

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

DREAM DEFENDERS, et al.,

Plaintiffs,

v.

RON DESANTIS, et al.,

Defendants.

Case No. 1:20-cv-67-RH- GRJ

Judge Robert L. Hinkle

KIRK NIELSEN, et al.,

Plaintiffs,

v.

RON DESANTIS, et al.,

Defendants.

Case No. 4:20-cv-236-RH-MJF

Judge Robert L. Hinkle

**DREAM DEFENDERS PLAINTIFFS MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

In the midst of the most serious pandemic the world has seen in a century, Florida has failed to take the steps necessary to protect its citizens' fundamental right to vote. Its restrictions on the franchise violate the 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 limits crucial online voter registration and third-party registration efforts, which are all the more critical at a time when key government offices are closed and many people cannot safely leave their homes. In addition, Florida makes it difficult to obtain, complete, and return mail ballots, refusing to extend accommodations already available to military and overseas voters. It gives voters only two days after Election Day to cure technical mistakes on ballots and requires submission of a written affidavit and identification. And election officials have failed to ensure adequate in-person voting opportunities when voters need more options to avoid crowding and prevent transmission of the virus.

When plaintiffs filed this case, Florida had 149 confirmed cases of COVID-19 and 4 deaths. Elderly voters, those with underlying health conditions, people obeying guidance to quarantine, and college students who had left the state were unable to vote, and the state recorded near record-low turnout for its PPP. Today,

52,634 people have tested positive and 2,319 have died.¹ The latest models show that Florida’s coronavirus peak is still to come, and epidemiologists warn of a second wave in the fall, right in time for the general election.

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 relief from this Court, thousands of Floridians will be disenfranchised in the primary in August and presidential election in November (“2020 elections”).

BACKGROUND

I. The Coronavirus Pandemic

COVID-19 has upended every aspect of American life. Less than three months after the World Health Organization announced that the novel coronavirus outbreak had become a pandemic, nearly 1.7 million Americans have been diagnosed with COVID-19 and 100,000 have died.

In response to this unprecedented public health crisis, the federal government advised Americans to undertake extensive social distancing measures.² States acted quickly to issue “stay-at-home” orders. Across the country, “316 million people in at least 42 states, three counties, nine cities, the District of Columbia and Puerto

¹ Ctrs. for Disease Control & Prevention, COVID-19 Cases in the U.S., <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited 5/26/2020).

² U.S. Office of the Press Sec’y, 15 Days to Slow the Spread (3/16/2020), .

Rico” were ordered not to leave their homes for work, school, or for any non-emergency reason.³ Many of those orders remain in place today.

In Florida, Defendant DeSantis declared a statewide state of emergency in early March and issued a “stay-at-home” order on April 1. The order required local jurisdictions to “ensure that groups of people greater than ten are not permitted to congregate in any public space.”⁴ Despite the public health emergency, the Governor and Secretary of State failed to take any action to mitigate its impact on Florida’s March 17 PPP.⁵ Unsurprisingly, turnout in the PPP plummeted to just over 31%—the lowest figure since 2004 and nearly 15 points below the level of participation in Florida’s 2016 PPP.

In the aftermath of the PPP, SOEs have spoken out about the problems they faced administering the election in the midst of a pandemic. In a letter to the Governor, the SOEs stated that they “encountered significant challenges with polling places becoming unavailable, difficulty in acquiring hand sanitizer and other supplies, and substantial numbers of poll workers deciding not to work, many at the last minute” and anticipated that “these challenges will continue and likely ... impact

³ Mervosh, Sarah, *et al.*, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> (last visited 5/26/2020)

⁴ Fla. Exec. Order No. 20-91 (4/1/2020).

⁵ Sullivan, Kate, *et al.*, *Here Are The States That Postponed Their Primaries Due To Coronavirus*, CNN (May 21, 2020), <https://www.cnn.com/2020/03/16/politics/state-primaries-postponed-coronavirus/index.html> (last visited 5/26/2020).

the August 2020 Primary Election and the November 2020 General Election.” To address these challenges, the SOEs requested modifications to Florida’s election procedures to facilitate voting in pandemic conditions. Many of the proposed changes are common-sense measures that would help assure voters are able to cast their ballots, including by extending the early voting period—one of the measures Plaintiffs seek here. Several states (including Georgia, West Virginia, Michigan, Nebraska, and Iowa) have undertaken similar measures voluntarily in response to the pandemic and others (such as Montana) are subject to court orders requiring them to do so.

SOEs of both parties have urged Florida to accept \$20 million in federal funding under the CARES Act to fund changes needed to facilitate voting during the pandemic. On May 15, 2020, after weeks of delay in the face of SOE’s urgent calls for assistance, Florida became one of the last two states to apply for such funds.

II. Florida’s Restrictive Voting and Registration Rules

Florida’s current voting rules are not well-adapted for voting in the time of a pandemic.

A. Voting by Mail

Florida law permits registered voters to vote by mail for any reason. In practice, however, voting by mail is not equally accessible to all voters, and the rules on VBM vary by county.

1. Requesting VBM Ballots

To vote by mail, a voter must request a VBM ballot. To be valid, requests must be received by SOEs no later than 5PM on the tenth day before an election (the “request deadline”). In most counties, requests can be made by phone, mail, online, or in person. If the voter wishes to have the ballot sent to an address other than the voter’s residence as reflected in FVRS, however, the request must be in writing and must be signed (the “written request requirement”), FS § 101.62(1)(b), meaning only in-person or mail requests can be used for this purpose. In reality, for voters absent from their homes, it may be impossible to make in-person VBM requests, making mail the only realistic option. Mailed VBM requests are not postage prepaid and must be sent well in advance of the request deadline to ensure they are received at SOE offices in time.

There is one exception to the written request requirement: Under UOCAVA, military and overseas voters can request that VBM ballot be sent to an alternate address using any of the available request methods. FS § 101.62(1)(b).

There is an exception to the 10-day request deadline where an emergency prevents a voter from voting at their regular polling-place on election day. FS § 101.62(4)(c)(5). To request an emergency VBM ballot, the voter must complete a VBM request form and an affidavit explaining the emergency. *Id.* The voter must make the request on election day, even if the emergency arose prior to election day.

If the voter is having a designee pick up the emergency ballot, the voter and the designee must complete and sign a designation form. *Id.* § 101.62(4)(c)(4). Some counties require additional documentation of the emergency, such as a doctor’s note. *E.g.*, Miami-Dade County Ordinances § 12-14(b).

The Secretary of State prescribes a standard emergency affidavit and designation form in English and Spanish, but there is no statewide VBM request form.⁶ Counties must therefore create their own, and the forms vary in content and function. For example, some, but not all, counties permit voters to use the VBM request form to update their registered address—that is, to simultaneously change their address and have their ballot sent to the new address.⁷ In addition, not all counties create VBM request forms in Spanish.

2. Delivery of VBM Ballots

Beginning 40 days before each election, the SOEs send VBM ballots to all voters who have requested them. FS § 101.62(4)(b). SOEs must mail VBM ballots within two days of receiving the request. *Id.* Thus, the last day for SOEs to mail VBM ballots is 8 days before the election—two days after the 10-day request

⁶ See Florida Secretary of State, “Vote by Mail,” <https://dos.myflorida.com/elections/for-voters/voting/absentee-voting>.

⁷ Compare, *e.g.*, Duval County Vote-By-Mail Ballot Request Form, <https://www.duval elections.com/Portals/Duval/Documents/Absentee%20Ballot%20Forms/VBMRequestFormWeb.pdf>, with Alachua County Vote-by-Mail Ballot Form, <https://www.votealachua.com/Portals/Alachua/Documents/in house absentee request-approved-2020.pdf>.

deadline. VBM ballots are sent by non-forwardable mail, with the exception of ballots sent to UOCAVA voters. *Id.* § 101.62(4)(c). If the ballot is returned to the SOE as undeliverable, the voter is not notified.

Voters may also pick up ballots in person at the SOEs office, or they may designate another person to pick up their ballot for them. FS § 101.62(4)(c)(3), (4). Voters can designate anyone to pick up their ballot, but each designated person is limited to picking up two ballots for voters who are not immediate family members (“ballot collection restriction”). In some counties, ballot collection restrictions are even tighter. In Miami-Dade County, for example, a designee may only pick up one ballot for a non-family member. Miami-Dade Ordinances § 12-14(b).

VBM ballots exist only in paper form in Florida. There is no alternative VBM ballot that is accessible to visually impaired voters or voters with disabilities preventing them from marking a paper ballot, though technology allowing electronic delivery of ballots in accessible formats exists and is under review by the Secretary.

3. Return of VBM Ballots

Voters may return their VBM ballot by mail or in person at the SOE’s. To return the ballot, the voter places it in the return envelope that accompanied the ballot and completes and signs the form on the outside of the envelope, known as the “voter’s certificate.” The voter must then deliver the envelope to the SOE. To be counted, the VBM ballot must be received by the SOE no later than 7PM on election

day (the “receipt deadline”). FS § 101.67. A voter wishing to return their VBM ballot by mail must therefore mail it well in advance of election day to ensure it is received by the deadline, and it is not always possible to know how long mail delivery will take. Moreover, because ballots can be mailed to voters as late as 8 days before an election, it may be impossible for a voter to receive, mark, and return their ballot by mail with sufficient time for it to be received by the deadline, particularly when mail delivery times are impacted by the pandemic. Once again, there is an exception to the receipt deadline for UOCAVA voters. A VBM ballot cast by a UOCAVA voter will be accepted if it is postmarked or dated no later than election day and received within 10 days thereafter.

In most counties, VBM ballot return envelopes are not postage prepaid. Moreover, it is not always clear how much postage is required. VBM envelopes vary in size and weight. In some instances, the amount of postage may vary depending on whether the voter has folded and sealed the envelope correctly.

Counties provide drop boxes for voters to return VBM ballots at the SOE’s office on election day. During early voting, some counties provide additional drop boxes at early voting sites. Most counties have few early voting sites, and they are not always conveniently located for voters, particularly when they are maintaining social distancing protocols.

4. Cure Procedures

Errors or omissions in completing the voter's certificate on the VBM envelope will result in rejection of the ballot. Of relevance here, if the voter fails to sign the envelope, omits required information, or if the voter's signature on the envelope does not match the signature in FVRS, the ballot is considered deficient. Although SOEs are generally responsible for identifying deficiencies in the first instance, the final decision whether to accept a ballot belongs to county canvassing boards. FS § 101.68(2).

Some deficiencies, including missing or mismatched signatures, can be "cured." To cure, the voter must submit a "cure affidavit" along with a form of identification ("cure identification requirement"). FS § 101.68(2). To be effective, the cure affidavit must be received by the SOE no later than 5PM on the second day after an election (the "cure deadline"). *Id.*

There are two "tiers" of acceptable identification. The first tier includes IDs containing the voter's photograph; the second, documents showing only the voter's name and address. FS § 101.68(4)(d)(1). Certain deficiencies, such as where the signature on the cure affidavit does not match the signature in FVRS, can be cured only with a tier 1 ID will. *Id.* § 101.68(2)(c)(1)(b). The instructions accompanying the cure affidavit ("cure instructions") do not explain that tier 2 IDs cannot cure all ballot deficiencies, however. *Id.* § 101.68(4)(d).

Additionally, identification must be included with the cure affidavit even if the deficiency was a missing signature or other information that has been supplied on the cure affidavit and matches the information in FVRS. FS § 101.68(2)(c)(1)(a).

When a deficiency is identified, the SOE attempts to notify the voter (“cure notice procedure”). Mail-ballot request forms typically ask the voter to supply a telephone number and email address, but this information is optional. If the voter has provided it, the SOE must provide notification of a deficiency by email, telephone, or text message, but mail ballot request forms and websites do not explain this purpose for requesting contact information. The SOE must also notify the voter by mail, but only if the deficiency is identified earlier than the day before the election. If the SOE is unsuccessful in providing notice, the notice is received too late for the voter to cure, or the affidavit arrives after the cure deadline, the ballot is rejected.

B. In-Person Voting

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.

Early voting must be offered at SOE offices and may be offered at other designated locations in the county. Early voting begins no later than 10 days before

an election and ends no later than 3 days before an election. Fla Stat. § 101.657(1)(d). 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.* Thus, the maximum number of permitted early voting days is 14. Early voting sites must be open between 8 and 12 hours per day. *Id.* SOEs do not have discretion to hold early voting outside of this timeframe in statewide elections.

C. Voter Registration

Under state and federal law, Florida offers voter registration at DHSMV offices, armed-forces recruitment offices, public assistance and other designated offices, by mail, and in person at SOE's offices. *See* 52 U.S.C. §§ 20501, *et seq.*; FS § 97.053. Due to COVID-19, many government offices are closed or are operating with reduced hours or by appointment only.⁸ As a result, voter registration opportunities are significantly reduced.⁹

⁸ *E.g.*, DHSMV, "Locations," <https://www.flhsmv.gov/locations/> ("Due to COVID-19, FLHSMV offices are currently closed to the public.") (last visited 5/27/2020).

⁹ The number of Floridians registering to vote has significantly diminished as a result of COVID-19. Reported registrations for March 2020, the most recent month for which data is available, dropped 25% as compared to March 2016. *See* Florida Department of State, "Voter Registration Reports," <https://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-reportsxlsx/> (last visited 5/23/2020). Given the continued spread of the pandemic in April and May, the impact on voter registration in more recent time periods is likely much greater.

In addition, Florida offers OVR. FS § 97.0525. To complete a voter registration application online, the voter must have a Florida driver's license or ID issued by DHSMV ("OVR restriction").¹⁰ The OVR system uses the driver's license or ID number to verify the voter's identity by matching the information provided to the information on file with DHSMV. If the information matches, the OVR system pulls an electronic image of the voter's signature from the DHSMV system and uses it to sign the voter's registration. A voter without a DHSMV credential may begin the registration online, but after entering the required information, the voter must print and sign the application and mail or hand-deliver it to the SOE. *Id.*

If the voter makes any error in entering the required information, such as mistyping the driver's license number or birthdate, the OVR system will not notify the voter of the error. Instead, because the registration cannot be verified, the OVR system will treat the application as if the person did not have a DHSMV credential—*i.e.*, the applicant will be required to print, sign, and mail or hand-deliver the application. Only when the SOE processes the application and discovers that the provided information cannot be verified will the voter be notified of the problem ("OVR error notification"). At that point, depending on the error, the voter may have

¹⁰ See "RegisterToVoteFlorida.gov: Frequently Asked Questions," <https://dos.myflorida.com/media/698341/ovr-faq-english.pdf>.

to submit a new application before the registration deadline.¹¹ If the voter registration deadline for the next election has since passed, the voter will be unable to participate.

Florida also permits non-profit organizations, political parties and candidates, and other third parties to conduct voter registration drives. These organizations must register with the Secretary, must use specific voter registration forms containing their registration number, and face penalties if they fail to comply with various regulations concerning how and when they submit voter registration forms they have collected. Third-party voter registration organizations collect registration applications using paper forms; there is no mechanism for third-parties to submit registrations electronically, such as through the OVR system (“third-party registration restrictions”).

III. Plaintiffs’ Harm from Defendants’ Failure to Act

Individual Plaintiffs are all U.S. citizens, over the age of 18, and registered Florida voters. Plaintiffs Celcio Romero and Paulina Hernandez are both naturalized U.S. citizens who are elderly, Spanish language dominant, and live with health conditions that put them at high risk for deadly consequences from COVID-19. Mr. Romero lives with multiple sclerosis and the effects of a stroke, and as a result, he has difficulty writing and can no longer sign his name. Like many voters of color and Spanish language dominant voters, Mr. Romero ordinarily votes in person. Ms.

¹¹ *E.g.*, “Incomplete Notice,” Exhibit C to Romero Decl.

Hernandez is 85 and suffers from stage 2 breast cancer and high blood pressure. Like many naturalized U.S. citizens, Ms. Hernandez distrusts Florida's VBM system. Twice, Ms. Hernandez has unsuccessfully attempted to cast a VBM ballot in Florida. Because of COVID-19, Plaintiffs Romero and Hernandez both intend to vote by mail in the 2020 elections.

Plaintiff Heller is elderly and has a serious heart condition that places him at high risk for deadly consequences from COVID-19. As a result, Mr. Heller cannot safely vote in person, so voting by mail is his only option. Mr. Heller is so concerned about contracting COVID-19 that he does not want to go into a post office to deliver his ballot. He would use a drop-box to return his ballot if he could get to one.

Plaintiff Sheila Young is a registered voter in Florida who is blind, and, as a result, has in the past relied on technology available at her polling station to vote independently and privately. Although she intends to vote by mail in the 2020 elections because of COVID-19, without appropriate home technology, she will only be able to vote with assistance, compromising the secrecy of her ballot.

Plaintiffs Dream Defenders ("Defenders"), New Florida Majority Education Fund ("NewFM"), Organize Florida Education Fund ("Organize"), Zebra Coalition ("Zebra") (collectively, "Organizations") and their members are burdened by Defendants' failure to make reasonable changes to election procedures. Florida's failure to enact emergency measures during the PPP disenfranchised the

Organizations' members during that election. For the August and November elections this year, Organizations anticipate further harm: their members will struggle with accessing and completing OVR, utilizing VBM, having their ballots successfully counted, and safely voting in-person. Each OP must divert resources to address deficiencies in Florida's OVR system and VBM process.

NewFM serves and advocates on behalf of all Floridian voters, particularly voters of color, and maintains a statewide presence with offices in Miami, Fort Lauderdale, Jacksonville, Leon, Gadsden, and Palm Beach. NewFM's membership includes Floridians who are disabled and have special needs. The state's inaction has required NewFM to divert staff and funds to provide VBM voter education as well as an on-the-ground OVR operation in order to fill the gaps in Florida's anemic OVR system.¹²

Likewise, Defenders works in 10 counties engaging youth and student activists. They have diverted staff and volunteer time as well as funds to the task of untangling Florida's thorny VBM process for the base they engage.¹³ Zebra provides shelter and services, including mail delivery, to housing unstable LGBT youth. Zebra's clients have difficulty accessing traditional government services and the technology needed for OVR and VBM.¹⁴ Organize has supporters in 67 counties and

¹² Mercado Decl. ¶¶13-15; 19-21.

¹³ Gilmer Decl. ¶¶1-7, 9-15, 17-20, 25.

¹⁴ Wilkie Decl. ¶¶3, 12-13, 15-16.

members in 21 counties across Florida. The organization advocates for members of all ages and races and has at least one member who is blind; Organize is diverting significant staff and funds to provide voter education around VBM, supplement OVR, and assist members with the VBM process.¹⁵

ARGUMENT

Preliminary injunctive relief is necessary to protect Floridians' fundamental right to vote in this unprecedented time. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). Plaintiffs easily satisfy all four requirements of this standard. Each of Plaintiffs' claims has a substantial likelihood of success on the merits, and the remaining factors support preliminary injunctive relief.

I. Plaintiffs Are Likely to Succeed on the Merits of Their Claims.

Plaintiffs are likely to succeed on their claim that Florida's VBM, in-person voting, and voter registration processes unconstitutionally burden the right to vote, violate Section 2 of the VRA, Title II of the ADA, and Section 504 of the Rehabilitation Act, and deprive Floridians of the right to vote without due process of law.

¹⁵ Woods Decl. ¶¶5-9, 11-19, 21-26.

A. The Challenged Election Rules Unconstitutionally Burden the Right to Vote.

Florida’s VBM request deadline, written request requirement, emergency ballot procedures, receipt deadline, ballot collection restrictions, drop-box limitations, cure deadline, cure instructions, cure identification requirement, OVR restrictions, and OVR error notification (“Challenged Restrictions”) severely and unduly burden Plaintiffs’ First and Fourteenth Amendment rights.

When assessing constitutional challenges to voting restrictions, courts apply the framework set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). Under *Anderson-Burdick*’s sliding-scale standard, courts weigh the character and magnitude of the injury against the state’s justifications, taking into consideration the extent to which those justifications require burdening plaintiffs’ rights. *See Burdick*, 504 U.S. at 434. When a restriction on the right to vote is severe, it “must be ‘narrowly drawn to advance a state interest of compelling importance.’” *Id.* at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). At the other end of the scale, when a restriction places only a slight burden on the right to vote “it must 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). Even when a burden is slight, if “the effects of a facially neutral and nondiscriminatory law are unevenly

distributed across identifiable groups,” courts apply a higher level of scrutiny under *Anderson-Burdick*. See *Anderson*, 460 U.S. at 793.

While states have an interest in orderly administration of elections, these interests must be accommodated when possible without sacrificing voters’ “interest in not being disenfranchised through no fault of their own.” See *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1322. Therefore, courts “must take into consideration not only the ‘legitimacy and strength’ of the state’s asserted interest, but also ‘the extent to which those interests make it *necessary* to burden’ voting rights.” *Id.* (quoting *Anderson*, 460 U.S. at 789) (emphasis in original).

As Florida’s March 2020 PPP demonstrated, each of the Challenged Restrictions severely burdens the voting rights of Florida’s voters; that impact falls more heavily on people of color and is aggravated by COVID-19. Because the Challenged Restrictions severely burden the right to vote, they must be—but are not—“narrowly drawn to advance a state interest of compelling importance,” to survive constitutional scrutiny under *Anderson-Burdick*. *Burdick*, 504 U.S. at 434 (quoting *Norman*, 502 U.S. at 289) (internal quotation marks omitted). Indeed, the Challenged Restrictions fail to further any legitimate state interest—and in some cases run directly contrary to Florida’s interest in protecting public health—and thus would not survive constitutional scrutiny even if viewed as only moderate burdens.

Here, Plaintiffs request simple, common-sense changes to VBM, in-person voting, and voter registration rules for upcoming elections. These measures are less restrictive of the right to vote while still serving Florida's administrative interests and better protecting its citizens' health and right to vote. Most of what Plaintiffs request is already in place for some voters in Florida and for all voters in other states, demonstrating feasibility. Moreover, the only plausible justification for many of the restrictions—cost—fails when the federal government has made millions of dollars available to Florida to address the impact of COVID-19 crisis on voting.

1. VBM Ballot Receipt Deadline

The ballot-receipt deadline severely burdens the right to vote. Because postal delivery times vary, the receipt deadline makes it difficult or impossible for voters to know when they must mail their ballots. To avoid risk of ballot rejection, voters are forced to return the ballot in person, potentially risking their health. This receipt deadline, which previously disenfranchised Plaintiff Hernandez, combined with increased VBM usage during the pandemic and the challenges the USPS currently faces,¹⁶ create additional barriers to voting for Floridians. To remove uncertainty created by the receipt deadline and ensure voters have access to VBM, the Court

¹⁶ E.g., Joe Davidson, *The Postal Service Was In Trouble Before Covid-19. Now It's Fighting For Its Life*, WASHINGTON POST (3/26/2020), https://www.washingtonpost.com/politics/the-postal-service-was-in-trouble-before-covid-19-now-its-fighting-for-its-life/2020/03/25/b5b10c6a-6ee0-11ea-96a0-df4c5d9284af_story.html.

should order the Secretary and SOEs to accept ballots postmarked by Election Day and received within 10 days thereafter, and extend the certification date, if necessary.

Changing the receipt deadline to a postmark deadline simply extends an accommodation Florida already offers to some Florida voters—namely UOCAVA voters—to the electorate as a whole. While extending this deadline to all voters may result in larger numbers of ballots arriving later in the canvassing period, Florida’s purported interest in rapid certification of election results cannot justify the burden created by the receipt deadline. Indeed, many states have deadlines identical to the deadline requested by Plaintiffs here, without compromising their interest in timely certification of election results. *E.g.*, Ak. Stat. § 15.20.081(e), (h) (ballots accepted if postmarked by Election Day and received within 10 days); Cal. Elect. Code § 3020 (postmarked by Election Day and received within three days); Kan. Stat. § 25-1132 (same).

2. Written Request Requirement

Florida’s requirement that alternative-address VBM ballot requests be in writing severely burdens the right to vote at a time when many voters are displaced or in precarious circumstances. For example, many of Dream Defender’s student members have been displaced due to COVID-19, making in-person requests difficult/impossible. In some cases, students forced to live away from their campuses have lost access to a printer and are struggling financially, making postage costs out

of reach. Likewise, homeless and housing-insecure voters served by Plaintiff Zebra may only receive mail ballots through Zebra's mail-pickup service. During a pandemic, this restriction will likely result in a denial of many voters' right to vote. To remove this barrier to accessing a VBM ballot, the Court should order SOEs to allow voters to request alternative-address ballots by phone or online provided the voter provides adequate identity verification.

Requiring written requests to have VBM ballots be sent to alternate addresses cannot be justified by an interest in preventing fraud. Florida has many ways of verifying a voter's identity over the phone or online that it could use to protect this interest, such as requiring voters to provide driver's license numbers or other identifying information used to verify identity when the individual registered to vote. Moreover, Florida already verifies the voter's signature on the mail ballot itself, obviating the need to impose a signature requirement at the request stage to prevent fraudulent votes.

3. Varying VBM Ballot Procedures

The ability to receive an emergency mail ballot or return a regular VBM ballot depends on a voters' county of residence. Variability in documentation required for emergency ballots, prepayment of postage, ballot collection restrictions, and the number and location of drop-boxes means that a voter's address may dictate whether they can successfully cast a VBM ballot. To ensure all voters have equal VBM

opportunities without facing arbitrary, unequal burdens, the Court should order the SOS to impose uniform VBM and emergency ballot procedures on all counties and enjoin all county-level rules altering them.

4. Postage Requirements

Most counties do not prepay postage for voter registration forms, VBM ballot requests, VBM ballot returns, or cure affidavits. Pandemic-caused job and financial losses have put even stamp costs out of reach for many voters, especially those already living on the margins, *e.g.*, those Zebra serves. To ensure voter registration and VBM is equally accessible to all voters, regardless of their ability to obtain and pay for postage, the Court should order that either the Secretary or the SOEs prepay postage for voter registration forms, VBM requests, VBM ballot return, and cure affidavits.

5. Restrictions on Third-Party Ballot Collection.

Florida unduly restricts who may, at a voter's request, collect VBM ballots and deliver them to voters. Florida voters who do not have family members nearby or who, like Plaintiff Romero, live in senior living facilities that have limited or prohibited visitors during the pandemic will experience hurdles obtaining emergency ballots. For example, Florida law prevents senior living facility employees from assisting more than two residents.

Justifications for restrictions on the use of authorized third-parties to collect and return mail ballots on behalf of eligible voters were always questionable and are now inadequate. While there have been recent high-profile instances of fraudulent third-party mail-ballot collection, such instances are rare and do not justify the burdens created by the ballot-collection restrictions.¹⁷ Moreover, restricting the number of ballots per designee increases the number of designees required to provide assistance to voters who need it, thus increasing the number of people coming and going from SOE offices, in violation of social distancing strictures. Accordingly, restricting the number of mail ballots a third-party may obtain and deliver to voters is not narrowly tailored to serve Florida's interest in preventing election fraud and is contrary to the state's interest in protecting public health.

To ensure Organizations can carry out their mission of increasing electoral participation and that Florida voters can receive assistance in casting VBM ballots by a person of their choosing, the Court should enjoin enforcement of the restriction on third-party ballot collection.

¹⁷ See, e.g., Miles Parks, *Fact Check: Is Mail Ballot Fraud As Rampant As President Trump Says It Is?*, NPR (4/7/2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/07/829323152/fact-check-is-mail-ballot-fraud-as-rampant-as-president-trump-says-it-is>.

6. Drop-Box Limitations

Limitations on the number and location of ballot return drop-boxes prevent many voters from having meaningful alternatives to VBM for returning ballots. Significantly, drop-boxes are not available at precinct polling places—where voters who have historically voted in person would normally go to cast their ballot. To alleviate the burden on voters who can neither return their ballot by mail nor safely travel to an SOE office, the Court should order that all SOEs add drop-boxes at polling places during the entire early voting period and on Election Day.

Expanding use of drop-boxes, which counties already use, will not compromise election security and having drop-boxes at polling places will provide voters another safe and secure way of returning ballots no matter how far they may be from a post office or SOE's office. Moreover, making it easier for voters to use drop-boxes will further Florida's interest in ballots being returned as early as possible, allowing timely certification of results.

7. Cure Procedures

Florida's process for curing allegedly deficient ballots severely burdens the right to vote. The Challenged Restrictions require that ballots SOEs identify as deficient be cured within two days of an Election, during business hours. This inadequate cure period means that SOEs either never notify voters they need to cure

or such notice provides insufficient time. Compounding these problems are incomplete instructions and unnecessary identification requirements.

Although facially race and age-neutral, Florida's restrictive cure process disparately impacts minority and young voters like Individual Plaintiffs and OP members. During the 2018 General Election, Black voters were almost than twice as likely as white voters to have their ballots rejected, and Latinx voters were nearly two-and-a-half times as likely to have their ballots rejected. Smith ¶¶61-62. In addition, voters aged 18-21 were nearly five times as likely to have ballots rejected as voters 45-64. Exh. D to Sadasivan Decl., at 19.

The state cannot justify the severe and discriminatory burdens the cure procedures place on the right to vote. Any interest served by the anemic cure period do not overcome the burdens these restrictions impose on Floridians' right to vote. Other states allow as much as three weeks post-election for voters to cure their ballots without impacting the legitimacy of their elections, demonstrating that Florida's basis for the short cure period has no reasonable justification. *E.g.*, Wash. Admin. Code § 434-261-050 (giving voters until the day before certification, or 21 days, to cure signature issues). While extending the cure period may require a concomitant extension to the certification deadline, such an extension would not prevent Florida from timely certifying election results. Whatever limited interest

Florida has in an earlier certification date, it does not justify burdens the two-day cure period imposes on the right to vote.

Likewise, except in limited circumstances, there is no legitimate interest served by requiring identification with cure affidavits. For example, where a voter did not sign the VBM envelope, and the signature provided on the cure affidavit matches the signature in the voter registration system, the voter has already provided the same level of verification as if she had signed the envelope in the first place, meaning no additional identity verification can justify disenfranchising that voter. And where there is a valid interest in requiring additional identification beyond the cure affidavit itself, there is no justification for failing to instruct voters that correcting some errors require a photo ID.

This court should order three changes to the cure procedures to make them less restrictive while still serving Defendants' legitimate interests. First, the Court should order that Florida extend the deadline for curing missing or mismatched signatures or other curable errors to 15 days after the election, and, if necessary, extend election certification dates to allow cured ballots to be counted. This will ensure that voters who mail their ballots on or close to Election Day can be notified and given meaningful cure opportunities.

Second, the Court should order that Florida eliminate ID requirements for curing ballot deficiencies unless necessary to verify the voter's signature and

identity, and ensure cure instructions explain when an ID is necessary and what forms of ID will satisfy the requirement.

Third, the Court should order that Defendants add instructions in English and Spanish to mail ballot request forms and websites explaining that providing telephone and email address will allow SOEs to notify voters of problems with their mail ballots.

8. Restrictions on Voter Registration.

Florida does not provide qualified voters with adequate voter registration opportunities given COVID-19. Both Florida's OVR system and its mail-in registration forms create hurdles qualified voters must navigate to register—hurdles often insurmountable for low-income and housing insecure voters, and those self-isolating.

First, low-income Floridians and those who lack stable housing—like those voters served by Organizations and their members—often lack the identification needed to register online. Because designated registration agencies are closed or operating at reduced capacity, many of these voters have no way to register other than through the use of a printed form that they must sign and mail (as well as print if using OVR) These paper voter registration forms are neither postage pre-paid nor easily attainable.

Second, the OVR system's failure to notify voters of errors risks making them miss the registration deadline, resulting in disenfranchisement. Disenfranchising voters through failure to provide timely notification of easily correctible errors severely burdens the right to vote.

Because in-person paper registration is not an option for those without accessible at-home or community resources during the pandemic, having an OVR system that limits use to certain ID holders, fails to inform voters why they are unable to submit an online application, and requires a cumbersome process to correct errors deprives many first-time registrants and those needing registration updates of their right to vote. Organizations are expending resources helping individuals navigate the current online registration system and must divert resources to help troubleshoot problems and ensure voters successfully register. Organizations' members and voters they serve face disenfranchisement as a result of this broken system.

At a time of increased demand for online and mail registration, Defendants have taken no steps to either increase access to registration or eliminate the burdens the current system places on Floridians who want to vote. Thus, the Court should order Defendants to allow voters whose identities can be verified through means such as social security numbers to register using OVR and provide voters with contemporaneous notice of OVR registration errors.

The only justification for failing to ensure the OVR system provides real-time notice of missing information or errors is one of cost. No legitimate interest in orderly or efficient election administration is served by delayed error notifications that make correction difficult. Indeed, Florida's interests demand what Plaintiffs seek: ensuring voters can register and registration records are kept up to date. Moreover, an OVR system reaching more voters—namely, those lacking driver's licenses but with other forms of identification—would reduce counties' burdens in processing paper applications. Regardless, when state agencies have been shuttered, registration numbers have dropped, and traditional methods of registration are unavailable to many, Florida's fiscal interest cannot justify the burdens on voter registration imposed by the OVR system.

9. In-Person Voting Procedures.

For voters without traditional addresses where they can reliably receive mail—such as the housing insecure voters served by Zebra—VBM may not be a reliable option. Additionally, many Florida voters, including Plaintiff Hernandez, have historically voted in person and distrust the mail system. Organize's rural members 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's elderly members of color, voting is an act of pride made significant by physically casting a ballot in-person. For these voters, having an in-person voting

option is critical.¹⁸ Failing to provide sufficient safe and accessible in-person voting options burdens Floridians' voting rights.

Given CDC's guidance to avoid large gatherings and practice social distancing, and the likelihood of a second outbreak,¹⁹ the Court should order Defendants to implement measures to ensure the well-being of Florida's citizens and its democracy. Specifically, the Court should order Defendants to provide 30 days of early and add early voting sites so that voters of color have equal access to early voting. Without this relief, in-person voting is likely to be unavailable or unreasonably risky, thereby severely burdening the right to vote.

Expanding early voting days and locations advances Florida's public health interests by reducing the number of Floridians appearing at polling places on Election Day, and spreads voting opportunities over a longer time-period. The SOEs—who bear most early voting costs—have themselves sought a similar expansion of early voting, and they agree with Plaintiffs that increased early voting furthers the protection of public health and is needed to provide robust opportunities to cast ballots during the pandemic, *see* Exh. A to Sadasivan Decl., vitiating any

¹⁸ Woods Decl., ¶¶23-24.

¹⁹ Achenbach, Joel, et al., *Coronavirus Hot Spots Erupt Across The Country; Experts Warn Of Second Wave In South*, WASHINGTON POST (5/20/2020), https://www.washingtonpost.com/health/coronavirus-hot-spots-erupt-across-the-country-experts-warn-of-possible-outbreaks-in-south/2020/05/20/49bc6d10-9ab4-11ea-a282-386f56d579e6_story.html

argument that burdens imposed by limited in-person voting opportunities are justified by any legitimate, much less compelling, state interest.

Defendants' failure to address the impact of the Challenged Restrictions in the face of COVID-19 severely and unduly burdens the right to vote and is plainly unconstitutional. Plaintiffs are therefore likely to succeed on their claim under the First and Fourteenth Amendments.

B. Florida's VBM and OVR Systems Violate Section 2 of the Voting Rights Act.

The Voting Rights Act ("VRA") was enacted to "rid the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966). To fulfill that "broad remedial purpose," the Supreme Court has held that the VRA should be interpreted to provide "the broadest possible scope in combating ... discrimination." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (citation omitted). The essence of a claim under Section 2 of the VRA "is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Congress amended Section 2 in 1982 to enable Plaintiffs to establish a violation "by proof of discriminatory results alone." *Chisom*, 501 U.S. at 403-04; accord *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994).

Under the “results” test, a Section 2 violation exists when, considering “the totality of the circumstances,” racial minorities have “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 52 U.S.C. § 10301(b); *Johnson*, 405 F.3d at 1228 n.26 (11th Cir. 2005). The question of whether political processes are equally open to minority voters “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) (quoting (quoting S. REP. NO. 97-417, at 30 (1982) (hereinafter “Senate Report”))). Section 2 analysis is necessarily 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); *accord Gingles*, 478 U.S. at 78-79.

In evaluating the totality of circumstances, courts use a list of objective factors from the Senate Report accompanying the amended Section 2.¹⁶ *See Gingles*, 478 U.S. at 37, 44-45. The factors considered will vary depending on the kind of procedure in question. *Id.* at 28. No factor predominates and the “ultimate test” always remains the same—whether, in the particular situation, the challenged practice operates to deny minority voters equal access to the political process. *Id.* at 30. Plaintiffs argue that Florida’s VBM and OVR procedures and the existence of

various Senate factors provide Black and Latinx voters less of an opportunity to participate equally in the electoral process.

1. Florida’s VBM and OVR Systems Deny and Abridge Black and Latinx Voters’ Ability to Vote.

Section 2 prohibits both obstacles and hurdles to cast a vote and those that “den[y] or abridge[]” the right to vote. 52 U.S.C. § 10301(a). “[A]bridg[ing]” the right to vote includes imposing “onerous procedural requirements which effectively handicap exercise of the franchise by voters of color.” *Lane v. Wilson*, 307 U.S. 268, 275 (1939). Using Florida’s VBM and OVR systems in 2020 elections would violate Section 2 both by preventing Black and Latinx voters from casting ballots and by placing disproportionate burdens on their voting rights.

During Florida’s 2016 and 2018 general elections Black voters were **almost twice as likely than** white voters to have their VBM ballots rejected. Smith at ¶62. This disparity increased in the 2020 PPP. *Id.* The statistics reflect similar disparities for Latinx voters during the same periods. *Id.* The VBM system’s disproportionate rejection of Black and Latinx voters is sufficient in itself to establish an electoral system that is not equally open to minority participation.

At least three aspects of Florida’s VBM system cause this invidious discrimination. *First*, requiring that ballots be delivered to the address where the voter is registered by nonforwardable mail results in **Black voters’ ballots being returned as undeliverable more often than white voters’ ballots.** *Id.* ¶40. *Second*,

Florida's requirement that VBM ballots be received by 7:00 p.m. on election day results in Blacks and Latinx, including those who mailed their ballots before election day, having their ballots rejected as late 2.5 times more often than whites. *Id.* ¶79. *Third*, VBM ballots of Black and Latinx voters are conspicuously rejected for "voter-caused" errors, including signature issues, that are not cured within the "cure period," over 3 times more often than whites. In each instance the disparity got worse in the 2020 PPP. *Id.* ¶¶61-62. In pandemic conditions, more voters are likely to use the VBM system to vote to avoid contact with strangers. Conducting elections using Florida's current VBM system is therefore increasingly likely to result in Black and Latinx voters being disproportionately unable to cast ballots.

Florida's OVR system likewise imposes burdens and 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, Kousser ¶¶22, 73, and therefore face greater burdens in proving their identity and a greater likelihood that their OVR application will be rejected.

In pandemic conditions, use of the OVR system is likely to surge, as Supervisors' offices are more often closed to the public and voters seek ways to register without going to a public office. The current OVR process requires voters to print and mail applications when information cannot be matched to a voter file or DHSMV record. Black and Latinx voters are more likely than white voters to face

these additional burdens. Additionally, economic disparities in these communities impact their ability to correct these issues or receive notice of these problems in time to engage in full voter participation. Consequently, conducting elections using Florida's current OVR system is therefore likely to impose disproportionate burdens on Blacks and Latinos and prevent many from voting altogether.

This burdensome voter registration process is linked to "social and historical conditions" that discriminate against voters of color.²⁰ Consequently, defendants' onerous voter registration requirements provide less of an opportunity for African American and Latinx voters who experience discrimination, housing instability, and lower income to participate fully in the electoral process.

2. The Disparate Racial Impacts of Florida's VBM and OVR Systems Are Clearly Linked to the Effects of Discrimination.

Florida has a legacy of race discrimination that persists and is exacerbated during the pandemic. Blacks and Latinos bore the historical brunt of that discrimination and suffer its legacy today in ways that make them more vulnerable to burdensome voting regulations. *See LULAC v. Perry*, 548 U.S. 399, 440 (2006); *DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1079 (N.D. Fla. 1992). Blacks and Latinos are more likely to move, be poor and less educated, lack access to transportation, and experience poor health outcomes. Kousser ¶¶14, 47, 60. All of

²⁰ *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

these factors make them more likely to face disproportionate burdens or to be denied the right to vote outright, if Florida uses its current VBM and OVR systems.

Numerous studies show that educational attainment is the best predictor of whether an individual votes. Kouser ¶47. Educational attainment differs by race in Florida. *See id.* Census data reveals that 93% of white Floridians graduated high school, compared to 84% of Blacks and 80% of Latinos. *Id.* ¶47. Similarly, 34% of whites hold four-year college degrees, while only 20% of Blacks and 25% of Latinos do. *Id.*

Additionally, Florida has racial disparities in employment, poverty and average income. *Id.* at ¶50. In 2018, Black Floridians were more than twice as likely than whites to live in poverty and statistics for Latinos are not much better. Average income was \$39,116 for white Floridians, but just \$20,139 for Blacks and \$23,017 for Latinos. And that was before the COVID-19 pandemic caused income and job losses that fell heavily on Blacks and Latinos.

Disparities in housing conditions increase the burdens voters face in utilizing Florida's VBM system, which only permits delivery of ballots to the address in a voter's registration file, and OVR system, which requires an address match to the voter's state-issued ID. Over 75% of White Floridians live in homes they own, whereas 54.3% of Blacks and 48% of Latinos rent. *Id.* ¶51. Minorities are thus more likely to change their address; and to need to find a place other than their residence

to quarantine or recover from COVID-19, all of which makes it more difficult to register successfully online or receive VBM ballots.

Especially during this pandemic, health outcomes impact the ability to vote. Florida has significant health-related racial disparities. Blacks and Latinos are more likely to be subject to health conditions that increase susceptibility to COVID-19. *Id.* ¶61. Sadly, Black Floridians have suffered a disproportionate share of COVID-19-related deaths. Moreover, Florida’s health care infrastructure serves Blacks and Latinos less well. For example, they are less likely than whites to have health insurance or to receive flu or pneumonia vaccinations and more likely to forego a trip to the doctor for cost reasons. *Id.* ¶58. These disparities in education, income, housing and health coupled with the state’s and SOE’s VBM and OVR rules “impose a discriminatory burden” on Florida’s voters of color.

3. Other Senate Factors Confirm the Likely Section 2 Violation.

History of Official Discrimination: Florida’s history of racial discrimination in voting, dates back to the disenfranchisement of slaves and free Blacks, and successful efforts to eliminate Black voting and representation following Reconstruction. Kousser ¶9. Florida later fought to preserve official segregation, defended the use of at-large voting systems that suppressed minority representation, and pursued changes in early voting as recently as 2012 that violated the VRA. *See Id.* ¶33.

Racially Polarized Voting: Racial polarization has long plagued Florida elections, *see, e.g., Davis v. Chiles*, 139 F.3d 1414, 1416 (11th Cir. 1998); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1298-99 (S.D. Fla. 2002). As Professor Kousser has documented, it has remained prevalent over the past decade, including in presidential and recent gubernatorial contests, including party primaries. Kousser ¶12, 37-39. Racial polarization provides the state and SOEs little incentive to remedy VBM and OVR systems that disproportionately burden Blacks and Latinos. *Id.* ¶40.

Voting Practices Enhancing Opportunities For Discrimination: Florida employed Jim Crow practices like poll taxes and literacy tests, as well as discriminatory registration practices that effectively eliminated Black voting and representation during most of the 20th century. *Id.* ¶27. This past year, the Legislature passed legislation to undermine a voter-backed effort to restore voting rights to former felons, even though felon disenfranchisement affects one in four Black Floridians. *Id.* ¶11.

Racial Appeals In Campaigns And The Extent Of Success By Minority

Candidates: Racial appeals have persisted in Florida political campaigns up through and including Defendant DeSantis’s public statement in 2018 that voters should not “monkey this up” by voting for his Black opponent Andrew Gillum. *Id.* ¶21.

Black and Latinx candidates have experienced limited electoral success. Only one Black candidate has been elected to statewide executive office and none to the

U.S. Senate since Reconstruction. No Latinx candidates were elected to statewide office prior to 2014 or to the Senate prior to 2005. No Blacks served in the Legislature from the end of Reconstruction through 1968 or in Florida's congressional delegation until 1993. Likewise, the Legislature's first Latinx member in modern times was elected in 1982 and Florida had no Latinx U.S. Representatives until 1989.

Lack Of Responsiveness By Elected Officials: Florida's government has often been unresponsive to minorities. Black and Latinx Floridians disproportionately lack health insurance, yet the Legislature refused to adopt Medicaid expansion under Obamacare, thus turning down millions of Federal dollars. Kousser ¶¶71. Other examples include Florida's failure to assure Spanish language ballot materials for Latinx voters and the inability to reduce performance gaps between white and minority students. *See id.* ¶¶10, 46.

Tenuousness Of State Policy: Florida has no legitimate interest in using voting systems that disproportionately burden minority voters and prevent them from voting. There is no evidence that more voter-friendly VBM systems are prone to fraud. Moreover, the remedies Plaintiffs seek have been adopted in response to the COVID-19 pandemic in numerous other states. *Id.* ¶¶24, 77-79. There is literally no reason why Florida cannot take similar common-sense steps to protect the right to vote.

Accordingly, Florida's VBM and OVR systems disproportionately burden Black and Latinx voters combined with the existence of several Senate factors make it harder for these voters to exercise the right to vote and provides less of an opportunity to participate in the electoral process.

C. Defendants' failure to provide accessible vote-by-mail procedures violates the Americans with Disabilities Act and Section 504 of the Rehabilitation Act

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. Similarly, 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. The standard for determining liability under the ADA and the Rehabilitation Act are essentially the same. *Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005).

To prove a Title II violation, plaintiffs must prove that: (1) they are a qualified individual with a disability; (2) they were either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was

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). Voting, as a "quintessential public activity," *see Nat. Fed. of the Blind v. Lamone*, 813 F.3d 494, 507 (4th Cir. 2016), is covered by Title II. 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. *See* 28 C.F.R. § 34.130(b)(1)(ii)-(iii); *see also* 45 C.F.R. § 84.4(b)(1)(ii)-(iii).

For purposes of ADA and Section 504 compliance, it is not enough that the state's overall voting process is accessible; both in-person voting and vote-by-mail must independently comply with the ADA and Section 504. *See Lamone*, 813 F. 3d at 503-05 (requiring that state's absentee ballot program independently comply with the ADA and Section 504).

Moreover, ADA compliance requires public entities to provide "appropriate auxiliary aids and services where necessary to afford individuals 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), and that 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).

The ADA’s protection of the right to vote privately and independently has been recognized by courts. *See Lamone*, 813 F.3d at 506; *see also Disabled in Action v. Bd. Of Elections*, 752 F.3d 189, 199-200 (2d Cir. 2014) (finding that individuals with disabilities must have “option to cast a private ballot” where same right is afforded to non-disabled voters); *Cal. Council of the Blind v. Cnty. 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’” (citation omitted)). This obligation is also incorporated into Florida statute. *See* FS § 101.662 (requiring procedures to “allow all voters to cast a secret, independent and verifiable vote-by-mail ballot without the assistance of another person.”).

Florida provides all voters the option to vote by mail. Thus, under the ADA and Section 504, defendants must provide the opportunity to vote by mail to voters with disabilities in a manner that is “equal to that of others.” 28 C.F.R. § 34.130(b)(1)(ii)-(iii). This obligation is even more urgent in light of COVID-19, where voters generally, and voters with disabilities in particular, face significant

health risks if they attempt to vote in person²¹—currently the only accessible option for the visually impaired.²²

Currently, to cast a VBM ballot, visually impaired voters like Plaintiff Young or manually impaired voters like Plaintiff Romero, must find someone to assist them to whom they must reveal their votes and whom they must trust to correctly and accurately mark their ballot.²³ That is, they are unable to vote “privately and independently” by mail, an opportunity that is afforded to Florida voters who are not visually impaired.

Electronic ballot delivery technology is currently available that would guarantee private and independent VBM voting for visually or manually impaired individuals²⁴—technology that has been adopted in other states.²⁵ This technology is currently under review by the Florida Division of Elections, but has not yet been certified,²⁶ meaning SOEs cannot lawfully use it. Defendants’ failure to provide an accessible electronic absentee ballot is thus a violation of the ADA and Section 504.

²¹ E.g. Young Decl. ¶¶8-9; Jordan Decl. ¶¶9-10; Bukala Decl. ¶¶8, 12; Romero Decl. ¶13.

²² Young Decl. ¶¶4-5, Jordan Decl. ¶6, Bukala Decl. ¶6.

²³ Young Decl. ¶11; Jordan Decl. ¶12; Bukala Decl. ¶14.

²⁴ See Exh. B to Young Decl.; Democracy Live, Voter Info. Technologies., OmniBallot Online Flyer, Exh. E to Sadasivan Decl.

²⁵ See Exh. B to Young Decl.; Democracy Live, Voter Info. Technologies, Approvals, Reviews and Certifications, <https://democracylive.com/approvals-reviews-and-certifications/> (last visited 5/27/2020).

²⁶ See FLA. ADMIN. CODE ANN. r. 1S-5.001.

See Lamone, 813 F. 3d at 506-07. The Fourth Circuit in *Lamone* found that Maryland violated the ADA and Section 504 because, as in Florida, while most voters could cast an absentee ballot without assistance, the state’s “current absentee voting program does not allow disabled individuals such as plaintiffs to mark their ballots without assistance.” *Id.* The court held that this “sharp disparity” showed that “an aid, benefit or service” Maryland provided to disabled individuals was “not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.” *Id.* (citing 28 C.F.R. § 35.130(b)(1)(iii)).

This same conclusion applies here: Florida voters without a disability can cast their VBM ballots privately and independently; visually impaired and blind voters like Plaintiff Young and manually impaired voters like Plaintiff Romero cannot.²⁷ Florida’s failure to provide electronic absentee ballots is even more significant in light of COVID-19, since visually impaired voters—because their disability makes it difficult to maintain social distancing—today face enormous health risks if they attempt to vote in person.²⁸ Accordingly, defendants’ failure to provide accessible electronic ballot delivery violates the ADA and Section 504.

²⁷ *See supra* note 23.

²⁸ *See supra* note 21.

D. County Defendants’ Process for Accepting VBM Ballots and Curing Purported Ballot Defects Deprives Floridians of the Right to Vote without Due Process of Law.

For elections during the COVID-19 pandemic, the receipt deadline, cure notice procedure, and cure deadline fail to provide voters with adequate notice or a meaningful opportunity to be heard, depriving them of a fundamental liberty interest—the right to vote—without due process of law. Where the deprivation of the constitutionally guaranteed right to vote is at stake, courts assess the constitutionality of the process provided using the test laid out in *Mathews v. Eldridge*, which considers (1) the private interest affected, (2) the risk of erroneous deprivation under the current procedures “and the probable value, if any, of additional or substitute procedural safeguards,” and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that additional” or alternative procedures would entail. 424 U.S. 319, 335 (1976). Under this standard, the VBM receipt deadline and cure procedures deprive voters of their right to vote in violation of the Fourteenth Amendment’s Due Process Clause.

1. The VBM and Cure System Denies the Fundamental Right to Vote, Which Cannot Be Restored Post-Deprivation.

During the COVID-19 pandemic, obstacles created by the deadline for submitting a mail ballot and the hurdles and deficiencies baked into the cure process will impede the fundamental right to vote. This right is in no way diminished when exercised by absentee ballot. For, once “[h]aving created a [VBM] 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 v. Kemp*, 341 F. Supp. 3d 1326, 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.’”). Once denied in a given election, the right to vote cannot be restored. Thus, the private interest at stake weighs heavily in favor of providing greater procedural protections prior to the deprivation.

2. Without Additional Procedural Safeguards, the VBM and Cure System Will Deprive Florida Voters of Due Process.

The VBM receipt deadline, the inadequate cure notice procedure and cure instructions, and the extremely tight cure deadline create a serious risk that Floridians will be erroneously deprived of their fundamental right to vote.

First, the receipt deadline deprives Florida voters of due process because it fails to provide adequate notice of when voters must mail their VBM ballots to ensure they are counted. This uncertainty—and the risk that a voter will be erroneously deprived of the fundamental right to vote—is aggravated by mail delays resulting from the pandemic. Ballots returned close to the deadline are more likely to be late. Anywhere between 2 and 8 percent of VBM ballots delivered in the final week before the election were returned too late to be counted in the PPP. Smith ¶ 80. Moreover, under Florida law, ballots rejected for arriving after the receipt deadline

cannot be cured. The receipt deadline has twice deprived Plaintiff Hernandez of her right to vote when her timely mailed VBM ballot arrive too late to be counted. Hernandez Decl. ¶¶ 2, 4, 6, 9-10. A deadline based on a postmark date with sufficient time for the ballot to reach the SOE would provide greater certainty and would help avoid erroneous deprivations of the fundamental right to vote.

Second, the cure notification procedure frequently fails to ensure voters are notified of the VBM deficiencies. The extremely short deadline for curing a ballot means counties have little time to notify voters of deficiencies. Although counties are required to attempt notification by phone, email, or text message, in many instances they fail to do so successfully, either because the county lacks contact information for the voter or because voters do not receive notification before the cure deadline. The inadequate notice of the need to cure has demonstrable impacts on Florida voters. For example, declarant Zetta Williams voted by mail in 2016, but was told her ballot was rejected because her signature did not match. Williams Decl. ¶11. She voted by mail again in 2018 and again was told her ballot was rejected because her signature did not match. Williams Decl. ¶12. Each time, Ms. Williams only received notice of her ballot's rejection after election results were announced, making the cure process entirely illusory. Williams Decl. ¶¶11-13. Members of Plaintiff Organize Florida likewise fear that they will not be notified of ballot deficiencies in time to cure them. Woods Decl. ¶22. Even when counties are aware

that the voter has received no notice of the deficiency, they do not attempt notice a second time; the voter's ballot is simply rejected. *See, e.g.*, Exh. B to Sadasivan Decl. Greater procedural protections, including attempting notice by mail in all cases and providing 15 days after the election for notice to reach the voter and the voter to cure, would greatly decrease the likelihood of voters being deprived of their right to vote without actual notice of a deficiency in their VBM ballot.

Third, even when voters are successfully notified that their vote is in jeopardy, the cure deadline—46 hours after the close of the polls on election day—provides an inadequate opportunity to cure ballot defects in many cases, risking that eligible voters will be erroneously deprived of their right to vote. In effect, the cure deadline affords many voters only two weekdays during working hours to cure their ballots, greatly disadvantaging persons without flexible work schedules. Moreover, should this Court determine that the constitution requires the VBM receipt deadline to be extended as Plaintiffs request—*i.e.*, to consider timely ballots postmarked by election day and received within ten days—the cure deadline will preclude voters whose ballots arrive with deficiencies after the cure deadline from having any opportunity to cure. Extending the cure deadline to 15 days after the election will ensure that most voters, including those who postmark their ballots on election day, will have an opportunity to cure deficiencies and have their ballots counted.

3. The County Defendants' Interest is Insufficient to Justify Maintaining the Current Procedures During a Global Pandemic.

Defendants lack sufficient interest in maintaining the current VBM ballot receipt deadline, cure notice procedure, and cure deadline “rather than [the] additional or different procedures” outlined above. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982); *see also Mathews*, 424 U.S. 334-35. Under the *Mathews* framework, the burden and costs of additional or substitute procedures are low where substitute procedures already exist within state law or procedure. *See Zinermon v. Burch*, 494 U.S. 113, 137 (1990) (“we cannot say that predeprivation process was impossible ... [where the state] already has an established procedure”); *see, e.g., 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.”); *Fla. Democratic Party v. Detzner*, No. 4:16-cv-607, 2016 WL 6090943, at *8 (N.D. Fla. 2016) (“There is no reason that same procedure cannot be implemented ... for mismatched-signature ballots.”).

Although County Defendants have an interest in a timely canvass, this interest can accommodate improved due process protections without imposing significant fiscal and administrative burdens. Indeed, some of the alternative procedures Plaintiffs request already exist in Florida law. Specifically, allowing voters to

postmark their VBM ballots by election day and allowing ballots to be received up to 10 days after the election is already the rule in Florida for UOCAVA voters. FS § 101.6952(5). While affording that same opportunity to all voters may increase the number of ballots that must be processed after election day, it will not prevent Defendants from certifying election results in a reasonable time. Indeed, other states allow for much longer periods to canvass ballots. *E.g.*, Wash Rev. Code § 29A.52.321 (certification deadline 21 days after election).

Likewise, Plaintiffs' request for more robust notification of ballot deficiencies already exists in Florida law. Defendants are already required to provide notice of deficiencies by both mail and telephone, email, or text-message when the deficiency is identified prior to election day. Plaintiffs simply request that both methods of notification be afforded when deficiencies are identified after election day as well.

Finally, Plaintiffs' request to extend the cure deadline, while missing a precise analog in state law, is easily accommodated by the authority granted to the Elections Canvassing Commission, which has the power to extend the deadlines for counties to submit their election results in cases of emergency. FS § 102.112(4). Extending the cure deadline will both allow for more robust cure notice procedures and give voters a meaningful opportunity to correct deficiencies.

The procedures Plaintiffs request to address the deficiencies in the County Defendants' mail and cure system will not place an undue administrative burden on

Defendants. Instead, they will ensure that Plaintiffs are not denied their fundamental right to vote in violation of the due process guarantees enshrined in the Fourteenth Amendment. *See, e.g., Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646 (N.D. Ill. 2006) (noting that “the probable value of an additional procedure is ... great [when] it serves to protect the fundamental right to vote.”). Consequently, Plaintiffs are likely to succeed on the merits of their due process claim.

II. Plaintiffs Will Be Irreparably Harmed Absent a Preliminary Injunction.

The Challenged Restrictions place a burden on the fundamental right to vote of Individual Plaintiffs and members of the Organizations. The denial and abridgement of the constitutionally protected right to vote is an irreparable injury that warrants injunctive relief. *Jones v. Governor of Fla.*, 950 F.3d 795, 806 (11th Cir. 2020) (“The denial of the opportunity to cast a vote that a person may otherwise be entitled to cast—even once—is an irreparable harm.”). 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). Preventing eligible voters like Individual Plaintiffs and Organizations’ members from voting inflicts “harms that cannot be recompensed.” *Shannon v. Jacobowitz*, 301 F. Supp. 2d 249, 258 (N.D.N.Y. 2003). Thus, “irreparable injury is presumed when ‘[a] restriction on the fundamental right to vote’ is at issue.” *League of Women Voters of Florida v. Detzner*, 314 F. Supp. 3d

1205, 1223 (N.D. Fla. 2018) (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012)). After all, given the “one-shot nature of elections,” there is no possible redress “[o]nce the election comes and goes.” *League of Women Voters of Fla.*, 314 F. Supp. 3d at 1223-24.

III. The Public Interest and Balance of Equities Plainly Favor Granting a Preliminary Injunction.

The public interest and “balance of equities” tip sharply in favor of preliminary injunctive relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). It is well-established that “the public has a strong interest in exercising the fundamental political right to vote ... [that] is best served by favoring enfranchisement and ensuring that qualified voters’ exercise of their right to vote is successful.” *Obama for Am.*, 697 F.3d 423, 436 (citation omitted); *see also League of Women Voters*, 314 F. Supp. 3d at 1224 (“[A]llowing for easier and more accessible voting for all segments of society serves the public interest.”). Meanwhile, Florida has no legitimate interest in enforcing unconstitutional voting restrictions, and administrative convenience cannot justify laws that impinge upon fundamental constitutional rights. *Obama for Am.*, 697 F.3d at 436-37; *United States v. Berks Cnty., Pa.*, 250 F. Supp. 2d 525, 541 (E.D. Pa. 2003); *see also Taylor v. Louisiana*, 419 U.S. 522, 535 (1975). The balance of the harms and public interest thus favor granting the requested injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this court issue the requested preliminary injunction.

Respectfully submitted,

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s/ Stuart C. Naifeh

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Pursuant to Northern District of Florida Local Rule 7.1(F), I certify that, according to the word count of the word processing system used to prepare this document, the foregoing memorandum contains 11,998 words.

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