriminatory intent because they failed to provide reasonable explanations for how the challenged provisions of SB90 serve a valid state interest. First, despite describing SB90 as a necessary election integrity measure, supporters of SB90 (including Secretary Lee) repeatedly praised existing election laws in Florida and admitted that the 2020 election in Florida ran "smoothly" and was a "model" for the country. SOF 5. Conversely, supporters of the bill could not identify any fraud that occurred in Florida in 2020 that SB90 addresses. Secretary Lee told the legislature she was not aware of "any instance of fraud" involving VBM ballots, SOF 32; Baxley expressly disclaimed that the purpose of the bill was to prevent VBM fraud, SOF 9, and repeatedly acknowledged that there was no fraud with drop boxes, SOF 49; and Ingoglia explained only that the legislature should not "rest on our laurels" and that the legislation was intended to address "problems that happened in other states," SOF 9.

Throughout debate, SB90's supporters were accused of, and essentially admitted to, SOF 9, "contriv[ing] a problem in order to impose a solution." *McCrory*, 831 F.3d at 230, 238. Notably, SB90's sponsors rejected an amendment directed at preventing an instance of election fraud that *did* occur in Florida's 2020 election: running a sham third-party Senate candidate to siphon votes from an opponent. ECF

(Kousser Supp. Rep. ¶¶37-39); ECF 271-14 at 10:16-21; ECF 271-12 at 52:1-53:7. This evidence undermines SB90's purported purpose of enhancing election integrity and creates an inference of discriminatory intent, particularly when juxtaposed with other circumstantial evidence discussed below.

2. SB90 has a disproportionate impact on Black and Latino voters.

In analyzing discriminatory intent, courts also examine the impact of the challenged law, *see GBM*, 992 F.3d at 1322, including whether "the *cumulative* impact of the challenged provisions … bear[s] more heavily" on Black and Latino voters, *McCrory*, 831 F.3d at 231 (emphasis added). Defendants wrongly assert (Mot. 24) that Plaintiffs must demonstrate "a pattern, unexplainable on grounds other than race" in order for the law's impact to be evidence of discriminatory intent. As this Court has recognized, that standard applies only when a plaintiff relies *solely* on disparate impact as the basis for finding racial discrimination. ECF 201 at 52; *see also McCrory*, 831 F.3d at 231 ("[s]howing disproportionate impact, even if not overwhelming impact, suffices to establish *one* of the circumstances evidencing discriminatory intent").

Plaintiffs' evidence, at minimum, creates a factual dispute as to whether the challenged provisions have a disproportionate impact on Black and Latino voters. Contrary to Defendants' assertion (Mot. 7, 24-25, 35, 44), Plaintiffs have quantified the disparate impact. Plaintiffs' expert Dan Smith—nowhere mentioned in

Defendants' motion—presented quantitative evidence substantiating that each of the challenged provisions has a disparate impact. *See generally* ECF 271-27. With regard to Section 24, Smith noted:

- Of post-2006 registrants who cast ballots in 2016, but did not "have a valid ID on file with the Division of Elections that would allow them to obtain a VBM ballot under SB90, 30.3% were Black, 21.5% were Hispanic … and just 13.7% were white";
- Since 2016, there have been "twice, and sometimes three times, as many new Black registrants as white registrants who were able to register without providing a driver's license or a Social Security number";
- In the 2020 general election, 37.5% of the registered voters with no IDs on file with the Florida Division of Elections cast a VBM ballot, suggesting that a significant portion of Black and Hispanic voters would be affected by SB90's VBM ID requirements.

Id. ¶¶89-92.

Regarding Section 7, Smith found that Black and Hispanic voters "disproportionately rely on 3PVROs when registering to vote," noting that at least 10.9% of Black and 9.6% of Hispanic voters registered through a 3PVRO, compared to only 1.87% of white voters. SOF 14. Plaintiffs are already seeing the impact of mandatory disclosures resulting in individuals declining to register. SOF 23.

Smith found that the Section 28 restrictions on drop box days were also likely to have a disparate impact on Black and Hispanic voters; that in one county Black voters were more likely than whites to use a drop box on a day prohibited by SB90; and that in another county Black and Hispanic voters were approximately 18 percent more likely to use a drop box after hours. ECF 271-27 ¶¶147-48, 155-57. Smith has quantified the number of drop boxes that will be impacted by SB90, SOF 53, and noted that because voters of color are more likely to drop off ballots after hours, they will suffer a disparate impact. SOF 44, ECF 271-27 ¶¶202-205.

Smith also found that the Section 29 at-poll assistance restrictions were more likely to impact Black and Hispanic voters noting studies finding that nonwhite voting locations are associated with wait times approximately double that at predominantly white locations. SOF 40. Another study found that in the 2016 general election, voters in predominantly Black neighborhoods were 74% more likely to wait in line for over a half-hour than those in predominantly white neighborhoods. ECF 271-27 ¶230. Smith also found that in the Miami-Dade 2020 general election, more than 23 percent of Black voters and nearly 24 percent of Hispanic voters, but only 17 percent of white voters, faced wait times of 30 minutes or more across five days of early voting. *Id.* ¶243.

Together, these provisions result in the kind of "cumulative" disparate impact found in *McCrory*, 831 F.3d at 231. And as explained, the extent of the disparate

impact does not have to be "overwhelming" to constitute circumstantial evidence of discriminatory intent. *Id.*

3. There is evidence that SB90's disparate impact on Black and Latino voters was foreseeable and known to legislators.

Defendants cannot plausibly claim that legislators lacked knowledge of SB90's disparate impact. During legislative debate, legislators pointed to the disparate impact on non-white voters dozens of times. SOF 9; *see, e.g.*, ECF 271-13 at 27:1-28:20 ("it will have a disparate impact on folks like me"). When challenged about SB90's racially discriminatory impact, Baxley acknowledged: "I can understand why there's a sensitivity, because we do have a history that's frightening." SOF 8.

Defendants argue the comments of a bill's opponents are irrelevant (Mot. 35-36), but courts consider exactly this type of evidence in determining whether legislators were aware of a law's disparate impacts. *See, e.g.*, *Veasey*, 830 F.3d at 236 ("[T]he Legislature was advised of the likely discriminatory impact by the Deputy General Counsel to the Lieutenant Governor and by many legislators[.]"). This Court has already recognized that there is at least some relevance to the fact that "allegedly, a majority of the Florida Legislature was repeatedly warned that SB90 would have a discriminatory effect, struggled to identify why the Act was necessary, and eventually said, more or less, 'eh, why not?'" ECF 201 at 56.

4. There is evidence of a historical pattern of racial discrimination in voting laws.

Arlington Heights instructs that "[t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." 429 U.S. at 267. Furthermore, it is well-established that "[a] longstanding general history of official discrimination against minorities has influenced Florida's electoral process." *DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1079 (N.D. Fla. 1992); *see also* ECF 271-26 ¶¶ 29-49, ECF 271-24 ¶¶ 12-88. Defendants insist that Florida's history of discrimination is irrelevant because it "predates SB90" and "does not stem from 'the precise circumstances' surrounding SB90's passage." Mot. 25. But SB90 was not passed in a vacuum; it is best understood as the latest chapter of Florida's long history of racially discriminatory voting restrictions. *See generally* ECF 271-26.

This history is detailed in the expert reports of Drs. Morgan Kousser and Sharon Austin. Dr. Austin "demonstrates that progress by Florida's Black and Hispanic voters in the form of increased participation, increased utilization of new voting methods, and election of preferred candidates has historically been met by backlash against that progress by Florida's legislature and governors." ECF 271-24 ¶3. Dozens of historical examples reveal how "'progress followed by backlash' has been a pattern since the end of the Civil War[.]" *Id.* That history includes passage of HB1355, also sponsored by Baxley, which was found to have a racially disparate impact. SOF 3.

The passage of SB90 fits seamlessly into this story of "progress followed by backlash." In the 2020 election, Black and Hispanic voters "made unprecedented use of expanded early voting opportunities" and "expanded their voting by mail and drop boxes." *Id.* ¶89. Florida responded to this increased use of early voting mechanisms "by passing SB90, which created several impediments to using these voting mechanisms, and which will plainly affect Black and Hispanic voters far more than white voters." *Id.* ¶93. This is precisely why opponents repeatedly invoked Florida's "long dark history of voter suppression," ECF 271-3 at 73:7, and warned that SB90 would be "continuing that legacy," ECF 271-6 at 121:5-7, as "the modern day version of voter suppression in the State of Florida." ECF 271-11 at 10:24-11:2.

"[A]ddressing intentional discrimination does not require kid gloves." *League of Women Voters of Fla., Inc., v. Detzner*, 314 F. Supp. 3d 1205, 1222 (N.D. Fla. 2018) (comparing a 2014 Florida election rule to an analogous 1910 Oklahoma voting restriction). Racial discrimination in Florida cannot be credibly characterized as a vestige of the past; "the history of Florida politics is rife with examples of racial discrimination" that "continue in the extremely recent past." ECF 271-26 ¶50). Viewed in light of this pattern, "SB90 is best understood as a backlash to Black and Hispanic turnout in 2020," ECF 271-24 ¶96), which supports an inference of discriminatory intent.

5. There is evidence of racial discrimination in the sequence of events leading to SB90.

"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. Of particular significance here is Florida's history of expanding VBM prior to SB90. In his expert report, Dr. Kousser details how, in Florida, "Republicans were—until 2020—more likely than Democrats to make use of absentee ballots. And the Republican-majority legislature after 1996 took few actions to regulate the use of absentee ballots, despite proven episodes of fraud." ECF 271-26 ¶52. In the 2020 election, the number of Black voters who used VBM doubled compared to 2016, and the number of Hispanic voters who used VBM increased as well. SOF 4. That is, SB90's increased restrictions on vote by mail came—not after increased reports of VBM fraud—but "after Democrats, especially Black[] [voters], suddenly voted by mail in larger proportions than Republicans in the 2020 election." ECF 271-26 at ¶52.

This sequence of events is all the more striking because Florida's 2020 election had been universally lauded as a "success story." *Id.* at ¶83; SOF 5. There was no "incident or condition in Florida's election of 2020 to spur such a major election change as SB90." ECF 271-26 ¶91, SOF 9. In other words, the events leading up to SB90—a successful election characterized by an increase in minority voters' use of vote by mail—are indicative of discriminatory intent.

Defendants discount the importance of increased VBM among minority voters, citing *Brnovich* for the proposition that "partisan motives are not the same as

racial motives." Mot. 26-27. But *Brnovich* did not hold that a legislature cannot harbor both partisan and racial motivations for legislation; instead, the Supreme Court merely noted that the district court had "carefully distinguished" between partisan and racial motivations. *Brnovich*, 141 S. Ct. at 2349. Here, the sponsors did not articulate "partisan" motives at all and nothing in *Brnovich* can be read to suggest that partisan motivations can never coexist with racially discriminatory intent. As other courts have observed, "acting to preserve legislative power in a partisan manner can also be impermissibly discriminatory." *Veasey,* 830 F.3d at 241 n.30; *see also McCrory*, 831 F.3d at 222 ("[I]ntentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose."). At minimum, summary judgment is inappropriate where "[r]easonable inferences from the undisputed facts can be drawn in favor of a racial motivation finding or in favor of a political motivation finding." *Cromartie*, 526 U.S. at 552.

6. There were significant substantive and procedural departures from the ordinary legislative process.

"The legislative or administrative history may be highly relevant" to showing a legislature's discriminatory intent. *Arlington Heights*, 429 U.S. at 268. A "legislature need not break its own rules to engage in unusual procedures," *McCrory*, 831 F.3d at 228; departure "from usual procedures in its consideration or enactment of the bill" may support a discriminatory purpose claim, *Allstate Ins. Co. v. Abbott*,

495 F.3d 151, 161 (5th Cir. 2007). Here, Defendants' bald assertion that "Plaintiffs identify no relevant procedural irregularities," Mot. 28, is not supported by the record. The legislature repeatedly deviated from normal procedures to rush through the bill over numerous objections. SOF 10(a-f); ECF 271-26 ¶144.

These departures were significant. First, unlike in prior election reform efforts, the Supervisors of Elections—a key constituency because of their role administering elections—were largely excluded from the initial drafting of SB90. SOF 10(c). The Supervisors opposed the bill, SOF 10(e), and the sponsor lied about their position, SOF 10(f).

Second, there were significant restrictions on public testimony about the bill, including severely circumscribed time limits. SOF 10(b). These restrictions cannot possibly be attributed to the pandemic (*contra* Mot. 3); the legislature forced members of the public to testify in person at the Leon County Civic Center, rather than from the safety of their homes.

Third, debate in committees was truncated as well, with individual legislators being given as little as 30 seconds to speak. SOF 10(a).

Fourth, "strike all" amendments were repeatedly passed with minimal deliberation, particularly in the last three days of the session when a replacement bill was introduced and passed in 64 minutes. SOF 10(c); Kousser Rep. ¶144. Defendants insist that "strike alls" are a frequently used tool in the normal legislative process. Mot. 29. Even if true, Defendants point to no situation remotely comparable

to this one, where, on a matter of the utmost public importance, the legislature used "strike alls" to rush replacement provisions through with minimal debate. SOF 10(c). These tactics were repeatedly used in the final days before SB90's enactment; indeed, a replacement bill was introduce at 1:33 am on April 27, 2021 in the House and passed the following evening in the House; a separate strike all was introduced on April 29 and passed the Senate a few hours later; and that bill was passed through the House in 64 minutes, over complaints that there had been "less than three hours" to review "a 48 page document." ECF 271-14 at 34:3-17, 38:10-39:22. The fact that the bill changed so much in the last few days of the legislative session is not only a significant substantive and procedural departure; it also impeded meaningful public participation. ECF 271-26 ¶144.

Finally, despite the bill's importance and the late changes, final debate on the bill lasted only 64 minutes in the House. SOF 10(c). All in all, "minorities and the public were essentially shut out of the process of crafting and passing SB90." ECF 271-26 ¶144.

These procedural irregularities suggest that "improper purposes [were] playing a role" in the legislative process. *See Arlington Heights*, 429 U.S. at 267.

7. The legislature rejected less discriminatory alternatives.

The legislature passed SB90 notwithstanding repeated warnings that its impact would disproportionately harm Black and Hispanic voters. SOF 8. Worse still, the legislature "passed the bill without adopting a number of proposed ameliorative

measures that might have lessened this impact." *Veasey*, 830 F.3d at 236. The legislature rejected multiple amendments that would have reduced the potential discriminatory impact of the bill. SOF 11,20,35,51,67; ECF 271-35 ¶¶37-39.

Defendants cite *Brnovich* for the proposition that "a State is not required to show that 'a less restrictive means would not adequately serve the State's objectives,'" Mot. 37, but this Court has already rejected Defendants' suggestion that *Brnovich* "sought to edit a factor out of the *Arlington Heights* standard," ECF 201 at 50 n.10. Under *Arlington Heights*, it is highly relevant that proponents of SB90 actively defeated amendments that would have limited SB90's discriminatory impact against Black and Hispanic voters. The repeated failures to adopt a less discriminatory law "shed[s] some light on the decisionmaker's purposes" to discriminate against minority voters. *Arlington Heights*, 429 U.S. at 267.

In sum, Plaintiffs have offered evidence that SB90 intentionally discriminates against Black and Hispanic Floridians. These are disputes of material fact that defeat Defendants' motion.

III. THERE ARE DISPUTED ISSUES OF MATERIAL FACT REGARDING PLAINTIFFS' SECTION 2 RESULTS CLAIM

VRA Section 2 prohibits any law or practice that "*results* in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color," regardless of motivation by discriminatory intent. 52 U.S.C. § 10301(a) (emphasis added); *see Chisom v. Roemer*, 501 U.S. 380, 383-84 (1991). As this

Court has explained, a Section 2 violation occurs "when minority voters are denied 'meaningful access to the political process[.]'" ECF No. 201 at 43. A court must examine the "totality of the circumstances" to determine whether Section 2 is violated. 52 U.S.C. § 10301(b).

Defendants argue *Brnovich* requires the Court to identify any "*unusual* burdens" on voting and then "weigh[] those burdens against the State's interests." Mot. 40. That is simply not the case. *Brnovich* reaffirmed that Section 2 claims are highly fact-dependent and require consideration of "any circumstance that has a logical bearing on whether voting is 'equally open' and affords equal 'opportunity'" to members of minority groups. 141 S. Ct. at 2338. Relevant circumstances may include the factors set forth in the 1982 Senate report and *Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986), including the history of voting-related discrimination and the persistent effects of discrimination on members of minority groups. *See* S. Rep. No. 97-417, at 28-29 (1982); *see Brnovich*, 141 S. Ct. at 2340 (noting that *Gingles* factors should not be "disregarded"). Other relevant circumstances include the non-exhaustive list of *Brnovich*'s "guideposts," including the size of the burden, the size of the disparate impact, and the strength of the state interests. 141 S. Ct. at 2338-40. As this Court has stated, "no one factor controls"; "[e]ven at trial, failure on some factors is not dispositive." ECF 201 at 44, 46; *see also Gingles*, 478 U.S. at 45 (Congress did not intend that "any particular number of factors be proved, or that a majority of them point one way or the other").

Applying these factors, there is ample evidence that SB90 will deny minority voters equal and meaningful access to the political process. Summary judgment on this claim is therefore unwarranted. *See Ga. State Conf. of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336, 1348 (11th Cir. 2015) (summary judgment "presents particular challenges" in Section 2 cases due to "fact-driven nature" of the analysis).

A. There Are Triable Issues of Fact as to Whether the Challenged Provisions Have Discriminatory Effects

1. There are triable factual issues as to the *Gingles* factors.

There are triable fact issues as to many *Gingles* factors, especially 1 and 5, the factors most relevant under *Brnovich*.

For factor 1, Florida's long history of racial discrimination in voting is well-documented. SOF 1-3; ECF 271-26 ¶¶ 29-49, ECF 271-24 ¶¶ 12-88. This "history of voting-related discrimination in the State" is sufficient to put the first factor in dispute. *See Gingles*, 478 U.S. at 44.

For Factor 5, there is ample evidence that "minority group members bear the effects of past discrimination" in various areas of life. *Gingles*, 478 U.S. at 45 (citing S. Rep. No. 97-417, at 28-29). Discrimination in education, employment and health are reflected in lower income, less access to driver's license, ad less access to jobs with flexible hours for Black and Hispanic Floridians, all of which impedes access to voting, especially under SB90's new restrictions. ECF 271-26 ¶¶135-37,160,163-65. *See, e.g.*, *Meek v. Metro. Dade Cty., Fla.*, 805 F. Supp. 967, 979 (S.D. Fla.

1992), *aff'd in part, rev'd in part*, 985 F.2d 1471 (11th Cir. 1993) (finding "a history of discrimination" against Black plaintiffs "in areas such as housing" relevant to *Gingles* Factor 5).

There is also evidence of other relevant factors under the totality of the circumstances, including that voting continues to be racially polarized (factor 2), use of voting procedures that enhance the opportunity for discrimination (factor 3), continuing racial appeals in elections (factor 6), and the extent to which minorities have been elected to office (factor 7). ECF 271-26 ¶¶156-165.

2. There are triable factual issues as to the *Brnovich* guideposts.

The record similarly reflects issues of material fact as to the *Brnovich* guideposts.

a. ***Size of the burden.*** The burdens imposed by SB90 exceed the "usual burdens of voting," even considering the other "opportunities" for people to vote. In *Brnovich*, the Court found that Arizona's requirement that voters must vote in their assigned precinct constituted no more than the "usual burdens of voting." 141 S. Ct. at 2344. In making that determination, the Court emphasized that the State had "made extensive efforts to reduce [the] impact on the number of valid votes ultimately cast." *Id.*

In contrast, the burdens imposed by SB90 are significantly heightened by the fact that the State has made little effort to reduce impacts on voters. For example,

Section 29 allows only SOE staff to render aid to voters standing in long lines, yet the legislature did not mandate such assistance and provided no funding to enable SOE staff to offer help. ECF 271-12 at 41:8-16. Similarly, regarding Section 24's VBM application restriction, legislative and the Secretary's staff recognized that voters may not know which identification number they provided when they registered to vote. SOF 36,37. But rather than accommodate such voters, the Secretary has decreed that there will be "no exceptions" to the exact-match requirement. SOF 27.

In *Brnovich*, the Court highlighted the various ways Arizona voters could vote early even if they could not vote on election day in their assigned precinct. 141 S. Ct. 2344. The "easy ways to vote" highlighted by the Court included the option of being placed on a permanent VBM list, an option which SB90 prohibited. *Id.* Furthermore, the provisions challenged here are distinguishable from those the Court found to be non-discriminatory in *Brnovich* because here they burden practically every mode of voting in Florida (VBM, VBM via drop box, and voting in person) as well as the process of *registering* to vote.

b. ***Benchmarking to 1982***. In 1982, civil rights organizations challenged Florida's redrawing of districts to prevent the election of Blacks, ECF 271-24 ¶41, and it would be another eleven years before Florida sent a Black to Congress. ECF 271-26 ¶35. Thus, Florida's laws in 1982 hardly set a reasonable benchmark for assessing modern voting restrictions. But even measured against Florida's 1982

election laws, SB90 is in some respects more restrictive. For example, in 1982, the law only prohibited the distribution of campaign material or selling of any item within 100 feet of a polling place, whereas SB90 prohibits "giving *any* item to voters" within *150* feet. ECF 271-25 at 62-64.

c. ***Disparate impact.*** Defendants badly misstate the record in asserting that Plaintiffs' experts "failed to provide evidence of any facts" concerning the "extent of any disparity." Mot. 46. Defendants cite Dr. Austin's testimony (ECF 244-9), but she is one of Plaintiffs' historical experts who testified that she was not retained to analyze impact. Defendants' motion nowhere discusses the analysis by Dr. Smith, Plaintiffs' impact expert, whose report details the burdens imposed by the contested provisions. *See generally* ECF 271-27.

The disparities that Dr. Smith found do not relate to a "small and apparently diminishing portion of overall ballots cast." *Brnovich*, 141 S. Ct. at 2344. He analyzes the impact of Section 24 on VBM ballots, which composed over 40% of total ballots cast in 2020, and were far more significant for Black and Hispanic voters than in any prior election. SOF 4; ECF 271-27 ¶54 & Tab. 5). Dr. Smith notes that Section 28 impacts one of every four drop boxes deployed in 2020, SOF 53; that Section 7 impacts a registration method used to register at least 10.9% of Black and 9.6% of Hispanic voters, five times the percentage of white voters, SOF 14; and that Section 29 prevents providing assistance to voters on line, when lines in

predominantly Black neighborhoods are twice the length in predominantly white neighborhoods, SOF 40.

d. ***Strength of the state interest.*** SB90's burdens far outweigh the state interests behind it. In *Brnovich*, the Court stated that Arizona's interest in preventing fraud should not be discounted simply because "there was no evidence that fraud in connection with early ballots had occurred in Arizona." 141 S. Ct. at 2348. But as this Court recognized, "nothing in *Brnovich* suggests that the words 'voter fraud' are a mysterious and powerful incantation that instantly incinerates even the most fearsome section 2 claims." ECF 201 at 48. Here, unlike in *Brnovich*, the legislative sponsors expressly disclaimed that the purpose of the bill was to address fraud. SOF 9. Indeed, if the genuine purpose of SB90 was to combat fraud, the SB90 sponsors would not have rejected amendments targeting the sham candidate fraud that actually impacted Florida's 2020 election. Kousser Supp. Rep. ¶¶37-38; ECF 271-14 at 10:16-21; *cf. McCrory*, 831 F.3d 204 ("The photo ID requirement here is both too restrictive and not restrictive enough to effectively prevent voter fraud; '[i]t is at once too narrow and too broad.'"). The state's interests should be further discounted because, unlike in *Brnovich*, there are no "obvious disadvantages" to the plethora of less-discriminatory alternatives proposed by legislators during the SB90 debate. 141 S. Ct. at 2346; *see* SOF 11,20,35,57,67. To reject even the most innocuous of proposals to make SB90 less restrictive to voters cannot be reconciled with the state's asserted interest of election integrity.

In sum, there are genuine issues of material fact that require denial of Defendants' motion.

IV. THERE ARE DISPUTED ISSUES OF MATERIAL FACT ON PLAINTIFFS' UNDUE BURDEN CLAIM UNDER *ANDERSON/BURDICK*

Plaintiffs' claim that SB90 imposes an undue burden on the right to vote is assessed under the *Anderson-Burdick* doctrine. That doctrine requires courts to "weigh the character and magnitude of the asserted First and Fourteenth Amendment injury against the state's proffered justifications for the burdens imposed by the rule, taking into consideration the extent to which those justifications require the burden to plaintiffs' rights." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi,* 504 U.S. 428, 434 (1992)).

The fact-intensive nature of the *Anderson-Burdick* doctrine makes it ill-suited for a ruling at the summary judgment stage. The standard "emphasizes the relevance of context and specific circumstances to each challenge" and is best "address[ed] with testimony and other direct evidence." *Cowen v. Ga. Sec'y of State*, 960 F.3d 1339, 1346 (11th Cir. 2020) (vacating grant of summary judgment). Here, summary judgment should be denied because there are material facts in dispute.

A. Defendants Misstate the Legal Standard.

Defendants argue burdens on distinct groups of voters—as opposed to voters generally—are not relevant under *Anderson/Burdick*. Mot. 52. This Court has

already considered and rejected that argument, *see* ECF 201 at 39-40 ("If anything, *Crawford* supports, not forecloses, the conclusion that disparate impact matters."); *see also Detzner*, 314 F. Supp. 3d at 1216 ("Disparate impact matters under *Anderson-Burdick*."), and Defendants make no reasoned argument for revisiting that conclusion.

Defendants also assert that Plaintiffs bear an "especially high" burden because their claim is a facial challenge; in their view, Plaintiffs cannot point to the law's burden on *some* voters to justify invalidating the challenged provisions in their entirety. Mot. 51-52 (citing *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 189 (2008)). But that argument is inconsistent with *Crawford* itself. That case involved a facial challenge, yet a majority of the Court still considered whether the statute "impose[d] excessively burdensome requirements on *any class of voters*." 553 U.S. at 202 (plurality opinion) (emphasis added) (internal quotation marks omitted). Defendants are thus incorrect to suggest that disparate impacts on particular groups—*e.g.*, Black and Latino voters—are irrelevant to a facial challenge under *Anderson-Burdick*.[3]

[3] Nor does *Crawford* otherwise alter the fundamentally fact-intensive nature of the *Anderson-Burdick* inquiry. *Crawford* reiterated that "[a] facial challenge must fail where the statute has a plainly legitimate sweep," 553 U.S. at 202, but whether a statute has a "plainly legitimate sweep" under *Anderson-Burdick* is a factual question. *Crawford* thus does not require that Plaintiffs bringing facial challenges bear a "particularly high burden" at the summary judgment stage.

In any event, Plaintiffs *have* provided evidence that the challenged provisions will burden large numbers of Florida voters generally, in addition to evidence that they will have a disparate impact on Black and Latino voters. *See, e.g.,* ECF 271-27; SOF 13-14,29-31,43,53,55; *cf.* ECF 59 ¶6 (alleging not only that the challenged provisions impose a "disproportionate[ly] heavy burden on Black, Latino, and disabled voters," but also that they "impose[] unjustified burdens on all voters"). As set forth below, there is ample record evidence raising genuine issues of material fact, precluding summary judgment.

B. There Is a Triable Issue of Material Fact as to the Burden Imposed by SB90 on Voters Generally and Black and Latino Voters Specifically.

As mentioned above, Defendants badly misstate the record when they say that Plaintiffs' experts failed to "quantify the burdens" of the challenged provisions. Mot. 55. Defendants fail to address the analysis by Plaintiffs' impact expert, Dr. Smith, *see* ECF 271-27, who, among other things, found:

1. Section 28 reduces availability of 122 (or one in four) drop boxes: 65 drop boxes in 48 counties that were previously available 24/7 and 57 drop boxes that were not located at an SOE office. SOF 48, 58. Smith noted that limiting drop box operation to hours of early voting would have affected 600,000 of the 1.5 million ballots deposited in the 2020 election. ECF 271-27 ¶¶135-36, 221-22. This change affects voters throughout Florida, and "will negatively affect *all* voters, depriving them of an opportunity to securely return their VBM ballot to an official SOE drop

box after hours." *Id.* ¶¶127,136,219,223. Smith also found disparate impact on Black and Hispanic voters because "voters of color are more inclined to drop off their VBM ballots in person than other voters" and because mailed ballots were rejected at "disproportionately higher [rates] among minority voters than white voters in Florida." *Id.* ¶¶12,109,135,137,223.

2. Section 7 makes it harder for all Floridians to register to vote. *Id.* ¶¶24,47. At least five percent of Florida's more than 15 million registered voters—some 750,000 current voters—registered to vote via a 3PVRO. SOF 14; ECF 271-27 ¶¶40-42. 3PVROs "are essential players in the registration of voters in Florida" and "provide a convenient—and free—alternative for thousands of individuals in Florida who are eligible, but not yet registered, to vote." *Id.* ¶¶42-43. Smith also found that disparate impact on Black and Hispanic voters because they are five times as likely to rely on 3PVROs to register as white voters. *Id.* ¶¶8,37-50; SOF 15.

3. Section 29 affects "*all* voters who vote in person during the early voting period and on Election Day" because "long lines at the polls are common in Florida." *Id.* ¶¶225-226. Assistance at the polls is especially critical given that Florida voters "regularly report having to endure some of the longest lines in the country." *Id.* ¶¶229-233. Smith also found disparate impact: "There is ample scholarly evidence that Black and Hispanic voters face longer wait times when casting a ballot in person," and that trend holds true in Florida. *Id.* ¶225-226,230; ECF 271-37 ¶31 (identifying additional support).

4. Section 24 will burden over 600,000 registered voters who do not have one of the prescribed identification numbers in their voter record and thus will be unable to obtain a VBM ballot. SOF 33; ECF 271-27 ¶¶61-95. Smith also found disparate impact on voters because white voters are more likely to possess the required ID, and voters who have registered to vote since HAVA was implemented in 2006 without one of the permissible forms of ID are more than twice as likely to be Black. *Id*. ¶¶55-58,88-89.

Although Defendants urge the Court to consider "the landscape of all opportunities" to vote, Mot. 52, at this stage it is sufficient that the evidence shows a dispute of fact as to the impacts of SB90. Conversely, Defendants contend that the Court cannot consider the "cumulative impact" of the challenged provisions, Mot. 53, but provide no legal support for that contention, which is contrary to the position the Secretary has asserted in discovery that "the provisions work together in allowing Florida voters to cast their ballots in-person on Election Day." ECF 271-22 Rog No. 1. Courts have certainly considered the "cumulative burdens" of several provisions of one bill, noting that "*Anderson* instructs courts to consider the cumulative burden upon plaintiffs' rights based on the context of each case." *Cowen v. Raffensperger*, No. 17-04660, 2021 WL 4281327, at *15 (N.D. Ga. Mar. 29, 2021); *Tennessee State Conf. of N.A.A.C.P. v. Hargett,* 420 F. Supp. 3d 683, 710 (M.D. Tenn. 2019) ("plaintiffs have demonstrated that these aspects of the Act, functioning together, create a cumulative burden" that would not pass muster under *Anderson-Burdick*).

Taken together, these facts show triable issues of material fact.

C. There Are Triable Issues of Material Fact as to Whether the State's Interests are Sufficiently Weighty Relative to the Burden on Voters.

Under *Anderson-Burdick*, the level of justification that must be provided by the State depends on the level of scrutiny the Court applies, which itself is a highly fact-intensive inquiry. *See generally* ECF 201 at 33-34 (summarizing the sliding scale standard). At the summary judgment stage, the Court's role is not to find the facts necessary to make the threshold determination of what level of scrutiny to apply, much less to evaluate the persuasiveness, strength or credibility of the justifications proffered by the State.

In arguing that the State has "substantial" interests, Defendants rely exclusively on *post hoc* rationalizations from the Director of the Florida Division of Elections and two of Defendants' experts, Mot. 57-59, but ignores that these purported interests are inconsistent with the contemporaneous justifications for SB90 provided by the legislative sponsors and Secretary Lee. For example, one of Defendants' experts says the State's interest is addressing "absentee ballot fraud," Mot. 58, ignoring that (i) Baxley expressly acknowledged that preventing VBM fraud was "not the purpose of our bill," and (ii) Secretary Lee and Ingoglia affirmatively stated that they were not aware of such fraud. SOF 9.

Similarly, Defendants maintain that Section 7's compelled disclosure is simply "another way of letting the voter be informed," Mot. 57, a rationale never

mentioned by the legislative sponsors, who (falsely) insisted that the provision was to codify a federal court order. SOF 18. Defendants assert that the Section 24 VBM application restrictions are "just another layer of security," Mot. 57, an assertion inconsistent with Defendant Lee's acknowledgment that "there are safeguards in place to ensure that vote-by-mail ballots are going to voters who are on the voter registration rolls." SOF 32. The other explanations offered by Defendants are inconsistent with the statements of Defendant Lee and the sponsors that Florida's 2020 election ran "smoothly." SOF 5.

These inconsistencies raise a question as to whether the purported state interests are *bona fide* and creates another triable issue of fact. Defendants argue that they are allowed to present *post hoc* rationalizations and that their asserted interests should be accepted uncritically as "legislative fact." Mot. 54. The Eleventh Circuit, however, has held that "[t]he existence of a state interest ... is a matter of proof" and must be supported by evidence. *Duke v. Cleland*, 5 F.3d 1399, 1405 n.6 (11th Cir. 1993). At minimum, Defendants will need to explain the glaring inconsistencies in their asserted justifications. These factual disputes preclude summary judgment.

V. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THE SECTION 208 PREEMPTION CLAIM

Section 208 of the VRA provides in relevant part 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." 52 U.S.C. § 10508.

For the reasons stated in Plaintiffs' cross-motion for summary judgment, that provision preempts Section 29's broad prohibition on "any activity" that is intended to or has the effect of influencing a voter. ECF 241-1.

Defendants' assertion that there is no private right of action under Section 208, Mot. 59-60, ignores that Plaintiffs have brought parallel claims under both the VRA *and* 42 U.S.C. § 1983. ECF 59 ¶¶ 212, 213. Defendants cite no reason why Plaintiffs cannot bring a Section 1983 claim asserting a violation of a federal statute. For that reason alone, Defendants' argument fails.

Even if Plaintiffs had brought this claim exclusively under the VRA, they would have a private right of action to enforce the guarantees of Section 208. Numerous courts have allowed private challenges under Section 208. *See, e.g.*, *Ark. United v. Thurston*, 517 F. Supp. 3d 777, 790 (W.D. Ark. 2021) (the VRA "clearly contemplates" a private right of action); *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017); *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 188 (M.D.N.C. 2020): *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 816 (E.D. Mich. 2020); *Nick v. Bethel*, No. 3:07-cv-98, 2008 WL 11456134, at *5 (D. Alaska July 30, 2008). These courts' holdings are entirely consistent with the broad range of private rights of action available under the VRA. *See generally Morse v. Republican Party of Va.*, 517 U.S. 186, 233-34 (1996). Defendants cite no case holding that Section 208 does not confer a private right of action.

On the merits, a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted under the Supremacy Clause. *Arizona v. United States*, 567 U.S. 387, 399 (2012). In enacting Section 208, Congress's purpose was to ensure all citizens, regardless of disability or language skills, the opportunity to vote. Section 29 directly interferes with that purpose by barring any person from engaging in "any activity with the intent to influence or effect of influencing a voter." Fla. Stat. § 102.031(4)(b). On its face, that language makes it unlawful to provide voters within 150 feet of the polls with any assistance, including language assistance or assistance to disabled voters, because such activity is intended to or has the effect of influencing a voter by making it more likely that the voter will cast a ballot.

Defendants' assertion that this reading of Section 29 is "overly expansive," Mot. 62, flies in the face of the sweeping language of the Florida law, as well as the way Defendants Hays, Doyle, and other Supervisors have interpreted it. Hays, for example, testified that "nobody is allowed to interact with" voters other than election workers; Doyle likewise stated that "[n]o one is supposed to interact [with voters] within the no-solicitation zone." SOF 62. Defendants' argument is also inconsistent with Section 29's language stating that it does not "prohibit *an employee of, or a volunteer with, the supervisor* from providing nonpartisan assistance to voters within the no-solicitation zone such as, but not limited to, giving items to voters." Fla. Stat.

§ 102.031(4)(b) (emphasis added). If Section 29 did not otherwise outlaw providing "nonpartisan assistance," there would be no need to exempt supervisors' agents.

Enforcement of Section 29 violates Section 208. Section 208 guarantees the right to receive assistance not just for "the mechanical act of filling out the ballot sheet," but also for "steps in the voting process before entering the ballot box." *OCA-Greater Houston* 867 F.3d at 615. And it guarantees the right to receive assistance from "a person of [their] choice." 52 U.S.C. § 10508. Because Section 29 categorically precludes protected voters from receiving polling-place assistance, Section 29 is preempted.

VI. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' FIRST AMENDMENT CHALLENGE TO THE IN-PERSON VOTER ASSISTANCE RESTRICTIONS

A. Defendants Have Not Shown that Section 29 Complies with the First Amendment as a Matter of Law[4]

1. Plaintiffs' voter assistance activities constitute expressive conduct.

Courts "have long recognized that [First Amendment] protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). "[C]onduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Id.* "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play," the Supreme Court has "asked whether '[a]n intent to

[4] Secretary Lee has no standing to assert these arguments. ECF 201 at 58-59.

convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" *Id.*

Plaintiffs' at-poll voter assistance activities are intended to encourage people to vote, particularly when they encounter an obstacle or burden, SOF 55-56, and constitute core protected speech under the First Amendment. *See, e.g.*, *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1158, 1163 (N.D. Fla. 2012) ("encouraging others to register to vote … is core First Amendment activity," and "[s]oliciting a [voter registration] application is core First Amendment speech"); *League of Women Voters of Fla. v. Browning*, 575 F. Supp. 2d 1298, 1321 (S.D. Fla. 2008) ("Undoubtedly, Plaintiffs' interactions with prospective voters in connection with their solicitation of voter registration applications constitutes constitutionally protected activity."); *Coley-Pearson v. Martin*, No. 20-151, 2021 U.S. Dist. LEXIS 197415, at *8 (S.D. Ga. Oct. 13, 2021) ("Plaintiff's right to assist voters in voting" by driving a voter to and from the polling place is protected by the First Amendment as expressive conduct).

First Amendment protection also extends to providing food, water, and other assistance to voters waiting in long lines to encourage them to stay in line and vote. As the Eleventh Circuit stated in reversing a grant of summary judgment concerning the distribution of food to protesters:

> The critical question ... is whether the reasonable person would interpret [the conduct] as *some* sort of message. In answering this question, the context … is important, for the context may

> give meaning to the [activity]…. It should be no surprise, then, that the circumstances surrounding an event often help set the dividing line between activity that is sufficiently expressive and similar activity that is not.

Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235, 1241 (11th Cir. 2018) ("*FLFNB*") (internal citations and punctuation omitted).

There is ample record evidence in this case that Plaintiffs provide aid to individuals waiting in line outside of polling places, SOF 55, with the intent to communicate a message about the importance of participating in the political process and to persuade those waiting in line at polling places to remain and vote. SOF 56. Given the context, such efforts plainly are protected by the First Amendment. And given the overbroad sweep with which Defendants Hays and Doyle testified they enforce the statute, *see* SOF 62, the statute clearly infringes on that protected conduct.

Defendants insist, in essence, that this Court should rule as a matter of law that Plaintiffs' efforts to assist and encourage voting at the polls are entitled to no First Amendment protection. But this argument depends on fundamental factual disputes that cannot be resolved before trial. The cases Defendants cite do not hold otherwise and are clearly distinguishable. For example, Defendants cite various cases that do not involve elections or political expression. Mot. 63-64 (citing *Barnes v. Glen Theatre*, 501 U.S. 560, 570 (1991) (prohibition on public nudity) and *Bar-Navon v. Brevard Cty. Sch. Bd.*, 290 F. App'x 273, 276 (11th Cir. 2008) (school prohibition

on pierced jewelry)). Defendants also cite several out-of-circuit cases involving denials of preliminary injunctions of laws prohibiting the collection of ballots. Mot. 64-65. But the standard to obtain a preliminary injunction is different from the standard to defeat summary judgment, the activities at issue are different, and as the Eleventh Circuit has emphasized, in determining whether activity is protected, "the context … is important, for the context may give meaning to the" activity. *FLFNB*, 901 F.3d at 1241. Plaintiffs should be allowed to present their evidence (SOF 55-56) at trial because its context makes clear that they are engaged in First Amendment activity.

2. Section 29 does not survive First Amendment scrutiny.

Defendants' arguments are predicated on three erroneous statements of law. First, Defendants are wrong when they assert that "Section 29 applies only in non-public forums," Mot. 66; public spaces do not become non-public forums because of their proximity to polling sites. In *Burson v. Freeman*, 504 U.S. 191, 196-98 (1992), the plurality opinion treated the area within 100 feet of a polling place as a public forum. The Eleventh Circuit similarly treats the area surrounding a polling place to be a public forum. *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1218-22 (11th Cir. 2009) (100-foot buffer zone from a polling place treated as a public forum). So do other appellate courts. *Daily Herald Co. v. Munro*, 838 F.2d 380, 384 (9th Cir. 1988) ("The public areas within 300 feet of the entrance

to the polling place are traditional public forums because they traditionally are open to the public for expressive purposes.").[5]

Second, even assuming *arguendo*, that Section 29 only applies to non-public forums, Defendants ignore that "nonpublic forum status does not mean that the government can restrict speech in whatever way it likes." *Cambridge Christian Sch., Inc. v. Fla. High School Ath. Ass'n*, 942 F.3d 1215, 1240 (11th Cir. 2019) (restriction "cannot be exercised in an arbitrary and haphazard manner"). The conflicting interpretations of the statute offered by SB90's sponsors, by the Secretary, and by the Supervisors reflect officials are enforcing the prohibition in an arbitrary manner. And the vagueness of the statute, SOF 60-66, practically guarantees haphazard enforcement across the State.

Third, the question of whether Section 29 survives any level of scrutiny depends on contested issues of fact. While Defendants posit that Section 29 protects voters from "confusion, undue influence, fraud, pressure and intimidation," Mot. 68, they point to nothing that links Section 29 to those ends. In fact, the non-solicitation provision that Section 29 supplemented *already* banned partisan activities. Accordingly, Defendants will not be able to establish that adding Section 29, which

[5] Defendants' suggestion, Mot. 66, that under *United Food & Commer. Workers Local 1099 v. City of Sidney*, 364 F.3d 738 (6th Cir. 2004), "parking lots and walkways leading to the polling places are nonpublic forums" is highly misleading. In that case, the court held only that proximity to the polling place did not, without more, transform the non-public property of a school into a public forum. *Id*. at 750.

broadly prohibits "any activity" that is intended to or does influence a voter, furthers a substantial government interest, much less that it is narrowly drawn. In particular, neither the Secretary nor the Supervisors reported any complaints from voters about at-poll assistance activities, SOF 65, and in the absence of such complaints, Defendants cannot show either that their interest is compelling or that the statute is tied to that interest.

Defendants have not shown, as a matter of law, Section 29 does not violate the First Amendment.

3. Defendants have failed to demonstrate that Section 29 is not unconstitutionally overbroad as a matter of law

"In the First Amendment context," a law must be struck down as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010). In prohibiting "any activity" performed "with the intent to influence or effect of influencing a voter," Section 29 prohibits expressive conduct, including providing assistance aimed at influencing individuals at polling places to remain in line and vote.

While Defendants insist the statute only targets "partisan activities," Mot. 72, they ignore the deposition testimony of Defendants Hays and Doyle. SOF 62 ("nobody is allowed to interact" with a voter). And they read words into the statute that simply are not there: electioneering for a particular candidate was already

prohibited by Fla. Stat. § 102.031(4) prior to SB90. Section 29's inclusion of the "any activity" clause therefore restricts nonpartisan expression.

Defendants' insistence that Section 29 does not extend to "giving voters a drink of water," Mot. 71, is directly contrary to their deposition testimony, SOF 62, and the statements of the sponsors on April 27, SOF 61 (only "an elections office can hand out that stuff"). It also cannot be squared with the rejection of amendments that would have made clear such activity was permitted. SOF 67.

Defendants' argument that overbreadth doctrine is a "last resort," Mot. 73, is not a reason why Defendants are entitled to summary judgment. Whether a "limiting construction has been or could be placed on the challenged statute," Mot. 73 is a disputed issue of fact. The limiting construction Defendants offer is to interpret "any activity" as only prohibiting partisan activities. That is not how the Supervisors have been enforcing it. SOF 62. Summary judgment should be denied.

B. Defendants Have Failed To Show that Section 29 Is Not Unconstitutionally Vague as a Matter of Law

As explained in Plaintiffs' cross-motion, Section 29 is unconstitutionally vague. The language of the prohibition fails to provide "fair notice of what is prohibited," and it "is so standardless that it authorizes or encourages seriously discriminatory enforcement." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012). As to fair notice, Section 29 fails to define any of the key open-ended statutory terms—"intent to influence," "effect of influencing," or "activity." That

leaves Plaintiffs and the Supervisors guessing as to what activities are prohibited and whether Plaintiffs may continue to engage in any voter assistance activities without violating Florida law. The statutory text provides no answer, and that dooms the provision.

SB90's legislative history underscores the vagueness of Section 29. Sponsors took shifting and conflicting positions on what activities would be prohibited, including on key questions like whether nonprofit groups would be barred from distributing food or water to voters standing in line. SOF 60-63. And the Secretary continues to interpret the law differently from the sponsors. SOF 64-66.

Defendants' invocation of various "canons of construction," Mot. 70-72, merely serves to confirm that the statute is vague. For example, their argument that "any activity" is saved by the series of prohibited activities itemized in Fla. Stat. § 102.031(4)(b), has been rejected by the Supreme Court. *See Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1884, 1889 (2018) (prohibition on political apparel in a polling place "designed to influence or impact voting" was impermissibly vague notwithstanding that it followed three "clear" examples).

Plaintiffs and Supervisors should not have to guess at what Section 29 means. The uncertainty about the provision's scope is already generating the very problems that the vagueness doctrine is supposed to prevent, as Plaintiffs, lacking clarity on what activities are permitted, have ended their assistance programs. SOF 68.

VII. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THE FIRST AMENDMENT CHALLENGES TO THE VOTER REGISTRATION RESTRICTIONS

A. The Notification Requirements of Section 7 Violate Plaintiffs' First Amendment Rights.

The parties have cross-moved on this claim. Plaintiffs' motion should be granted and Defendants' motion should be denied because Section 7 unconstitutionally compels Plaintiffs to convey particular messages—including that they may fail to return the voter's registration application on time. Simply stated, Florida is dictating what Plaintiffs must say. This type of restriction is subject to strict scrutiny, which Section 7 cannot survive. As the record demonstrates, the provision does not serve a compelling state interest and is not narrowly tailored.

Forcing a speaker to convey a particular message—including a "compelled statement[] of 'fact'"—"necessarily alters the content of the speech." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795, 797 (1988). Such laws are, therefore, subject to strict scrutiny. *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018). Section 7 is precisely such a content-based regulation of speech. It compels organizations to tell every voter they seek to register that their application may not arrive in time—regardless of the organization's intentions, its ability to process registrations, or its record in timely submitting registrations. *See League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 730 (M.D. Tenn. 2019) (applying strict scrutiny to a mandatory voter registration disclaimer).

A content-based law is "presumptively unconstitutional" and fails strict scrutiny unless it is "narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, *Ariz.*, 576 U.S. 155, 163 (2015). "To be a compelling interest, the State must show that the alleged objective was the legislature's *actual* purpose." *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (emphasis added). Defendants have not identified any compelling state interest that the Florida legislature intended Section 7 to serve. The sponsors did not identify any such purpose during debate, wrongly insisting that the provision was to "codify a federal court order" concerning "statutes that have been ruled unconstitutional." SOF 18.

Defendants' *post hoc* interests cannot be compelling interests, and in any event are not entitled to any weight. For example, Defendants contend that Section 7 serves state interests "in ensuring that 3PVROs fulfill their statutory obligation to serve as fiduciaries." Mot. 74-79. Their brief, however, fails to explain how the specific statements compelled by Section 7 (*e.g.,* "inform the applicant how to register online") relate to this interest. Nor do Defendants address the fact that "more benign and narrowly tailored options are available," *Riley*, 487 U.S. at 800, such as including a disclaimer on the state-issued voter registration form or having the Secretary conduct a public awareness campaign. Defendants instead simply assert (Mot. 80) that Section 7 makes "[v]oters no less likely to register with Plaintiffs"—a claim that Plaintiffs' experience directly contradicts. SOF 23.

Defendants' legal arguments about the level of scrutiny that should apply are clearly wrong. Defendants first contend (Mot. 75-76) that Section 7 is subject to minimal scrutiny under *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 650-52 (1985). But *Zauderer* applies only where a state regulates "commercial advertising" and requires the disclosure of "purely factual and uncontroversial information about the terms under which ... services will be available." *Id.* at 651; *see NIFLA*, 138 S. Ct. at 2374 (noting that the lawyers' statements in *Zauderer* would have been "fully protected" outside the advertising context). Plaintiffs are not engaged in commercial advertising, the compelled statements do not relate to the "terms" of "service," and the compelled statements are controversial. *See* SOF 19 (supervisor testifying provision "was designed to make it so that more often than not people will just walk away and not get registered"), SOF 23 (describing the chilling effect of the disclaimer).

Defendants alternatively argue that Section 7 should be reviewed as commercial speech. Mot. 76-79. But commercial speech is "speech which does no more than propose a commercial transaction." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (citation and internal quotation marks omitted). Defendants cannot explain how Plaintiffs—*i.e.*, nonprofit, nonpartisan organizations that educate and mobilize voters, SOF 12,24,42,55—are proposing a commercial transaction when they register voter. *Cf. Riley*, 487 U.S. at 795-96 (even if some aspect of speech is commercial, it does not "retain[] its

commercial character when it is inextricably intertwined with otherwise fully protected speech").

B. The Delivery Requirement of Section 7 Also Violates Plaintiffs' First Amendment Rights.

Plaintiffs' voter registration activities, including conversations with prospective voters, constitute protected speech and expressive conduct intended to convey Plaintiffs' belief in the importance of all eligible citizens participating in the democratic process. SOF 12-13. Advocating for that belief by registering Floridians to vote is core political speech and expression. *See Meyer v. Grant*, 486 U.S. 414, 421-23 (1988). Plaintiffs' voter registration activities also constitute protected associative conduct. *See League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d at 1158 (voter registration includes "speak[ing] and act[ing] collectively with others, implicating the First Amendment right of association").

Section 7 violates the First Amendment for two reasons. First, restrictions on protected political speech, expression, and association are unconstitutional when they "significantly inhibit" election-related speech and expression and are "not warranted by the state interests … alleged to justify [the] restrictions." *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 192 (1999). Laws that burden core political speech are subject to "exacting scrutiny" and will be upheld only if "narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 34647 (1995).

Section 7's delivery restriction has interfered with Plaintiffs' registration efforts. One Plaintiff has terminated its registration program, and the others have all had to invest significant additional resources. SOF 23. Section 7 thus infringes on Plaintiffs' First Amendment rights because it burdens Plaintiffs with increased costs and dissuades them from engaging with and registering potential voters. *Id.* And the requirement is not warranted by or tailored to serve any sufficiently weighty state interest. Florida lacks any legitimate interest in forcing 3PVROs, at risk of fines and reputational harm, to expend their limited resources delivering each registration form to the registrant's home county, a task that the Supervisors have performed every election without issue.

Second, Section 7 also violates the First Amendment because it constitutes unconstitutional viewpoint and speaker-based discrimination, in that it imposes different obligations on 3PVROs than it does on other persons who register voters, such as government agencies, political parties, and family members of the applicant, all of whom may continue to return applications to any Supervisor. Fla. Stat. § 97.021(40); *see Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (First Amendment prohibits restrictions on speech that "distinguish[] among different speakers, allowing speech by some but not by others"); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (viewpoint discrimination is "an egregious form of content discrimination" and is *per se* prohibited). Because Florida allows other persons to deliver registration forms to any Supervisor, any legitimate

interest the State may have in directing voter registration materials to the proper county is not served by imposing fines on 3PVROs like Plaintiffs.

CONCLUSION

For the foregoing reasons, Defendants' summary judgment should be denied.

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Respectfully submitted,

s/ *Kira Romero-Craft*

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LOCAL RULE 7.1(F) CERTIFICATION

Pursuant to Local Rule 7.1(F), this memorandum contains 19,711 words, excluding the case style, table of authorities, table of contents, signature blocks, and certificate of service.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was served on all counsel of record through the Court's CM/ECF system on the 3rd of December, 2021.

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