UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FLORIDA STATE CONFERENCE OF BRANCHES AND YOUTH UNITS OF THE NAACP, COMMON CAUSE, and DISABILITY RIGHTS FLORIDA, et al., Plaintiffs, v. LAUREL M. LEE, in her official capacity as Florida Secretary of State, et al., Defendants, REPUBLICAN NATIONAL COMMITTEE and NATIONAL REPUBLICAN SENATORIAL COMMITTEE, Intervenor-Defendants.	Case 4:21-cv-00187-MW-MAF

PLAINTIFFS' RESPONSE IN OPPOSITION TO SECRETARY LEE'S MOTION TO DISMISS

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INTRODUCTION

In December 2020, Florida Secretary of State Laurel M. Lee ("Secretary Lee" or "the Secretary") publicly declared that the state ran three "safe, secure, and orderly elections" in 2020, including the 2020 general election. First Am. Compl., ECF No. 45 ("FAC") ¶ 2 n.1. The November 2020 election was also characterized by historic turnout by Florida voters—particularly Black voters and voters of color. FAC ¶¶ 46-47.

The response from the State of Florida was Senate Bill 90, An Act Relating to Elections, 2021 Fla. Sess. Law Serv. ch. 2020-11 (West) ("SB 90"), a statute laced with provisions designed to cut off voters from critical resources, such as ballot drop boxes, that had facilitated voter participation in the 2020 elections. In enacting SB 90, the State further sought to hinder the efforts of organizations and individuals seeking to mobilize voters by limiting their ability to assist in the collection and delivery of vote-by-mail ("VBM") ballots and provide assistance to voters standing in line, waiting their turn to vote. Voters of color and voters with disabilities have been, and will continue to be, particularly hard-hit by many of these provisions.

The Secretary now defends these unduly burdensome and discriminatory restrictions on the right to vote, moving to dismiss all but one count in Plaintiffs' FAC. At bottom, the Secretary asks this Court to adopt the

conclusion that the law has nothing to say about the voter-suppression measures at issue in this case and that this Court is powerless. She is wrong. The Secretary has even moved to dismiss counts and claims as to which she is not even a party, and for which she therefore lacks standing. Her motion should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

On May 6, 2021, Governor Ron DeSantis signed SB 90 into law. The Act went into effect immediately, imposing substantial limitations on voting rights in Florida, particularly for Black voters, Latino voters, and voters with disabilities.

The Florida State Conference of Branches and Youth Units of the NAACP, Common Cause, and Disability Rights Florida (collectively, "Plaintiffs") are groups that advocate for voting rights and promote voter participation, particularly for these historically disadvantaged groups. On the day SB 90 was enacted, Plaintiffs filed this action, naming Secretary Lee in her official capacity as a defendant. ECF No. 1. On June 11, 2021, Plaintiffs filed the FAC, providing detailed new allegations that, among other things, connected each of the allegations to the counts they supported and added Florida's 67 county supervisors of elections (the "Supervisors") as defendants. FAC ¶¶ 125–228. The FAC challenges, on various statutory and

constitutional grounds, four particularly restrictive provisions of SB 90 (together, the "Challenged Provisions"):

- **Drop Box Restrictions** (Section 28): Severely curtails the locations, availability, and operating hours of ballot drop boxes for receipt of VBM ballots established by the Supervisors' offices;
- **Volunteer Assistance Ban** (Section 32): Effectively bars volunteer organizations from helping voters return their VBM ballots;
- **VBM Application Restrictions** (Section 24): Cuts the lifespan of "standing" VBM requests in half by requiring voters to submit new VBM applications every general election cycle; and
- **Voting Line Relief Restrictions** (Section 29): Exposes volunteers to the risk of criminal liability for giving food, water, or other relief to voters waiting in line.

The FAC alleges nine causes of action, FAC ¶¶ 125–228, and seeks declaratory, injunctive, and other relief against all Defendants. *Id.* ¶¶ 229–41. The Secretary has moved to dismiss eight causes of action, even though only six are pleaded against the Secretary. Moreover, as to those six counts, the Secretary moves to dismiss each count *in its entirety* even though those

counts are directed against her with respect to only a single Challenged Provision (with the Supervisors named as Defendants as to the others).[1]

Count	**Legal Basis**	**Challenged Provision/Defendant(s)**
I	Voting Rights Act ("VRA") Section 2: discriminatory results	— As to the Drop Box Restrictions Against Secretary Lee — As to all four Challenged Provisions against the Supervisors
II	First and Fourteenth Amendments to U.S. Constitution: undue burden on the right to vote	
III	Title II of the Americans with Disabilities Act ("ADA"): failure to provide reasonable accommodations	
IV	First Amendment to U.S. Constitution: freedom of speech/expression	— As to the Voting Line Relief Restrictions against the Supervisors[2]
V	Fourteenth Amendment to U.S. Constitution: vagueness/overbreadth	
VI	Fourteenth Amendment to U.S. Constitution: intentional race discrimination	— As to the Drop Box Restrictions Against Secretary Lee — As to all four Challenged Provisions against the Supervisors
VII	Fifteenth Amendment to U.S. Constitution: intentional race discrimination	
VIII	VRA Section 2: intentional race discrimination	

[1] As explained *infra*, however, Plaintiffs expect to amend their complaint to remove certain Challenged Provisions from the scope of certain counts. This chart merely sets forth the content of Plaintiffs' FAC.

[2] The Secretary has not included Count IV in her Motion to Dismiss.

IX	VRA Section 208: conflict preemption	— As to the Voting Line Relief Restriction and Volunteer Assistance Ban Against the Supervisors

On June 25, 2021, the Secretary filed a Motion to Dismiss, ECF No. 92, and an accompanying memorandum, ECF No. 92-1 ("Mem."). Plaintiffs now timely respond in accordance with the schedule set by the Court. ECF No. 94.

LEGAL STANDARD

To withstand a motion to dismiss under Rule 12(b)(6), the allegations in the complaint need only include "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations and citations omitted). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable." *Id.* When considering a motion under Rule 12(b)(6), "[a] court is generally limited to reviewing what is within the four corners of the complaint." *Bickley v. Caremark RX, Inc.*, 461 F.3d 1325, 1329 n.7 (11th Cir. 2006). The Court must take the facts alleged in the FAC as true and draw all reasonable inferences in Plaintiffs' favor. *PBT Real Estate, LLC v. Town of Palm Beach*, 988 F.3d 1274, 1286 (11th Cir. 2021).

In seeking to dismiss Plaintiffs' claims for lack of standing under Rule 12(b)(1), the Secretary does not rely on any evidence extrinsic to the FAC. She therefore raises solely a facial challenge to standing. *See Stalley ex rel. United States v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232-33 (11th Cir. 2008) (distinguishing facial and factual challenges to standing under Rule 12(b)(1)). When a challenge is facial, "the plaintiff has safeguards similar to those retained [on] a Rule 12(b)(6) motion" and "the court must consider the allegations in the plaintiff's complaint as true." *Id.* (internal quotations and citations omitted).

ARGUMENT

I. The Secretary Lacks Standing to Seek Dismissal of Claims for Relief As to Which She Is Not a Party.

As an initial matter, the Secretary improperly seeks dismissal of several of Plaintiffs' claims—specifically, Counts I–III and V–IX—in their entirety, even though those claims either are not alleged *against the Secretary* at all or are alleged only with respect to the Drop Box Restrictions.

Thus, the Secretary is not a defendant as to Count V (contesting only the Voting Line Relief Restrictions) or Count IX (contesting only the Voting Line Relief Restrictions and Volunteer Assistance Ban). And the FAC alleges claims in Counts I–III and VI–VIII against the Supervisors only with respect

to the VBM Application Restrictions, Volunteer Assistance Ban, and Voting Line Relief Restrictions. FAC ¶¶ 126–228.

Because the Secretary is not a party to Counts IV, V, or IX, and is not a party to Counts I–III and VI–VIII as to three of the four Challenged Provisions, she lacks standing to move against them. The Secretary's motion to dismiss as it relates to the foregoing provisions therefore must be denied.

It is well established that "the requirement that a party establish its standing to litigate applies not only to plaintiffs but also [to] defendants." *Yellow Pages Photos, Inc. v. Ziplocal, LP*, 795 F.3d 1255, 1265 (11th Cir. 2015). "Standing to sue *or defend* is an aspect of the case-or-controversy requirement." *Arizonans for Off. English v. Arizona*, 520 U.S. 43, 64 (1997) (emphasis added). "[I]t is axiomatic that for a defendant to move to dismiss a cause of action for failure to state a claim for relief, the complaint must actually assert that cause of action against the defendant." *Fleetwood Servs., LLC v. Ram Cap. Funding LLC*, No. 20-cv-5120, 2021 WL 1987320, at *2 (S.D.N.Y. May 18, 2021)*; see also State Farm Fire & Cas. Co. v. Brewer*, No. 1:06-cv-2296, 2007 WL 2746707, at *1 n.1 (N.D. Ga. Sept. 17, 2007) (holding that moving defendant lacked "standing to seek the dismissal of claims against other defendants in this action").

The Secretary therefore has no standing to seek dismissal of any claims or portions of claims as to which she is not a party. There is no case or controversy between the Plaintiffs and the Secretary on any Challenged Provision other than the Drop Box Restrictions. The Secretary's motion thus should be denied under Rule 12(b)(1) for lack of subject-matter jurisdiction (defendant standing) as to Counts V and IX, and as to Counts I–III and VI–VIII to the extent those counts are grounded in the (i) VBM Application Restrictions, (ii) Volunteer Assistance Ban, and (iii) Voting Line Relief Restrictions.

II. The Drop Box Restrictions Are Unconstitutional Under the Controlling *Anderson-Burdick* Test.

Count II of the FAC adequately pleads that the Drop Box Restrictions unduly burden the right to vote in violation of the First and Fourteenth Amendments under *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

Secretary Lee attempts to rewrite the *Anderson-Burdick* test in her motion, arguing that (1) the Drop Box Restrictions are VBM-related restrictions and therefore immune from *Anderson-Burdick* analysis; and (2) the Court must consider only voting-rights injuries to the voting population as a whole, not the burdens inflicted on any particularly burdened

sub-group of voters. Both of the Secretary's arguments are incorrect as a matter of law, and this Court should reject them.

A. The Drop Box Restrictions Implicate the Right to Vote and Are Subject to *Anderson-Burdick* Analysis.

Secretary Lee first argues that Drop Box Restrictions are VBM-related election restrictions and that VBM restrictions as a category do "not implicate the right to vote" and are therefore immune from *Anderson-Burdick* analysis. Mem. at 7, 10. The law is to the contrary.

The Eleventh Circuit and other courts routinely apply the *Anderson-Burdick* test to scrutinize restrictions related to VBM ballots. *See, e.g.*, *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317–24 (11th Cir. 2019) (applying *Anderson-Burdick* test to Florida's VBM and provisional-ballot signature-match scheme); *Ne. Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 630–35 (6th Cir. 2016) (applying *Anderson-Burdick* test to Ohio law requiring election boards to reject the ballots of absentee and provisional voters who fail to accurately complete birthdate and address fields, and holding that this "technical perfection" requirement infringed on the constitutional right to vote); *Black Voters Matter Fund v. Raffensperger*, 478 F. Supp. 3d 1278, 1315–24 (N.D. Ga. 2020) (applying *Anderson-Burdick* test to Georgia's requirement that voters pay for postage to mail VBM ballot

applications and VBM ballots, and determining that plaintiffs "have at the very least stated a claim" under *Anderson-Burdick* test), *appeal docketed*, No. 20-13414 (11th Cir.).

Notwithstanding this clear line of cases applying *Anderson-Burdick* to VBM restrictions, Secretary Lee erroneously relies on a pre-*Anderson-Burdick* precedent, *McDonald v. Bd. of Election Commissioners*, 394 U.S. 802, 809 (1969). In *McDonald*, the Supreme Court upheld a statute regulating VBM ballot access among pretrial detainees because "***nothing*** in the record . . . indicate[d] that the Illinois statutory scheme ha[d] an impact on appellants' ability to exercise the fundamental right to vote." 394 U.S. at 807–08 (emphasis added). Given the lack of record evidence of an impact on the right to vote, and noting the many robust alternatives available to the pretrial detainees, the Court characterized VBM as an additional "convenience" sought by the detainees and thus applied only rational-basis review rather than strict scrutiny. *Id.* at 808–11; *see also O'Brien v. Skinner*, 414 U.S. 524, 531 (1974) (Marshall, J., concurring) ("We relied heavily in *McDonald* on the fact that there was no evidence that the State made it impossible for the appellants to exercise their right to vote.").

Nothing in *McDonald* suggested that all VBM restrictions have no such impact or are *per se* permissible burdens on voting rights. Nor does *McDonald* support the Secretary's rigid contention that the Drop Box Restrictions here must amount to an "absolute prohibition" on voting in order to offend the Constitution. Rather, "the Court's disposition of the claims in *McDonald* rested on failure of proof." *O'Brien*, 414 U.S. at 529.

Unlike the record in *McDonald*, Plaintiffs' pleadings here explain in detail how and why the Drop Box Restrictions impose a substantial burden on Floridians' voting rights, FAC ¶¶ 77–84, that is not justified by the state's proffered interests, *id.* ¶¶ 79, 115–19, 136. Section 28 of SB 90 requires drop boxes to "be monitored in person by an employee" of a Supervisor at all times and imposes a $25,000 civil penalty against any Supervisor if "any drop box is left accessible for ballot receipt" contrary to the law's provisions.

The same section of the Act mandates that drop boxes that are not located within a Supervisor's main office or branch office may only be made available "during the county's early voting hours of operation." 2021 Fla. Sess. Law 2021-11, § 28 (amending Fla. Stat. § 101.69). In Florida, early voting ends two or three days prior to Election Day, depending on the county,

and is restricted to "no less than 8 hours and no more than 12 hours per day." Fla. Stat. § 101.657(d).

The FAC alleges that the Drop Box Restrictions will impose heavy burdens on voters who, due to work or family obligations, cannot travel to a drop box during early voting hours. FAC ¶ 80. Plaintiffs further allege that the Drop Box Restrictions will especially burden voters who do not receive their VBM ballots until the final days before the election. *Id.* ¶ 82. For such voters, the availability of drop boxes under the pre-SB 90 regime was no mere "convenience," and the Drop Box Restrictions are a fundamental burden on the ability to vote.

The Secretary's reliance on *McDonald* is particularly inapt because that case was decided at summary judgment, after discovery and full development of the record. 394 U.S. at 805–06. By contrast, this case is at the pleading stage. At this stage of the action, the Court must take the allegations in the FAC as true and draw all reasonable inferences from those allegations to determine whether Plaintiffs are entitled to discovery to buttress and develop their proof. At trial, Plaintiffs will adduce strong evidence, backed by expert analysis, that the Drop Box Restrictions unduly burden the fundamental right to vote. The decision in *McDonald*, which

rested "on failure of proof," *O'Brien*, 414 U.S. at 529, thus provides no support for a dismissal on a Rule 12(b)(6) motion.

Secretary Lee's reliance on *New Georgia Project v. Raffensperger*, 976 F.3d 1278 (11th Cir. 2020) ("*NGP*"), is equally misplaced. In *NGP*, the Eleventh Circuit, in evaluating a constitutional challenge to a VBM ballot receipt deadline, reiterated that "we must evaluate laws that burden voting rights using the approach of *Anderson* and *Burdick*." *Id.* at 1282 (citation omitted). *NGP* neither endorsed an "absolute prohibition" test espoused by Secretary Lee here, nor suggested that VBM or drop box restrictions are immune from *Anderson-Burdick* analysis.[3]

Decisions from other courts are in accord. *See e.g.*, *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 103–09 (2d Cir. 2008) (holding that the *Anderson-Burdick* framework must apply whenever there is ***some*** degree of burden on the plaintiffs' associational rights, even when the extent of the burden was debatable); *Thomas v. Andino*, Nos. 3:20-cv-1552 & 3:20-cv-

[3] Secretary Lee's reliance on *Griffin v. Roupas*, Mem. at 9, is equally misplaced. The *Griffin* court denied a challenge by Illinois working mothers who contended that they had a constitutional right to cast VBM ballots, but did so after applying the *Anderson-Burdick* test. 385 F.3d 1128, 1130–33 (7th Cir. 2004). Unlike in *Griffin*, Plaintiffs here are not seeking a "blanket right." *Id.* at 1129–30.

1730, 2020 WL 2617329, at *18 (D.S.C. May 25, 2020) (noting that while "the right to an absentee ballot is not guaranteed by the First Amendment, that does not mean that absentee voting is per se unprotected under the First Amendment").

B. Plaintiffs Have Pleaded a Substantial Burden on the Right to Vote.

As Plaintiffs plead in detail, the Drop Box Restrictions impose severe burdens on voting rights, greatly narrowing the locations, availabilities, and operating hours for drop boxes. FAC ¶ 77–84. The Drop Box Restrictions especially burden voters who have unpredictable or less-flexible work obligations; are assigned to early voting sites and Election Day polling places that more often suffer from long lines; or lack access to a car. *Id.* ¶¶ 80, 84. The Drop Box Restrictions' burdens are heightened because voters, particularly in historically disenfranchised communities, "have come to rely on drop boxes as a safe and an important option" for voting. *Id.* ¶ 78.

Because the Drop Box Restrictions pose a "risk of disenfranchisement," they constitute at least a serious burden on the right to vote. In such circumstances, a robust form of the *Anderson-Burdick* balancing test obtains. *See Democratic Exec. Comm.*, 915 F.3d at 1319–21. The state has not set forth any interest sufficient, at the pleading stage, to outweigh this burden

on voting rights. *Cf. id. at* 1321 n.11 (declining to determine "whether the burden imposed is anything more than serious," since "the state's interests d[id] not sufficiently justify the burden imposed" in any case).

The Secretary asserts that the burdens imposed on a subset of voters cannot support an *Anderson-Burdick* claim, contending that such a claim must "focus on the electorate as a whole" and "the voters generally," not hardships experienced by a "subset of the electorate." Mem. at 5–6, 10–11. This is not the law. As this Court has recognized, "[d]isparate impact matters under *Anderson-Burdick*." *League of Women Voters of Fla., Inc., v. Detzner*, 314 F. Supp. 3d 1205, 1216 (N.D. Fla. 2018).

This point was expressly recognized in the case on which the Secretary principally relies, *Crawford v. Marion County Election Board*. In that case, a six-justice majority of the Supreme Court clearly held that "whether the effects of a facially neutral and nondiscriminatory law are unevenly distributed across identifiable groups" is an *Anderson-Burdick* factor. *League of Women Voters of Fla.*, 314 F. Supp. at 1216–17 (referencing 553 U.S. 181, 198–99 (2008) (op. of Stevens, J., joined by Roberts, C.J., and Kennedy, J.); *id.* at 209–37 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 238 (Breyer, J., dissenting)). This is true even if the law is of general

applicability and irrespective of the size of affected subset. *Id.* at 198–99. In asserting that the impact on a particularly burdened sub-group must be disregarded, Secretary Lee relies exclusively on the views of the three-justice ***minority*** in *Crawford*. *Id.* at 204–09 (Scalia, J., joined by Thomas and Alito, JJ., concurring in the judgment). The trio espoused the view that, for purposes of *Anderson-Burdick* analysis, a burden on voting rights should be considered "categorically" and without reference to "peculiar circumstances of individual voters or candidates." *Id.* That view was squarely rejected by a majority of the Court.

As the Seventh Circuit observed in *Frank v. Walker* (*Frank II*), "[t]he right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily." 819 F.3d 384, 386 (7th Cir. 2016) (Easterbrook, J.) (accepting argument that "high hurdles for some persons eligible to vote" will "entitle those particular persons to relief," and noting that "Plaintiffs' approach is potentially sound if even a single person eligible to vote is unable to get acceptable photo ID with reasonable effort").

III. Plaintiffs Have Alleged Facts Sufficient to Support a Section 2 "Results" Claim Under the Voting Rights Act.

Count I of the FAC sufficiently states a "results" claim as to the Drop Box Restrictions under Section 2 of the VRA. To plead a Section 2 results

claim, a plaintiff must allege facts plausibly demonstrating that "based on the totality of the circumstances," "the political processes leading to nomination or election . . . are not equally open to participation" by members of a protected group "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." 52 U.S.C. § 10301.

After Plaintiffs filed their FAC and the Secretary filed her Motion to Dismiss, the Supreme Court issued *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021). The Court affirmed "that § 2 applies to a broad range of voting rules, practices, and procedures; that an 'abridgement' of the right to vote under § 2 does not require outright denial of the right; that § 2 does not demand proof of discriminatory purpose; and that a 'facially neutral' law or practice may violate that provision." *Id.* at 2341. The Court also identified a non-exhaustive list of factors that should be considered in addition to many of the factors previously identified in *Thornburg v. Gingles*, 478 U.S. 30 (1986). The *Brnovich* factors are helpful "guideposts," 141 S. Ct. at 2336, but are not dispositive at the pleading stage. Plaintiffs nevertheless intend to seek leave to amend the FAC in light of *Brnovich*.

A. Plaintiffs Alleged Facts Plausibly Demonstrating That They Have Less *Opportunity* to Elect Candidates of Their Choice.

Secretary Lee first argues that Count I fails as a matter of law because Plaintiffs do not allege that SB 90 "keeps them from electing candidates of their choice." Mem. at 21. Section 2, however, requires only that such voters "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 (emphasis added). Even "a small minority" group is entitled to protection under Section 2, regardless of whether the group members' votes may determine the outcome of an election. *Chisom v. Roemer*, 501 U.S. 380, 397 n.24 (1991). Plaintiffs' FAC unmistakably alleges that, under "the totality of the circumstances," the Drop Box Restrictions will "diminish the opportunities of Black and Latino voters"—large minority groups—"to elect their preferred representatives" and participate in the political process. FAC ¶ 133 (emphasis added).

B. Plaintiffs' Factual Allegations in Support of Their VRA Section 2 Results Claim Are Neither Speculative Nor Conclusory.

Secretary Lee also argues that the FAC's allegations of discriminatory effect are "speculative" or "conclusory," or based "primarily on claims relating to either Florida's 'distant' history of racial prejudice or conclusory

allegations about increases in minority voters' use of alternative means of voting (during a once-in-a-generation pandemic)." Mem. at 22.

Defendant is incorrect. Far from being conclusory, Plaintiffs identify at least three concrete, specific ways in which the Drop Box Restrictions impair voting opportunities for voters of color:

- Voters of color are disproportionately likely to have stricter and more unpredictable work obligations and are therefore particularly burdened by the limitation of drop boxes to early voting hours;
- The longer lines at polling places in communities where voters of color live means that they have a greater need for drop boxes as a means of voting; and
- The limited transportation methods available to voters of color make it likely that they will be disproportionately burdened by the restricted availability of drop boxes.

FAC ¶ 80.

The Secretary's reliance on *Greater Birmingham Ministries v. Secretary of State for Alabama* ("*GBM*"), 992 F.3d 1299 (11th Cir. 2021), to support her dismissal argument, Mem. at 22, is misplaced. As an initial matter, the Eleventh Circuit decided *GBM* after discovery and after the

district court had ruled on cross-motions for summary judgment. 992 F.3d at 1317–18. The *GBM* court's statements about the quantum of evidence needed to warrant summary judgment on a Section 2 results claim, *id.* at 1330, are simply inapposite at the pleading stage.

To the degree that *GBM* is relevant at the pleading stage, Plaintiffs have adequately pleaded, and at trial will prove, that the Drop Box Restrictions will "cause[ ] the . . . abridgement of the right to vote on account of race." *Id.* The particularized allegations of Paragraph 80 of the FAC, are not, as the Secretary suggests, mere "inconveniences." Mem. at 21.

Nor is there any doubt that Plaintiffs have alleged that the Drop Box Restrictions "caused the denial or abridgement of the right to vote on account of race," as the Secretary insists. *Id.* The FAC clearly alleges that the effect of the Drop Box Restrictions must be measured in the context of actual circumstances, both historical and current, born of discrimination. Thus, it would be improper to ignore the disproportionate incidence of inflexible work schedules or the lack of transportation options amongst voters of color when considering the effect of the Drop Box Restrictions. Yet that is precisely what the Secretary invites the Court to do, ignoring the plain language of Section 2 to consider the impairment of a voting opportunity under the

totality of the circumstances, which the *Gingles* Court expressly stated includes the effects of historical discrimination (*i.e.*, *Gingles* Factors 1 and 5). *See Brnovich*, 141 S. Ct. 2 at 2340 (stating that, in a vote-denial case, "these and the remaining [*Gingles*] factors" are relevant "to show that minority group members suffered discrimination in the past (factor one) and that effects of that discrimination persist (factor five)," and "[w]e do not suggest that these factors should be disregarded.") (internal citations omitted).

Further, as support for their Section 2 results claim, Plaintiffs allege that, among other things, Florida legislators who opposed SB 90 called attention to the fact that the Challenged Provisions would "(consistent with Florida's unfortunate history) set up obstacles to vote in the various methods that minority voters relied upon to cast ballots in historic numbers in 2020." FAC ¶ 123; *see also id.* ¶¶ 133, 37–73, 115–24. The FAC also alleges that "SB 90 builds on a long history" of efforts by the State of Florida to "prevent African Americans from having a political voice." *Id.* ¶ 37; *see, e.g.*, ¶¶ 37–45. These allegations—that the Legislature targeted measures that Black and Latino voters used to vote in historic numbers in the 2020 election—support Plaintiffs' contention that the Drop Box Restrictions will "diminish the

opportunities of Black and Latino voters . . . to elect their preferred representatives." *Id.* ¶ 133. Secretary Lee fails to engage with these allegations. *See* Mem. at 21.

IV. Plaintiffs Have Adequately Pleaded Intentional Discrimination Claims Under the Fourteenth Amendment, Fifteenth Amendment, and Section 2 of the VRA.

A. The Legal Standard Governing Intent Claims.

Plaintiffs have sufficiently alleged that the Challenged Provisions of SB 90 intentionally discriminate against voters of color in violation of the Fourteenth Amendment (Count VI), Fifteenth Amendment (Count VII), and Section 2 of the VRA (Count VIII). *See* FAC ¶¶ 186–223; *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1186 (11th Cir. 2004). A law violates these provisions as long as race is ***a*** "motivating" factor in its enactment; Plaintiffs need not allege that "a particular purpose was the 'dominant' or 'primary' one." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). The *Arlington Heights* factors, as supplemented by the Eleventh Circuit, guide courts in this inquiry. *GBM*, 992 F.3d at 1322.

The FAC includes ample allegations to support a "reasonable inference," *Iqbal*, 556 U.S. at 678, that the Challenged Provisions, and specifically the Drop Box Restrictions challenged with respect to Secretary

Lee, intentionally discriminate against voters of color. By contrast, the Motion to Dismiss ignores key allegations and mischaracterizes the Plaintiffs' pleadings.

B. The FAC Sets Forth Allegations that Provide the Basis For an Inference of Discriminatory Intent Under the *Arlington Heights* Factors.

Arlington Heights sets forth a list of factors relevant to establishing discriminatory intent. Plaintiffs have pleaded allegations that satisfy those factors.

1. Impact of SB 90

Offering specific details, Plaintiffs have adequately pleaded that the Challenged Provisions, "individually and collectively," intentionally discriminate against and disproportionately impact Black and Latino voters. FAC ¶ 75. These disparate racial impacts are an important "starting point" in the "sensitive inquiry [] into circumstantial and direct evidence of intent." *Arlington Heights*, 429 U.S. at 266 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). Plaintiffs allege that Black and Latino voters will be disproportionally harmed by the Challenged Provisions. FAC ¶ 9; *see supra* Section III (discussing allegations of the discriminatory impact of the Drop Box Restrictions).

Secretary Lee argues that impact is irrelevant here because Plaintiffs fail to "couple impact with sufficient allegations to establish a pattern unexplainable on grounds other than race." Mem. at 14–15. But Plaintiffs do not argue that disparate impact alone proves SB 90 was passed with discriminatory intent. Rather, Plaintiffs argue that the Challenged Provisions disparately impact Black and Latino voters, and that this impact is probative of intent.

This is consistent with Supreme Court precedent, which has held that impact is just one of many factors to consider and is only a "starting point" in the intentional-discrimination inquiry. *Arlington Heights*, 429 U.S. at 266. The Court has not required that a plaintiff establish that this pattern is unexplainable on grounds other than race, but rather has held that *sometimes* this pattern emerges from the effect of facially neutral legislation. *Id.* Also, such inquiries are rarely decided at the pretrial stage, *see Hunt v. Cromartie*, 526 U.S. 541, 549 (1999), and, on a motion to dismiss, the FAC's factual allegations must be assumed to be true.

2. Historical Background of SB 90

The FAC adequately alleged that Florida's historical background supports a finding of intentional discrimination under *Arlington Heights*. 429 U.S. at 267. Plaintiffs' pleadings detail Florida's history of discriminatory

voting practices. FAC ¶¶ 37–45. Although this history dates back to the post-Civil War period, the allegations in the FAC are by no means frozen in time.

Indeed, Plaintiffs specify that over the past two decades, and as recently as 2019, the Florida Legislature has gone to great lengths to limit the political participation of people of color. *See, e.g.*, FAC ¶¶ 7, 41–45. These efforts have included "imposing new restrictions on voting, including voter identification requirements; engaging in racially motivated voter purges and redistricting; imposing new barriers preventing the re-enfranchisement of formerly incarcerated persons until they paid legal fines, even when they could not afford to do so; and routinely closing voting sites in predominantly Black and brown communities." *Id.* at ¶ 7 & n.3 (citing *League of Women Voters*, 314 F. Supp. 3d at 1205; *Florida v. United States*, 885 F. Supp. 2d 299 (D.D.C. 2012) (three-judge court) (per curiam); *Brown v. Florida*, 208 F. Supp. 2d 1344 (S.D. Fla. 2002)). Secretary Lee fails to acknowledge or engage with this undeniably recent history in any way, and instead wrongly suggests that Plaintiffs "dwell on the distant past."[4]

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[4] Secretary Lee suggests that historical background may support an inference that a challenged law is intentionally discriminatory *only* if a court has previously made legal findings of intentional discrimination as to the

3. Sequence of Events Leading to Passage of SB 90

The legislative history and "[d]epartures from the normal procedural sequence" may also support a finding of intentional discrimination. *Arlington Heights*, 429 U.S. at 267. The FAC adequately pleads this factor, FAC ¶¶ 46–73, 192, but Secretary Lee fails to engage with these allegations regarding the many irregularities in the process leading to SB 90's enactment.

First, Secretary Lee argues that "Plaintiff groups attribute most of the sequence of events and departure to a once-in-a-lifetime pandemic." Mem. at 17. But Secretary Lee ignores the allegations that members of the public were severely limited, or altogether barred, from offering testimony on SB 90 and HB 7041,[5] even as members of the public were permitted to

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particular law. Mem. at 17. This is incorrect. "The historical background of the decision is one evidentiary source, *particularly* if it reveals a series of official actions taken for invidious purposes." *Arlington Heights*, 429 U.S. at 267 (emphasis added). *Arlington Heights* does not suggest that the historical background of a challenged law is irrelevant absent past legal findings of intentional discrimination.

[5] HB 7041 contained many of the same provisions as SB 90 and was classified as a "related bill." FAC ¶ 55.

participate on other bills without any limitation, often in the *same committee hearing*. FAC ¶¶ 62, 65.[6]

Second, Secretary Lee argues that "strike-all" amendments (a legislative procedure used in connection with SB 90 and HB 7041) are commonly used in Florida Legislature. Mem. at 17-18. This argument misses the point. Plaintiffs' intentional-discrimination claim is not based on the infrequency of strike-all amendments. Rather, the use of strike-all amendments is relevant to this factor because the bill's proponents repeatedly used the procedure to introduce new, lengthy legislative language and proceeded to adopt that language the same day or the next day, a departure from the ordinary legislative process. *See* FAC ¶¶ 63, 67. Secretary Lee does not even attempt to argue that these tactics, which denied the public and the Legislature sufficient opportunity to read and understand the language or impact of SB 90 before its enactment, represented a "normal procedural sequence." Nor does Secretary Lee provide any explanation for

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[6] The Secretary's motion ignores allegations that despite repeated requests from advocacy organizations seeking to permit remote testimony—a practice routinely used in other state legislatures and other government bodies in Florida during the COVID-19 pandemic—legislative committees instead forced members of the public to testify in person. FAC ¶¶ 56–60.

many of the most serious procedural departures in the consideration of SB 90 and HB 7041, including allegations that proponents of the measure prematurely shut down debate, limited opportunities for committee members to ask questions, and rushed the bills through the legislative process. FAC ¶¶ 62–70.[7]

4. Contemporary Statements and Actions of Key Legislators

Plaintiffs also adequately pleaded the existence of contemporary statements and actions of key legislators that support an inference of intentional discrimination. *GBM*, 992 F.3d at 1322. Secretary Lee attacks two quotations from the *Florida Rising* complaint as insufficient to support a finding of discriminatory intent. Mem. at 18–19. Secretary Lee makes no argument about the adequacy of ***NAACP*** Plaintiffs' allegations regarding contemporary statements made by key legislators.

Nor could she. Plaintiffs' FAC detailed several comments made by Senator Baxley that support an inference of discriminatory intent. *See*, *e.g.*, FAC ¶ 121 n.50 (in response to being questioned about the impact that SB 90

[7] In one egregious example, debate in a committee meeting was limited to 30 seconds per committee member, even though none of the nine other bills considered during that meeting was subjected to such treatment. *See* FAC ¶ 64.

would have on Black voter turnout, Senator Baxley responded by saying, "I don't buy the whole Jim Crow story."); *id.* ¶ 117 ("Senator Baxley proffered the following glib rationale for SB 90's restrictions: 'Some people ask why and I say why not? Let's try it.'"). These specific allegations, taken collectively, and in combination with the other *Arlington Heights* factors, are additional probative evidence of an "inference of invidious purpose," and must be taken as true at this stage. 429 U.S. at 270.

5. Foreseeability and Knowledge of the Discriminatory Impact of SB 90

Plaintiffs have amply alleged that disparate impact is a "foreseeable and anticipated effect" of the Challenged Provisions. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 462 (1979). This is true for two key reasons:

First, SB 90's proponents were repeatedly warned of SB 90's disparate impact. *See Veasey v. Abbott*, 830 F.3d 216, 236 (5th Cir. 2016) (en banc). Legislators—based on research findings and experience—called attention to the expected disparate impact of the Challenged Provisions during the legislative debate. *See* FAC ¶¶ 120–24. For example, Senator Berman referred to a Stanford-MIT research study identifying a surge in VBM usage by Black voters in 2020, and asked Senator Baxley if he was "aware that" the Drop Box Restrictions and Volunteer Assistance Ban would "have a disparate

impact on black voters[.]" *Id.* ¶ 121. Senator Powell similarly expressed concern that "by putting these measures in place it would be helpful to reduce that black overt [*sic*] turnout." *Id.* ¶ 121 n.50. Supervisors also called attention to the ways SB 90 would burden minority voters and suppress voter turnout, *id.* ¶ 119, and representatives of minority groups—including Florida Rising Together, Latino Justice, and others—strongly opposed SB 90, citing its expected disparate impact. Thus, as in *Veasey*, SB 90's proponents "were aware of the likely disproportionate effect of the law on minorities, and . . . nonetheless passed the bill without adopting a number of proposed ameliorative measures that might have lessened this impact." 830 F.3d at 236.

Second, proponents of SB 90 could reasonably be expected to know that minority voters as a whole face socioeconomic conditions that make them especially susceptible to burdens under the Challenged Provisions. S*ee NAACP v. McCrory*, 831 F.3d 204, 227–28 (4th Cir. 2016) (observing that "a reasonable legislator would be aware of the socioeconomic disparities endured by African Americans" that impacts their likelihood of possessing identification documents). Voters of color tend to live in larger counties that rely on broad access to drop boxes and VBM to alleviate the burdens of

Election Day lines. *See* FAC ¶ 80. That Black and Latino voters are more likely than white voters to have stricter work schedules and limited access to transportation—and thus have good reason to need after-hours drop boxes and ballot collection assistance, for example—likewise is well-documented. *See id.* Notably, Representative Eskamani warned that the Challenged Provisions of SB 90 would disproportionally burden those "who face systematic historic hurdles to the ballot box," including "people of color," and in particular those with lesser means or unconventional hours of work. FAC ¶ 120.

6. Availability of Less Discriminatory Alternatives

Plaintiffs have adequately pleaded that the Legislature had a less discriminatory alternative: not passing SB 90.

The status quo was an "available" and effective alternative, *Jean v. Nelson*, 711 F.2d 1455, 1486 (11th Cir. 1983), given that, as even SB 90's proponents have acknowledged, Florida's 2020 elections were successfully administered. *See* FAC ¶¶ 2–4, 49; *see also McCrory*, 831 F.3d at 237 (elimination of same-day registration despite State Board of Elections report "that same-day registration was a success" supported finding of discriminatory intent). Thus, the status quo is less discriminatory than the

Challenged Provisions, which generate discriminatory impacts not present in the status quo.

The FAC includes factual allegations that numerous amendments proposed by some legislators to "mitigate[] the restrictive and discriminatory impacts" of the Challenged Provisions were rejected. FAC ¶ 72. Amendments were offered that would have (i) reduced the restrictions on secure drop boxes; (ii) expressly allowed the practice of giving food or water to voters waiting in line; and (iii) allowed ballots to be returned by anyone registered to vote at the same address as the voter. All were voted down in a rushed process that thwarted careful discussion and debate. *See Veasey*, 830 F.3d at 237 (finding discriminatory intent based in part on legislators' "refus[al] to explain the rejection of" proposed "ameliorative measures"). Thus, proponents of SB 90 were aware of the availability of less discriminatory alternatives but chose not to enact them, thus evincing discriminatory purpose. *See United States v. Bd. of Sch. Comm'rs of Indianapolis*, 573 F.2d 400, 413 (7th Cir. 1978).

V. There Is No Basis for Dismissing the ADA Claim.

A. The Plaintiffs Have Standing to Sue the Secretary for ADA Violations Flowing From the Drop Box Restrictions.

The Secretary contends that Plaintiffs' ADA claim should be dismissed for lack of standing. Mem. at 34. It is well-settled, however, that the harmful effects of a challenged election law are fairly traceable to election officials that "possess [the] authority to *enforce* the complained-of provision." *Jacobson*, 974 F.3d at 1255–57. It is equally established that the redressability requirement is satisfied if the court can bar such "officials from taking steps to enforce" the challenged law. *Id.* at 1255 (citation omitted). Plaintiffs thus have standing to seek injunctive relief against the Secretary for her enforcement of Drop Box Restrictions that allegedly result in barriers to access that violate the ADA.

The FAC pleads against the Secretary *only* with respect to the Drop Box Restrictions, a matter in which the Secretary exercises unique coercive enforcement power. Specifically, the Legislature, in enacting SB 90, gave the Division of Elections (led by the Secretary) the authority (under Fla. Stat. § 101.69(3)) to impose civil penalties of ***$25,000*** against any Supervisor who fails to adhere to the Drop Box Restrictions. *See Bennett v. Spear*, 520 U.S. 154, 170 (1997) (finding that plaintiffs had standing to sue a government

agency which, through threat of penalty, had coerced another agency to impose restrictions that allegedly injured the plaintiffs); *see also* Plaintiffs' Stmt. in Response to the Court's Order to Show Cause (filed concurrently).

Regarding Plaintiffs' ADA claim, Plaintiffs' standing theory as against the Secretary properly "relies on [] the predictable effect of [the Secretary's] action on the decisions of" the Supervisors. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019). That is, Plaintiffs have pleaded that the Drop Box Restrictions—enforced on pain of penalty by the Secretary—foreseeably will prompt the Supervisors to curtail the availability of drop boxes on which voters with disabilities rely. FAC ¶ 159. In particular, Plaintiffs have pleaded that the Supervisors will likely divert drop boxes from accessible outdoor or "drive-through" locations to less-accessible indoor locations where Supervisors' employees (who, under SB 90, are required to continuously monitor drop boxes) are more likely to be located. *Id.* ¶¶ 79, 159. This predictable diversion is expected to disproportionately affect voters with limited mobility who "are more likely to rely on drop boxes that are placed outdoors and are easily accessible." *Id.* ¶ 159.

This diversion is also traceable to the Secretary's Division of Elections, whose substantial penalty power helps ensure that Supervisors—who must

designate drop box locations 30 days before an election, *see* Fla. Stat. § 101.69(2)(b)—will not take the risk of designating drop boxes in outdoor locations where staff is unavailable or is less likely to be continuously available.

B. Plaintiffs Have Adequately Pleaded an ADA Claim Against the Secretary.

To state a claim under the ADA, a plaintiff must allege that he or she (1) is a "qualified individual with a disability" and (2) was "excluded from participation in or . . . denied the benefits of the services, programs, or activities of a public entity" or otherwise "discriminated [against] by such entity" (3) "by reason of such disability." 42 U.S.C. § 12132; *see also Shotz v. Cates*, 256 F.3d 1077, 1079–81 (11th Cir. 2001).

Whether a person with a disability is discriminated against depends on whether he or she has access to a particular mode of voting, not whether he or she is precluded from voting altogether. *See Nat'l Fed'n of the Blind v. Lamone,* 813 F.3d 494, 503–04 (4th Cir. 2016); *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1158–59 (N.D. Ala. 2020). If a state provides voters choices as to how to cast a ballot, then under the ADA, the different options must each be accessible to voters with disabilities. *See People First of Ala.*, 491 F. Supp. 3d at 1158.

The Secretary maintains that Plaintiffs have inferred, without a factual basis, that the Drop Box Restrictions will cause many drop boxes to be moved indoors and made less accessible. Mem. at 38. But Plaintiffs' pleading follows directly from the statute. SB 90 requires that secure drop boxes "must be monitored in person by an employee of the supervisor's office." This new requirement necessarily increases the staffing requirement for remote drop boxes. It is thus reasonable to infer that many drop boxes will be moved indoors to Supervisors' offices where they can be more easily and cheaply monitored. Fla. Stat. § 101.69.

Moreover, with regard to the effect of the provision on voters with disabilities, Plaintiffs have adequately pleaded that "these restrictions will . . . impact the availability of 'drive through' drop boxes, which permit voters, including voters with disabilities, to drop off their ballot without leaving their cars." FAC ¶ 79. They also pleaded that "[v]oters with disabilities who have limited mobility are more likely to rely on drop boxes that are placed outdoors and are easily accessible." *Id.* ¶ 159. In her Motion to Dismiss, the Secretary improperly asks Plaintiffs to prove—rather than plead—their claim at this stage.

Though the Court need not reach this issue, the Secretary's challenges to the Volunteer Assistance Ban are also without merit. Mem. at 39–40. First, the Secretary claims that the Volunteer Assistance Ban does not impair "the ability of 'elderly voters and voters with disabilities who live in group facilities' to deliver their absentee ballots," because SB 90 includes a carve-out permitting supervised voting at assisted living and nursing home facilities pursuant to Fla. Stat. § 101.655. Although the statute permits supervised voting in certain assisted living and nursing home facilities, it does not mandate it, and many voters living in assisted living and nursing home facilities do not have access to this option.[8] Moreover, supervised voting is never available in a host of settings that are not covered by the statute, including group homes, short-term residential facilities, and hospitals. *See* Fla. Stat. § 101.655. Plaintiffs have sufficiently pleaded that the Volunteer Assistance Ban will disenfranchise "voters with disabilities who live in group facilities in which staff collect and return VBM ballots on behalf of residents." FAC ¶ 92.

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[8] The Supervisors are only required to provide supervised voting in facilities that are sufficiently large (with more than five residents) and where the administrator of the facility submits a written request at least 21 days before the election. *See* Fla. Stat. § 101.655(1).

Second, while SB 90 permits ballot return by immediate family members and up to two non-family members, the Secretary's position that these options are sufficient—as a matter of law at the pleading stage—ignores the reality that many voters rely on ballot collection and delivery by volunteers, a process that will now be effectively banned. And this is precisely what Plaintiffs have alleged. *See* FAC ¶ 87.

Third, the ability of voters with disabilities to vote by mail is insufficient to justify dismissal of Plaintiffs' ADA claim as a matter of law. The test is whether a particular mode of voter access is impaired, not whether other voting options exist. *See Nat'l Fed'n of the Blind,* 813 F.3d at 503–04; *People First of Ala.*, 491 F. Supp. 3d 1158–59.

Fourth, even if it were proper to consider the availability of voting by mail, that is not a reasonable option for voters who (for example) receive their ballots too late to make effective use of VBM. Nor is it a reasonable option for voters who (for example) simply want to wait closer to the election to weigh their choices. And many voters with disabilities are likely to have difficulty returning their ballot on their own and without assistance from a third party. *See* FAC ¶ 92.

VI. The Secretary's Arguments Against Plaintiffs' Section 208 Claims Are Baseless.

Section 208 of the VRA provides that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508. Count IX of the FAC specifically alleges that the Voting Line Relief Restrictions and the Volunteer Assistance Ban violate Section 208. FAC ¶¶ 222–25. The Secretary's Motion to Dismiss Count IX fails both procedurally and substantively.

The Secretary argues that Plaintiffs lack standing to assert their VRA Section 208 claim against her office. *See* Mem. at 43–44. But this is a moot point: because Plaintiffs' Section 208 claim does not concern drop boxes, Plaintiffs have only raised Section 208 claims (Count IX) against the Supervisors, not the Secretary. As a non-party to the Section 208 claim, the Secretary lacks standing to seek dismissal of Plaintiffs' Section 208 claim.

Even if the Court considers the Secretary's arguments regarding Plaintiffs' Section 208 claim, those arguments would fail on the merits.

A. There is a Private Right of Action to Enforce Section 208.

The Secretary contends that there is no private right of action to enforce Section 208. This argument fails for two reasons.

First, as a matter of statutory construction, 52 U.S.C. § 10302(a) states that "the Attorney General *or an aggrieved person*" may institute a proceeding "under *any* statute to enforce the voting guarantees of" the Fourteenth or Fifteenth amendments (emphasis added). Since Section 208 "is, by its terms, a statute designed for enforcement of the guarantees of the Fourteenth and Fifteenth Amendments, Congress must have intended it to provide private remedies." *See Morse v. Republican Party of Va.*, 517 U.S. 186, 233 (1996) (citation omitted); *Ark. United v. Thurston*, No. 5:20-cv-5193, 2021 WL 411141, at *7 (W.D. Ark. Feb. 5, 2021) (holding that Section 10302 "explicitly creates a private right of action to enforce the VRA").

Second, the Supreme Court has clearly recognized Congress's intent to create private rights of action to enforce similar provisions of the VRA. *See Morse*, 517 U.S. at 232 ("It would be anomalous, to say the least, to hold that both § 2 and § 5 are enforceable by private action but § 10 is not, when all lack the same express authorizing language."). Accordingly, numerous courts have entertained private suits to enforce Section 208. *See, e.g.*, *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017); *Priorities USA v.*

Nessel, 462 F. Supp. 3d 792, 816 (E.D. Mich. 2020); *Nick v. Bethel*, No. 3:07-cv-98, 2008 WL 11456134, at *5 (D. Alaska July 30, 2008).

B. Plaintiffs Have Adequately Pleaded a Conflict Preemption Claim Under Section 208 of the VRA.

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

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

Absent a clarifying or narrowing construction, the Voting Line Relief Restriction prevents voters with disabilities from receiving assistance to

remain in line to vote. For some voters with disabilities, the Volunteer Assistance Ban will restrict their choice of a friend, non-immediate family member, or nonpartisan volunteer to assist them with returning their ballot. Because these restrictions limit who a voter may choose to assist them, they conflict with Section 208 and Plaintiffs have adequately pleaded conflict preemption. *See OCA-Greater Houston*, 867 F.3d at 614 ("Section 208 guarantees to voters the right to choose any person they want, subject only to employment-related limitations, to assist them throughout the voting process[.]"); *Priorities USA*, 462 F. Supp. 3d at 816 (finding a conflict where "[the regulation] does not permit a voter to request just anyone to assist them," in contrast to Section 208, which "provides that a voter may be given assistance by anyone of that voter's choice.").

VII. Plaintiffs Have Adequately Pleaded That Section 29's Voting Line Relief Restrictions Violate The First Amendment.

A. Section 29 Is Unconstitutionally Vague.

The Voting Line Relief Restrictions—Section 29 of SB 90, amending Fla. Stat. § 102.031—are impermissibly vague because they fail to provide adequate notice of what constitutes prohibited conduct. *Wollschlaeger v. Governor*, 848 F.3d 1293, 1319 (11th Cir. 2017). Section 29 expands the definition of "solicitation" and "soliciting" to include "engaging in any

activity with the intent to influence or effect of influencing a voter." This expands the scope of the Florida statute that makes it a criminal offense to "solicit voters inside the polling place or within 150 feet of a drop box or the entrance to any polling place." Fla. Stat. § 102.031(4).

The Secretary offers a narrowing construction of Section 29. But this litigation position is not clearly supported by the text and, in any case, cannot save Section 29 from being impermissibly vague. Moreover, any narrowing construction adopted to save Section 29 from unconstitutionality must be judicially enforceable, and formally adopted by this Court in a written order. *See infra* section VII.B.2.

As an initial matter, Secretary Lee's suggestion that the section "is unambiguous in what it prohibits," Mem. at 25, is simply wrong. Neither the text of Section 29, nor SB 90's sponsors, ever explained what "activities" within the 150-foot zone would be considered to have the "effect of influencing a voter." FAC ¶ 102. The prohibition on "engaging in any activity with the . . . intent to effect of influencing a voter" offers no guidance on what offers of relief to a voter (*e.g.*, food, water, chairs, or verbal encouragement urging a voter to continue to wait his or her turn) are permissible or impermissible. Because the restriction fails to provide "reasonably clear

lines" regarding what conduct is prohibited, it is impermissibly vague. *Smith v. Goguen*, 415 U.S. 566, 574 (1974); *Sessions v. Dimaya,* 138 S. Ct. 1204, 1212 (2018). This is particularly true here because the vagueness (and the threat of criminal liability that it imposes) discourages and "chills" free speech. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("If . . . the law interferes with the right of free speech or of association, a more stringent vagueness test should apply"); *Hynes v. Mayor & Council of Borough of Oradell*, 425 U.S. 610, 620 (1976) (vagueness test "applies with particular force in review of laws dealing with speech.").

Faced with this defect, Secretary Lee offers a narrowing construction not supported by the statute's plain meaning. She suggests that the existence of the statutory "supervisor exception"[9] merely "confirms the exact kinds of activities the statute permits" and "that the legislature was primarily concerned with restricting partisan activities." Mem. at 28–29. Reading

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[9] Section 29's "supervisor exception" allows employees of the Supervisors or volunteers with Supervisors to provide "nonpartisan assistance to voters," such as "giving items to voters," in the no-solicitation zone. This does not aid the Secretary's argument. FAC ¶ 102; Fla. Stat. § 102.031(4)(b). This supervisor exception, by its plain language, does not cover the Plaintiffs or other third parties. Moreover, just like the "any activity phrase," the phrase "giving items to voters" lacks clearly defined limits.

Section 29 in the cramped way advanced by Secretary Lee would essentially render the "supervisor exception" nugatory, violating the "cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute," *Nat'l Labor Relations Bd. v. SW Gen.*, 137 S. Ct. 929, 941 (2017) (quoting *Williams v. Taylor,* 529 U.S. 362, 404 (2000)).

Notwithstanding the Secretary's arguments, Plaintiffs would accept a limiting construction of Section 29 ordered by this Court that makes clear that the provision of nonpartisan assistance to voters waiting in line is allowed and saves Section 29 from its present vagueness.

B. Section 29 Is Impermissibly Overbroad.

1. Section 29 Prohibits and Chills Significant Protected Speech Activities.

As described above, Section 29 sweeps up a wide range of protected speech. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244–51, 253–55. Secretary Lee's arguments to the contrary, Mem. at 29, are incorrect. In *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, the Eleventh Circuit held that a nonpartisan organization's provision of food in a public forum was constitutionally protected because it was expressive conduct. 901 F.3d 1235, 1243 (11th Cir. 2018). By sharing food in a public forum, the *Food Not Bombs* group expressed their views that food is a human right, that all

persons are equal, and that an end to hunger and poverty is possible. *Id.* at 1240–43. Plaintiff Florida NAACP's provision of food, water, chairs, and nonpartisan words of encouragement to voters waiting in line is similarly expressive: it affirms the dignity of each vote and voter, and conveys the message that each citizen's vote matters and is worthy of being counted. FAC ¶¶ 169-72; *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995) (noting that a "narrow, succinctly articulable message is not a condition of constitutional protection.").

Secretary Lee incorrectly assumes that Plaintiffs' First Amendment rights depend upon voters having "a constitutional right to receive food, water, chairs, etc. . . . while waiting in a public line to vote." Mem. at 32. Not so. Plaintiffs' rights to engage in this nonpartisan provision of basic needs to voters waiting in line are based on the giver's *intent* to engage in expressive conduct, and the import of these expressions which constitute "core First Amendment activity." *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1158 (N.D. Fla. 2012).

The Secretary's reliance on the nonpublic-forum standard, Mem. at 31, is misplaced given that Section 29 prohibits protected speech "within 150 feet of a drop box or the entrance to any polling place." This prohibition

clearly encompasses speech on public streets, sidewalks, and other traditional public forums. *See Burson v. Freeman,* 504 U.S. 191, 196–98 (1992). Section 29 cannot pass constitutional muster under the public-forum standard because it sweeps up too much protected speech to be considered a reasonable time, place, and manner restriction. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 66 (1983).

2. The Court Should Adopt a Limiting Construction of Section 29.

Where a statute is found to be overbroad, the Court next must consider whether the unconstitutional portion is severable from the remainder; if so, only that portion "is to be invalidated." *United States v. Miselis*, 972 F.3d 518, 531 (4th Cir. 2020) (quoting *New York v. Ferber,* 458 U.S. 747, 769 n.24 (1982)). Plaintiffs respectfully request that the Court adopt a limiting construction by striking the overbroad sections of Section 29, namely, the "any activity" phrase and supervisor exception, such that Section 29 unambiguously allows for all third parties to provide all forms of nonpartisan assistance to voters waiting in line. The Court should order a limiting construction here so that Plaintiffs have clear notice as to what conduct is prohibited. *Dimaya*, 138 S. Ct. at 1212.

CONCLUSION

For the foregoing reasons, the Court should deny Secretary Lee's Motion to Dismiss.

Dated: July 16, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE AND CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMITATION

I certify that a true and correct copy of the foregoing was served to all counsel of record through the Court's CM/ECF system on July 16, 2021. I further certify that the foregoing document contains 9,989 words, excluding the case caption, table of authorities, table of contents, signature blocks, and these certifications. This is within the 10,000-word limit authorized by the Court's order (ECF No. 107).

s/ Benjamin L. Cavataro
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