

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

KIRK NIELSEN et al.,

Plaintiffs,

v.

RON DESANTIS et al.,

Defendants.

CONSOLIDATED

CASE NO. 4:20cv236-RH-MJF

DREAM DEFENDERS PLAINTIFFS PRE-TRIAL BRIEF

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INTRODUCTION

Dream Defender Plaintiffs bring this action to protect the right of Floridians to vote amidst the most serious pandemic the world has seen in a century. The restrictions challenged here violate Plaintiffs' rights under the First and Fourteenth Amendments and have an unlawful disparate impact on Black and Latinx voters in violation of the Voting Rights Act. The State's failure to provide an accessible, on-line means of voting for visually impaired voters violates the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

The voting practices challenged here force voters to make a constitutionally and statutorily impermissible Hobson's choice between risking their health and well-being to vote in person, or taking a chance that their vote will not count due to serious, persistent flaws in how Defendants administer their Vote-by-Mail ("VBM") system. In the context of social distancing and other social disruptions of the COVID-19 pandemic, the State's limitations on use of VBM ballots, the State's refusal to accept VBM ballots cast, but not received, by Election Day, the State's refusal to allow voters more than 46 hours (and not a single minute more) after polls close on Election Day to cure any deficiencies in VBM ballots, and the State's restrictions on online voter registration ("OVR") will all significantly impact the ability of Floridians to vote. Plaintiffs will also show that the State's refusal to

accept VBM ballots received after Election Day, and the state’s refusal to modify the cure process, has a dramatic discriminatory effect on Black and Latinx voters.

It is a “basic truth that even one disenfranchised voter . . . is too many.” *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1321 (11th Cir. 2019). Without the relief Plaintiffs request from this Court in light of the daily growing risk from the pandemic, tens of thousands of Floridians will be disenfranchised in the primary in August and the presidential election in November (“2020 elections”). The relief proposed by Plaintiffs imposes only a minimal burden on the State and the Counties, a burden more than overcome by the overriding importance of ensuring that every vote counts.

I. THE CLAIMS

Based on the court’s Order Denying a Preliminary Injunction on All Issues But One, ECF 332,¹ and Order Dismissing the Nielsen and Williams Complaints in Part, ECF 366, Dream Defender Plaintiffs have narrowed their claims to focus the relief that is most important and essential to ensuring a fair election. Accordingly, at trial, Plaintiffs will address the following claims (identified in the More Definite Statement (“MDS”), ECF 68):

¹ Unless otherwise noted, all ECF references are to the docket of *Nielsen v. DeSantis*, Case No. 4:20cv236-RH-MJF.

- Claims related to the deadlines for receipt of VBM ballots and the cure period, MDS 15 & 25;
- Claims related to the VBM cure process, MDS 20, 21, 22, 23 & 24;
- Claims related to expansion of Early Voting, MDS 27;
- Claims related to expanded use of drop boxes at polling places on Election Day, MDS 19;
- Claims related to deficiencies in the OVR system, MDS 31, 32 & 34;
- Claims related to providing election materials in Spanish, MDS 8, 9, 10, & 13;
- Claims related to providing accessible means for visually impaired voters to cast a private, independent ballot, MDS 14.

PLAINTIFFS' PROPOSED FINDINGS OF FACT

II. PARTIES

A. Dream Defenders Plaintiffs²

In the action styled *Dream Defenders, et al. V. DeSantis, et al.*, No. 1:20-cv-00067-RH, now consolidated with *Nielsen et al. v. DeSantis et al.*, 4:20-cv-00236-RH-MJF (the “Action”), plaintiffs are individual Florida voters (“Individual Plaintiffs”) and Florida-based civic engagement organizations (“Organizational Plaintiffs”).

The Individual Plaintiffs are Bianca Baez, Murray Heller, Paulina Hernandez Morales, Celcio Eduardo Romero and Sheila Young. Each Individual Plaintiff is over 18 years old, a U.S. citizen, and a Florida resident. Each is registered to vote. And each is at serious risk of being unable to vote in the 2020 Elections absent relief from this Court.

- **Bianca Maria Baez:** Ms. Baez is a voter in Leon County. Due to the overwhelming evidence that Florida will continue to face the COVID-19 pandemic in the fall, Ms. Baez is unwilling to risk her health to vote

² This Brief refers to Plaintiffs as Dream Defenders Plaintiffs rather than Williams Defendants, since Acacia Williams has been dismissed from this case and is no longer a Plaintiff.

in person. The existing vote-by-mail deadlines (including the deadline to cure any deficiencies) do not sufficiently protect her right to vote. For Ms. Baez, voting is personal and she prefers to make sure that her ballot gets where it needs to be by turning it in herself. Deposition of Bianca Baez 50:12-52:12. She would prefer to vote in person to ensure her ballot is submitted, but given the circumstances she would feel safe and more comfortable knowing she dropped her ballot off at a curbside voting location. *Id.* 51:25-52:12. However, if the Defendants refuse to provide an alternate voting method with curbside voting, due to safety concerns, Ms. Baez would vote by mail. *Id.* Ms. Baez has always voted in person and recognizes that even if she has to vote by mail she has the right to wait until Election Day to see if something happens before she decides who to vote for in the upcoming elections. *Id.* 52:13-53:11.

- **Paulina Hernandez-Morales:** Ms. Morales is a Spanish-speaking voter in Seminole County. Twice already, Seminole County has lost her vote-by-mail ballot. Declaration of Paulina Hernandez-Morales ¶¶ 9-10, ECF 91-2. If Defendants provided a way for Ms. Hernandez-Morales to accurately track her ballot (as many states do) to ensure it was counted or notified her in a reasonable time if her ballot had

deficiencies Ms. Morales would feel comfortable voting by mail. Furthermore, on multiple occasions Ms. Morales has been forced to rely on an English-speaking friend when interacting with individuals from the SOEs office in Seminole County because the workers only spoke English. Hernandez-Morales Decl. ¶¶ 10-11. Ms. Hernandez-Morales would also need Spanish language assistance or Spanish materials in order to cast an informed vote. *Id.* ¶ 16.

- **Murray Heller** is an 86-year-old voter living in Delray Beach, Florida. Mr. Heller has a pacemaker and a history of cardiac conditions. Declaration of Murray Heller ¶ 3. Consistent with public health guidance at the time, Mr. Heller decided not to vote in person during the March 2020 PPP because of his fears of contracting COVID-19. Due to Defendants' failure to extend the vote-by-mail request deadline, by the time Mr. Heller decided he didn't want to risk his life to vote in person, the vote-by-mail deadline had passed. *Id.* ¶ 8-9. Mr. Heller plans to vote by mail in the upcoming elections but refuses to be forced to vote early because he wants all available information before deciding to cast his ballot. *Id.* ¶¶ 11-12. Mr. Heller would also prefer to return his completed ballot using a drop box or curbside voting if those options

were available to him because he would be able to vote without risk of contracting the virus or having to get postage. *Id.* ¶¶ 13-14.

- **Celcio Eduardo Romero** is a 76-year-old voter living in Orlando, Florida. Mr. Romero's dominant language is Spanish, his ability to communicate in English is limited, and he cannot understand ballot and voting instructions that are only in English. Declaration of Celcio Romero ¶ 3, ECF 91-3. When voting in person Mr. Romero usually relies on a family member to translate the ballot and other voting materials. Mr. Romero also has multiple serious medical conditions that make him particularly vulnerable to serious harm or death if he were to contract COVID-19, including multiple sclerosis, diabetes, and high blood pressure. *Id.* ¶ 4. Additionally, he has had a stroke and has issues using his legs and arms, which means he is unable to walk without assistance and can no longer sign his full name or even to write his initials in a consistent way. *Id.* ¶¶ 4-6. Mr. Romero plans to vote by mail due to the pandemic and is worried that his ballot will be rejected due to signature mismatch issues.
- **Sheila Young** is a sixty-six year old voter living in Orlando, Florida. Declaration of Sheila Young ¶¶ 1-2, ECF 91-4. Ms. Young is

blind and she has diabetes and high blood pressure. Deposition of Sheila Young 12: 11-13. Ms. Young is worried that voting in-person during the pandemic would pose a grave risk to her health because she would be unable to independently verify whether she is six feet apart from other people at her polling place, and is not certain that the accessible voting equipment and sign in surfaces at her polling site will be sanitized between users. Young Decl. ¶¶ 8-9; Young Dep. 43:10-14. Ms. Young wishes to vote privately, independently, and safely in upcoming elections via accessible vote-by-mail. Young Decl. ¶ 10, Young Dep. 20:21-23. Paper vote-by-mail ballots are not accessible to Ms. Young because she cannot read them nor mark her selections privately and independently due to her blindness. Young Decl. ¶ 11. She would use an accessible vote-by-mail option, such as electronic ballot delivery, to read her ballot and mark her selections if such an option were made available to her. Young Decl. ¶¶ 12-19, Young Dep. 23:19-21. Ms. Young's signature has worsened over time due to vision loss and her signature has been rejected by a bank on approximately three occasions in the past five years. Young Dep. 26:11-24, 30:6-18; Young Decl. ¶ 14. In the event that Ms. Young's ballot is rejected for

signature mismatch, she would like the “cure” period to be extended to fifteen days to allow her sufficient time to receive notification of and cure any signature mismatch issues that may arise. Young Decl. ¶ 15. Ms. Young has communicated her need for accessible vote-by-mail to the Orange County Supervisor of Elections and the Florida Secretary of State. Young Decl. ¶¶ 17-19.

The Organizational Plaintiffs are Dream Defenders, New Florida Majority Education Fund (“NewFM”), and Organize Florida Education Fund (“Organize Florida”). Organizational Plaintiffs are nonpartisan, not-for-profit membership organizations that seek to increase civic participation in Florida. These organizations assist students, Black and Latinx voters, disabled individuals, and other marginalized communities with voter registration, voter education, and other election related activities. As is discussed further below (*infra* at 93-103) all of the Organizational Plaintiffs have had to divert significant organizational resources to other activities as a result of the actions by Defendants in failing to protect the right to vote in the 2020 elections, and each of the Organizational Plaintiffs have members at serious risk of being unable to vote in the 2020 Elections absent relief from this Court.

Like the Individual Plaintiffs, Defendants' refusal to implement reasonable and accessible changes to their in-person and vote-by-mail process and procedures in Florida has injured members of Dream Defenders, NewFM, and Organize Florida.³

- **Dream Defenders:** Dream Defenders, founded after the killing of Trayvon Martin, organizes Black and Brown youth to advance a vision of safety and security. As a critical part of that mission, Dream Defenders conducts voter engagement work throughout the State of Florida, including phone banks and voter registration. Declaration of Rachel Gilmer ¶¶ 2-3, ECF 86-4. Many of Dream Defenders' members have been displaced by COVID-19, especially students at Florida colleges and universities who were forced to leave campus abruptly and

³ Plaintiffs incorporate by reference the additional factual assertions related to Plaintiffs' injuries due to Defendants' actions as set forth in the Declarations Submitted with the Motion for Preliminary Injunction (ECF No. 86); Wujciak Decl. (ECF No. 86-2); Baez Decl. (ECF No. 86-3); Gilmer Decl. (ECF No. 86-4); Jordan Decl. (ECF No. 86-5); Heller Decl. (ECF No. 86-6); Mercado Decl. (ECF 86-7); Ciriello Decl. (ECF No. 86-8); Woods Decl. (ECF No. 86-9); Williams Decl. (ECF No. 86-10); Bukala Decl. (ECF No. 91-1); Morales Decl. (ECF No. 91-2); Romero Decl. (ECF No. 91-3); Young Decl. (ECF No. 91-4); Wise Decl. (ECF No. 91-5). At trial, Plaintiffs will provide testimony from Individual and Organizational Plaintiffs regarding the nature of their injuries, which are directly traceable to Defendants' actions and inactions in the face of COVID 19, and how plaintiffs' proposed relief will redress their injuries.

are unsure when they will be allowed to return. *Id.* ¶ 14. The situation these members are in now is difficult because many student members were registered to vote on campus in Florida, but now they must go through the burdensome process of changing their address and requesting a vote-by-mail ballot at their parents' houses. *Id.* at 20. In order to change the address where their ballot is mailed they need to request the change either in writing or in person. Deposition of Rachel Gilmer 99:11-24. Since many students are now in different states it is almost impossible for them to request the change of address in person, and having access to computers and printers are serious impediments that certain student members of Dream Defenders face when attempting to make the address request via writing. *Id.* Due to the problems with the Defendants' vote-by-mail and change of address requirements in Florida, many student members will be unable to update their registrations or vote by mail before the August and November elections.

- **NewFM:** NewFM is a non-profit organization in Miami-Dade County dedicated to creating an inclusive, equitable, and just Florida by building up the unified power of the State's historically marginalized groups. As part of that mission, NewFM maintains a statewide

presence serving individuals and communities in all regions of Florida to ensure they can exercise their fundamental rights to vote. Mercado Decl. ¶¶ 3-6. New FM has members whose right to vote is at risk of being burdened or denied as a result of the actions and omissions challenged in this litigation. For example, Alice Wujciak, a NewFM member in her 70s who faces severe illness or death if she contracts COVID-19, does not want to vote in person and will attempt to vote by mail for the first time ever. Wujciak Decl. ¶¶ 1-3, 15. However, under the Defendants' vote-by-mail procedures in Florida, Ms. Wujciak faces a significant risk that her mail ballot will be rejected because her hand shakes when she signs her name and her signature may not match up with the one she has on file. *Id.* ¶¶ 15-18. Due to the Defendant's burdensome signature cure processes, there is a significant chance that Ms. Wujciak will not be able to have her vote by mail ballot count in the August and November elections.

- **Organize Florida:** Organize Florida is a nonpartisan, nonprofit organization whose mission is to educate voters on issues facing low-income and middle-class Floridians. In that capacity, Organize Florida holds large-scale voter registration programs throughout the State of

Florida. Woods Decl. ¶ 3. In fact, Organize Florida has supporters in *every* one of Florida's 67 counties. *Id.* at ¶ 2. Several of Organize Florida's student members were disenfranchised in the PPP when they were forced to return to their parents' residence due to the pandemic at a time when the deadline to request a VBM ballot had already passed. Deposition of Stephanie Porta 35:6-18. Other members, such as John Jordan, are facing the threat of imminent injury due to Defendants' inaction. Mr. Jordan, who is legally blind, cannot safely remain 6 feet apart from other voters at the polls. Jordan Decl. ¶¶ 9-10. Mr. Jordan has requested that the state provide him an accessible way to vote by mail but under the current voting procedures, the only way for Mr. Jordan to vote independently and maintain the secrecy of his ballot is to vote in person. To vote by mail, Mr. Jordan would have to ask for assistance from another person, sacrificing his independence and the secrecy of his ballot. Either option would bring him into close contact with another person, requiring him to face the risk of contracting COVID-19. Marsha Bukala, another member of Organize Florida, is also legally blind and requires accommodations to cast a ballot. Bukala Decl. ¶¶ 3, 14. Ms. Bukala voted in-person during the PPP and

encountered numerous difficulties with casting her ballot. Bukala Decl. ¶ 7, Exhibit A. Ms. Bukala fears attempting to vote in-person again in the upcoming 2020 Elections because she is afraid of the heightened risks in-person voting creates for contracting the virus, and she cannot be certain election officials will provide her with necessary precautions. Bukala Decl. ¶¶ 8–12. Ms. Bukala would like to vote privately and independently using a VBM ballot, but Defendant’s failure to offer an accessible means for disabled voters to vote by mail currently render this an impossibility. Organize Florida also has members who are Spanish language dominant organized under Pa’lante Por Más, a Latinx Caucus of Organize Florida, founded by Hurricane Maria survivors and allies in Orange County. ECF 313-2 ¶ 1 (Gomez-Tejeda Decl.). Ms. Gomez-Tejeda details her past experiences assisting Floridian, Spanish language dominant voters and Organize Florida’s plan to work with voters needing language assistance navigate registration, vote-by-mail and other election procedures in her role as Organizing Director of Organize Florida. *Id.* ¶¶ 1-21. Organize Florida also has members who are Spanish language dominant organized under Pa’lante Por Más, a Latinx Caucus of Organize Florida, founded by Hurricane Maria

survivors and allies in Orange County. *Id.* ¶ 1. Ms. Gomez-Tejeda details her past experiences assisting Floridian, Spanish language dominant voters and Organize Florida’s plan to work with voters needing language assistance navigate registration, vote-by-mail and other election procedures in her role as Organizing Director of Organize Florida. *Id.* ¶¶ 1-21.

B. Defendants

State Defendants are Laurel M. Lee, in her official capacity as the Florida Secretary of State (the “Secretary”), and Ron DeSantis, Ashley Moody and Jimmy Patronis, in their official capacities as commissioners of the Florida Elections Canvassing Commission.

The County Defendants include the 67 individual County Supervisor of Elections (“SOEs”) in Florida and 67 County Canvassing Boards whose membership consists of the county SOE, a county court judge, and the chair of the board of the county commissioners.

County Defendants in thirteen counties are subject to the requirements of Section 203 of the Voting Rights Act. 52 U.S.C. § 10503; *see* 81 Fed. Reg. 87,532, 87,534–35 (Dec. 5, 2016).

Defendant Lee is the head of the Florida Department of State and the chief election officer of the state. Fla. Stat. §§ 15.01, 15.13; 97.012.⁴ As chief election officer, the Secretary is responsible for maintaining “uniformity in the interpretation and implementation of the election laws,” providing “uniform standards for the proper and equitable implementation of the registration laws,” and for creating and administering “a statewide voter registration system as required by the Help America Vote Act of 2002.” Fla. Stat. § 97.012(1)-(2), (11). The Secretary is also responsible for adopting rules governing the vote-by-mail procedures, and for providing written direction to the SOEs “on the performance of their official duties with respect to the Florida Election Code or rules adopted by the Department of State.” Fla. Stat. § 97.012(16); Fla. Stat. § 101.6107.

The Florida Election Canvassing Commission consists of the Governor and two members of the Cabinet selected by the Governor. Fla Stat. § 102.111. The Commission meets on the 9th day after a primary and on the 14th day after a general election to certify the results of the election. *Id.* In emergency circumstances, the Election Canvassing Commission can extend the deadline by which the SOEs and

⁴ Governor DeSantis was a named defendant when this action was originally filed. He was dismissed from the case on June 10, 2020, after entering a stipulation that he would not contest Defendant Lee’s authority to implement any relief ordered by the Court, ECF 198.

County Canvassing Boards are required to submit the election results. Fla. Stat. § 102.112. The Election Canvassing Commission has the power to provide relief by declaring extending the deadline by which County Canvassing Boards must file election returns, relief which is necessary to allow for the counting of ballots postmarked by election day to be counted if they are received within 10 days of the election which may need to be cured as late as 15 days of the election (MDS 15 & 25).

Defendant SOEs are the chief election administrators in each of Florida's 67 counties. The SOEs can designate early voting sites, decide, within limits, the days early voting will be offered and the hours early voting sites will be open each day. Fla. Stat. § 101.657(b), (d). The SOEs enforce the VBM ballot receipt deadline and oversee (in conjunction with the County Canvassing Boards) the vote-by-mail cure process, including making initial assessments of VBM ballots, notifying voters of ballot deficiencies, and enforcing the cure deadline of 5 p.m. on the second day after each election. Fla. Stat. §§ 101.62, 101.68. To remedy the imminent injuries Plaintiffs face, the SOEs must:

- a) Expand early voting days, hours and locations to begin 30 days before the elections and run through Election Day (MDS 27).
- b) Provide drop boxes for vote by mail ballots at early voting locations during the early voting period and at polling places on election day (MDS 19).

- c) Ensure sufficient time for voters to cure signature deficiencies, suspending unnecessary and burdensome cure requirements, including the requirement to provide both identification and a matching signature to cure a missing signature, and completely and accurately informing voters of relevant identification requirements to remedy signature mismatch where verification of identification is needed. (MDS 24).
- d) Provide an accessible method for visually or manually impaired voters to cast a private and independent ballot under the ADA and Section 504 of the Rehabilitation Act (MDS 14).

The Defendant County Canvassing Boards (“CCBs”) are the entities with final authority over counting ballots and certifying election results in each of Florida’s 67 counties. The CCBs are responsible for canvassing the vote-by-mail ballots, verifying the signatures on the vote-by-mail ballots, verifying the validity of signatures on cure affidavits, and resolving challenges to the legality of vote-by-mail ballots. Fla Stat. § 101.68. To remedy the imminent injuries Plaintiffs face, the SOEs must

- a) Canvass all ballots that are postmarked by election day and received within 10 days after election day.
- b) Ensure sufficient time for voters to cure signature deficiencies, suspending unnecessary and burdensome cure requirements, including the requirement to provide both identification and a matching signature to cure a missing signature, and completely and accurately informing voters of relevant identification requirements to remedy signature mismatch where verification of identification is needed. (MDS 24).

III. EXPERTS

A. Dr. Morgan Kousser

Plaintiffs will present expert testimony by Dr. Morgan Kousser, a professor of history and social science at the California Institute of Technology, to address several of the “Senate factors” that this Court should consider to determine whether, within the totality of the circumstances in Florida, the operation of certain electoral devices, in combination with historical and continuing discrimination, result in a violation of Section 2 of the Voting Rights Act. Expert Report of J. Morgan Kousser Report ¶ 3, ECF 86-11 (“Kousser Report”).

Dr. Kousser’s scholarly work has focused on minority voting rights, educational discrimination, race relations, the legal history of all of the forgoing subjects, political history, and quantitative methods. He has published three books and numerous scholarly articles on these subjects. *Id.*⁵ Dr. Kousser’s expert testimony has been admitted in dozens of cases. Some of his more recent testimony

⁵ One of Dr. Kousser’s many articles, “The Strange, Ironic Career of Section Five of the Voting Rights Act, 1965-2007,” published in the *Texas Law Review*, is the first comprehensive history of the Voting Rights Act’s first 42 years. Another, “Do the Facts of Voting Rights Support Chief Justice Roberts’s Opinion in Shelby County?” introduced the largest data base of voting rights cases and administrative actions yet compiled, covering the U.S. from 1957 through 2006. It has now been extended through 2019.

includes the Section 2⁶ and Section 5⁷ Texas redistricting cases, the 2012 Texas voter identification case,⁸ the 2014 North Carolina photo identification and election law case.⁹ *Id.* ¶ 5; and the case challenging SB 7066¹⁰. Dr. Kousser has testified before Congress on voting rights issues, the most recent being before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Committee on the Judiciary, U.S. House of Representatives, about Legislative Proposals to Strengthen the Voting Rights Act, Oct. 17, 2019. Kousser Report ¶ 6.

B. Dr. Daniel Smith

Plaintiffs will present testimony by Dr. Daniel Smith, Professor and Chair of the Political Science Department at the University of Florida, to demonstrate the undue burden of Florida's vote by mail system in the face of the COVID-19 pandemic and its disparate impact on Black and Hispanic voters.

⁶ *Perez v. Abbott*, No. 5:11-cv-360, 2017 WL 962947 (W.D. Tex. Mar. 10, 2017) (three-judge court).

⁷ *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012) (three-judge court), *vacated*, 133 S. Ct. 2885 (2013).

⁸ *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012) (three-judge court), *vacated*, 133 S. Ct. 2886 (2013).

⁹ *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).

¹⁰ *Jones v. DeSantis*, Consolidated Case No. 4-19-cv-300-RH-CAS, (N.D. Fla.)

Dr. Smith is a leading expert on voting and elections in the U.S.—having published more than 80 articles or book chapters, testified before the U.S Senate and state legislatures, and co-authored a leading college textbook on those issues. Smith Report at 70-85 (Curriculum Vitae). He has also served as an expert in many voting and election-related cases for both plaintiffs and defendants, including recently for successful plaintiffs in *League of Women Voters of Florida, Inc. v. Detzner*, 314 F. Supp. 3d 1205 (N.D. Fla. 2018), and for the Secretary of State of Florida in *Worley v. Detzner*, U.S. District Court, N.D. Fla (4:10-cv-00423-RH-WCS). *Id.* at 23. Dr. Smith also testified as an expert witness for plaintiffs in *Jones v. DeSantis*, Consolidated Case No. 4-19-cv-300-RH-CAS, (N.D. Fla.). Dr. Smith also serves as President of a consulting firm based in Gainesville, Florida, which focuses on empirical research on U.S. election processes. *See* Expert Report of Daniel A. Smith ¶ 8, ECF 86-12 (“Smith Report”).

C. Dr. Michael Herron

Plaintiffs will rely on Dr. Michael C. Herron’s testimony, Professor at Dartmouth College, to demonstrate the undue burden of Florida’s vote by mail system in light of the COVID-19 pandemic. Dr. Herron is the William Clinton Story Remsen 1943 Professor of Government and Chair of the Program in Quantitative Social Science at Dartmouth College. Expert Report of Michael C. Herron ¶ 20, ECF

88-1 (“Herron Report”). Dr. Herron is a recognized expert on American elections and election administration, having published more than 20 articles in peer-reviewed political science journals and additional articles in specialty journals. *Id.* ¶ 22-23; Herron Report at 79 (Curriculum Vitae). Dr. Herron has also studied Florida elections specifically, having completed, with two co-authors, a working paper on vote by mail ballot rejection in Florida. *Id.* ¶ 25. Dr. Herron has served as an expert in several voting-related cases such as *Veasey v. Abbott*, 265 F. Supp. 3d 684 (S.D. Tex. 2017) (for plaintiffs); *NAACP v. Husted*, 43 F. Supp. 3d 808 (S.D. Ohio 2014) (for plaintiffs); and *Radogano v. IL State Board of Elections*, 836 F. Supp 2d 759 (N.D. Illinois 2011) (for defendants) to name just a few.

IV. IMPACT OF COVID AND LIKELY RESURGENCE

There is growing concern that Florida may be the next epicenter for the coronavirus disease 2019, commonly known as (“COVID-19”).¹¹ On July 2, 2020, Florida reported over 10,000 new cases—a one-day record that is approaching New

¹¹ See Robert Glatter, MD., *Where Is the New Epicenter for COVID-19?*, Forbes, June 28, 2020, <https://www.forbes.com/sites/robertglatter/2020/06/28/where-is-the-new-epicenter-for-covid-19/#6b07744c2636> (last visited July 2, 2020).

York's peak in early April.¹² COVID-19, the novel respiratory disease that can cause severe complications, including respiratory failure and death.¹³

The virus, which is easily spread through respiratory airborne secretions, such as coughing, sneezing, or talking, which can project as much as six feet from an infected person, has a long incubation period “estimated to average 5-7 days and up to 14 days.” See ECF 88-2, at 14, 16. Sometimes, people who are infected with the virus do not show any symptoms, appearing to themselves and others to be perfectly healthy, making them particularly potent agents of transmission. See *People First of Alabama v. Merrill*, 2020 WL 3207824, at * 3 (N.D. Ala. June 15, 2020), *aff'd sub nom. People First of Alabama v. Sec'y of State*, Case No. 20-12184, 2020 WL 3478093 (11th Cir. June 25, 2020), *rev'd on other grounds*, -- S. Ct. --, No. 19A1063, 2020 WL 3604049 (July 2, 2020) (staying order granting preliminary injunction pending disposition of appeal).

¹² *Id.* For comparison, New York's single-day peak on April 2, 2020, was over 12,000 diagnoses. See Emily Czachor, *Florida COVID-19 Spike Approaches New York April Peak with Less than One-Tenth of Deaths* (last visited July 2, 2020). <https://www.newsweek.com/florida-covid-19-spikes-approach-new-york-april-peak-one-tenth-deaths-1513966> (last visited July 2, 2020).

¹³ See The Center for Disease Control and Prevention (“CDC”), *Cases in the U.S.*, available at <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited July 2, 2020).

Although all persons are susceptible to contracting the virus and people of all demographics have endured severe cases, certain groups have a higher risk of developing complications and dying from COVID-19. *Id.* at * 2. These high-risk individuals include people over 65 years and older, people who live in nursing home or long-term care facility, and people of all ages with underlying medical conditions or who are immunocompromised. *See* ECF 88-2, at 20. More than 80% of Floridians who have died from COVID-19 were age 65 or older. *Id.* at 22.

COVID-19 also has had a devastating disproportionate effect on African Americans and Latinos. For example, in Miami, of positive cases, African Americans “died at a rate of 4.6% versus 3.1% for whites, representing a 50% higher death rate.” *Id.* at 23. In Seminole County, 42% of the deaths were among Latinos, even though they make up 22% of the county’s population.¹⁴ *Id.* The CDC data

¹⁴ Statewide, non-Whites constitute 56.4% of COVID-19 cases even though they account for 46.8% of Florida’s population. *See* Florida Department of Health, Division of Disease Control and Health Protection, *Florida’s COVID-19 Data and Surveillance Dashboard*, available at <https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429> (last visited July 2, 2020).

suggests “a disproportionate burden of illness and death among racial and ethnic minority groups.”¹⁵ *Id.* at 24.

At this time, there is no known cure, no effective treatment, and no vaccine for COVID-19. *See South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring). To minimize the risk of infection, experts caution against gatherings of persons from multiple households, including at polling places, post offices and libraries. *See* ECF 88-2, at 27. Indeed, high-risk populations are advised to avoid public gatherings altogether. *Id.*

Importantly, experts predict “multiple ‘waves’ of this pandemic and agree that these waves will continue through the fall of 2020 and beyond.” *Id.* at 28. Waves of new cases are predicted “for Independence Day, return to school, Labor Day weekend, and then September [and] October [all of which will predictably] have an impact for the November 3rd election.” Deposition of Robert T. Ball 15, 15:19. Given the high likelihood of a fall surge, “there will be a significant risk of infection

¹⁵ Besides the human toll, COVID-19 also severely impacts Florida’s \$90 billion hospitality industry. Governor DeSantis acknowledged that the industry “has taken a hit” amid a Moody’s analysis projecting that the state’s revenue could lose between \$8.1 to \$10 billion. *See* Michael Moline, *COVID-19 highlights a particular vulnerability for Florida: Its regressive tax system*, Florida Phoenix, May 12, 2020, available at <https://www.floridaphoenix.com/2020/05/12/covid-19-highlights-a-particular-vulnerability-for-florida-its-tax-system/> (last visited July 1, 2020).

among voters and poll workers at polling places in Florida in November.” *See* ECF 88-2, at 30.

Without a vaccine, to limit the spread of the virus, the CDC recommends self-isolation, social distancing, wearing masks, and frequent handwashing. *Id.* at 19. More specifically, to protect the franchise, the CDC recommends using voting methods that minimize direct contact with other people and reduce crowd sizes, using mail-in ballots, early voting, and drive-up voting. *Id.* at 29. Dream Defenders Plaintiffs seek relief consistent with the CDC guidelines.

V. FLORIDA’S INADEQUATE RESPONSE TO PROTECTING THE RIGHT TO VOTE DURING COVID

A. Florida’s Vote By Mail Requirements Have a Disparate Impact on Black and Latinx Voters (MDS 15, 25)

Florida’s onerous vote by mail system places a heavy burden on all Florida voters, with severe predictable consequences amid the current pandemic. Without changes, and depending upon voting method trends, between 36,000 and 153,000 VBM ballots will be rejected in the 2020 November general election—a sharp increase from recent years. Herron Report ¶ 18.

But, these burdens do not fall evenly on voters across race. Black and Latinx voters are more likely to have their ballots rejected across the board, as well as for so-called “voter-caused errors” and late return. These disparities are driven by

factors within Florida's control: more undeliverable ballots, slower turnaround times for delivering requested ballots to voters of color, inadequate cure procedures, and a return deadline that is not completely with the voter's ability to meet. COVID-19 will exacerbate these disparities, unless Florida makes simple changes that can dramatically reduce them.

1. Florida's VBM System Disproportionately Blocks Black and Hispanic Voters From the Ballot Box

a. Florida Rejects a Greater Proportion of Black and Hispanic Voters' Ballots Across the Board

The various types of costs to vote-by-mail voting present higher barriers to Black and Hispanic voters, both historically throughout the nation, and in Florida particularly. Smith Report ¶ 19. As a result, a disproportionate number of Florida registered voters whose vote-by-mail ballots are not ultimately counted are Black and Hispanic. *Id.* ¶ 5; DD Plaintiffs' Exh. 1, Expert Rebuttal of Daniel A. Smith ¶ 8 ("Smith Rebuttal"). This includes voters who never received a ballot, returned the ballot beyond the 7 p.m. Election Day deadline, or had their ballot rejected by the county canvassing board. Smith Report ¶ 5.

These disparate rejection rates apply across the state of Florida and across the three elections studied by Plaintiffs' Expert Dr. Daniel Smith—the 2016 general election, 2018 general election, and 2020 PPP. Smith Rebuttal ¶ 39. As noted in Dr.

Smith's Expert Report, "in nearly every county across three elections, the difference between both the Black and White VBM rejection rates and the difference between the Hispanic and White VBM rejection rates [] was positive." Smith Rebuttal ¶ 39 (emphasis in original).

b. Florida Rejects Black and Hispanic Voters' Timely VBM Ballots More Often Than White Voters' Ballots

Black and Hispanic voters are significantly more likely than White voters to have their timely-submitted ballots rejected in the 2016 general election, the 2018 general election, and the 2020 PPP. Smith Report ¶¶ 61-62; Smith Rebuttal ¶ 15.

Black voters ranged from 91% to 246% more likely than White voters to have their timely ballots rejected due to so-called "voter-caused error" in the most recent statewide elections. Smith Report ¶ 61; Smith Rebuttal ¶ 15. Hispanic voters ranged from 143% to 250% more likely than White voters to have their timely ballots rejected due to voter caused error in the elections studied. Smith Report ¶¶ 61-61; Smith Rebuttal ¶ 15.

Rejection rates are lower for White voters than for Black and Hispanic across the state. Smith Report ¶ 65. While the differences are less than one percentage point, the disparities translate into tens of thousands of rejected vote by mail ballots in a Florida statewide election. Smith Rebuttal ¶ 16.

c. Florida Rejects Black and Hispanic Voters' VBM Ballots as Late Far More Often Than White Voters' Ballots

Vote by mail ballots cast by Black and Hispanic voters are consistently rejected as late at a higher rate than those cast by White voters across Florida. Smith Rebuttal ¶ 13. Plaintiff Expert Dr. Smith's "analysis of VBM ballots returned after the state's deadline shows that Florida's Election Day deadline for VBM ballot returns has a disparate impact on racial and ethnic minorities, with Black and Hispanic VBM voters more likely to have their ballots rejected for lateness when compared to White VBM voters, in the 2020 PPP, the 2018 GE, and the 2016 GE." Smith Rebuttal ¶ 37.

In each of the past three statewide elections in Florida, approximately twice the proportion of Hispanic voters' VBM ballots as White voters' ballots were rejected as late. Herron ¶ 90. Defendant's own expert Dr. Lockerbie reported statistically significant findings that Black voters are more likely than White voters to have their VBM ballots rejected as late in all three elections analyzed, controlling for a range of factors. DD Plaintiff's Exh. 2, Report of Brad Lockerbie 12-13 ("Lockerbie Report"). Dr. Lockerbie reported that Hispanic voters are statistically significantly more likely than White voters to have their VBM ballots rejected as late in two of the three elections analyzed. Lockerbie Report 12-13.

Plaintiffs' Expert Dr. Herron corrected some errors in Dr. Lockerbie's calculations and found an even stronger statistically significant disparity for Black voters for all three elections, and that Hispanic voters also suffered a statistically significant disparity in all three elections. DD Plaintiff's Exh. 3, Expert Rebuttal Report of Michael C. Herron Rebuttal ¶¶ 91-92 ("Herron Rebuttal").

2. These Disparities Are Caused by Florida Policy, and COVID-19 Will Make Them Worse

These disparities are driven by factors within Florida's control, and will be predictably worsened by COVID-19 without simple remedial action.

a. Disparities in Undeliverable Ballots

Black voters were more likely than White voters to have their requested VBM ballots returned as undeliverable in Florida in the 2016 general election, the 2018 general election, and the 2020 PPP. Smith Report, ¶ 40 tbl. 2. Moreover, the rate of undeliverable ballots between the 2018 and 2020 elections jumped much more sharply for both Black and Hispanic voters than for White voters. Smith Report ¶ 41.

As more people are temporarily displaced by the pandemic, this suggests a greater COVID impact on voters of color and may portend a similar disproportionate increase in the upcoming August and November elections. *Id.*

b. Supervisors of Elections Are Slower to Send VBM Ballots to Black and Hispanic Voters

For every Florida election studied, SOEs took longer to send requested ballots to Black and Hispanic voters than to White voters. Smith Report ¶ 84. This additional delay increases the cost of voting for voters of color as compared to their White counterparts. Smith Report ¶ 85. In the 2020 PPP, this difference appears to have been driven by two factors. First, SOEs more often sent early-applying White voters their ballots on the first day permitted by statute, whereas for early-applying Black and Hispanic voters there was more likely to be a two-day delay. Smith Report ¶ 78. Second, even for those voters who requested ballots within 35 days of the election (when statute requires SOEs to send a ballot within two days of request), SOEs took more time to turn around requests to Black and Hispanic voters. Smith Report ¶ 84. For Hispanic voters, this extra delay actually placed SOE turnaround time outside the period of statutory compliance at an average of 2.23 days. *Id.*

Analysis of the 2016 and 2018 elections tells a consistent story, with similar delays in SOEs sending out ballots to early-applying Black and Hispanic voters. Smith ¶¶ 88, 95. In both the 2016 and 2018 general elections the average delay for SOEs sending ballots to Black voters was 2.5 days or greater—again outside the statutory period. Smith Report ¶ 84. For Hispanic voters the delay was 3.20 and 3.67 days respectively during these elections. *Id.*

Although many voters of all races requested ballots in the days leading up to the request deadline of 10 days prior to Election Day, SOEs were more likely to send ballots out to Black voters than to White voters in the final week before the 2020 PPP election—leading to increased late return rates. Smith Report ¶ 80.

Across various dates that SOEs sent ballots to voters in the 2020 PPP, Black and Hispanic voters are typically more likely to have their return ballots arrive at elections offices past the statutory Election Day deadline. Smith Report ¶ 79. In 2016 and 2018, “the closer to the statutory four-day cutoff prior to Election Day (that [was] in place at the time for those two elections) that a VBM ballot was delivered by SOEs, the greater the likelihood that these VBM ballots arrived late, and that the rejection rates for [Black and Hispanic] voters across time were generally higher than they were for White voters.” Smith Report ¶ 81.

The number of VBM ballot requests is likely to increase dramatically in the coming elections due to COVID-19, putting more stress on SOEs and likely leading to even greater disparities. County SOEs are already reporting ballooning demand for VBM ballots due to safety concerns over in-person voting. *See, e.g.*, Deposition of Christina White 31:18-32:5 (estimating that the number of Miami-Dade County voters requesting VBM ballots will increase by 400,000 for the November 2020 election). If Florida’s trends match surges in other states, there could be 6.8 million

VBM ballots cast in the 2020 general election. Herron Report ¶ 6. Even a repetition of the 2020 PPP rate would produce 4.3 million VBM ballots. *Id.* This would lead to a corresponding surge in rejected VBM ballots—estimated between 56,949 and 152,591. *Id.* ¶ 18. These, like past rejected ballots, would disproportionately come from Black and Hispanic voters.

c. Black and Hispanic Voters Are Less Likely to Have VBM Experience

Racial disparities between VBM rejection rates exist regardless of voters' level of experience with VBM. Smith Rebuttal ¶¶ 21-22. But, the combination of less prior experience with VBM and substantial disparities among those without experience produces even sharper disparities than either factor alone—and this combination is likely to become more acute due to COVID.

Shifting voting mode leads to more rejected ballots, both for alleged voter-caused errors and lateness, which partly drove differential rejection rates for Black and Hispanic voters in the 2020 PPP. Smith Rebuttal ¶ 10. New VBM voters face the same financial, transportation, and time-based costs as those with prior experience, and also new information costs to voting. Herron Report ¶ 44. Voters who typically vote in person are at greater risk of failing to overcome the different barriers associated with voting by mail. Smith Report ¶ 23; Herron Report ¶ 41.

Regardless of race, in the 2020 PPP those with no recent VBM experience were nearly three times more likely (181%) to have their timely ballots rejected, Smith Rebuttal ¶¶ 21-22; Herron Report ¶¶ 170-171, and more than two and a half times more likely (162%) to have their ballots rejected as late than those with previous mail voting experience. Smith Rebuttal ¶ 29; Herron Report ¶ 181-182.

Black and Hispanic voters who voted by mail in the 2020 PPP were less likely than White voters to have had prior experience with mail voting. Smith Rebuttal ¶ 9. Hispanic voters were 18% (6.1 percentage points) more likely than White voters to lack previous VBM experience; and Black voters were 11% (3.6 percentage points) more likely than White voters to lack experience. Smith Rebuttal ¶ 18.

d. Among New VBM Voters There Are Substantial Racial Disparities

Among inexperienced vote by mail voters, there are further significant disparities in rejection rates between Black and Hispanic voters on one hand, and White voters on the other. Smith Rebuttal ¶ 20. The rejection rate for Black voters who submitted timely ballots was more than twice that for White voters (103% larger). Smith Rebuttal ¶ 22.

This translates to “nearly one out of 50 Hispanic voters, and one out of 65 Black voters, who successfully cast a ballot in person in the previous two general

elections [having] had his or her VBM ballot rejected in the 2020 PPP, for a missing signature or ‘voter-caused error.’”

Black voters without prior mail voting experience were also more than twice as likely as similarly situated White voters (109% more likely) to have their ballots rejected as late. Smith Rebuttal ¶ 29. Hispanic voters lacking vote by mail experience, similarly, were 91% more likely than similar White voters to have their ballots rejected as late. *Id.*

The threat of COVID-19 is likely to further increase the burdens on Black and Hispanic voters, who were already disproportionately burdened by Florida’s vote by mail system. Smith Report ¶ 88. Dr. Herron notes in his expert report that “Florida voters who in the run-up to an election had honestly intended to vote in-person, but changed their minds or lost the option to do this on account of the COVID-19 pandemic in general or a specific outbreak in particular, are at elevated risk of a non-counted VBM ballot.” Herron Report ¶ 135. Black and Hispanic voters will be more likely to shift their method of voting from in-person to vote by mail as a result of COVID-19 and less likely to have those VBM ballots count. Smith Rebuttal ¶ 5.

e. The Existing Cure Process Worsens Disparities Rather Than Reducing Them

In the two elections studied in Miami-Dade County, Black voters who attempted to cure on-time ballots with missing signatures or other errors were

substantially less likely than White voters to successfully navigate the cure process. Smith Report ¶ 71. White voters' cure rates were nearly 30% higher than Black voters' in the 2018 general election and approximately 13% higher in the 2020 PPP. *Id.*

3. Simple Fixes Can Drastically Reduce Racial Disparities

Black and Hispanic voters in Florida have historically been more responsive than White voters to changes in voting opportunities. Turnout among these populations has decreased disproportionately when additional barriers to the ballot are erected and increased disproportionately when similar barriers are removed. Smith Report ¶ 20.

a. Shifting Ballot Receipt Deadline to Election Day Postmark

If Florida makes no changes to its Election Day receipt deadline, we can expect at least 33,175 ballots to be rejected due to lateness, which is more than three times the peak number in recent elections. Herron Report ¶ 18. Critically, these late ballots figures will be marred by racial disparity—meaning that an increasing and disproportionate number of Black and Latinx voters will be blocked from the ballot box.

If Florida shifted its VBM deadline to postmarked instead of received by Election Day, “the disparities in the VBM rejection rates for [Black and Hispanic]

and [W]hite voters would likely be drastically reduced, if not eliminated altogether. Smith Rebuttal ¶ 12.

Across all three elections studied, shifting the deadline benefits all voters, and, critically, reduces the racial disparities among voters. Smith Rebuttal ¶ 35. As Plaintiff Expert Dr. Herron notes, “a postmark deadline provides voters with a greater degree of individual control over ballot receipt than the present VBM deadline, which is based on actual ballot receipt by an SOE.” Herron Report ¶ 144. Consequently, pushing back the deadline by one or two days “would result in a massive reduction in rejected VBM ballots for [Black and Hispanic] voters, but White voters casting ‘late’ VBM ballots would also reap the benefits.” *Id.* Pushing back the deadline between 10 and 14 days could eliminate the racial disparities entirely Smith Rebuttal ¶¶ 32-35.

b. Addressing Deficiencies in the Cure Process

Some of the sharpest racial disparities in Florida’s VBM system observed across the most recent statewide elections can be fixed through an adequate cure process: missing signatures and other “voter-caused errors.” Unfortunately, the current cure process appears to be exacerbating rather than addressing racial disparities. Addressing deficiencies in the process by improving notice and

providing a longer post-election cure window is necessary to close the gap between rejected ballots among Black, Hispanic, and White voters.

4. These Disparate Impacts Take Place Against the Backdrop of Florida's Long History of Racial Discrimination and other Factors Relevant to Voting Rights Act Section 2 Senate Factors Analysis

Florida has a long history of discrimination against people of color that has hampered their ability to register, vote, and generally, to participate equally in the democratic process. Kousser Report ¶ 9. Florida disfranchised even free people of color before the Civil War. *Id.*

Despite being the most urbanized southern state with the most northern immigrants by 1920, Florida remained a segregated, largely one-party plutocracy until the early 1960s, and Black citizens remained largely disfranchised until the passage of the federal Voting Rights Act in 1965. Every Florida governor until 1970, even the moderate Leroy Collins, felt the necessity to endorse segregated schools. Kousser Report ¶ 10.

The levels of racial segregation and prejudice permeated the electoral process where people of color have had a difficult time getting elected in Florida. Until 1992,

no African American had been elected to Congress in Florida since Reconstruction.¹⁶ No African American served in the State Legislature in Florida from 1889 until 1969. Even today, the percentage of Black and Latinx State Legislators is well below the proportion of these residents in Florida's population. Only two black people have won statewide office, Supreme Court Justice Joseph Hatchett, who had previously been appointed to the office, in 1975, and Jennifer Carroll, elected Lt. Gov. in 2010. Kousser Report ¶¶ 10, 20, 65-68.

As the federal court for the Northern District of Florida noted in 1992,

A longstanding general history of official discrimination against minorities has influenced Florida's electoral process. . . . As recently as 1967, § 350.20, Fla. Stat. provided in part: "The Florida Public Service Commissioners may prescribe reasonable rules and regulations relating to the separation of white and colored passengers in passenger cars being operated in this state by any railroad company or other common carrier." Additionally, § 1.01(6), Fla. Stat. (1967) provided that "the words 'Negro,' 'colored,' 'colored persons,' 'mulatto,' or 'persons of color,' when applied to persons, include every person having one-eighth or more of African or Negro blood."¹⁷[2]

Kousser Report ¶ 29.

¹⁶ See *DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1079 (N.D. Fla 1992) (three-judge court) (noting that "[a]n African-American has not represented Florida in the United States Congress in over a century).

¹⁷ *De Grandy*, 794 F. Supp. at 1079.

Federal courts have repeatedly found evidence of racial discrimination in voting in the state. Once Black people could vote, they found their way to exercising political power in Florida blocked by such devices as at-large elections, which were widely and successfully attacked with Section 2 lawsuits in the 1980s. But the State continued to pass discriminatory laws, such as restrictions on early voting, and has failed to provide election materials in Spanish as required by the Voting Rights Act. *Id.* ¶¶ 10, 31-36.

From 1983 to the present, there have been 90 voting rights legal actions against the state, county, or municipal governments of Florida, at least 57 of which resulted in findings of discrimination, including 37 under Section 2 of the Voting Rights Act and 6 under Section 5. *Id.* ¶ 31.

Florida has a long history of disenfranchisement of formerly incarcerated persons. Until last year, restoration of voting rights has been dependent on a governor's whim. Although the executive clemency process was eased under Governors Reubin Askew and Bob Graham from 1975 through 1988, more easily restoring the rights of former incarcerated persons to vote, clemency remained at the whim of the governor, and grants of clemency slowed markedly from 1989 through 2002, and even more dramatically from 2011 through the present. A successful voter-initiated amendment of the State Constitution in 2018, which aimed to allow

formerly incarcerated persons to vote much more easily, was severely limited by the 2019 passage of SB7066. *Id.* ¶¶ 11, 42. Indeed, the more than one million voters who witnessed the passage of Amendment 4 and the hope of enfranchisement continue to wait for the opportunity to register and to cast a ballot.

Voting in Florida continues to be strongly racially polarized. From 2004 through 2018, Democratic candidates for president and governor received the votes of 84-96% of Black Floridians and 44-62% of Latinos, but only 32-42% of non-Hispanic whites in various elections. This was not just a product of Barack Obama's and Andrew Gillum's candidacies; votes for John Kerry and Hillary Clinton were nearly as racially polarized as Obama's and Gillum's. The strong correlation between race and party gives Republicans an incentive to impede voting by African Americans and some Latinos. *Id.* ¶¶ 12, 37-40.

Direct racial appeals in election campaigns were commonplace in Florida through the 1990s; they have continued in more subtle, but still effective ways. For example, racial appeals were still in evidence in the campaign against the first Black statewide nominee of a major political party in Florida history in 2018. In 2018, Democratic gubernatorial nominee Andrew Gillum was opposed with racist robocalls from an out-of-state neo-Nazi group, as well as an appeal to voters by his opponent not to "monkey up" the election by voting for Gillum, and an attack on

Gillum by a Republican congressman that evoked the racial stereotype of Black people as violent. Kousser Report, ¶¶ 19, 62-64.

Black and Latinx communities continue to encounter elections officials who harbor prejudices against them. For example, when asked to explain why Black voters in her county encounter higher rates of uncured VBM ballot errors than White voters, the Monroe County SOE replied, “I do not know every black voter in Monroe County . . . I would say that maybe these are voters, were people who felt they had to vote to stay on the rolls, so they just sent their ballot in *but they weren’t interested in voting.*” Joyce Griffin Dep. 108:19-109:10 (emphasis added). The same SOE also noted explained that it’s harder to recruit Latino voters because “it’s not in our culture to vote, to work as a poll worker. . . .” *Id.* 113:17-20.

The persistent effects of past discrimination are palpable and continue to hinder the ability of communities of color to participate effectively in the political process. Decades after *Brown v. Board of Education*, Florida’s public and charter schools are increasingly segregated. The effects of segregation are intensified because poverty is concentrated in the segregated schools of students of color. *Id.* ¶ 45.

A racially disparate education gap also exists in Florida. Student scores on standardized tests and teacher scores on qualification exams show large gaps

between non-Hispanic Whites and Hispanics, and even more dramatic gaps between White and Black residents. The Black and Latinx communities in Florida have considerably smaller percentages of high school and college graduates than the non-Hispanic White community. These are the kinds of deficits that put people at a disadvantage in negotiating the complex avenues of political participation that are likely to constitute the 2020 election during the COVID-19 crisis. *Id.* ¶¶ 13, 47.

The rates of poverty among Black and Hispanic residents in Florida are far higher than those of White Floridians. Income disparities are not confined to the very poor. Black and Latinx median household incomes also trail well behind those of White Floridians. Black and Latinx residents are also much more likely to live in renter-occupied housing than are White residents. Unemployment rates among people of color were appreciably higher than those of Whites before the declaration of a national emergency in March 2020, and they have soared since. More than 25% of Florida's workforce at least tried to file claims for unemployment insurance with Florida's notoriously difficult system from March 1 through the middle of May 2020. While unemployment figures broken down by race and ethnicity since the pandemic are not yet available for Florida, nationwide figures show that Black and Latinx communities are suffering higher rates of unemployment than Whites, and there is no reason to believe the pattern is different in Florida. *Id.* ¶¶ 14, 50

Black and Latinx families move more often, rent more often, and are poorer than white Floridians, which makes them less likely to have home access to the internet. Not having an internet connection, in turn, makes it more difficult to register to vote online and to learn about all of the many changes in the voting process in 2020. The fact that Florida, unlike most states, does not require employers to allow employees time off to vote, also potentially diminishes participation among people of color at a time when flexible time for new ways of voting are needed, and even longer voting lines than previously are likely. The fact that Black and Latinx residents move more often may make it more difficult for people of color than for non-Hispanic Whites to vote by mail, because election authorities may not have up-to-date addresses for them. *Id.* ¶¶ 15, 51-52.

Because of their comparative poverty and, more important, because of Florida's refusal to expand Medicaid under the Affordable Care Act, people of color in the state were much more likely than non-Hispanic Whites to be uninsured in 2018. Since Black and brown Americans have been more likely to lose their jobs, and thus their health insurance, because of the pandemic, the health insurance gap between non-Hispanic Whites and people of color in Florida has probably increased during 2020. Kousser Report ¶¶ 16, 55-57.

Florida Department of Health (FDOH) statistics from 2019 show that Black and brown Floridians were more likely than non-Hispanic Whites to have several underlying health conditions that the Centers for Disease Control has found are associated with susceptibility to COVID-19. FDOH figures also emphasize that people of color in the state were only about 60% as likely as non-Hispanic Whites to have previously had vaccinations for flu and pneumonia, possibly disproportionately weakening their lungs, that Black and brown residents were 83-94% less likely to have health insurance (reaffirming figures from the U.S. Census), and that they were about 150% more likely not to have seen a doctor in the last year because of the cost of doing so. Kousser Report ¶¶ 17, 57-60.

Although reporting on COVID-19 case numbers and hospitalizations by race in Florida is spotty and outdated, and in some reports, deliberately inaccurate, data that is available shows that as of May, 2020, deaths of Black Floridians from COVID-19 are nearly 50% higher than the proportion that we would expect from their proportion of the population. A greater incidence of morbidity within the African-American and Latinx communities on account of COVID-19 will likely increase their demand for mail ballots, and therefore, for eased online voter registration, less restrictive vote-by-mail (VBM) acquisition and submission policies, more early voting, polling place, and curbside drop-off facilities, and more

opportunities to cure errors in acquiring and casting ballots. Because they are likely to be sicker from COVID-19, these communities can enjoy an opportunity “to participate in the political process and to elect representatives of their choice”¹⁸ only if those procedures are eased or made more widely available compared to what they are now. Kousser Report ¶¶ 18, 61.

Florida has not been responsive to the particularized needs of Black and Latinx residents. Not only did the State refuse to extend Medicaid under the Affordable Care Act, but it also joined the Texas-led lawsuit, now pending in the U.S. Supreme Court, which aims to overthrow the ACA entirely. Florida’s rate of uninsured adults is considerably higher for people of color. The same is true for children. In 2018, Florida had the sixth highest rate of uninsured children of any state in the nation. From 2016 to 2018, the proportion of Latinx children in the state without health insurance rose by 20%, and that rate was 1.25 times as high as the rate for Florida’s children as a whole. Kousser Report ¶¶ 21, 69-70.

Florida’s criminal justice system also perpetuates discrimination. Florida suspends driver’s licenses not just for traffic infractions, but also as a penalty for failing to pay any court fines. In 2017, one out of every 15 Florida drivers had their

¹⁸ Section 2 of the Voting Rights Act, as amended in 1982, as quoted in *Thornburg v. Gingles*, 478 U.S. 30, 36 (1986).

license suspended. A case study found that the licenses of black people were suspended at 1.6 times their proportion in the population. The license suspension policy, which, like the State's felon disenfranchisement policies under SB7066, differentially penalize those too poor to pay fines, which could certainly make it more difficult for Black and brown Florida voters to participate in the COVID-impacted elections of November, 2020. Kousser Report ¶¶ 22, 71-72.

Florida has been much less responsive than other states to the implications of the COVID-19 crisis for the election system. In that sense, the State's policies have been quite tenuous. Since the beginning of 2020, at least 23 states and the District of Columbia have adjusted their election laws, including vote-by-mail rules, to deal with the crisis—red states and blue states, southern and Midwestern and northern and coastal and land-locked—but not Florida. Kousser Report ¶¶ 23.¹⁹

B. Florida Imposes Unreasonable Restrictions on the Process for Curing Deficiencies in VBM Ballots

Many VBM ballots that are timely received by Florida SOE are simply rejected as illegal and not counted. In both the 2016 and 2018 elections, more than

¹⁹ Although the Governor recently issued an executive order authorizing some assistance to counties to recruit poll-workers and ensure sanitary polling places, the order does nothing to increase access to alternatives methods of voting, such as vote-by-mail or early voting, that would avoid crowded polling places and allow at-risk voters to vote safely. Executive Order 2020-149.

11,000 on-time ballots were rejected because of lack of signature or other “voter-caused error.” Smith Report ¶ 59. In the 2020 PPP, more than 7,000 ballots were rejected for these reasons. *Id.* Rates of rejection vary across Florida’s 67 counties, demonstrating that burdens on vote-by-mail voters are not equal across the state. *Id.* ¶ 6. The rejection rate, however, was higher for the 2020 PPP. *Id.* ¶ 60. It increased by more than 20% over the 2018 rejection rate, demonstrating a likely initial impact of COVID-19. *Id.*

VBM ballots are only counted if the signature of the elector on the voter’s certificate is deemed to match her signature in the registration books or the precinct register envelope. Fla. Stat. § 101.68(2)(c). When a county canvassing board believes a VBM ballot contains a signature that does not match, the supervisor “shall ... immediately notify” the voter. Fla. Stat. § 101.68(4)(a) (2017).

1. Florida Law and Policy Requiring Documentation to Cure a Ballot Deficiency Unreasonably Burdens the Right to Vote.

Currently, if the voter’s certificate is unsigned or the SOE determines the voter’s signature does not match her signature in the registration books or precinct register, the voter must submit a “cure affidavit” along with a form of identification (“cure identification requirement”) to the SOE no later than 5:00 PM on the second day after an election (the “cure deadline”), for her ballot to be considered by the County Canvassing Board. *Id.* If the voter does not submit the cure affidavit and a

copy of a cure eligible identification document by the cure deadline or, even if she does, if the County Canvassing Board finds that the voter's signature on the vote-by-mail cure affidavit does not match her signature in the registration books or precinct register, her vote will not be counted. *Id.*

Florida law specifies that for an elector who is required to cure her VBM ballot because of a potential mismatch in her signature, the elector must submit a current and valid "Tier 1" identification document which confirms the identity of the elector. Fla. Stat § 101.68(2)(c)(1)(b). Tier 1 identification includes the following: a "[c]urrent and valid identification that includes your name and photograph: Florida driver license; Florida identification card issued by the Department of Highway Safety and Motor Vehicles; United States passport; debit or credit card; military identification; student identification; retirement center identification; neighborhood association identification; public assistance identification; veteran health identification card issued by the United States Department of Veterans Affairs; a Florida license to carry a concealed weapon or firearm; or an employee identification card issued by any branch, department, agency, or entity of the Federal Government, the state, a county, or a municipality." *Id.*

For other ballot deficiencies, a voter may submit either Tier 1 ID or Tier 2 ID. Tier 2 identification consists of the following, and can only be submitted by a voter

who does not have a form of Tier 1 identification: “identification that shows your name and current residence address: current utility bill, bank statement, government check, paycheck, or government document (excluding voter information card).” *Id.* However, the cure affidavit does not tell a voter that Tier 1 identification is required to cure a VBM ballot flagged with a signature match issue. DD Plaintiffs’ Exh. 4, Form DS-DE 139 VMB Cure Affidavit. Florida’s cure process thus requires a voter who simply does not sign her ballot, even though there is no question or concern regarding her identity, to submit identification documents that would otherwise not be required.

2. Florida Law and Policy for Flagging Alleged Ballot Deficiencies

Staff at the SOE office, sometimes including the SOE, flag ballots for signature match concerns and notify the voter of her need to cure; the Canvassing Board later determines, according to statute and sometimes after the cure deadline has passed, whether a voter’s signature matches for the purpose of counting or rejecting that ballot. Anna Baringer, Michael C. Herron, Daniel A. Smith, Voting by Mail and Ballot Rejection: Lessons from Florida in the Age of the Coronavirus 14, ECF 92-4 (“Baringer et al. Report”); Deposition of Lisa Lewis 82-83; Deposition of Jennifer Edwards 120; Deposition of Tammy Jones 168-69. The SOE is required by Florida law to notify the voter of alleged ballot deficiencies “[a]s soon as

practicable” in the following manners: 1. by e-mail and directing the elector to the cure affidavit and instructions on the supervisor's website; 2. by text message and directing the elector to the cure affidavit and instructions on the supervisor's website; or 3. by telephone and directing the elector to the cure affidavit and instructions on the supervisor's website. Fla. Stat. § 101.68(4)(a). The SOE is only required to actually mail the voter a notice by first-class mail when the ballot deficiency is identified earlier than the day before an election. *Id.*

3. Florida Law and Policy for Contacting a Voter About An Alleged Ballot Deficiency

County Defendants vary widely in how they attempt to contact a voter regarding the voter’s alleged ballot deficiency. County Defendants that do not have the voter’s email address or phone number will only attempt to contact the voter by U.S. mail. Lewis Dep. 82-83; Edwards Dep. 122; Jones Dep. 172 (“Q. I'm sorry if you mentioned this earlier, but how do you notify people that they need to cure their ballot? A. . . . So whatever the voter provides us, we make every attempt to provided the voter with -- usually a phone call will do. Our first attempt is usually a phone call so we can actually speak one-on-one to the voter. But then if we don't have a phone number -- because, as you know, the phone number’s not required.”). Even counties that have a voter’s email address will only make two attempts to

contact a voter regarding the need to cure. Edwards Dep. 121. Moreover, the time it takes counties to actually notify a voter of an error, varies.

The Levy County SOE explained that the time between receiving a ballot and staff checking the ballot for errors, including validating the signature, can “easily” take one to two days. Jones Dep. 170-71 (“Q. The maximum time before a error would be checked for would be the next day? A. I would say one to two days before they’re -- to be honest, before they're checked in. We try to do our best, you know, to check them in within 24 hours of receipt.”).

4. Florida’s Cure Deadline Results in De Facto Ballot Rejection of VBM Ballots Received by the SOE on or Near Election Day as well as for some UOCAVA Voters.

Some voters are totally deprived of an opportunity to cure any alleged deficiency in their VBM ballot because of the cure deadline. Voters are not required to list an email address or phone number in their registration application or other information provided to their SOE, and voters do not all update that information when it changes. For the subset of voters without a phone number or email address on file, U.S. mail is the only way the SOE can contact them. Fla. Stat. § 101.68(4)(a); Edwards Dep. 122; Lewis Dep. 85. Any of these voters whose VBM ballot is received by their SOE on Election Day will only be notified of their need to cure by U.S. mail, meaning the voter will be notified of a ballot deficiency after the

cure deadline has passed. Edwards Dep. 122-23. This could explain why sometimes not even half of voters flagged as not signing their VBM ballots or as having a signature match issue attempt to cure their VBM ballot. Lewis Dep. 86.

5. County Defendants' Ballot Rejection Practices Allow Bias to Flourish, Accounting for the Higher Rates of Ballot Rejection Among Already Disadvantaged and Burdened Groups Represented by Dream Defenders Plaintiffs

County Defendants' practices with respect to ballot rejection allows bias to flourish and leads to a heightened risk of ballot rejection for identifiable, disadvantaged communities. This is evidenced by the significant variance in rejection rates across Florida's 67 counties, and consistent disparate rejection of VBM ballots from Black and brown voters, as well as older and younger voters.

In Florida, "[t]he percentage of rejected VBM ballots across Florida ranges from three counties with no rejected VBM ballots (Baker, Hamilton, and Jefferson), to ten counties that rejected more than two percent of all VBM ballots (Alachua, Bay, Broward, Miami-Dade, Gulf, Madison, Marion, Seminole, and Volusia). However, across all 67 Florida counties, the rejection rates for VBM ballots cast by Black and Hispanic voters exceeded the rejection rates of White voters. Baringer et al. Report 21. In fact, "[d]espite reforms that allow voters to 'cure' problematic VBM ballots, the rejection rate of VBM ballots in Florida elections has remained relatively constant over time." Baringer et al. Report 13-14. That report also found

that younger and older voters were disproportionately more likely to have their VBM ballots rejected and that while roughly 0.9 percent of all VBM ballots cast by White voters were rejected by local canvassing boards in the 2018 General Election in Florida, roughly 2.0 percent of VBM ballots cast by Black, Hispanic, and voters of other racial or ethnic group were rejected. Relatively speaking, the VBM ballots cast by Black, Hispanic, and non-white voters were more than twice as likely to be rejected as VBM ballots cast by White absentee mail voters in 2018.

These disparities persisted in Florida's 2020 Presidential Preference Primary. In the PPP, about 1.28% of VBM ballots were rejected by Florida canvassing boards, and Black and brown voters were more likely than white voters to have their VBM ballots rejected for a missing signature or "voter-caused" error even when their VBM ballot is received by the state's 7:00 PM Election Day Deadline. Smith Report ¶ 51. For example, in Collier County, 3.5% of Black voters had their VBM ballots rejected (nearly seven times the rate of white voters) and 1.5% of Hispanic voters had their VBM ballots rejected in the 2020 Presidential Preference Primary. When asked about this disparity, the County SOE stated that employees do not undergo any bias training and despite the significant disparities in signature verification and ballot rejection by race and ethnicity in the county, did not believe any bias training was necessary. Edwards Dep. 109-16.

In response, the Collier County Supervisor of Elections testified as follows:

Q. Do the staff members who participate in signature verification process undergo any training for unconscious bias?

A. No.

Q. You think that perhaps they should?

A. No. It's never been an issue.

Q. And after hearing the rates of differential rejection in your county, you continue to believe it's not an issue?

A. I do.

...

Q. Do any of the poll workers receive training on unconscious bias?

A. We don't label it that way. We train our poll workers to treat everyone equally.

Q. And when you train your poll workers to treat everyone equally, do you specifically have a component about race or ethnicity?

A. No. We treat everybody the same.

Edwards Dep. 109-16.

The State of Florida's County Canvassing Board workshop²⁰ on signature verification discusses with precision why the signature verification process results in the disproportionate flagging of disadvantaged and burdened groups, particularly elderly, disabled and infirmed voters. DD Plaintiffs' Exh. 5, Florida Canvassing Board Workshop Slides; Lewis Dep. 90-91. SOE staff receive training that the following influences affect how a person signs his or her name at any given time: old age, injury, vision problems, medications, drugs and alcohol, and awkward writing position. DD Exh. 5, Slide 38. Florida's SOE training on signature verification also explains that a person's signature often changes dramatically in a 10-year period. *Id.* Slide 36. Nevertheless, SOE staff do not know whether any of these factors affect a voter's VBM ballot signature before the SOE staff flag the ballot as requiring a cure nor before the Canvassing Board makes a final determination whether to accept or reject the voter's ballot.

A. Old age, injury, mental illness, vision problems, medications, drugs and alcohol, awkward writing position. These are influences that could change someone's signature.

²⁰ The training was required following successful lawsuits challenging Florida's signature match verification process and cure period. *See Florida Democratic Party v. Detzner*, No. 4:16-cv-607, 2016 WL 6090943, at *8 (N.D. Fla. Oct. 16, 2016); *Democratic Executive Committee of Fla. v. Detzner*, 347 F.Supp.3d 1017 (N.D. Fla. 2018).

...

Q. Does a vote-by-mail ballot sent by you to a voter include a place for the voter to indicate that they have vision problems, old age, an injury, mental illness, vision, manual impairment, medications that they're on, drugs or alcohol, that would affect their signature?

A. No, it does not.

Q. So you don't know when you're determining whether to [accept] or reject a voter's ballot whether those outside influences affect the person's signature?

A. We do not.

Lewis Dep. 93-95.

C. Florida Has the Power to Rectify The Above Disparities and Burdens.

1. The Secretary of State or Governor Can Extend the Certification Deadline for Ballots in Elections Affected by the COVID-19 Pandemic.

Florida law creates procedures for both the Secretary of State and or the Governor, as a result of an emergency or a common disaster occurring before or during a regularly scheduled or special election, to designate a procedure for the emergency suspension or delay and rescheduling of elections. Fla. Stat. § 101.733. Florida law also creates opportunities for the Division of Elections of the Department of State to, by rule, adopt specific contingency plans to address emergencies that affect election day. *Id.*

2. County Defendants Could Implement Plaintiffs Requested Relief Regarding Extension of VBM Deadlines and Cure Procedures with Minimal, if any, Additional Personnel or Costs.

The Secretary of State does not have to certify election results until 14 days following Election Day. Fla. Stat. § 102.111(2). County Canvassing Boards accept and tabulate VBM ballots from UOCAVA voters' VBM ballots ten days following an election. Fla. Stat. § 101.6952(5). The Volusia County SOE, in response to Dream Defenders Plaintiffs discovery in this case responded to the following question "describe the additional financial, staff, or other resources You contend will be needed to ...Accept[] returned vote-by-mail ballots and counting them as long as they are postmarked or dated by Election Day and received within ten days of Election Day: "None, if post-election deadlines (*i.e.*, certifying election results, etc.) were also extended." DD Plaintiffs' Exh. 6, Volusia County Response to DD Plaintiff's First Set of Interrogatories, Response to Interrogatory No. 4.

D. Florida's Restrictions on Early Voting and Drop Boxes Are Unreasonable and Restrict the Right to Vote (MDS 19, 27).

1. Florida's Overly Restrictive Early Voting Rules

Voters have two primary ways of voting in-person: at a precinct polling place on Election Day or at an early-voting site during the early voting period. Election

day and early voting are done using paper ballots or using electronic ballot marking devices that are accessible to voters with disabilities.

The SOEs are responsible for the administration of Florida laws and regulations related to the conduct of elections, including but not limited to determining the hours and locations of early voting sites, as prescribed by statute. Fla. Stat. § 101.657(d).

Pursuant to Florida Statutes § 101.657(1)(d), early voting must be offered at SOE offices and may be offered by SOEs at other designated locations in the county. Fla Stat. § 101.657(1)(d).

Pursuant to Florida Statutes § 101.657(1)(d), early voting must begin no later than 10 days before an election and end on the third day before an election *Id.* Thus, the minimum period for early voting prescribed by statute is 8 days. Early voting “shall be provided for no less than 8 hours and no more than 12 hours per day at each site during the applicable period. *Id.* Counties that offer only the minimum period only allow voting over a single weekend.

SOEs, at their discretion, may begin early voting as early as 15 days before the election and end on the second day before an election. *Id.* (“In addition, early voting may be offered at the discretion of the supervisor of elections on the 15th, 14th, 13th, 12th, 11th, or 2nd day before an election that contains state or federal

paces for at least 8 hours per day, but not more than 12 hours per day.”). Thus, the maximum number of permitted early voting days is 14. *See id.* Counties that avail themselves of this option allow voting over three weekends. Florida law currently prohibits SOEs from holding early voting outside this 14-day timeframe in statewide elections. *See id.*

The voting equipment used during early voting is the same as the equipment used on Election Day. *See* “*What is Early Voting?*,” <https://dos.myflorida.com/elections/for-voters/voting/early-voting/>.

2. During the March PPP, Florida’s Election Officials’ Response to COVID-19 Severely Burdened and Deprived Individuals Who Sought to Vote in Person of the Right to Vote.

During the PPP, the COVID-19 pandemic made in-person voting substantially more difficult. For example, in six counties alone, SOEs moved or consolidated at least 86 polling places, including many at assisted living facilities whose residents are at more acute risk than the general population. *See* DD Plaintiffs’ Exh. 7, Hillsborough SOE Coronavirus Preparedness Update (Mar. 15, 2020); DD Plaintiffs’ Exh. 8, Emergency Polling Place Changes for Marion County Voters (Mar. 16, 2020); DD Plaintiffs’ Exh. 9, Miami-Dade County Presidential Primary Election Polling Place Changes (Mar. 13, 2020); DD Plaintiffs’ Exh. 10, Palm Beach

County 2020 Polling Place Changes 4; DD Plaintiffs' Exh. 11, Pinellas County Emergency Polling Place Change Notice; DD Plaintiffs' Exh. 12, Sarasota County Emergency Polling Place Changes (Mar. 17, 2020).

Also, during the PPP, 1576 poll workers withdrew from participating in the election in Palm Beach County due to concerns about the pandemic. DD Plaintiffs' Exh. 13, Palm Beach County SOE's Objections and Responses to Nielsen Plaintiffs' First Set of Interrogatories, Response to Interrogatory 14, at 11. The former president of the Florida Supervisors of Elections recognized that Palm Beach suffered a "great loss of poll workers and polling places" due to COVID-19, even though a different county was "ground zero for Covid." Jones Dep. 106:2-107:2.

Similarly, 1,300 poll workers canceled or did not appear at their assigned polling places in Broward County on the day of the PPP. Broward County SOE's Answers to Nielsen's First Set of Interrogatories, Response to Interrogatory 14, at 9-10. This constituted over one third of the total poll workers scheduled. *See id.* And in Volusia County, between 125 and 150 poll workers did not work due to fears surrounding COVID-19, and the SOE for that county does not expect them to work in the forthcoming elections. *See* Lewis Dep. 17:12-18:12:

Q. Describe your understanding of COVID-19.

A. It is a virus that is spreading rapidly throughout the world, and I will tell you that people are afraid of it. Most

-- most of the poll workers that we have want to work but cannot or will not.

Q. How many poll workers have expressed their fears about COVID-19?

A. Well, we have had a hundred -- between 125 and 150 that did not work during the March 17th presidential preference primary election. Of those, I doubt any of those are coming back. They are not coming back. And we are losing more that are worried about it, and what procedures we are going to have in place and then they will make their decision on whether or not they will work.”

On April 1, 2020, Governor DeSantis signed Executive Order 20-91, which outlined the state’s stay-at-home policy. Executive Order 20-91 requires “[s]enior citizens and individuals with a significant underlying medical condition (such as chronic lung disease, moderate-to-severe asthma, serious heart conditions, immunocompromised status, cancer, diabetes, severe obesity, renal failure and liver disease)” to “stay at home and take all measures to limit the risk of exposure to COVID-19.” DD Plaintiffs’ Exh. 14, Fla. Exec. Order No. 20-91 (Apr. 1, 2020). The order also *requires* local jurisdictions to “ensure that groups of people greater than ten are not permitted to congregate in any public space.” *Id.* Subsequently, Florida Executive Order No. 20-114 (issued May 8, 2020), DD Plaintiffs’ Exh. 15, extended the state of emergency for another 60 days because “the impact of COVID-19 poses

a continuing threat to the health, safety and welfare of the State of Florida and its residents.” *Id.*

3. Lee and DeSantis refuse to expand early voting despite repeated requests from SOEs

Following the dismal election turnout during the PPP and the Governor’s declaration of a state of emergency, the SOEs reported to the Governor that “due to the COVID-19 situation and concerns of the public, Supervisors of Elections encountered significant challenges with polling places becoming unavailable, difficulty in acquiring hand sanitizer and other supplies, and substantial number of poll workers deciding not to work, many at the last minute.” Florida Supervisors of Elections, Letter to Governor Ron DeSantis (April 7, 2020), ECF No. 92-1 at 1 (Sadasivan Decl., Ex. A).

The SOEs specifically requested modifications to Florida’s statutory voting procedures “[i]n anticipation that these challenges will continue and likely will impact the August 2020 Primary Election and November 2020 General Election” *Id.* The requested modifications included the following proposals regarding in-person voting:

“As provided in your Executive Order Number 19-262 (for Bay and Gulf Counties), suspend applications of provisions of Section 101.657(1)(a) and (b), Florida Statutes, and allow each county Supervisor of Elections to

designate additional or alternative Early Voting site locations.”

“Allow counties the option of beginning Early Voting up to 22 days prior to the August and November 2020 elections, notwithstanding the provisions of Section 101.657(1)(d), Florida Statutes, and allow Early Voting to continue, at the chosen locations, through 7:00 p.m. on Election Day.”

“Consistent with Executive Order 19-262, concerning relocation or consolidation of polling places, suspend the provisions of sections 101.001 and 101.71(1), Florida Statutes, which require there to be one polling place in each precinct. This will allow the Supervisor the option to relocate or consolidate polling places with Early Voting sites.”

In May 2020, Craig Latimer, the President of the Florida SOE, sent a second letter to Governor DeSantis to “ask that [he] act immediately to address what our state’s 67 elections experts have recommended.” DD Plaintiffs’ Exh. 16, Florida Supervisors of Elections, Letter to Governor Ron DeSantis, (May 13, 2020). These requests included “more flexibility around in-person voting.” *Id.*

“Our requests recognize that counties differ significantly in size and need, and require flexibility to structure voting in the best possible way for their electorate. At the same time, all 67 counties should have, at a minimum, the allowances *currently provided* to Bay and Gulf Counties under your Executive Order 19-262. ***The ability to designate additional Early Voting sites and use those sites through Election Day resolves a critical issue for many counties – a shortage of Election Day polling locations and poll workers.***” *Id.* (bold emphasis added).

Thus, by referring to Florida Executive Order 19-262, DD Plaintiffs' Exh. 17, the SOEs were requesting modifications similar to those that had been implemented in response to Hurricane Michael, including suspension of portions of Section 101.657, Florida Statutes, in Bay County and Gulf County:

“The Supervisor of Elections, who, as a result of the destruction caused by Hurricane Michael, determines that additional early voting opportunities are necessary to provide the voters in his county an adequate opportunity to cast ballots, shall have the authority to:

a. ***Designate one or more additional or alternative early voting sites***, notwithstanding the deadlines and facility eligibility restrictions set forth in Section 101.657(1)(a) and (b), Florida Statutes, provided the early voting sites are geographically located so as to provide all voters in the aforementioned counties an equal opportunity to cast a ballot, insofar as is practicable; and

b. Conduct early voting in the aforementioned counties beginning on the 15th day before any federal, state or multicounty election in the 2020 calendar year, whichever is applicable, ***and ending on the day of the applicable election***, at the discretion of the Supervisor of Elections, notwithstanding the provisions of Section 101.657(1)(d), Florida Statutes.”

At least some of the SOE Defendants support these modifications. For example, Lisa Lewis, the SOE for Volusia county, testified in her deposition as follows:

Q. Do you support the requests made in this letter?

A. Yes.

Q. All of them?

A. Yes.

...

Q. If you had the option, would you continue early voting through Election Day in Volusia County?

A. Absolutely.

...

Q. If you had the option, would you add additional early voting sites?

A. Yes

See Lewis Dep. 33:2-33:6; 34:18-20; 34:21-35:17.

Similarly, the SOE for Miami-Dade County, indicated that in the wake of the executive order, she remains “concerned about lines . . . with the social distancing, it’s going to cause the operation within [polling places] to be slower.” SOE Christina White Dep. 86:20-87:2. Meanwhile, the SOE for Seminole County recognized that increasing the number of days for early voting could help reduce congestion within the polling places. Christopher Anderson Dep. 56:4-11. Finally, another former FSE President explained, “[E]verything that we asked the governor to put in his executive order were all things that we felt collectively might improve our ability to conduct the election.” Lux Dep. 170:22-171:26.

Following the second letter from the SOE, the Governor issued an Executive Order recognizing that “the Florida Association of Supervisors of Elections has requested accommodations to allow for the effective and efficient administration of elections in their respective counties in response to COVID-19” DD Plaintiffs’ Exh. 18, Fla. Exec. Order No. 20-149 (Emergency Management-COVID-19-Primary and General Elections) (June 17, 2020).

Despite recognizing the SOEs’ request to expand early voting, the Governor’s Executive Order No. 20-149 did *nothing* to expand the days or times during which the SOEs may conduct early voting. Similarly, Executive Order No. 20-149 did *nothing* to expand the ability for SOE to designate additional or alternative Early Voting site locations. The Governor refused to permit these accommodations, despite the request of the SOEs and despite the fact that similar accommodations were allowed for the Bay and Gulf counties in Executive Order No. 19-262 in response to the state of emergency caused by Hurricane Michael. When asked whether the order was “sufficient to address [his] office’s concerns,” one former FSE President lamented, the order “is what it is.” Lux Dep. 184:18-21.

Without the permission of Defendant Lee, the SOEs are not permitted to offer voting at early voting locations outside of the statutorily designated days and times (with the exception of Bay and Gulf Counties). Such prohibition prevents the SOEs

from, for example, offering voting at Early Voting locations on the day before or the day of Election Day, or prior to the 15th day before Election Day.

These restrictions also prevent vote by mail ballots from being returned at precinct polling locations on Election Day. Fla. Stat. Ann. § 101.69(1), (2) (indicating an elector may either vote in-person or may return their vote-by-mail ballot to “a secure drop box” “placed at the main office of the supervisor, at each branch office of the supervisor, and at each *early* voting site” (emphasis added); *see also* Lewis Dep. 70:21-71:12 (“Q. So vote-by-mail ballots cannot be turned in at the precinct? A. No. . . .”).

Moreover, in-person voting is many Floridians’ only feasible method for voting. First, Florida requires that an SOE compare a voter’s signature on their VBM ballot to their registration signature; if the two do not match, the voter must cure the signature within days or their vote will not be counted. *See* Fla. Stat. Ann. § 101.68(1), (4)(b). This signature-match requirement presents an insurmountable hurdle for many voters. For example, Plaintiff Sheila Young is blind and cannot mark, let alone sign, a VBM ballot without another person’s assistance. Young Decl. ¶ 11, ECF 91-4; *see also* Bukala Decl. ¶ 17, ECF 91-1 (same). Similarly, Plaintiff Romero suffers from multiple sclerosis and has difficulty signing his name or initials. Romero Decl. ¶¶ 4, 6, ECF 91-3.

The Volusia County SOE's own statements reinforce that VBM is not a realistic option for these voters. She recognized that the State's Canvassing Board workshop on signature matching teaches "[o]ld age, injury, [or] vision problems" can produce a signature mismatch, but there is no way for an elections official reviewing a signature mismatch to know if it was caused by such a problem. Lisa Lewis Dep. 93:21-94:1, 95:20. In fact, signatures vary so widely that she has *her own daughter* "update her signature every election, because it changes horribly." *Id.* 89:15-16.

Second, many voters have unreliable mail that may prevent them from properly receiving or returning a VBM ballot. *See Hernandez Morales Decl.* ¶ 9, ECF 91-2. This has led many to vote in person and distrust the mail system. *Id.* ¶¶ 13-15.

Organize Florida's rural members similarly fear that USPS may not deliver mail ballots in time to meet deadlines; for them, voting in-person provides confidence that their vote will count. For many of Organize Florida's elderly members of color, voting is an act of pride made significant by physically casting a ballot in-person. For each of these voters and many others that are similarly situated, having an in-person voting option is critical. Woods Decl., ¶¶23-24.

Moreover, for many Floridians who receive their VBM ballot, their ballots are nevertheless not counted because they are received by the SOEs after 7 p.m. on Election Day even though they were postmarked on or before Election Day. For example, in Volusia County, in the 2018 general election, 1004 returned ballots mail ballots were disregarded because they were not received prior to the deadline even though they were postmarked on or before Election Day.

“Q. Ms. Lewis, would you please read Interrogatory No. 8, followed by your answer? A. Yes. “With respect to the mail ballots returned to your office by US Mail after 7 p.m. on Election Day for each of the past elections, state how many of the ballots were postmarked on or before election day.” "Answer: For the 2016 general election, unknown. The vote-by-mail ballots are no longer available due to the applicable record retention schedule.

"For the 2018 general elections, 1,004.

"For the 2020 presidential preference primary, 632."

See, Lewis Dep. 76:2-16. Another SOE indicated that the “lion’s share” of late mail ballots arrive “in the immediate week following the election.” Paul Lux Dep. 147:1-8.

Finally, COVID-19 poses a grave threat for many of these same voters. Plaintiff Hernandez-Morales is 85 years old and suffers from stage-2 breast cancer, Hernandez-Morales Decl. ¶¶ 4, 6, ECF 91-2, while Plaintiff Romero is 76 years old and suffers from multiple sclerosis, diabetes and high blood pressure. Romero Decl.

¶¶ 2, 4, ECF 91-3. And Plaintiff Young is 66 years old. Young Decl. ¶ 2, ECF 91-4. If they contract COVID-19, these and other voters' old age and preexisting conditions put them a much higher risk of serious injury or death than the general population. Thus, Florida's current election scheme forces Plaintiffs and similarly situated voters to risk serious injury or death in order to vote the only way they can: in person.

At trial, Dream Defender Plaintiffs will offer additional testimony regarding the impacts to Plaintiffs of these unnecessary restrictions on early voting.

E. Florida's inaccessible online voter registration system prevents many Floridians from completing their registration online or at all, and has a discriminatory effect on Black and Latinx voters' ability to exercise their fundamental right to vote (MDS 31, 32, and 34)

Since COVID-19 cases began increasing more rapidly throughout the United States, voter registration in Florida has significantly decreased compared to previous elections. In April 2020, there was a 60 percent decrease in new voter registrations compared to April 2016 with only a little more than 21,000 newly registered voters added to Florida's rolls this April.²¹

²¹ Allison Ross, *Voter Registration in Florida Plunged Amid the Coronavirus Pandemic*, Tampa Bay Times (June 11, 2020), <https://www.tampabay.com/news/health/2020/06/11/voter-registration-in-florida-plunged-amid-the-coronavirus-pandemic/>; Center for Election Innovation & Research, *New Voter Registrations in 2020* (June 10, 2020),

The decline has been seen in voter registrations across the board. Despite leaders and organizations turning more attention to online voter registration efforts, there has not been an uptick in online voter registration in Florida to make up for the plunge in voter registrations in response to COVID-19.²²

This decline in registrations is surprising because (i) Florida's population has grown by over a million persons between 2016 and 2020, *e.g.*, University of Florida Bureau of Economic and Business Research, *Florida Estimates of Population*, and (ii) the passage of Amendment 4 in 2018 has significantly expanded the number of newly eligible voters. *Jones v. DeSantis*, No. 4:19CV300-RH/MJF, 2020 WL 2618062 (N.D. Fla. May 24, 2020), *pending appeal sub nom. Jones v. Gov. of Fla.*, No. 20-12003-AA (11th Cir. July 1, 2020).

Third-party voter registration has also decreased dramatically. Florida's third-party organizations in Florida registered only **133 voters** in April 2020, compared to

https://electioninnovation.org/wp-content/uploads/2020/06/New_Voter_Registrations.pdf.

²² Kaleigh Rogers & Nathaniel Rakich, *Voter Registrations Are Way, Way Down During The Pandemic*, FiveThirtyEight (June 26, 2020), <https://fivethirtyeight.com/features/voter-registrations-are-way-way-down-during-the-pandemic/>; Michael Wines, *Covid-19 Changed How We Vote. It Could Also Change Who Votes.*, N.Y. Times (June 14, 2020), <https://www.nytimes.com/2020/06/14/us/voter-registration-coronavirus-2020-election.html>.

14,144 in January 2020, and 3,806 in April 2016.²³ Aggravating the inability of third-party organizations to register voters through their traditional field operations, Florida does not allow third parties to register voters through its online voter registration system. Other avenues to voter registration are more difficult to access or in some instances, completely closed. SOE Christina White described her “robust community outreach program” prior to COVID-19, including outreach at naturalization ceremonies, and the current condition of those efforts: “I like to phrase it as wherever there are people, we are there as well. Of course we haven’t been doing that as of late . . . Obviously, there’s no community outreach events happening.” White Dep. 137:20-22; 138:1-18. Similarly, SOE Lisa Lewis testified that voter registration levels “have slowed down” due to both third party voter registration organizations and her office “not being able to be out there amongst the people.” Lewis Dep. 43: 17-22; 44:1-9. Her office is coordinating with local libraries to address the reduction in voter registration levels, but because “gathering” is not “allowed . . . at the moment” the county is simply “doing what [they] can.” Lewis

²³ Kaleigh Rogers and Nathaniel Rakich, Voter Registrations Are Way, Way Down During The Pandemic, FiveThirtyEight (Jun. 26, 2020), <https://fivethirtyeight.com/features/voter-registrations-are-way-way-down-during-the-pandemic/>; <https://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-reportsxlsx/voter-registration-method-and-location/>.

Dep. 51:7-22; 52:1-17. In describing voter registration's slowdown in Volusia County as a result of the inability of third-party organizations to conduct registration, Supervisor Lewis stated, the SOE said "You know, the online has picked up some, but not much." Lewis Dep. 44: 1-9; *see also* Lewis Dep. 45, 46:1-18.

Voter registration through the Florida DHSMV and other public agencies has also plummeted. Florida's voter registration records show a decrease in March 2020 of 39.77 percent in registrations at the DHSMV, 76.02 percent decrease at public assistance agencies, 77.78 percent decrease at offices serving persons with disabilities or centers for independent living, and 87.64 percent decrease at public libraries.²⁴ The April 2020 numbers are even more dismal, with an 85.94 percent decrease at the DHSMV, 94.85 percent decrease at public assistance agencies, 97.56 percent decrease at offices serving persons with disabilities or centers for independent living, and 94.33 percent decrease at public libraries.²⁵

²⁴<https://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-reportsxlsx/voter-registration-method-and-location/>;
<https://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-reportsxlsx/>

²⁵<https://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-reportsxlsx/voter-registration-method-and-location/>;
<https://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-reportsxlsx/>

With increasingly limited access to paper and downloadable voter registration forms and greater health risks associated with in-person voter registration during the COVID-19 pandemic, the OVR system is one of the few accessible and safe means for Floridians to register to vote.

As noted above, Plaintiffs have offered to the Court the expert analysis of Dr. J. Morgan Kousser, PhD, a professor of history and social science at the California Institute of Technology. Dr. Kousser has studied Florida's voting systems and their impact on racial minorities. For the purpose of Dream Defender Plaintiffs' claims, Dr. Kousser has several principal findings.

First, Dr. Kousser found that because Black and Latinx communities face higher risk and rate of death from COVID-19, potential voters in those communities are likely to increase the demand for OVR. Kousser Report ¶ 18.

Second, Dr. Kousser found that Florida's OVR system is subject to a number of limitations that can prevent many Florida residents from successfully registering to vote. And he further found, without an ease of the restrictions on the OVR process, many Black and Latinx residents will be deprived of their right to vote in the August and November elections at higher rates than white voters. *Id.*

Third, Dr. Kousser noted that because the OVR system requires a potential voter to have a driver's license or identification card issued by the Department of

Highway Safety & Motor Vehicles (DHSMV), it has a discriminatory impact on Black and Latinx voters. Individuals who do not have a driver's license or identification card cannot complete registration process through the OVR system. Instead, the system will produce an electronic voter registration form, which the voter must print, sign, and mail to the county SOE or Secretary of State. *Frequently Asked Questions*, [RegistertoVoteFlorida.gov](https://dos.myflorida.com/media/698341/ovr-faq-english.pdf), available at <https://dos.myflorida.com/media/698341/ovr-faq-english.pdf>; Woods Decl. ¶ 16; Lewis Dep. 42:18–43:1.

Because voters of color are less likely to have identification issued by the DHSMV, they are more likely to encounter this obstacle with online registration. ECF 86-11 ¶¶ 22, 71-72. In addition, Black and Latinx families are poorer on average than white Floridians and therefore less likely to have access to the resources needed to print and mail a voter registration application from the OVR system. Kousser Report ¶ 14-15; Woods Decl. ¶ 16. As explained above, they have also been disproportionately impacted by COVID-19 and are at greater risk of serious illness and death if they contract the disease when going out in public places, including to access community resources like printers or the post office. Kousser Report ¶ 18; Declaration of Andrea Mercado ¶ 10, ECF 86-7.

Dr. Kousser also found that even when a voter has a valid DHSMV credential, the OVR system makes it difficult or impossible for voters to detect and correct errors in their applications, and that this also has a discriminatory effect on Black and Latinx potential voters. Voters who register using a traditional paper form are notified by the SOE if their application is incomplete or if errors are found, and they are provided an opportunity to make corrections. *See, e.g.*, Miami-Dade SOE Incomplete Voter Notice, ECF 92-3; *see also* Fla. Stat. Ann. § 97.073. When the OVR system identifies an error, the voter is not notified. Instead, the OVR system switches to producing the same printable, mailable registration application it produces for those who lack the required identification. Gilmer Decl. ¶ 12, ECF 86-4; ¶ 12; Lewis Dep. 46:20–47:10. For example, if a voter mistypes her birthdate, the OVR system will refuse to complete the application online but will not notify the voter of the reason. If the voter is able to print and mail or hand-deliver the application, the error will eventually be identified when one of the Defendant SOEs process the form, and only then will the voter possibly have an opportunity to correct it—possibly when the deadline for registration has already passed.

Many Floridians without safe access to printers and other resources needed for mailing or delivering a paper application, including many potential voters from Black and Latinx communities, will be unable to complete the registration process

at all if they are unable to determine the error in their online application and finish the registration online. Kousser Report ¶ 14-15; Mercado Decl. ¶ 18.

Since its launch in 2017, the OVR system has experienced technical problems that have prevented voters from registering to vote before the deadline, especially when the site experiences a high volume of traffic. Marc Caputo, *'A Mess': Florida's Online Voter-Registration System Panned*, Politico (Oct. 9, 2018), <https://www.politico.com/states/florida/story/2018/10/09/a-mess-floridas-online-voter-registration-system-panned-641953>; Mahsa Saeidi, *Is Florida's Online Voter Registration System Ready for an Election Surge?*, WFLA (June 19, 2020), <https://www.wfla.com/8-on-your-side/investigations/is-floridas-online-voter-registration-system-ready-for-an-election-surge/>. Supervisor Lewis discussed the prevalence of the OVR website crashing and becoming inaccessible for voters for various lengths of times. Lewis Dep. 47:11–49:12. In October 2018, the system crashed under the weight of too many users just before the October registration deadline for the 2018 mid-term election. *Id.* The site also experienced breakdowns in March 2020 with the site displaying an error message when users attempted to visit the site to register. Allison Ross, *Florida's Voter Registration System Experienced 'Intermittent Issues'*, Tampa Bay Times (last updated Mar. 31, 2020),

<https://www.tampabay.com/news/health/2020/03/30/floridas-voter-registration-system-experiences-intermittent-issues/>.

During the coronavirus pandemic, voters who are medically vulnerable to COVID-19 may not have any other means of registering to vote when OVR goes offline. More traffic to the site can also be expected as organizations and officials encourage residents to register online given the risks posed by the current health crisis. Gilmer Decl. ¶ 10; Mercado Decl. ¶ 17, 21; Woods Decl. ¶ 7. Supervisor Edwards discussed the vulnerabilities of the site, including the probability of its crashing, especially around book closing. Edwards Dep. 128:4-22; 129:1-13.

The changes that Plaintiffs request to the OVR system and procedure are feasible and would not create a substantial burden on the government. For example, Plaintiffs' request that state allow voters to register online without a Florida driver's license or identification card to register to vote has already been implemented by other states, like Minnesota.²⁶ Additionally, according to the FAQ on OVR provided by the state Division of Elections, the website does not save a registrant's information. However, it would be possible for the state to save that information for incomplete registrations by adding a few fields to the website to capture those. The

²⁶ <https://mnvotes.sos.state.mn.us/VoterRegistration/VoterRegistrationMain.aspx>

Division of Elections could then code incomplete online registrations and send the data to the SOEs so that they can notify voters of the specific errors in their online registration more quickly and efficiently to prevent situations where voters are unable to correct errors before the registration deadline.

F. Spanish Language Dominant Floridian Voters Are Not Being Provided Critical Voter Information as their English Language Counterparts Receive During the Pandemic

Section 203 of the VRA was enacted to address what Congress saw as the effective exclusion “from participation in the electoral process” of “citizens of language minorities.” 52 U.S.C. § 1503(a). At its core, Section 203’s mandate is to “allow applicable language minority groups to be effectively informed of and participate effectively in voting-connected activities.” 28 C.F.R. § 55.15 (2016).

The entire State of Florida is a covered jurisdiction under Section 203 for Hispanic, Spanish language. *See* 81 Fed. Reg. 87,532 (2016). Under section 203 of the VRA, a State and political subdivision (“covered jurisdiction”) is required to provide “any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots” (collectively “voting materials”) in the language of the applicable minority group, as well as in the English language. 52 U.S.C. § 10503(c).

The Secretary of State of Florida through the Department of State provides Spanish language election materials and support to the Supervisors of Elections. MM deposition. The Director of the Division of Elections also provides statewide election information, constitutional amendments, as well as other election materials in both English and Spanish to the Supervisors for use to prepare materials being provided directly to the voter. *See* Memorandum to Supervisors of Elections from Maria Matthews, Director, Division of Elections. Dated August 8, 2018, re: Constitutional Amendments and Revisions on the 2018 General Election Ballot.

The Division of Elections provides voters information and materials online and also makes the website available in Spanish via an automated translation system provided by Google translate. *See* Department of State, Division of Elections, For Voters webpage, <https://dos.myflorida.com/elections/for-voters/> (last visited July 3, 2020) Yet, the Division steers voters to their respective Supervisor's website via a landing page created and maintained by the Division of Elections that is in English with no translation option. *See* Florida Department of State, Contact Your Supervisor, Find Your County, <https://dos.elections.myflorida.com/supervisors/> (last visited July 3, 2020).

Even if a Spanish language dominant voter is able make out and choose their Supervisor of Elections website, the corresponding landing page of their respective

Supervisor may only be in English with no translation option. *See* Baker County Supervisor of Elections website, <https://www.bakerelections.com/> (last visited July 3, 2020). Bradford, Hamilton, Jefferson, Suwannee, Union and Volusia²⁷ counties also do not provide any Spanish language translation option on their respective website landing pages therefore depriving Spanish language dominant voters from being able to access information necessary to exercise their right to vote and remain updated on any changes made to the voting process in light of emergency measures taken because of the pandemic.

G. Section 203 County Defendants are not providing all Election materials and communications in Spanish in Violation of Section 203 of the Voting Rights Act

Plaintiffs incorporate by reference all the facts and supporting evidence contained in Plaintiffs' Memorandum in Opposition to the Motion for Summary Judgment and exhibits (ECF 313, 313-1, 313-2). Social media accounts such as Facebook and Twitter are being increasingly used and relied upon by Supervisors to relay important messages to Florida voters in light of social distancing requirements, office closures and lessened foot traffic to the Supervisors' offices including

²⁷ <https://www.bradfordelections.com/>, <https://www.hamiltonvotes.com/>,
<https://www.jeffersonvotes.com/>, <https://www.suwanneevotes.com/>,
<https://www.unionflvotes.com/>, <http://www.volusiaelections.org/> (last visiting July 3, 2020).

messages concerning social distancing requirements, office closures and reduced hours, and restrictions foot traffic to the Supervisors' offices. One SOE described social media as "very beneficial" for informing voters of critical information. Jones Dep. 192:18. However, the content posted by the Supervisors on these social media accounts which include office closures, voter election protection standards and other important voter information, is not being transmitted in Spanish. Despite Defendants' assertions to the contrary, social media accounts owned and maintained by Supervisors of Elections in order to communicate with Florida voters, such as Twitter, do not offer the option of having the content of social media messages or tweets translated. Although, Twitter allows a user to update their settings and set the display language to "Spanish," this does not translate the actual "tweet" to the language designated. Facebook provides an option to have messages machine translated, but many supervisors post their messages in the form of images rather than text. Facebook cannot translate English-language content that is embedded in an image.

Further, the SOE for Seminole County—a covered jurisdiction—indicated that his office does not conduct any media interviews or outreach in Spanish, Anderson Dep. 63:8-14, may not have Spanish-speaking staff available to help explain COVID-19 health precautions at polling sites, *id.* at 68:5-11, only conducts

its Facebook, Twitter, and Instagram social media outreach to voters in English, with a staff person who is only fluent in English, *id.* at 74:5-75:9, and did not know whether vital election documents, including the cure affidavit, were provided in Spanish, *see id.* 76:20-77:8. Further, he stated that when his office calls voters to notify them of a VBM signature error that they must cure, the elections employee calling is often not fluent in Spanish and only leaves a voicemail in English. *Id.* at 79:2-21. His office's email notices about ballot issues are also only in English. *Id.* at 80:1-3.

H. Florida Has Failed to Implement a VBM System that allows Visually Impaired Voters to Vote Privately and Independently (MDS 14).

Florida's vote by mail system is not adequately serving the state's voters with disabilities, including blind and visually impaired voters. A disproportionate number of Florida registered voters whose vote-by-mail ballots are not ultimately counted are voters who indicate that they need assistance to vote, and hence are more likely to have a disability. Smith Report ¶ 5. This includes voters who never received a ballot, returned the ballot beyond the 7pm Election Deadline, or had their ballot rejected by the county canvassing board. *Id.* Voters who report needing assistance faced greater rejection rates for their timely ballots in all three recent statewide elections studied, with a trend towards increasingly differential rejection rates, and

a discrepancy in the 2020 PPP of 150%. Herron Report ¶ 165. There is a similar trend towards voters who need assistance facing a greater burden from Florida's Election Day ballot return deadline over the past three statewide elections. Herron Report ¶¶ 97-99.

1. There is a Heightened Risk of Exposure to the Virus for Disabled Voters to Vote In-Person

The Nielsen Plaintiffs have offered to the Court the expert analysis of Dr. Robert T. Ball, Jr., an Adjunct Professor of Infectious Diseases at the Medical University of South Carolina. Dr. Ball has studied the COVID pandemic and its current and likely impacts on Florida. For the purpose of Dream Defender Plaintiffs' claims Dr. Ball has several principal findings.

First, to avoid contraction of or spread of the Virus, doctors and the CDC recommend that people "adhere to social distancing, stay at home, and avoid gatherings with persons from multiple households." Declaration of Robert T. Ball, Jr., ¶ 27, ECF No. 88-2.

Second, voters -- such as BVI voters -- are at a significantly heightened risk of exposure to SARS-CoV-2 and contracting COVID-19 if they vote in-person. *Id.* at ¶ 29-30. BVI voters are at particular risk when voting in person because they rely on the assistance of other people and they must touch surfaces more often than a

person with normal vision. *See* Bukala Decl. ¶8; Ball Decl. at 61-62; Young Decl. ¶8; Jordan Decl. ¶9.

This heightened risk is present from the moment they leave their house to get to the polling location throughout the entire voting process. For example:

- a. BVI voters cannot drive. BVI voters who cannot have someone they live with drive them to the polls are forced to use either public transportation, para-transit, or commercial ride-share vehicles. *See, e.g.,* TAC ¶89. All of these options require BVI voters to touch public surfaces that may not have been sanitized and to share a vehicle with drivers and other passengers. *Id.*
- b. At polling locations, BVI voters cannot see whether they are standing the necessary six feet away from other voters in voting lines or once they are inside the building. *See* Young Decl. ¶8; Jordan Decl. ¶9. Nor can BVI voters ensure that they remain six feet away from the poll workers they must interact with during the voting process. *See id.*
- c. When BVI voters are ready to cast their ballot at an in-person polling location, they require accommodations to vote privately and independently. *Id.* ¶ 5. Accessible machines require BVI voters to use headphones for audio ballots or to use touch screens with enlarged text

or other manual input devices. TAC ¶ 88. This equipment can carry the COVID-19 virus from previous users and workers if it is not properly sanitized. Ball Decl. at 61-62 (“frequently cleaning and disinfecting high-touch surfaces, remain[s] critical to reducing transmission.”).

- d. BVI voters cannot see if poll workers have properly disinfected the necessary equipment between voters to ensure their own safety. *See* Young Decl. ¶ 8; Jordan Decl. ¶¶9-10. Poll workers may not be trained in how to sufficiently clean accessible equipment to protect BVI voters. *See, e.g.*, Bukala Decl. ¶8 (“I would rely on poll workers to clean the accessible equipment between uses and my prior experience with poll workers [during the PPP] makes me fear that they will not be sufficiently trained to clean and operate the accessible equipment or assist blind voters.”).

Third, elderly BVI voters are at a greater risk of developing severe illness should they contract COVID-19. Ball Decl. ¶20. In fact, more than 80% of the Floridians who have died from coronavirus were age 65 or older. *Id.* ¶22.

Many BVI voters are also elderly. *See, e.g.*, Young Decl. ¶¶ 2-3 (Declaration from Sheila Young that she is blind and sixty-six years old); Jordan Decl. ¶¶ 3-4

(indicating that he is blind and sixty-nine years old); Bukala Decl. ¶¶ 2-3 (indicating that she has central vision loss and is sixty-two years old); *see also* Florida Agencies Serving the Blind, Two Million Floridians are Living with Low Vision (2018), <https://beyondvisionloss.org/blog/eye-care-professionals/two-million-floridians-are-living-with-low-vision/> (“[T]he number of severely visually impaired Florida seniors is currently in the range of 2 million older individuals.”).

2. Many Accommodations Voters Need are Not Currently Available in Home or Accessible by Mail

Florida’s vote-by-mail system relies exclusively on paper ballots that must be filled out, marked, and signed by hand. *See, e.g.*, Secretary’s Response in Opp. to PI at 1, ECF 342.

Because Florida’s VBM program that relies exclusively on paper ballots, it is inaccessible to BVI voters because their disabilities prevent them from reading, marking, and/or signing a paper ballot. *See* Young Decl. ¶¶ 11-12, 14; Jordan Decl. ¶12; Bukala Decl. ¶14.

Florida does not currently offer any accommodations for BVI voters who wish to vote absentee that would allow these voters to cast their ballots privately and independently. *See* Young Decl. ¶ 11; Jordan Decl. ¶ 12; Bukala Decl. ¶ 14. The only absentee option for BVI voters is to have another person read and fill out a vote-

by-mail ballot for them, thereby sacrificing their ability to vote privately and independently. *Id.*

If a BVI voter lives alone, he or she must have contact with another person they could otherwise avoid in order to fill out their ballot. *See, e.g.,* Young Decl. ¶11. This increases the BVI voter’s exposure to COVID-19 and thereby undermines the purpose of trying to vote absentee due to concerns about contracting COVID-19. *See, e.g.* Ball Decl. ¶17 (explaining that COVID-19 is unusually infective and can be spread by asymptomatic or pre-symptomatic carriers, even those wearing masks).

3. Florida Has Failed to Approve a Technology that Will Allow BVI Voters to Vote Privately and Independently

Florida is aware of these barriers to access for BVI voters regarding its vote-by-mail process. Intervenors’ Motion for PI ¶ 7, ECF 230.

- a. In May 2018, an officer of the Florida Council of the Blind (“FCB”) met with the Director of the State Division of Elections to discuss using recently distributed federal funds from the Help America Vote Act for the state’s purchase, certification, and approval of accessible vote-by-mail software. *Id.*
- b. FCB contacted the Director again regarding this issue in September 2019, November 2019, and May 2020. Krach Decl. ¶¶10, 13, 15.

There is a readily available accommodation for the inaccessibility of Florida's vote-by-mail process in the form of the Democracy Live OmniBallot. Omniballot allows BVI voters "to fill out their ballots by use of a screen reader, tactile input device, sip and puff or other assistive technologies." Declaration of Bryan Finney ¶ 21, ECF 351-1.

The entire statewide costs to implement the Democracy Live OmniBallot system for the 2020 Presidential election is estimated to be \$1-1.2 million. *Id.* ¶ 12. System implementation could be "done in less than 1-3 days," even working with each jurisdiction to support the system." *Id.* ¶ 11.

Omniballot is easy for a BVI voter to use. A BVI voter using the Democracy Live OmniBallot accesses a link available on her county website or the voter can request to have the ballot sent directly to her. *Id.* ¶7. The ballots are generated and stored in a federally approved secure cloud. *Id.* ¶ 5.

After the BVI voter has finished marking her ballot, the voter can then listen to a summary of her selections and go back to modify her choices if necessary. *Id.* ¶10.

BVI voters can cast their ballots through the Omniballot privately and independently from the safety of their own homes and without the assistance of another person. *See id.*

The OmniBallot voting portal has been certified in multiple states and used in hundreds of elections by BVI voters to access, mark, and print their ballot independently and privately. Finney Decl. ¶ 21.

Most recently, the Delaware Department of Elections announced on July 1, 2020, that it will reactivate its pilot accessible absentee voting program through Democracy Live for the Presidential Primary in order to “offer electronic delivery of accessible ballots, a ballot marking tool, and submission by voter choice of mail, fax, or email.” State of Delaware, Accessible Voting Available for July 7 Presidential Primary (July 1, 2020), <https://news.delaware.gov/2020/07/01/accessible-voting-available-for-july-7th-presidential-primary/>.)

Florida originally made efforts to certify the Democracy Live Accessible Vote by Mail Software in September 2019. Secretary’s Response in Opp. to PI at 4, ECF No. 342. Florida specifically considered the OmniBallot product, which provides ballot delivery and ballot marking, but does not enable electronic ballot return. Finney Decl. ¶ 5; *see also* DD Plaintiffs’ Exh. 24, Email from B. Finney to M. Matthews (June 15, 2020).

In March 2020, the Florida Department of State, Division of Elections Bureau of Voting Systems Certification sent a report to the Director of the State Division of

Elections recommending conditional approval of the OmniBallot through March 31, 2022. Fla. Div. of Elections, Draft Qualification test Report: Democracy Live OmniBallot, Version 1.1, at 10 (May 2020), ECF 342-4. Approval thereafter was conditioned upon addressing certain issues related to the procedures used by counties to administer an OmniBallot election without vendor support, adding detail and clarity to error messages, and implementing certain LiveBallot test items from previous test efforts. *Id.*

Shortly thereafter, the Division of Elections raised concerns about alleged security issues associated with the Democracy Live software, citing an article titled “Security Analysis of the Democracy Live Online Voting Systems” (“Security Analysis”).²⁸ *Id.* ¶3 at 4. The State claims that this article prompted “additional testing” that has delayed adoption of this option for disabled voters. *Id.*

The Democracy Live OmniBallot program that was recommended for conditional certification in March 2020 does not use the online ballot return or server-side ballot marking components that were highlighted in Security Analysis as potentially problematic. Finney Decl. ¶ 5. Rather, the OmniBallot merely provides

²⁸ Michael A. Specter & J. Alex Halderman, Security Analysis of the Democracy Live Online Voting System (June 7, 2020), *available at* <https://internetpolicy.mit.edu/wp-content/uploads/2020/06/OmniBallot.pdf>.

ballot delivery and ballot marking. *Id.* According to Democracy Live, for the OmniBallot “[V]oters are required to print and physically return the marked ballots (e.g., via postal mail).” *Id.* at ¶ 15.

The most significant issue identified in the Security Analysis article was the server-side ballot marking, which could allow hackers to learn voters’ selections and identities. Security Analysis at 19. This issue can be addressed using a “secure select” approach whereby ballots are generated and marked locally in the web browser and the selections are never sent to the server. Finney Decl. ¶ 8.

The OmniBallot program that has been reviewed in Florida can “easily be configured” to exclusively offer the “secure select” approach. *Id.* at ¶¶ 8, 15. This can be done at no additional cost to Florida. *Id.* at ¶ 8. This “secure select” feature was one of the key suggestions by the authors of the Security Analysis article. *Id.* The manufacturers of Democracy Live have confirmed that these modifications can easily be made. *Id.* at ¶ 15.

In the twelve years that Democracy Live has used electronic ballot delivery in over 1,000 elections in nearly 600 jurisdictions, the system has never been compromised and there have been no reported security flaws. *Id.* ¶ 26.

ARGUMENT

VI. STANDING

At various points in time throughout this litigation Defendants have challenged Plaintiffs' standing to bring this action, but the evidence will indisputably show that each Plaintiff has standing. Article III standing requires only that Plaintiffs prove an "injury [that is] fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs more than satisfy this standard. Indeed, this Court has already found as much. *See* Order Dismissing the Nielsen and Williams Complaint in Part, ECF 366 ("June 30 Order").

Here, Plaintiffs face the imminent threat of injury because they are being forced to make the constitutionally and statutorily impermissible Hobson's choice of exercising their constitutional right to vote or facing the risk of COVID-19. *See League of Women Voters of VA v. VA State Bd. of Elections*, 2020 WL 2158249, at *8 (W.D. Va. May 5, 2020) ("Constitution does not permit a state to force [] a choice" between exercising constitutional rights and avoiding the risk of COVID-19); *People First of Alabama*, 2020 WL 3207824, at *7-8 (holding that the individual plaintiffs suffered an injury for standing purposes during the COVID pandemic because the injury "that they will have to comply with the state's photo

ID requirements in order to vote absentee . . . is not speculative, it is ‘certainly impending’ since they intend to vote in the election on July 14”); *aff’d sub nom. People First of Alabama v. Sec’y of State*, 2020 WL 3478093 at *1 (denying stay pending appeal), *rev’d on other grounds* -- S.Ct. --, 2020 WL 3604049 (staying implementation of the order granting a preliminary injunction pending disposition of the appeal).

The Plaintiffs’ injuries “flow directly” from Defendants’ actions and inactions when faced with the risk of the pandemic. *Charles H. Wesley Educ. Found.*, 408 F.3d at 1352. Despite the thousands of people who have already died in Florida due to COVID-19, Defendants have refused to make adjustments to voting procedures that would reduce the risk of infection and provide a safe environment in which to vote. *Freeman v. JPMorgan Chase, N.A.*, 675 F. App’x 926, 931 (11th Cir. 2017) (plaintiff’s injury was “fairly traceable” to a defendant bank where the bank knew of and took no action to stop one of its employees from misappropriating money held in escrow for plaintiff); *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324 (11th Cir. 2012) (citing *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1273 (11th Cir. 2003) (injury in having personal information stolen traceable to the company that failed to secure the information on company laptops, even though the laptops were stolen by a third party)). That Defendants’ inaction exacerbates risks

presented by COVID-19 does not, however, remove their culpability. To the contrary, it is Defendants' blithe refusal to acknowledge and alter their course of conduct when presented with the risk of COVID-19 -- and not COVID-19 itself -- that is unnecessarily causing Plaintiffs' injury because that injury could be easily redressed by Defendants. *See League of Women Voters of Virginia v. Virginia State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249, at *8 (W.D. Va. May 5, 2020) (the state's witness signature requirement imposed a "significant burden on the right to vote" during the COVID-19 pandemic because "these are not ordinary times"); *Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329, at *15 (D.S.C. May 25, 2020) (finding Article III standing to challenge enforcement of voting requirements in the context of COVID-19 pandemic); *Drenth v. Boockvar*, No. 1:20-CV-00829, 2020 WL 2745729, at *5 (M.D. Pa. May 27, 2020) (holding the state's election policies violated the rights of the blind and Plaintiffs would "suffer irreparable injury" because "they are effectively forced to choose between forfeiting their right to vote privately and independently or risking their health and safety by traveling to a polling place to vote in person" during the COVID-19 pandemic); *Democratic Nat'l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 1638374, at *17 (W.D. Wis. Apr. 2, 2020) (finding that the state's deadline to receive absentee ballots would cause "imminent" harm to Plaintiffs in the face of the

COVID-19 pandemic); *Texas Democratic Party v. Abbott*, No. CV SA-20-CA-438-FB, 2020 WL 2541971, at *25 (W.D. Tex. May 19, 2020) (finding that Plaintiffs had standing because they faced “imminent risk of harm” due to the state’s mail voting laws as applied during the COVID-19 pandemic).

VII. THE INDIVIDUAL PLAINTIFFS HAVE STANDING

Each of the Individual Plaintiffs have shown that they are injured by conduct that is “fairly traceable” to the inaction of Defendants.

- **Bianca Maria Baez:** Per the facts detailed above in the Proposed Findings of Fact, Ms. Baez has standing to challenge the vote-by-mail receipt and cure deadlines. *See also* June 30 Order, at 5 (Individual Plaintiffs who wish to vote by mail have standing to challenge deadlines). She also has standing to challenge the Defendants’ refusal to offer curbside voting options. *See* June 30 Order, at 6 (“Individual plaintiffs who wish to vote in a manner minimizing the risk of COVID-19 have standing to challenge provisions they assert pose an unnecessary risk to them”). Finally, Ms. Baez has standing to challenge the deadline by which vote-by-mail must be received because she will be forced to vote before she has all the information she wants before

casting her ballot, and the closer to Election Day she waits, the greater the risk that her ballot will not be counted.

- **Paulina Hernandez Morales:** Per the facts detailed above in the Proposed Findings of Fact, Ms. Morales has standing to challenge the vote-by-mail receipt and cure deadlines. *See also* June 30 Order, at 5. Because Spanish is her dominant language and she has only a limited ability to communicate in English, Ms. Morales also has standing to challenge the fact her SOEs office lacked workers who can assist voters in Spanish and also lack Spanish ballot materials. If the Defendants' provided access to Spanish language assistance, or access to Spanish ballot materials, Ms. Morales would be able to freely exercise her right to vote without assistance.
- **Murray Heller:** Per the facts detailed above in the Proposed Findings of Fact, the existing vote-by-mail receipt deadlines do not sufficiently protect Mr. Heller's right to vote because he will be forced to vote before he has all the information he wants before casting his ballot, and the closer to election day he waits, the greater the risk that his ballot will not be counted. Accordingly, Mr. Heller has standing to challenge the vote-by-mail receipt deadlines. *See also* June 30 Order, at 5

(Individual Plaintiffs who wish to vote by mail have standing to challenge deadlines). Mr. Heller also has standing to challenge Defendants' provisions that pose an unnecessary risk to him when he wishes to vote in an alternative manner that minimizes the risk of getting COVID-19. *See* June 30 Order, at 6.

- **Celcio Eduardo Romero:** Per the facts detailed above in the Proposed Findings of Fact, the deadline to cure vote by mail deficiencies does not sufficiently protect Mr. Romero's right to vote, nor does the procedure currently in place for notifying him of a signature mismatch. Mr. Romero has requested accommodations and has standing to challenge the signature mismatch process and the vote-by-mail cure deadlines. *See also* June 30 Order, at 6 (Individual who wishes to vote-by-mail later than would be necessary to ensure a ballot was not excluded for a mismatched signature or to cure such an exclusion has standing to challenge the cure deadline).
- **Sheila Young:** Per the facts detailed above in the Proposed Findings of Fact, Ms. Young has standing to challenge the vote-by-mail receipt and cure deadlines. *See also* June 30 Order, at 5 (Individual Plaintiffs who wish to vote by mail have standing to challenge deadlines). She also

has standing to challenge failure of Defendants to offer an accessible means of voting privately and independently by mail. *See* June 30 Order, at 5 (“Blind individuals who wish to vote by mail have standing to challenge the secret-ballot limitation.”); *id.* at 6 (“Individual plaintiffs who wish to vote in a manner minimizing the risk of COVID-19 have standing to challenge provisions they assert pose an unnecessary risk to them”). In addition, because her signature is inconsistent, Ms. Young has standing to challenge the cure deadline and procedures. *Id.* (“[A]n individual who wishes to vote by mail later than would be necessary to ensure a ballot has not been excluded for a mismatched signature—or to cure any such exclusion—has standing to challenge the cure deadline.”).

A. Organizational Plaintiffs Have Standing

Organizational Plaintiffs have standing both to bring claims on behalf of the members they represent, and in their own right.

1. Associational Standing

Organizations have standing to bring claims to enforce the rights of its members whenever “its members would have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim

asserted nor the relief requested requires individual members' participation in the lawsuit." *Friends of the Earth, Inc.*, 528 U.S. at 169. Here, as detailed in Plaintiffs' Proposed Findings of Facts above, the evidence will show that Organizational Plaintiffs have members across the State of Florida who face the imminent threat of injury and that voting rights are germane to Plaintiffs' purpose. *See Gwinnet County NAACP v. Gwinnett Cty. Bd. of Registration*, -- F. Supp. 3d --, 2020 WL 1031897, at *3-4 (N.D. Ga. Mar. 3, 2020) (finding associational standing where plaintiff presented evidence that unnamed members intended to vote and would be harmed by defendant's conduct).

2. Organizational Standing

An organization also has standing to bring a claim whenever a defendant's actions have "perceptibly impaired" an organizational plaintiff's ability to carry out its established mission by creating a "drain on the organization's resources." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *see also Georgia Latino All. for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1260 (11th Cir. 2012) (holding that organizational Plaintiffs had standing to sue in their own right because they cancelled routine citizenship classes and diverted resources to help educate the community about a new immigration law) (citations and internal quotation marks omitted). Courts have consistently recognized organizational standing in the voting

rights context. *Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165–66 (11th Cir. 2008) (holding Plaintiffs “made a sufficient showing that they will suffer a concrete injury” because they had to divert resources and personnel from registration drives and election-day education to educating voters and volunteers on compliance with Subsection 6); *Arcia v. Fla. Sec’y of State*, 772 F.3d 1335, 1341-42 (11th Cir. 2014) (holding that the organizational plaintiffs sufficiently showed that they diverted resources from voter registration and education to address the Secretary of State’s program); *Common Cause Indiana v. Lawson*, 937 F.3d 944, 952 (7th Cir. 2019) (finding that organizational plaintiffs had made a sufficient showing of injury because they diverted time, staff, and resources to educating voters about Act 442 instead of their normal activities of registering voters).

Here, the evidence demonstrates that the Organizational Plaintiffs have diverted their limited resources because of Defendants’ inaction.

For example, Defendants’ failure to have a clear plan to deal with the pandemic and ensure people had access to the ballot caused Dream Defenders to lose time that normally would have been spent on voter registration. Gilmer Dep. 64:1-22. Dream Defenders was forced to alter its plans. *Id.* During this time, Dream Defenders staff did research to reassess what their new voter education and voter registration plans would look like. *Id.* The Dream Defenders normally would have

started launching more aggressive voter registration programs right after the March PPP, but they have spent the last four months figuring out how they will be able to educate voters on how to access the ballot safely in light of the pandemic. *Id.* at 75:25-77:3.

Dream Defenders has also been forced to divert resources towards educating voters about voting by mail ballots. *Id.* The resources devoted to digital organizing for educating voters about vote-by-mail would normally be focused on voter registration, in-person canvassing efforts, voter education on other issues, and communications work. Gilmer Decl. ¶ 7. Due to the change to focus on vote-by-mail education, Dream Defenders does not expect to meet their goal of registering 30,000 youth voters and the organization has been forced to reallocate funds they originally planned to use on other core programs. *Id.* at ¶¶ 8-9.

Similarly, Organize Florida has pulled around 70 canvassers from their in-person voter registration efforts and diverted them to assist voters remotely with Florida's OVR and VBM process. Woods Decl. ¶¶ 3-7. Organize Florida spent \$2,000 to have a landing page built that their QC callers can use to follow up with potential registrants. *Id.* ¶ 8. Organize Florida also spent an additional \$2,000 to have a separate vote-by-mail landing page built where eligible voters who want to vote-by-mail will be directed in order to assist them with registering to vote. *Id.* ¶

18. Organize Florida has also translated both the registration and the vote-by-mail landing pages to Spanish to educate Spanish language dominant, Florida voters needing the information in the language they best understand. Declaration of Gomez-Tejada ¶¶ 19-21, ECF 313-12. Organize Florida anticipates that it will not reach its intended goal of registering 100,000 people to vote because the deficient OVR system significantly slows down the registration process. Woods Decl. ¶¶ 10-11; Porta Dep. 45:22-46:5.

In the aftermath of the PPP, NewFM pivoted to COVID-19 emergency mode, providing direct relief and aid in communities of color and moving 200 voter registration canvassers from in-person voter registration to Comprehensive COVID Wellness Check phone calls using a high propensity Black and Brown voters list. Mercado Decl. ¶ 11; DD Plaintiffs' Exh. 19, NewFM Voters List. In those Wellness Check conversations, NewFM specifically asked respondents about voting during the pandemic. Mercado Decl. ¶11, Ex. DD Exh. 19. NewFM learned from those calls of the widespread lack of information about and distrust of the vote-by-mail process, particularly among voters of color. Mercado Decl. ¶¶ 12-15. In order to address those concerns and because Defendants have failed to announce plans on how they will conduct elections in light of COVID-19, NewFM has had to divert resources to provide special vote-by-mail voter education. Mercado Decl. ¶¶ 12-15.

Additionally, NewFM is diverting resources to remedy the “shortcomings” of the State’s OVR system and address the concerns of eligible, but unregistered voters, many of whom are being identified through Wellness Check phone calls. Mercado Decl. ¶¶ 17-21; DD Plaintiffs’ Exh. 20, NewFM Selected Production from DD-PROD003. Specifically, NewFM is implementing both a “chase” program and an “on-the-ground” voter registration program in low-income Black and brown communities, complete with WiFi hotspots, tablets, and printers. Mercado Decl. ¶¶ 17-21; Exh. 20, NewFM Selected Production. To date, NewFM has spent \$27,000 on tablets and WiFi hotspots. DD Plaintiffs’ Exh. 21, NewFM CSG Sales Order. Florida’s failures to take measures to protect every eligible citizen’s right to vote is forcing NewFM to divert resources from additional voter education, additional voter registration, and COVID-19 relief work. DD Plaintiffs’ Exh. 22, Nine SOEs Responses to DD Plaintiffs’ Second Set of Interrogatories.

Because the Organizational Plaintiffs have diverted resources due to the Defendants’ inaction in the wake of the COVID-19 pandemic, they have standing to sue in their own right.

All individual and Organizational Plaintiffs have demonstrated that they meet the requirements of standing, as already affirmed by this Court. ECF 366 at 7. To

the extent necessary, Dream Defender Plaintiffs are prepared to provide additional testimony at trial to demonstrate that all Plaintiffs meet the elements of standing.

VIII. FLORIDA’S RESTRICTIONS ON ACCESS TO VOTING AND VOTING PROCESSES DURING COVID 19 VIOLATE THE CONSTITUTION AND FEDERAL LAW

A. Florida’s Restrictive Ballot Receipt Deadline Violates the Voting Rights Act

1. The VBM Deadline Disproportionately Affects Black and Latinx Voters in Violation of § 2 of the Voting Rights Act and Violates Guarantees of Procedural Due Process (MDS 15)

Florida’s election-day deadline for receiving VBM ballots violates section 2 of the Voting Rights Act (“VRA”). Section 2 provides that “[n]o . . . standard, practice, procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color[.]” 52 U.S.C. § 10301(a). A “violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political process leading to the nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” *Id.* § 10301(b).

The VRA was enacted to “rid the country of racial discrimination in voting,” *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1996), and is intended to have the “broadest possible scope” in combatting discrimination. *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (citation omitted). The VRA in its current form represents amendments by Congress, enacted in 1982, in order to enable plaintiffs to establish a violation “by proof of discriminatory results alone.” *Id.* at 403-04; *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994). The Section 2 analysis is both “intensely fact-based and localized,” *Gonzalez v. Arizona*, 677 F.3d 383, 406 (9th Cir. 2012) (citations omitted), *aff’d on other grounds sub nom. Arizona v. Inter-Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013), and “depends on a searching practical evaluation of the past and present reality.” *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 918, 1013 (9th Cir. 2020) (citations and internal quotation marks omitted).

2. Florida’s VBM Ballot Receipt Deadline Abridges Black and Latinx Voters’ Ability to Vote

A disproportionate number of Florida registered voters whose vote-by-mail ballots are not ultimately counted are Black and Hispanic. Smith ¶ 5; Smith Rebuttal ¶ 8. This includes voters who never received a ballot, returned the ballot beyond the 7pm Election Deadline, or had their ballot rejected by the county canvassing board. Smith ¶ 5. Dr. Smith’s analysis found that in the 2016 and 2018 general elections and in the March 2020 PPP, Black and Hispanic voters were *two to three times as*

likely as White voters to have their timely VBM ballots rejected. Rebuttal Report of D. Smith (Ex. 1) ¶¶ 15-16; Expert Report of D. Smith ¶ 62. In addition, during the March 2020 PPP, Florida's requirement that VBM ballots be received by 7:00 P.M. on election day results in Black and Hispanic voters without prior vote by mail experience having their ballots rejected as late more than twice as often as White voters. Rebuttal Report of D. Smith 29.

Accordingly the VBM rejection results demonstrate an abridgment of ability to vote, as prohibited under Section 2. 52 U.S.C. § 10301(a).

3. The Disparate Impacts On Black and Latinx Voters Are Linked to Discrimination

Florida has a long legacy of racial discrimination, and Blacks and Latinx individuals have borne the brunt of that discrimination in ways making them more vulnerable to burdensome voting regulations. *See LULAC v. Perry*, 548 U.S. 399, 440 (2006). Blacks and Latinx individuals are more likely to move, be poor, less educated, lack access to transportation, and experience poorer health outcomes. Kousser Report 14, 47, 60. These factors make them more likely to face disproportionate burdens or to simply be denied the right to vote altogether under Florida's VBM requirements. For example, educational attainment and income are considered indicators of an individual's likelihood to vote. Kousser Report 47, 50. Yet Blacks and Hispanics in Florida are less likely to graduate high school and less

likely to hold college degrees compared to Whites. *Id.* ¶ 47. And average income for White Floridians (\$39,116) is nearly double that of Black Floridians (\$20,139) and well above that of Hispanics (\$23,017). *Id.* ¶¶ 50-51. White Floridians are also more than 20% more likely than Black or Latinx Floridians to live in homes they own, rather than needing to rent. *Id.* ¶ 51.

During the COVID-19 pandemic, Black and Latinx Floridians are more likely to be subject to health conditions that increase their susceptibility to the disease. *Id.* ¶ 61. Blacks and Latinx Floridians are also less likely to have health insurance and thus more likely to forego a visit to a doctor for costs reasons. *Id.* ¶ 58.

4. Other Senate Report Factors Demonstrate A Section 2 Violation

In evaluating the “totality of the circumstances,” Courts also look to the factors set forth under Senate Report 97-417 (1982) (hereinafter “Senate Report”). *See Thornburgh v. Gingles*, 478 U.S. 30, 47 (1986). Several of the Senate Report factors are present here.

First, Florida has a history of official discrimination. *See Gingles*, 478 U.S. 36. Dr. Kousser explains that disenfranchisement of Blacks dates back to the time of slavery and, later Florida’s attempts to preserve official segregation, including the use of at-large voting and suppression of Black and Latinx voters. *See Kousser*

Report ¶ 33. Florida has been found to have violated the VRA since as recently as 2012. *Id.*

Second, racially polarized elections have long been present in Florida. *See Davis v. Chiles*, 139 F.3d 1414, 1416 (11th Cir. 1998). Professor Kousser has documented that polarization remained prevalent throughout the past decade’s presidential and recent gubernatorial elections, including primaries. In effect, racial polarization gives the state and SOEs virtually no incentive to remedy VBM issues, including the deadline. *See, e.g.*, J. Edwards Dep. 113:10-16 (when asked whether SOE staff should undergo unconscious bias training, the County SOE responds “No. Its never been an issue.”).

Third, voting practices plainly enhance opportunities for discrimination in Florida. In addition to Florida’s VBM practices creating opportunities for discrimination, Florida’s other election laws have done the same. For example, this year the Florida Legislature enacted legislation to undermine a voter-backed effort to restore voting rights to former felons, despite that felon disenfranchisement affects ***one in four*** Black Floridians. Kousser Report ¶ 11.

Fourth, recent political campaigns in Florida continue to invoke racist and derogatory language. For example, Defendant DeSantis gave a public statement in 2018, in which he encouraged voters not to “monkey this up” by voting for his

opponent, Andrew Gillum, who is black. *Id.* ¶ 19. Additionally, in 1994 an experienced African American school reform advocate became the first Democratic Education Commissioner to lose an election when his Republican opponent ran a tv commercial featuring Jamerson's darkened and caricatured portrait. *Id.*

Fifth, Black and Latinx candidates have limited access to electoral success. For example, only two black candidates have been elected to statewide office in Florida. No Black people served in the Florida Legislature or Congress from the end of Reconstruction through 1969. Kousser Report ¶ 20. The number of Black and Latinx members of the Legislature remains well below their share of the population. *Id.*

Sixth, Elected Officials in Florida are unresponsive to minorities. For example, several counties do not provide Spanish language ballot materials. C. Anderson Dep. 79:15-17, 80:19-81:1, 149:17-150:5 (admitting that various election-related materials are not translated into Spanish). Similarly, other County elections officials are reluctant to address demonstrated problems with the VBM system. J. Edwards Dep. 113:10-16 (when asked whether SOE staff should undergo unconscious bias training, the County SOE responds "No. Its never been an issue."). *See also* J. Edwards Dep. 109:13-111:10 (County SOE was not aware that for the 2020 PPP her office rejected 3.5% of VBM ballots cast by Black voters and 1.5% of

VBM ballots cast by Hispanic voters, compared with just 0.5% of VBM ballots cast by White voters. The SOE confirmed that she does not make efforts to determine the rate of VBM ballots rejected by race or ethnicity and that she does not believe this is “something that Collier County should look into[.]”).

Finally, Florida’s interest in the election-day VBM deadline is extremely tenuous. Indeed, the 10-day extension of the VBM deadline for VBM ballots postmarked by election day—which is the relief Plaintiffs seek in this case—already exists under Florida law for UOCAVA voters. Fla. Stat. § 101.6952(4)-(5).

B. Florida’s Cure Processes Violate the Fourteenth Amendment to the U.S. Constitution and the Voting Rights Act

1. Florida’s Cure Process Deprives Dream Defenders Plaintiffs of Procedural Due Process

Florida’s cure laws and procedures for VBM ballots will deprive many voters, including individual Plaintiffs and Plaintiff Organizations’ members, pre-deprivation notice and an opportunity to cure their ballots prior to ballot rejection, in violation of the Due Process Clause of the Fourteenth Amendment. To determine what pre-deprivation process passes constitutional muster, the Supreme Court in *Mathews v. Eldridge*, explained that the balancing of several factors is required:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute

procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

a. The Right at Stake is the Sacred Right to Cast a Ballot that Counts

The private interest at stake in this case is the right to cast a ballot that is counted, the cornerstone of the fundamental right to vote. As this case affects Plaintiffs’ fundamental right to vote, this interest is entitled to “substantial weight.”

Martin v. Kemp, 341 F.Supp. 3d 1326, 1338 (N.D. Ga. 2018).

“The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Voting is, indisputably, a right ““of the most fundamental significance under our constitutional structure.’” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (internal quotations omitted). This right does not vanish for those whose votes are cast by absentee ballot. “Having created an absentee voter regime through which qualified voters can exercise their fundamental right to vote, the State must [] provide absentee voters with constitutionally adequate due process protection.” *Martin*, 341 F. Supp. 3d at 1338 (N.D. Ga. 2018) (“Given that the State has provided voters with the opportunity

to vote by absentee ballot, the State must now recognize that the “privilege of absentee voting is certainly ‘deserving of due process.’”); *Saucedo v. Gardner*, 335 F.Supp.3d 202, 217 (D.N.H. 2018).

b. The Risk of Erroneous Deprivation of Dream Defenders Plaintiffs, Black, Brown, Elderly, Disabled, and Limited English Proficiency Voters ability to Cast a Ballot that Will Count is High

Extensive evidence in this case demonstrates why the risk of erroneous deprivation is high for Plaintiffs given the procedures used by Florida to verify, cure, and ultimately accept or reject VBM ballots.

First, the sheer number of VBM ballots rejected in Florida is significant. In the 2018 General Election more than 1/100 VBM ballots cast were ultimately rejected by local elections officials, amounting to some 31,969 ballots that did not count.” Baringer et al. Report 15. In the PPP, about 1.28% of VBM ballots were rejected by County Defendants: 0.83 percent of returned VBM ballots were rejected because the return envelope had a “voter-caused” error, and another 0.45 percent of returned VBM ballots were rejected because the return envelope was missing the voter’s signature. Smith Decl. 64. Of these voters, Plaintiffs, Black, brown, elderly, disabled and limited English proficient voters were more likely than other voters to have their VBM ballots rejected. The risk of erroneous deprivation for individuals

like Plaintiff Romero is almost absolute – as a result of a manual impairment, he cannot sign his name. Romero Decl. ¶¶ 4, 6.

Bias and County Defendants’ procedures put Plaintiffs at a heightened risk of erroneous deprivation of the right to cast a ballot that counts. County Defendants determine which ballots to reject by making a judgment that the voter’s signature matches or does not match the one they have on file, but County Defendants have no particular expertise in handwriting analysis. In fact, County Defendants do not have the information their own training materials explain as necessary to determine whether two signatures match. DD Exh. 5, Canvassing Board Workshop Slides; Lewis Dep. 90-95. And despite persistent bias in Florida County Defendants’ rejection of VBM ballots—which results in the deprivation of Black and brown voters’ opportunity to cast a ballot that counts – County Defendants charged with making signature match determinations do not receive bias training. Some County Defendants do not believe it is necessary. Edwards Dep. 109-16.

Organizational Plaintiffs NewFM and Organize Florida Education Fund likewise have members, Black, brown and limited English proficient registered voters in Florida, who fear that their ballots in the remaining 2020 elections will be rejected with no meaningful time to cure, if the County Defendants continue to implement the current flawed “cure” procedures. Woods Decl. ¶ 20-24.

c. The Government's Interest is Minimal, and Greatly Outweighed by the Risk of Erroneous Deprivation of Plaintiffs' Fundamental Right to Cast a Ballot that Counts.

The public interest here commands that eligible Floridians can cast a ballot that is counted, because the societal costs and administrative burden of the additional procedures necessary to ensure due process are greatly outweighed by the interests at stake of private interests at stake. To determine the appropriate process due, a court must examine the government's interest, including “the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews*, 424 U.S. at 335. The burden and costs of additional or substitute procedures are low where substitute procedures already exist within state law or procedure. *Zinermon v. Burch*, 494 U.S. 113, 137 (1990) (“we cannot say that postdeprivation process was impossible ... [where the state] already has an established procedure.”); *Martin*, 341 F. Supp. 3d at 1339-40 (“Because many of the procedures Plaintiffs request are already in place, the Court finds that additional procedures would involve minimal administrative burdens while still furthering the State's asserted interest in maintaining the integrity of its elections.”); *Florida Democratic Party v. Detzner*, No. 4:16-cv-607, 2016 WL 6090943, at *8 (N.D. Fla. Oct. 16, 2016) (“There is no reason that same procedure cannot be implemented (rather, re-implemented) for mismatched-signature ballots.”); *Saucedo*

v. Gardner, 335 F.Supp.3d at 220, 2018 WL 3862704, at *13 (D.N.H. 2018) (“[A]dditional procedures further the State's interest in preventing voter fraud while ensuring that qualified voters are not wrongly disenfranchised.”).

Here, the Secretary of State does not have to certify election results until 14 days following Election Day and County Canvassing Boards accept and tabulate VBM ballots from UOCAVA VBM ballots ten days following an election. Fla. Stat. § 101.6952(5). County Defendants have ample time, within that period, to allow voters to “cure” alleged deficiencies in their ballots. But even pushing back the state’s certification deadline and Election Day receipt deadline would not create a significant burden or cost to County Defendants. Indeed, a Florida SOE, in response to Dream Defenders Plaintiffs discovery in this case responded to the following question “describe the additional financial, staff, or other resources You contend will be needed to ...Accept[] returned vote-by-mail ballots and counting them as long as they are postmarked or dated by Election Day and received within ten days of Election Day: “None, if post-election deadlines (i.e. certifying election results, etc.) were also extended.” DD Plaintiffs’ Exh. 6, Volusia County Response to DD Plaintiff’s First Set of Interrogatories, Response to Interrogatory No. 4.

There may indeed be some cost to the state if it is to extend the election certification deadline to allow county defendants to similarly, but it is minimal, and certainly pale in comparison to the interest in public confidence in elections.

2. The VBM Cure Process Has a Disparate Impact on Black and Latinx Voters, in Violation of Section 2 of the Voting Rights Act

As a result of County Defendants' procedures for flagging ballots with alleged deficiencies requiring cure, and the actual process for curing those alleged deficiencies, Black and Latinx voters do not have an equal opportunity to participate in the political process, and it is precisely because of Florida's long and sordid history of discriminating against Black and Latinx voters that these practices have such stark discriminatory results.

The Supreme Court as well as Congress have made clear that a violation of Section 2 of the Voting Rights Act can be established by proof of discriminatory results alone, albeit more than mere statistical evidence. *Chisom v. Roemer*, 501 U.S. 380, 404 (1991). Here, every level of Florida's "cure" process results in discrimination against Black and Latinx voters.

County Defendants – that is, the SOE and her staff – have nearly unfettered discretion to flag ballots as requiring "cure" for alleged signature mis-matches, which has allowed bias against Black and Hispanic voters to flourish in violation of

Section 2 of the Voting Rights Act. County Defendants determine which ballots to reject by making a determination that the voter's signature matches or does not match the one they have on file, but County Defendants have no expertise in handwriting analysis and each has different procedures for allowing their staff to flag ballots for cure. Baringer et al. Report 14; Lewis Dep. 82-83; Edwards Dep. 120; Jones Dep. 168-69. County Defendants also have widely disparate practices for notifying voters, which also has a disparate impact on Black and Latinx voters. Lewis Dep. 82-83; Edwards Dep. 122; Jones Dep. 172. Despite disparate rejection across every County in Florida, the state has taken no action to improve and correct its cure procedures. Indeed, Collier County's SOE brazenly stated, after a lengthy discussion of these stark disparities, that she did not believe bias was an issue in the county. Edwards Dep. 109-12.

The cure process leads to disproportionate rejection of Black and Latinx voters attempts to cure alleged deficiencies which, when combined with the disproportionate flagging of Black and Latinx voters' ballots for cure, leads to disparate and discriminatory ballot rejection of Black and Latinx voter's VBM ballots, even when they have attempted to cure alleged deficiencies. Available county-level evidence demonstrates that Black and Latinx voters are less likely to have their ballots successfully cured compared to White voters. This is in part due

to the arbitrary and burdensome “cure documentation” requirements. Such documentation is intimately linked with Florida’s history of voting discrimination against Black and Latinx voters. The cure process’s disparate impact is further evidenced by cure success amongst Black and Latinx voters as compared to white voters in Miami-Dade County in the 2018 GE and 2020 PPP. Smith Rep. ¶ 71. Dr. Smith’s analysis found that in the 2016 and 2018 general elections GEs and in the March 2020 PPP, Black and Hispanic voters were almost twice two to three times as likely as White voters to have their timely VBM ballots rejected. Smith Rep. ¶ 62.

It is Florida’s history of state-sanctioned discrimination against Black and Latinx voters that has created the social conditions which make it more likely County Defendants will flag Black and Latinx voters’ ballots as requiring cure; why Black and Latinx voters are more likely to receive their VBM ballots later than white voters; why Black and Latinx voters are less likely than white voters to have an up-to-date phone number or email on file in county records by which the County Defendants reaches out to them regarding the need to cure; and why Black and Latinx voters are less likely to have their ballots “cured” and counted than white voters.

IX. DEFENDANT’S FAILURE TO EXPAND EARLY VOTING AND ELECTION DAY VBM DROP OFF LOCATIONS VIOLATES CONSTITUTIONAL REQUIREMENTS (MDS 27)

As was set forth in Plaintiffs’ Motion for Preliminary Injunction, a court considering a challenge to a state election law applies the *Anderson-Burdick* framework, where the court “must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); *Cowen v. Georgia Sec’y of State*, 960 F.3d 1339, 1342 (11th Cir. 2020) (same). “The more a challenged law burdens the right to vote, the stricter the scrutiny to which [it is] subject[ed].” *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319 (11th Cir. 2019).

Unless Plaintiffs’ requests for expanded days, times, and locations for Early Voting are granted, the right to vote of thousands of Floridians, including the Individual Plaintiffs and Organizational Plaintiffs’ members and constituents, will be severely burdened (if not eliminated entirely) in the Primary Election on August 18, 2020, and the General Election on November 3, 2020. Plaintiffs will provide

evidence at trial that the limits on early voting significantly impact voters throughout Florida.

Under the first step of the *Anderson-Burdick* test, Florida's handful of early voting days impose a severe burden on their right to vote by creating a heightened risk of harmful COVID-19 exposure to in-person voters. Fewer polling places require more voters to vote at a given location, meaning each voter will be exposed to a greater number of people who may be infected with COVID-19. Meanwhile, fewer poll workers and increased social distancing will cause voting itself to take longer and generate longer lines. *See* White Dep. 86:20-87:2. As a result, voters will have to spend more time in a space that already exposes them to a heightened risk of contracting COVID-19. This hazard applies with equal force to early and Election Day in-person voting inside polling places.

This burden falls severely upon many vulnerable Floridians, including Plaintiffs Romero, Hernandez-Morales, and Young, whose age or underlying health conditions places them at increased risk of serious harm from COVID-19 and require them to minimize exposure to potentially infected individuals. Further, Mr. Romero cannot currently use the vote-by-mail process without risking a rejected ballot due to a signature mismatch because his multiple sclerosis and a stroke have made it impossible for him to sign his name, while Ms. Young cannot vote by mail without

giving up her right to vote confidentially and independently. Organizational Plaintiffs Dream Defenders, New Florida Majority, and Organize Florida all have members or serve communities who are similarly situated to these individual Plaintiffs, and would therefore benefit from expanded Early Voting days, hours, and locations. At trial, these organizations will provide testimony regarding the impact on their members of the limitations on early voting, and the burdens these limitations impose.

For people who must vote in-person, the current situation—with fewer polling places, fewer poll workers, and longer, slower lines—imposes a severe burden by forcing these individuals to choose between their ballot and their survival. *See People First of Alabama*, No. 2:20-CV-00619-AKK, 2020 WL 3207824, at *14 (noting that “[e]xposure to a deadly virus is a burden,” which poses “a more significant burden on some voters . . . who are at heightened risk of severe COVID-19 complications”), *aff’d* No. 20-12184, 2020 WL 3478093 (11th Cir. June 25, 2020), *stayed pending appeal* No. 19A1063, 2020 WL 3604049 (U.S. July 2, 2020).

Under the second step of the test, Defendants fail utterly. Despite the SOEs’ specific, repeated requests for expanded early voting options, the Governor and SOS have declined to provide any such options and have given no coherent justification for this. The State Defendants appear to have proffered just two cursory points: that

additional early voting “requires . . . scores of poll workers” and that limiting early voting ensures time to test voting machines. State Defendants’ Omnibus Opposition to Motion for Preliminary Injunction, ECF 290, at 47. These vague incantations cannot be squared with the fact that the Supervisors of Elections—who manage the poll workers and machine testing—specifically requested that the Governor provide them with the discretion to start early voting sooner and expand the number of early voting sites. *See* Florida Supervisors of Elections, Letter to Governor Ron DeSantis 1-2 (April 7, 2020), ECF 92-1.

The lack of a strong interest in preventing SOEs from taking the very steps they articulated as necessary to enfranchise voters is made all the more stark by the fact that the State of Florida provided very similar accommodations to the Bay and Gulf Counties in another emergency just two years ago—the aftermath of Hurricane Michael. Finally, even if State Defendants could justify not making increased early voting sites and days mandatory, they have *absolutely no justification* for not providing SOEs the option to adopt such practices—nor have they even tried to articulate such a justification.

Under the third step of the test, a court must consider the extent to which the government’s “interests make it necessary to burden the plaintiff’s rights.” *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). “[E]ven when a law imposes only a slight

burden on the right to vote, relevant and legitimate interests of sufficient weight still must justify that burden.” *Id.* at 1318-19; *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (“However slight [a] burden may appear, . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.” (quotation omitted)).

Here, not only do the Defendants’ anemic interests not require burdening Plaintiffs’ right to vote, but the severe burden on Plaintiffs substantially outweighs Defendants’ justifications. Expanded early voting days, hours and locations will reduce the number of in-person voters present at a polling place at any one time, and thereby reduce Plaintiffs’ risk of exposure to COVID-19. Without these accommodations, in-person voting is unjustifiably dangerous and thus unavailable for these voters, thereby severely burdening—if not eliminating—their right to vote.

The in-person early voting analysis above applies with equal force to the need for voters to be able to submit their VBM ballots at their nearest precinct on election day, as well as Early Voting locations (particularly if extended through Election Day as requested by Plaintiffs). Many voters may receive their VBM ballots too late for USPS to return their ballots to the SOEs in time to be counted. As a result, they must submit the ballots in-person. However, Florida prohibits returning VBM ballots to the nearest polling place, and instead restricts in-person return to a handful of

locations, including SOE offices and early voting sites, but *not* Election Day precincts. *See* Fla. Stat. Ann. § 101.69(1), (2).

If a voter is at higher risk of harm from exposure to COVID-19 and they receive their VBM ballot too late to return by mail, then they must either (i) trek to the SOE's offices, (ii) risk their life by voting in person, or (iii) not vote. But many of these same, at-risk voters lack access to personal transportation, and so using public transit forces them to risk their lives by increasing their risk of exposure to COVID-19. While precincts are fairly close to voters' residences and within walking distance, SOE offices are often many miles away—further increasing the time on public transit and the risk of exposure. As a result, many voters who need to return VBM ballots on election day will be forced to choose between their ballot and their survival. For all the reasons explained above, this is a severe burden for which the Defendants cannot and have not offered an adequate justification. To the extent that State Defendants invoke resource constraints, requiring a poll worker already present at a precinct on Election Day to accept VBM ballots returned there imposes negligible additional cost. Mandating such a system, especially with curbside drop off -- a measure at least one SOE already plans to implement, Joyce Griffin Dep. 131:10-22 -- would alleviate the otherwise severe burden that Florida's scheme imposes in light of COVID-19.

Various SOEs' own statements reinforce the Defendants' weak interest in not providing drop boxes. When asked about placing drop boxes at precincts on Election Day and having poll workers transport them back to the SOE's office for counting, one SOE affirmed that "it would be feasible." Christopher Anderson Dep. 125:5-6. Similarly, the *only* argument another could give *against* such a process was security concerns, but that SOE subsequently admitted she knew of no instance in which someone even attempted to steal or tamper with such a box. *See* Jennifer Edwards Dep. 102:13-103:2. Indeed, another SOE indicated that "stationing a staff member next to each box" was security enough. *See* White Dep. 103:5-6. In fact, this security concern is so minimal that one SOE's "mother's porch has become a dropoff spot." Griffin Dep. 131:1-2. These statements, made by the very officials most familiar with Florida's voting process, indicate that providing drop boxes on election day would be entirely feasible.

X. FLORIDA'S INACCESSIBLE ONLINE REGISTRATION SYSTEM BURDENS THE RIGHT TO VOTE IN VIOLATION OF THE 14TH AMENDMENT AND DISPROPORTIONATELY AFFECTS BLACK AND LATINX VOTERS IN VIOLATION OF SECTION 2 OF THE VRA (MDS 31, 32, 34)

A. Florida's Inaccessible Online Voter Registration System Burdens the Right to Vote in Violation of the 14th Amendment

The limitations and restrictions of Florida's OVR system severely burden the right to vote of many Floridians by making it unnecessarily difficult and at many

times impossible to successfully register online. The barriers currently part of the OVR system and process can result in disenfranchisement of voters who are unable to register by another method due to lack of resources or lack of notice of an application error. Preventing a potential voter from registering amounts to a severe burden on their fundamental right to vote. *see Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016); *Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249-wmc, 2020 WL 1320819, at *5-6 (W.D. Wis. Mar. 20, 2020). Organizational Plaintiffs are also burdened by the significant diversion of resources required to try to address problems with the OVR system to prevent their members and other residents from the communities they serve from being denied their fundamental right to vote. ECF 86-4, ¶ 9-13 (Gilmer Decl.); ECF 86-7, ¶ 17-21 (Mercado Decl.); ECF 86-9, ¶ 7-11 (Woods Decl.).

Under the Anderson-Burdick sliding scale standard, Florida's OVR restrictions are unconstitutional because they are not narrowly drawn to advance a compelling state interest. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Furthermore, they certainly do not survive the higher level of scrutiny that must be applied to burdens that have a disproportionate impact on identifiable groups, such as African American and Latinx voters *See Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983).

Even a restriction that imposes a slight burden on the right to vote can only be justified by “relevant and legitimate state interests sufficiently weighty to justify the limitation.” *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 191 (2008) (Stevens, J., plurality opinion). And courts must consider the extent to which the state’s justifications require burdening plaintiffs’ rights. *See Burdick*, 504 U.S. at 434. While it is true that the state has a legitimate interest in the orderly and efficient administration of elections, that interest is not even served by the OVR system’s limitations and restrictions here. For example, the failure to notify voters of specific application errors through the OVR system itself and the delayed error notifications that make correction of a registration application difficult do not advance the state’s efficiency interest. Also, making the OVR process more cumbersome is counterproductive and hurts the state’s interest in cost efficiency because adopting an OVR system widely used by voters actually saves the state money. The Pew Charitable Trusts, *Online Voter Registration* 4 (May 2015), available at https://www.pewtrusts.org/~media/Assets/2015/05/OVR_2015_brief.pdf?la=en. The state’s interests in both ensuring voters can register and registration records are kept up to date and promoting the public health are served by an OVR system that is accessible to more voters.

B. The Limitations and Restrictions of Florida’s Online Voter Registration System Disproportionately Affect Black and Latinx Voters in Violation of Section 2 of the Voting Rights Act

In violation of Section 2 of the Voting Rights Act, the limitations and restrictions present in Florida’s OVR system “interact[] with social and historical conditions to cause inequality in the opportunity enjoyed by black [and Latinx] and white voters to elect their preferred representatives.” *See Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). The obstacles of Florida’s OVR system deny or abridge the right to vote by imposing “onerous procedural requirements which effectively handicap exercise of the franchise by voters of color.” *See Lane v. Wilson*, 307 U.S. 268, 275 (1939). Using Florida’s OVR system without addressing any of its problems and obstacles in the 2020 elections would violate Section 2 both by denying Black and Latinx voters the opportunity to exercise their right to vote and disproportionately burdening their voting rights.

Florida’s OVR system disparately impacts Black and Latinx voters. Black and Latinx voters are less likely than white voters to have identification issued by DHSMV than white voters, ECF 86-11, ¶¶ 22, 73 (Kousser Report), and therefore face greater burdens in registering to vote through the OVR system, as they must then print and mail paper application rather than submit an application online. This is especially problematic given how medically dangerous other voter registration

methods, like in person or mail registration, may be when considering the greater likelihood of serious illness or death from COVID-19 faced by communities of color. *Id.* ¶ 18. Furthermore, communities of color have higher poverty rates and less access to resources like printers needed to register without a state-issued identification or to correct any errors in their application. *Id.* at ¶ 14, 15. Thus, Black and Latinx voters are more likely than white voters to face these additional burdens on their right to vote and have their right to vote denied altogether.

The disproportionately burdensome OVR process is linked to Florida’s legacy of racial discrimination and “social and historical conditions” that discriminate against voters of color. The OVR system therefore provides less of an opportunity for Black and Latinx voters who experience discrimination, housing instability, and lower income to fully exercise their right to vote in violation of Section 2 of the Voting Rights Act. Moreover, the same legacy of racial discrimination impacting Black and Latinx voters in Florida with respect to the VBM ballot deadline, *see Section V.A.4, supra*, applies equally to the OVR process. All of the Senate Factors that are applied to assess a VRA violation are present for this feature of the Florida voting system as well.

XI. DEFENDANTS’ FAILURE TO PROVIDE SPANISH LANGUAGE MATERIALS AND IN-PERSON LANGUAGE ASSISTANCE VIOLATES § 203 OF THE VOTING RIGHTS ACT

Congress intended to give Section 203 “the broadest possible scope.” *Allen v. State Bd. Of Elections*, 393 U.S. 544, 567 (1969). Guidance from the Attorney General of the United States also counsels for a broad interpretation of the Section’s language.²⁹ The list of voting materials listed in Section 203 “should be broadly construed to apply to all stages of the electoral process, from voter registration through activities related to conducting elections.” 28 C.F.R. § 55.15 (2016). These activities include the issuance of any materials “concerning the opportunity to register, the deadline for voter registration, the time, places and subject matters of elections, and the absentee voting process.” *Id.*

Judicial interpretation regarding Section 203 usually revolves around the meaning of “other materials,” which is not defined. *See Delgado v. Smith*, 861 F.2d 1489, 1496 (11th Cir. 1988) (citizen initiative petition); *United States v. Metropolitan Dade County*, 815 F. Supp. 1475 (S.D. Fla. 1993) (pamphlet regarding special elections for county commissioner); *Padilla v. Lever*, 463 F.3d 1046 (9th Cir.

²⁹ Guidance from the administration is only suggestive, not mandatory, but provides guidance “consistent with the central purpose of Section 203 of the Voting Rights Act” which may help the court on its own interpretation. *Metropolitan Dade County*, 815 F. Supp. at 1478.

2006) (recall petitions); *United States v. Berks County*, 277 F. Supp. 2d 570 (E.D. Pa. 2003) (signs; sample ballots; posters; text posted on the ballot; elector's affidavit; declaration of assistance). The law's language is clear that, at a minimum, if a voting material intends to inform voters of procedure for, or manner of, voting, then the material is covered by the plain language of Section 203. *Metropolitan Dade County*, 815 F. Supp. at 1478. Vote-by-Mail forms, instructions, the cure process, changes to polling places, and communications relating to changes to voting processes and procedures all fall under the clear definition of voting materials as defined by section 203. Communications include messaging posted via websites and social media sites as increasingly used by elections officials to communicate to voters during the COVID-19 pandemic.

The plain language of Section 203 leaves little doubt that the State of Florida must comply with plaintiffs' requests. Therefore, plaintiffs ask this court to order defendants to provide Vote-By-Mail forms, instructions and cure forms and processes bilingually, in Spanish and English, and be provided for by the Secretary and the Supervisors' websites, by either linking Supervisors' pages to the Division of Elections webpage or housed on their own site as required by the VRA and state law.

XII. DEFENDANTS’ FAILURE TO ACCOMMODATE BVI VOTERS VIOLATES THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT (COUNT 14)

Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.

Section 504 of the Rehabilitation Act provides that “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [federal] financial assistance.” 29 U.S.C. § 794. Here, all defendants receive Federal financial assistance for the purposes of voting, and specifically for the purposes of providing assistive voting technologies to persons with disabilities. *See* DD Plaintiffs’ Exh. 23, DOS CARE Grant Dispersal, DOS 0000072758 (showing HAVA CARE Grant funding to every county in Florida for 2020). Therefore, defendants’ voting programs are subject to Section 504.

The standard for determining eligibility under the ADA and the Rehabilitation Act are essentially the same, so these claims may be analyzed together. *Ellis v. England*, 423 F.3d 1321, 1326 (11th Cir. 2005).

To prove an ADA Title II violation, plaintiffs must establish that: (1) they are a qualified individual with a disability; (2) they were either excluded from participation in or denied the benefit of a public entity's services, programs, or activities, or were otherwise discriminated against by the public entity; and (3) the exclusion, denial of benefit, or discrimination was by reason of the plaintiff's disability. *See Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1083 (11th Cir. 2007).

As to element one, "disability" is defined under the ADA as a "physical or mental impairment that substantially limits one or more major life activities of such individual[.]" 42 U.S.C. § 12102. A qualified individual with a disability is one who, with or without: reasonable modifications, rules, policies, or practices; the removal of architectural, communication, or transportation barriers; or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. 42 U.S.C. § 12131(2).

Here, the plaintiffs include "qualified individuals" because BVI voters are qualified individuals with a disability under the ADA. *See American Ass'n of People with Disabilities v. Harris*, 647 F.3d 1093, 1101 (11th Cir. 2011).

The "public entity" element is also met here. A "public entity" is any department, agency, special purpose district, or other instrumentality of a State or

States or local government. 42 U.S.C. § 12131(1)(B). Thus, any instrumentality of the State or county government involved in the voting process is a public entity. Moreover, voting itself is a “quintessential public activity” that is covered by Title II. *Nat. Fed. of the Blind v. Lamone*, 813 F.3d 494, 507 (4th Cir. 2016).

Under the ADA, when public entities provide aid, benefits, or services, they may not “[a]fford a qualified individual with a disability an opportunity to participate in and benefit from the aid, benefit, or service that is not equal to that afforded others” and they may not provide qualified individuals with disabilities “an aid, benefit, or service that is not as effective in affording equal opportunity” to gain the same result or benefit as provided to others. 28 C.F.R. § 34.130(b)(1)(ii)-(iii); *see also* 45 C.F.R. § 84.4(b)(1)(ii)-(iii). Both in-person voting and vote-by-mail are services provided by a public entity, and both must independently comply with the ADA and Section 504. *Lamone*, 813 F.3d at 503-05.

It is well-established that individuals with disabilities must have the “option to cast a private ballot” where that same right is afforded to non-disabled voters. *Disabled in Action v. Bd. of Elections*, 752 F.3d 189, 199-200 (2d Cir. 2014); *see also Cal. Council of the Blind v. Cty. of Alameda*, 985 F. Supp. 2d 1229, 1239 (N.D. Cal. 2013) (voting with the assistance of others at best provides “an inferior voting experience ‘not equal to that afforded others’” (internal citation omitted)). Here,

element two is met because BVI voters have been excluded from the absentee voting process in Florida as they do not have the same option to cast a private ballot as non-disabled voters. *See* Young Decl. ¶ 11; Jordan Decl. ¶ 12; Bukala Decl. ¶ 14.

As to the “exclusion, denial of benefit, or discrimination” element, that requirement is met by reason of the BVI voters’ vision disability. If BVI voters could read a paper ballot without assistance, as non-disabled voters can do, then they would not be excluded from voting privately in the Florida absentee voting system. *See* Young Decl. ¶ 11. Thus, element three is also met.

The ADA further requires that public entities provide “appropriate auxiliary aids and services where necessary to afford individual with disabilities . . . an equal opportunity to participate in and enjoy the benefits of a service, program, or activity of a public entity.” 28 C.F.R. § 35.160(b)(1). These auxiliary aids “must be provided . . . in such a way as to protect the privacy and independence of the individual with a disability.” 28 C.F.R. § 35.160(b)(2). Auxiliary aids and services include “accessible electronic and information technology,” such as the Democracy Live OmniBallot. 28 C.F.R. § 35.104.

Florida law imposes the same requirement. *See* Fla. Stat. § 101.662. The Florida State Legislature has established its intent that “voting by vote-by-mail ballot be by methods that are fully accessible to all voters, including voters having a

disability.” *Id.* To do this, the Legislature directed the Department of State “to work with the supervisors of election and the disability community to develop and implement procedures and technologies . . . that will allow all voters to cast *a secret, independent, and verifiable vote-by-mail ballot without the assistance of another person.*” *Id.* (emphasis added).

Florida provides all voters the option to vote by mail. Thus, under the ADA and Section 504, Florida must provide BVI voters with appropriate auxiliary aids or services that afford these voters with an equal opportunity to enjoy the benefit of voting by mail. *See* 28 C.F.R. § 35.160(b)(1). Pursuant to the ADA, these auxiliary aids must be provided in such a way as to protect the privacy and independence of the BVI voters. *See* 28 C.F.R. § 35.160(b)(2). The Democracy Live OmniBallot would meet the requirements of the ADA and Section 504 because it would provide BVI voters with an auxiliary aid that afforded them an equal opportunity to cast an absentee ballot in a manner that protected their privacy and independence. *See id.*; *see also* Finney Decl. ¶ 21. By contrast, the current vote-by-mail option requires BVI voters to use the assistance of another person. *See, e.g.,* Young Decl. ¶ 11, ECF 91-4; Jordan Decl. ¶ 12. This option compromises the privacy and independence of BVI voters and thereby violates the ADA and Section 504.

Finally, to prevail on an ADA claim, plaintiffs must propose “a reasonable modification to the challenged public program that will allow them the meaningful access they seek.” *Lamone*, 813 F.3d at 507 (citing *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 464 (4th Cir. 2012)). A modification is “reasonable,” if it is “‘reasonable on its face’ or used ‘ordinarily or in the run of cases’ and will not cause ‘undue hardship.’” *Id.* The burden of establishing the reasonableness of an accommodation is “not a heavy one” and it “is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits.” *Henrietta D. v. Bloomberg*, 331 F.3d 261, 280 (2d Cir. 2003) (internal quotation marks and citations omitted).

Here, plaintiffs have proposed the modification of implementing the Democracy Live OmniBallot system, which would grant BVI meaningful access to private and independent absentee voting. Implementing the OmniBallot system is reasonable on its face because Florida already recommended conditionally approving the program. Secretary’s Response in Opp. to Grubb Plaintiffs’ PI, at 4 (ECF 342). While this conditional approval was apparently delayed by security concerns, all of those concerns have been addressed. Finney Decl. ¶ 8. Moreover, the OmniBallot system will in no way displace the existing vote-by-mail system for

the vast majority of Florida voters. The OmniBallot will simply improve access for the BVI voters who wish to avoid voting in-person to protect their health.

Most notably, the costs of implementing the OmniBallot system “do not clearly exceed its benefits.” *See Henrietta D.*, 331 F.3d at 280. The price tag of \$1-1.2 million across the entire state weighs lightly when balanced against protecting the right of BVI voters to vote privately and independently -- and safely --in the midst of a once-in-a-century global pandemic. Moreover, Florida is receiving more than \$20 million in HAVA CARES funding for the 2020 election, see DOS 0000072757, which could bring the effective cost of implementing OmniBallot to close to zero.

CONCLUSION

For the foregoing reasons, this court should enter judgment for Dream Defenders Plaintiffs on all counts, and should enter a permanent injunction requiring:

- Supervisors of Elections, and County Canvassing Boards to accept ballots postmarked or dated by election day and received within 10 days after election day;
- The Secretary, the SOEs and canvassing boards to accept cure affidavits that are received within fifteen days after the election;

- The Secretary, the SOEs and canvassing boards to provide clear and unambiguous instructions explaining which identification is necessary to cure each ballot deficiency;
- The Secretary, the SOEs and canvassing boards to accept cure affidavits without identification when the deficiency consists of missing information on the voter's certificate, and the cure affidavit supplies the missing information and is sufficient to verify the voter's identity;
- The Secretary, SOEs and canvassing boards to add instructions, in English and Spanish, to VBM request forms and websites, explaining that contact information will be used for notification of deficiencies;
- The Elections Canvassing Commission to extend the deadline for counties to submit election results to no earlier than fifteen days after the election;
- The Secretary and SOEs to allow voters to request alternative-address ballots online provided the voter provides adequate verification of identity;
- The SOEs to add drop-boxes at all early voting sites during the entire early voting period and at all polling places on election day;

- The Secretary and SOEs to extend early voting opportunities to include 30 days total of early voting, with voting locations distributed within the county to ensure that voters of color have equally convenient and safe access to early voting;
- The Secretary to provide voters with contemporaneous notice of errors made during online voter registration;
- The Secretary to certify and approve, and the SOEs to implement, an accessible electronic ballot delivery system for visually impaired voters.
- The Secretary and Section 203 SOEs to provide all notices and information concerning elections and voting, voting by mail, changes to polling places and election procedures, public service announcements, including information provide on websites and via social media, in English and Spanish.