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

THE DREAM DEFENDERS, THE BLACK COLLECTIVE, *et al.*, Plaintiffs, v. RON DESANTIS, *et al.*, Defendants.	Case No.: 4:21-cv-191-MW-MAF

PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

INTRODUCTION

Plaintiffs, The Dream Defenders ("Dream Defenders"); The Black Collective, Inc.; Chainless Change, Inc.; Black Lives Matter Alliance Broward ("BLMA Broward"); the Florida State Conference of the NAACP Branches and Youth Units ("NAACP-FL"); and Northside Coalition of Jacksonville, Inc. ("Northside") (collectively, "Plaintiffs"), all Black-led organizations who organize and participate in racial justice protests in Florida, filed a Complaint on May 11, 2021, alleging the Combating Public Disorder Act (the "Act" or "HB1") violates the First and Fourteenth Amendments of the United States Constitution. Each Defendant filed a motion to dismiss Plaintiffs' Complaint. *See* ECF Nos. 38–39, 48–50. As set forth below, none of Defendants' arguments warrant dismissing Plaintiffs' claims.

First, Plaintiffs have adequately pleaded both organizational and associational standing, and have sued the proper Defendants. *Second*, Plaintiffs have more than plausibly pleaded HB1 (a) was passed with the impermissible intent of targeting Black-led protests and protestors who demonstrate for racial justice and (b) is both overly broad and vague, in violation of the First and Fourteenth Amendments.

BACKGROUND

HB1 criminalizes protest activity, removes bail provisions for those arrested at protests, provides a civil defense to people who injure protestors with their vehicles, and allows the State to override any local decision to *decrease* police funding. It is no accident these provisions are all part of a single law. As Florida lawmakers—and most vocally Governor DeSantis—made clear, the law as a whole was a direct response to the racial-justice protests that occurred in Florida and throughout the country in the summer of 2020. Separately and in conjunction, the law's components chill protest activity, devalue protestor safety, and create additional roadblocks with respect to one of the most publicized of protestors' goals: the reallocation of police funding.

In response to widespread protests opposing police violence during the summer of 2020, then-President Donald Trump called on governors across the country to silence racial justice protests. Urging officials to "dominate" the streets

and to place protestors in jail "for a long time,"[1] the President's call to action did not include a call to root out the kind of policing that led to George Floyd's murder but focused instead on quelling protest about these issues.[2] Governor DeSantis and the Florida Legislature answered this call by passing HB1, with the goal of stifling protest against police violence and thwarting calls for a reimagining of public safety and reallocation of police budgets. Only a few months after the then-President's call to action, in September 2020, Governor DeSantis announced the "Combatting Violence, Disorder and Looting and Law Enforcement Protection Act"—the legislative proposal that ultimately led to HB1.

Governor DeSantis' announcement included allusions to incidents that had occurred at racial justice protests outside of Florida and received significant media attention over the summer. Echoing then-President Trump's call for "domination," Governor DeSantis threatened any protestor participating in conduct proscribed by his proposed legislation would have "a ton of bricks rain down on [them]."[3]

The purpose of HB1 is to punish protestors who call for racial justice—specifically, Black organizers and organizations—and to protect police budgets and "law and order" ideology at the expense of Plaintiffs' First and Fourteenth

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[1] Alana Wise, *Trump Calls Governors Weak, Urging Them To 'Dominate' To Quell Violence*, NPR (June 1, 2020), https://www.npr.org/2020/06/01/867063007/trump-calls-governors-weak-and-urges-them-to-dominate-violent-protesters.
[2] *Id*.
[3] ECF No. 1 (Compl.) ¶ 1.

Amendment rights. The law has already accomplished those goals. As pleaded, HB1's overbroad and vague protest-related offenses and heightened penalties for existing offenses serve the governor and legislature's intent: silencing Black people and their allies who protest racial injustice. Plaintiffs have also adequately pleaded the Act was designed to quash antiracist advocacy and advance a "law and order" viewpoint. Such viewpoint favoritism by government officials is anathema to the Constitution. And, as Plaintiffs have pleaded, the law also violates the Equal Protection Clause of the Fourteenth Amendment because it targets Black organizers and organizations. As detailed throughout Plaintiffs' Complaint, the text, legislative history, timing, and public statements about HB1 made by Florida officials all make clear that it was racially motivated.

As set forth below, Plaintiffs have adequately pleaded standing, named the proper Defendants, and pleaded plausible First and Fourteenth Amendment claims. Therefore, Defendants' motions to dismiss should be denied in their entirety.

ARGUMENT

I. Plaintiffs Have Standing

Defendants argue that Plaintiffs do not have standing because they have failed to allege injury in fact and because the Plaintiffs have sued the wrong Defendants. Defendants are wrong on both counts.

Article III standing requires that Plaintiffs demonstrate (1) an "injury in fact," (2) fairly traceable to the defendant's challenged action, (3) that is "likely" to be "redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). At the pleading stage, Plaintiffs need only "'clearly . . . allege facts demonstrating' each element." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). And in a multi-plaintiff case, one plaintiff's standing as to each claim is sufficient. *See ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1195 (11th Cir. 2009). Plaintiffs adequately pleaded each element of standing.

A. Plaintiffs Have Alleged Injury in Fact

Contrary to Defendants' argument that Plaintiffs have not alleged an injury in fact that would entitle them to federal-court jurisdiction, Plaintiffs have pleaded injuries sufficient for both organizational and associational standing, either of which satisfies Article III.

i. Organizational Standing

At the pleading stage, plaintiffs need only "generally allege a redressable injury" caused by the challenged action. *Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration All.*, 304 F.3d 1076, 1081 (11th Cir. 2002). "[A]n organization has standing to challenge conduct that impedes its ability to attract members, to raise revenues, or to fulfill its purposes." *Namphy v. DeSantis*, 493 F. Supp. 3d 1130, 1138 (N.D. Fla. 2020) (Walker, C.J.) (quoting *Fla. Democratic Party*

v. Hood, 342 F. Supp. 2d 1073, 1079 (N.D. Fla. 2004)); *see also Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1342 (11th Cir. 2014) (redirection of resources to counteract governmental acts is a "concrete and demonstrable injury"). The Complaint alleges HB1 has frustrated the Plaintiffs' organizational missions and has forced them to divert resources away from other activities to respond to HB1.

Organizing and participating in demonstrations in support of racial justice is core to the missions of Plaintiffs Dream Defenders, The Black Collective, BLMA Broward, Northside, and Chainless Change. *See* ECF No. 1 ¶¶ 10–11, 15, 18, 24, 32. HB1 has impeded these efforts and has required Plaintiffs to cancel or delay protests and demonstrations indefinitely. *See id*. ¶¶ 12, 19–20, 25. Plaintiff Chainless Change, in particular, was forced to dramatically rethink its advocacy and was "forced to expend funds on hiring a consulting company to transition from direct action to other communication tools." *Id*. ¶¶ 20–21.

HB1 has also affected the way Plaintiffs communicate with members. Plaintiffs Dream Defenders, Chainless Change, and BLMA Broward rely heavily on social media to spread their messages, including encouraging members to communicate with elected officials. *See id*. ¶¶ 11, 13, 22, 27. Because of fear that providing elected officials' contact information might violate HB1's Section 14, Chainless Change and BLMA Broward have ceased this means of communication and "must now seek alternative means" to convey the information. *Id*. ¶¶ 22, 27.

Dream Defenders has expended additional resources to ensure that they steer widely clear of Section 14, expending "additional time and effort to review electronic communications." *Id.* ¶ 13.

Moreover, each Plaintiff has diverted resources away from core activities to study HB1, to anticipate how the Act will affect its mission and members, and to adapt its advocacy accordingly. *See id.* ¶¶ 13, 16, 21, 26, 30, 35.

By alleging that they have diverted resources away from their other programs and services, Plaintiffs have met their burden of pleading organizational standing.

ii. Associational Standing

In addition to adequately pleading organizational standing, Plaintiffs have also sufficiently pleaded associational standing.

An organization may sue "on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). Defendants argue only that Plaintiffs' members do not have standing in their own right because they lack injury in fact.

Plaintiffs have alleged that their organizations and their members have refrained from expressive conduct to avoid potential arrest, prosecution, and harsh

penalties under HB1.[4] Plaintiffs' self-censorship is borne out of a credible fear of prosecution. That is enough to establish injury. *See ACLU v. Fla. Bar*, 999 F.2d 1486, 1492 (11th Cir. 1993) (refraining from expressive activity to avoid potential enforcement of challenged act constitutes injury in fact); *see also Hallandale Pro. Fire Fighters Loc. 2238 v. City of Hallandale*, 922 F.2d 756, 760 (11th Cir. 1991) ("The injury requirement is most loosely applied . . . where [F]irst [A]mendment rights are involved, because of the fear that free speech will be chilled even before the law, regulation, or policy is enforced.").

Plaintiffs Dream Defenders, Chainless Change, and BLMA Broward have canceled scheduled protests and demonstrations and refrained from expression on social media for fear of HB1's enforcement. *See* ECF No. 1 ¶¶ 12, 19–20, 22, 25, 27. Members of Northside have "expressed that they will not be able to participate in future nonviolent demonstrations due to their fear of unlawful arrest" and are "afraid to speak out on social media regarding racial and economic justice." *Id.* ¶¶ 33–34.

Plaintiffs' decisions to refrain from activities in which they would normally

[4] Defendants' assertion that Plaintiffs have alleged only speculative harm mistakes the nature of Plaintiffs' injury. Plaintiffs have not asked the Court to speculate regarding the "actions of independent third parties." ECF No. 38 (Moody Br.) at 13. Plaintiffs have alleged that their organizations' and their members' speech has been chilled by a reasonable fear of enforcement of HB1. Here, "the injury is self-censorship." *Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1428 (11th Cir. 1998).

participate arises from an objectively reasonable fear that Plaintiffs' and their members' intended conduct could subject them to arrest and significant jail time under HB1.

Plaintiffs' fear is reasonable because their usual expressive conduct is arguably prohibited by HB1. The "law sweeps broadly" and "covers the subject matter of petitioners' intended speech." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 162 (2014). For instance, Section 15, which is HB1's cornerstone, expands the definition of "riot" and "inciting a riot" and creates the new crimes of "aggravated rioting," "inciting a riot," and "aggravated inciting a riot." Fla. Stat. § 870.01. Section 15's overbroad definition of these crimes has reasonably made would-be protesters fearful that they could be caught up in a disturbance and unlawfully arrested for their mere presence at a demonstration in which others engage in violence. *See infra* § V.B. As another example, Section 2, which prohibits willful obstruction of traffic and, on its face, prohibits standing in the street even temporarily, has similarly discouraged Plaintiffs from assembling to protest. ECF No. 1 ¶¶ 170–71; Fla. Stat. § 316.2045.

Plaintiffs have also refrained from certain forms of social media advocacy because the language of Section 14, which prohibits the release of "personal identification information," is overbroad and vague enough that Plaintiffs fear they

could be prosecuted for distributing information about elected officials. *See* ECF No. 1 ¶¶ 11, 13, 22, 27; Fla. Stat. § 836.115.

The overbreadth and vagueness of the law, *see infra* §§ V.B–C, means the activities of Plaintiffs and their members arguably fall within HB1's prohibitions. Plaintiffs therefore have a legally cognizable basis for a reasonable fear of prosecution, and there is no need to wait for the law to be enforced in order to challenge it. *Wilson*, 132 F.3d at 1428 (in First Amendment context, "plaintiffs do not have to expose themselves to enforcement in order to challenge a law" because self-censorship is actual injury); *Harrell v. Fla. Bar*, 608 F.3d 1241, 1254 (11th Cir. 2010) (self-censorship is injury).

B. Plaintiffs Satisfy Traceability and Redressability

The Attorney General and Governor argue they are not proper defendants in this action because Plaintiffs' harms are not traceable to them nor redressable by them.[5] Not so. The Plaintiffs have alleged they have suffered injury in the form of self-censorship driven by their fear that HB1 will be enforced against them. The Attorney General and the Governor each enjoy enforcement authority under HB1—the potential exercise of that authority is the impetus for Plaintiffs' self-censorship.

[5] Sheriff McNeil also argues that he has not undertaken any "'unlawful conduct' that has caused Plaintiffs or any of their members redressible harm." ECF No. 50 (McNeil Br.) at 3. Plaintiffs will address that argument *infra* Part IV.

They have thereby sufficiently caused the Plaintiffs' injury, and enjoining enforcement of HB1 will redress that injury.

The traceability and redressability prongs of standing require that Plaintiffs show a causal connection between their injury and the Defendants' challenged actions, as well as a likelihood that a favorable judgment will redress the injury. *See Lewis v. Governor of Ala.*, 944 F.3d 1287, 1296 (11th Cir. 2019).

"When a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision." *Dig. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957-58 (8th Cir. 2015); *see also Lewis*, 944 F.3d at 1299 (relying on *Dig. Recognition Network*); *and see Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1257 (11th Cir. 2020) (same). Traceability and redressability exist when the defendant has enforcement authority and when enjoining the act will redress the plaintiff's harm. *See Georgia Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1260 & n.5 (11th Cir. 2012) (where Governor had "sufficient, albeit indirect" enforcement authority and plaintiffs' injuries would be redressed by enjoining challenged law, causation and redressability were satisfied in pre-enforcement challenge).

The Attorney General and the Governor each have authority to enforce HB1 and thus Plaintiffs' self-censorship, borne out of their fear of this very enforcement,

is traceable to them. Enjoining enforcement of the Act will redress Plaintiffs' harm. The traceability and redressability prongs of standing are thus met.

i. Attorney General Moody

This Court recently held the Attorney General's authority to superintend and direct the state attorneys was sufficient to render her a proper defendant for standing purposes in a suit challenging Florida's Amendment 13, which banned dog racing and directed the legislature to enact civil and criminal penalties to enforce the amendment. *Support Working Animals, Inc. v. DeSantis*, 457 F. Supp. 3d 1193, 1205 (N.D. Fla. 2020) (Walker, C.J.) (Attorney General's enforcement authority is sufficient for standing); *id*. at 1212–13 (cataloging Attorney General's enforcement authority). *Support Working Animals* is directly on point.

The decision was based on an extensive survey of the Attorney General's authority and the conclusion that she "wields broad statutory and common law authority to enforce Florida law, including the authority to police compliance with Amendment 13 and to enforce the forthcoming civil or criminal penalties." *Id*. at 1212. Indeed, the Attorney General is the State's chief legal officer with broad constitutional and statutory power, as well as residual common law powers. *See Thompson v. Wainwright*, 714 F.2d 1495, 1500 (11th Cir. 1983) (grant of specific powers to Attorney General does not deprive her of common law powers, including "prosecuting 'all actions necessary for the protection and defense of the property and

revenue of the state'" (citation omitted)); *see also United States v. Domme*, 753 F.2d 950, 957 (11th Cir. 1985) (Attorney General is Florida's "principal prosecuting attorney"). In addition to her power of "general superintendence and direction over the several state attorneys," Fla. Stat. § 16.08, the Attorney General is also responsible for representing the State in criminal appeals, including from any conviction under HB1's criminal provisions, *see Barnes v. State*, 743 So. 2d 1105, 1112 (Fla. 4th DCA 1999) ("Section 16.01 unambiguously authorizes only the Attorney General to represent the state in the appellate courts of this state.").

Here, like in *Support Working Animals*, 457 F. Supp. 3d at 1211, the Attorney General argues that traceability and redressability are lacking because the state attorneys are primarily responsible for enforcing the penalties enacted by HB1. And here, like in *Support Working Animals*, the Attorney General "could 'superintend and direct' the state attorneys to bring prosecutions" under HB1's penalties; "she could independently institute such prosecutions; and she could intervene in the trial of the case or on appeal." *Id*. at 1213 (citations omitted); *accord Teltech Sys., Inc. v. McCollum*, No. 08-61664-CIV, 2009 WL 10668266, at *2 (S.D. Fla. June 30, 2009) (holding Florida Attorney General, "as an officer charged with enforcing state statutes, is a proper defendant in a suit challenging the constitutionality of a state

criminal statute"). [6]

Finding the Attorney General to be a proper defendant under Article III is consistent with the Middle District of Alabama's conclusion that Alabama's Attorney General is a proper defendant under a standing analysis in a pre-enforcement challenge to a criminal statute because of the Attorney General's "statutory authority to 'superintend and direct' criminal prosecutions statewide and the responsibility to instruct the DAs." *Reproductive Health Servs. v. Strange*, 204 F. Supp. 3d 1300, 1318 (M.D. Ala. 2016).

This Court's decision in *Support Working Animals* and the additional precedent discussed above is not abrogated by the recent decision in *Jacobson*, 974 F.3d 1236. There, the Eleventh Circuit concluded the Secretary of State was not a proper defendant for purposes of standing in a challenge to a state statute governing the order in which candidates appear on the ballot. The court reasoned that the plaintiffs' injury could not be traced to the Secretary of State, and was not redressable by her, because Florida law explicitly tasks the Supervisors of Elections to print the names of candidates on the ballots in the order prescribed by law. The

[6] The Attorney General argues that state attorneys have "complete discretion" over decisions to charge and prosecute, citing *Valdes v. State*, 728 So. 2d 736, 738 (Fla. 1999). *Valdes* had nothing to do with the Attorney General's superintendence and nowhere mentions the relationship between the Attorney General and state attorneys. If the Attorney General is conceding that she has no authority whatsoever to enforce HB1, Plaintiffs require a judicially-enforceable determination to that effect in order to be protected from future harm by the Attorney General.

Secretary of State had no role in the process and, crucially, lacked authority over the Supervisors of Elections. *Id*. at 1253. Indeed, the Secretary of State's only means of coercion over the Supervisors was the judicial process. *Id*.; *accord Claire v. Fla. Dep't of Mgmt. Servs.*, 504 F. Supp. 3d 1328, 1331–33 (N.D. Fla. Dec. 3, 2020) (Walker, C.J.) (agencies not proper defendants where state law vests sole responsibility for determination at issue in another, independent entity). The Attorney General, who has statutory, constitutional, and residual coercive authority over the state attorneys, is not similarly situated to the Secretary of State in *Jacobson*.

ii. Governor DeSantis

The Governor also has sufficient enforcement authority to satisfy traceability and redressability based on his "power to call out the militia to preserve the public peace, execute the laws of the state, suppress insurrection, or repel invasion." Fla. Const. art. IV, § 1(d); *see also* Fla. Stat. § 250.06 (Governor may mobilize Florida National Guard and "order into state active duty all or any part of the militia").

The Governor is specifically authorized to mobilize the militia in response to "a riot," "a mob," or to respond to "unlawful assembly," all of which are implicated by HB1. *See* Fla. Stat. § 250.28; *e.g.*, *id*. §§ 784.0495, 870.01–.02 (HB1 Sections 8, 15–16). In May and June 2020, the Governor exercised this authority to police the very type of racial justice protest that Plaintiffs routinely participate in or organize and that HB1 was meant to target. He called on 700 National Guard troops and

mobilized 1,300 Florida Highway Patrol officers to respond to protests in Miramar, Camp Blanding, and Tampa. *See* ECF No. 1 ¶ 37 & n.2. The Governor thus has the type of enforcement authority that Plaintiffs fear and that drives their self-censorship.

II. Plaintiffs' Claims Are Ripe

Contrary to Defendants' arguments, Plaintiffs' claims are ripe. Ripeness tests the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Lab'y v. Gardner*, 387 U.S. 136, 149 (1967). In First Amendment cases, the ripeness test is "less exacting." *Fla. Right to Life, Inc. v. Lamar*, 273 F.3d 1318, 1323 (11th Cir. 2001). And because Plaintiffs bring a pre-enforcement challenge to HB1, the standing and ripeness inquiries converge. *See Elend v. Basham*, 471 F.3d 1199, 1205 (11th Cir. 2006).

Plaintiffs have alleged they have diverted resources and have been forced to cancel or otherwise change planned protests due to HB1's perceived reach. *See supra* § I.A. The action is therefore ripe. *Virginia v. Am. Booksellers Assoc., Inc.*, 484 U.S. 383, 393 (1988); *Harrell*, 608 F.3d at 1258 (void-for-vagueness claim ripe because the very censorial power of a vague statute is unacceptable).

Defendants suggest this Court should abstain until state courts have been granted an opportunity to weigh in on HB1's scope. That is inconsistent with First Amendment precedent. "[T]o force the plaintiff who has commenced a federal action

to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." *Zwickler v. Koota*, 389 U.S. 241, 252 (1967); *see also Int'l Soc. for Krishna Consciousness v. Eaves*, 601 F.2d 809, 822 (5th Cir. 1979) (finding a First Amendment challenge ripe and noting the harm to plaintiffs of withholding decision to allow state courts to weigh in).

III. The Attorney General and Governor Are Not Immune from Suit

The Attorney General and the Governor argue that they enjoy Eleventh Amendment immunity to this suit. But their enforcement authority under HB1 brings them within the *Ex parte Young* exception to sovereign immunity.

Ex parte Young provides an exception to the Eleventh Amendment bar on suit against states in federal court. Under the doctrine, "[a] state official is subject to suit in his official capacity when his office imbues him with the responsibility to enforce the law" at issue. *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011). So long as the official in question has "some connection" with the unconstitutional act, whether that connection "arises out of the general law, or is specially created by the act itself," the *Ex parte Young* exception to sovereign immunity applies. *Ex parte Young*, 209 U.S. 123, 157 (1908).

As the Attorney General acknowledges, the *Ex parte Young* inquiry and the traceability/redressability standing inquiry are similar, though standing requires a more rigorous analysis. *See* ECF No. 38 at 14 (citing *Jacobson*, 974 F.3d at 1256);

see also Support Working Animals 457 F. Supp. 3d at 1210 (explaining the inquiries "overlap significantly"). Thus, because the Attorney General and the Governor have significant enforcement authority to meet traceability and redressability, *see supra* § I.B, they also have sufficient enforcement authority to fall within the *Ex parte Young* exception.

A. Attorney General Moody

As to the Attorney General, *Support Working Animals* once again controls. In that case, in addition to satisfying the traceability and redressability prongs of standing, the Attorney General's law enforcement authority also placed her squarely within the *Ex parte Young* exception to sovereign immunity. *See Support Working Animals*, 457 F. Supp. 3d at 1212–13.

And once again, that decision accords with precedent concerning the Governor of Georgia, who has similar law enforcement authority to the Florida Attorney General. The Eleventh Circuit has held that the Governor of Georgia's responsibility for law enforcement, his residual power to commence criminal prosecutions, and his authority to direct the Attorney General to do so, made him a proper defendant under *Ex parte Young* in a suit challenging deficiencies in the provision of indigent legal services, *Luckey v. Harris*, 860 F.2d 1012, 1015–16 (11th Cir. 1988) and in a suit challenging criminal regulation of firearms,

GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1254 & n.18 (11th Cir. 2012) (relying largely on analysis from *Luckey*).

Recognizing the Attorney General as a proper defendant is also consistent with precedent holding that the Attorney General's superintendence *shields* state attorneys from suit under the Eleventh Amendment. *See Atterbury v. City of Miami Police Dep't*, No. 07-21507-CIV, 2007 WL 9734570, at *2 (S.D. Fla. Nov. 15, 2007). The Attorney General's superintendence cannot serve as a one-way ratchet to protect state officials from suit.

B. Governor DeSantis

As with the traceability and redressability analysis, the Governor's authority to mobilize the militia to enforce HB1 satisfies the requirement that he have "some connection" with enforcement of the challenged law.

That the Governor's authority to mobilize the militia is discretionary does not undermine this analysis, because the court does not impermissibly impede the exercise of discretionary authority when it enjoins an officer "from doing an act which he had no legal right to do." *Ex parte Young*, 209 U.S. at 159.

IV. Sheriffs Are Agents of the State for Purposes of Enforcing State Law

Sheriffs Tony, McNeil, and Williams argue that because the Complaint does not allege that the Sheriffs have enforced HB1 or otherwise promulgated a policy to enforce the law, they are not subject to suit under *Monell v. Dep't of Soc. Servs.*, 436

U.S. 658 (1978), and Plaintiffs lack standing. But the Sheriffs are agents of the state when enforcing state law and thus fall outside the *Monell* doctrine. And because this is a pre-enforcement challenge, their authority to enforce the law satisfies Article III. That is true even of Sheriff Tony and even in light of the Broward County Department of Law Enforcement's statements regarding enforcement.

In *McMillian v. Monroe Cnty.*, 520 U.S. 781 (1997), the Supreme Court addressed whether a county could be held liable for the acts of the local sheriff pursuant to the sheriff's exercise of law enforcement duties. The Court acknowledged the lesson of *Monell* that municipalities can only be held liable for their own policies that cause constitutional torts. It then engaged in extended analysis of state law as it bore on the sheriff's authority and held that the Alabama sheriff at issue represented the State, not the county, when he acted in a law enforcement capacity. *Id*. at 793; *see also Grech v. Clayton Cnty., Ga*., 335 F.3d 1326, 1327 (11th Cir. 2003) (*Monell* does not apply to conduct of Georgia sheriffs when acting pursuant to law enforcement function).

In light of *McMillian*, the Eleventh Circuit reconsidered its precedent holding that Florida sheriffs are not state agents in any context and recognized that the "determination must be made on a function-by-function basis." *Abusaid v. Hillsborough Cnty Bd. of Cnty. Commrs.*, 405 F.3d 1298, 1304 (11th Cir. 2005); *see*

id. at 1305 (holding Florida sheriffs are not state agents when enforcing *county* ordinances).

Since *McMillian* and *Abusaid*, Florida district courts have held that Florida sheriffs are state agents when serving in their capacity as enforcers of state laws. *See, e.g.*, *Troupe v. Sarasota Cnty.*, No. 8:02-cv-53-T-24MAP, 2004 WL 5572030, at *12 (M.D. Fla. Jan. 22, 2004) ("[S]heriff's [sic] in Florida act as agents for the state in enforcing the laws of the state."), *aff'd*, 419 F.3d 1160 (11th Cir. 2005); *see also Washington v. Washington*, No. 4:15CV114-RH/CAS, 2015 WL 9918155, at *4 (N.D. Fla. Nov. 24, 2015) (quoting *Troupe* for the same proposition), *report and recommendation adopted*, 2016 WL 335870 (N.D. Fla. Jan. 26, 2016); *L.S. ex rel. Hernandez v. Peterson*, No. 18-CV-61577, 2018 WL 6573124, at *9 (S.D. Fla. Dec. 13, 2018) (dismissing *Monell* claim against county for actions of the Sheriff because "[i]n Florida, a county has no authority and control over a sheriff's law enforcement function" (citation omitted)), *aff'd*, 982 F.3d 1323 (11th Cir. 2020). Because the Defendant Sheriffs are sued in their capacities as agents of the state, Plaintiffs need not satisfy *Monell*.[7] Instead, the Sheriffs are sued for prospective relief in their

[7] Sheriff Williams cites *Vigue v. Shoar*, 494 F. Supp. 3d 1204 (M.D. Fla. 2020), which held that sheriffs are liable under *Monell* for their deliberate decisions to enforce state law. The *Vigue* court relied largely on precedent assessing claims against police departments and did not engage in the analysis mandated by *McMillian* and *Abusaid* as it relates to sheriffs. And elsewhere in his brief, Sheriff Williams acknowledges that "[a]uthority from other jurisdictions consistently holds

official capacities as agents of the state, under the *Ex parte Young* doctrine. *See Powell v. Barrett*, 496 F.3d 1288 & n.27, 1308 (11th Cir. 2007), reversed on other grounds by *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (noting Georgia Sheriff not immune from claim for prospective, injunctive relief even when immune from money damages claim under Eleventh Amendment).

Next, while it is true that the Complaint does not allege enforcement action on behalf of the Sheriff Defendants, because this is a pre-enforcement challenge, the Sheriffs' authority to enforce HB1 is sufficient to render them proper parties. *See ACLU*, 999 F.2d at 1490 ("[W]hen a plaintiff challenges the constitutionality of a rule of law, it is the state official designated to enforce that rule who is the proper defendant, even when that party has made no attempt to enforce the rule."); *Dig. Recognition Network, Inc.*, 803 F.3d at 957–58 (in pre-enforcement challenge, causation is satisfied where defendant has enforcement authority); *see also Lewis*, 944 F.3d at 1299 (relying on *Dig. Recognition Network*); *Jacobson*, 974 F.3d at 1257 (same).

And finally, the fact that the Broward County Sheriff's Office has said that it will not enforce HB1 does not divest this Court of jurisdiction over Sheriff Tony. Even where defendants affirmatively represent that they will not enforce a

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that when county officials are sued for their role in enforcing a state law, the county officials are acting as an arm of the state." ECF No. 49 at 17.

challenged law, where they remain free to change their position in the future, the plaintiffs have standing. *See, e.g.*, *Solomon v. City of Gainesville*, 763 F.2d 1212, 1213 n.1 (11th Cir. 1985) (City Commission's motion instructing its City Manager to discontinue all prosecutorial action under challenged statute, including future action, did not moot appeal where defendant could change its position); *see also ACLU*, 999 F.2d at 1494 (nonbinding representations regarding enforcement of challenged rules did not defeat case or controversy requirement). The Sheriff's position is not binding on Sheriff Tony in the future, nor would it bind a successor Sheriff. *See* Fla. Const. art. 8 § 1(d) (Sheriffs are elected officers).

V. The Complaint Adequately Alleges First Amendment Violations

Defendants' arguments[8] that Plaintiffs have failed to state claims for relief under the First Amendment fare no better than their jurisdictional arguments. Plaintiffs allege HB1 violates the First Amendment in several ways. It enacts a content- and viewpoint-based restriction on speech and cannot survive the strict scrutiny required of such a law. It is also impermissibly vague and overbroad, meaning that it chills protected speech because of the intolerable risk that it will be used to criminalize expressive activity.

Defendants ignore both the vagueness and overbreadth of HB1's language and

[8] All Defendants have incorporated by reference the First Amendment arguments made in the memorandum of law filed by Attorney General Moody.

the drafters' intent in arguing that HB1 only restricts "incitement, fighting words, true threats, and speech integral to criminal conduct." ECF No. 38 at 22. On its face, and absent a narrowing or clarifying construction, HB1 regulates core protected speech. Its overbroad and vague provisions prohibit and chill Plaintiffs' ability to participate in public demonstrations, engage in advocacy and criticize public officials. HB1's facial neutrality, *id.* at 23–24, does not betray its scope, which is, in the words of Defendant Governor DeSantis, to have a "ton of bricks rain down on" protestors advocating for racial justice and police accountability in the state of Florida. ECF No. 1 ¶¶ 56–59.

A. HB1 in its Entirety Regulates Speech Based on Content and Viewpoint

Facially neutral laws adopted by the government "because of disagreement with the message [the speech] conveys"—like HB1—are considered content-based restrictions. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015). Moreover, where a law regulates speech based on "the specific motivating ideology or the opinion or perspective of the speaker," it is a restriction on speech based on both content and viewpoint. *Reed*, 576 U.S. at 168 (citation omitted).

Plaintiffs allege ample facts demonstrating HB1 was intended to elevate one viewpoint over the other and to crack down on a particular form of protected expression—protest. These allegations include public statements from Governor

DeSantis criticizing advocacy for police reform, ECF No. 1 ¶¶ 56–62; specific provisions in HB1 designed to favor law and order messages and restrict messages of police reform, *id*. ¶ 150; the title of HB1's predecessor proposal, the "Combatting Violence, Disorder and Looting and Law Enforcement Protection Act," *id*. ¶ 56; and HB1's enhanced penalties for certain conduct committed during a "riot," *e.g.*, *id*. ¶ 80. Governor DeSantis plainly stated HB1's preferred viewpoint in announcing that it was "the strongest . . . pro-law-enforcement piece of legislation in the country." *Id.* ¶ 120. Therefore, Governor DeSantis' constant critiques of Black-led protest activities and endorsement of "law and order" are especially probative of HB1's motivation.[9] *See, e.g.*, *Dakota Rural Action v. Noem*, 416 F. Supp. 3d 874, 883 (D.S.D. 2019) (finding that Governor Kristi Noem "clearly stated" one of the principal motivations behind a riot boosting statute while announcing the statute's predecessor proposal at a press conference). Defendants' reliance on post hoc motivations for HB1, ECF No. 38 at 24–25, carries little weight given the force of this evidence.

Because Plaintiffs allege more than enough facts to "state a claim to relief that

[9] *Compare* DeSantis' critiques of Black-led protests, ECF No. 1 ¶¶ 56–62, with recent statements of support for mass demonstrations calling for reforms in Cuba, Ron DeSantis (@GovRonDeSantis), Twitter (July 11, 2021 @ 5:29 PM), https://tinyurl.com/tddn4jkb; Michael Moline, *Groups sue to block enforcement of DeSantis' anti-riot law as Cuban violators in FL go largely untouched*, Florida Phoenix (July 14, 2021), https://tinyurl.com/pzzyahzx.

is plausible on its face," Defendants' motion to dismiss Plaintiffs' content-viewpoint discrimination claim must be denied. *Keating v. City of Miami*, 598 F.3d 753, 763 (11th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); *see also Carollo v. Boria,* 833 F.3d 1322, 1328–30 (11th Cir. 2016); *Bagley v. Herring*, No. 4:12cv611-WS, 2014 WL 585313, at *2 (N.D. Fla. Feb. 14, 2014) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" (citations omitted)).

B. Plaintiffs Have Sufficiently Alleged that Sections 15 and 2 Are Unconstitutionally Vague

HB1 is also unconstitutionally vague because it fails to provide adequate notice of what it prohibits and encourages discriminatory enforcement. *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1319 (11th Cir. 2017) (en banc) (Marcus, J.).

Contrary to Defendants' arguments, ECF No. 38 at 30, Plaintiffs do not challenge the validity of Florida's common law anti-rioting definition. Rather, Plaintiffs challenge Section 15 based on its changes to that definition that render Section 15's definition of "riot" vague.

Yet Defendants mistakenly contend Section 15 is not vague because previous courts have easily interpreted the common law definition of "riot." ECF No. 38 at 31. This argument overlooks the confusing, distinct changes that Section 15 makes

to this very common law definition. A "riot" under the common law was defined as a "tumultuous disturbance of the peace by three or more persons, assembled and acting with a common intent, either in executing a lawful private enterprise in a violent and turbulent manner, to the terror of the people, or in executing an unlawful enterprise in a violent and turbulent manner." *See State v. Beasley*, 317 So. 2d 750, 752 (Fla. 1975) (emphasis added). But Section 15 now imposes liability for a "riot" upon one who "willfully participates in a violent public disturbance involving an assembly of three or more persons, acting with a common intent to assist each other in violent and disorderly conduct, resulting in: (a) Injury to another person; (b) Damage to property; or (c) Imminent danger of injury to another person or damage to property." Fla. Stat. § 870.01(2) (emphasis added).

By its plain terms, it is unclear from the face of Section 15 what connection is needed between those at the public assembly as compared to those involved in the public disturbance. Can liability be imposed if the disturbance occurs beyond the view of those at the public assembly? Can liability be imposed against individuals who participated in the public assembly but left as soon as the public disturbance occurred?[10]

[10] *See also* ECF No. 65 (Plaintiffs' Mem. in Support of Preliminary Injunction Mot.) at 19–22.

This Court should not rely on the common law definition of riot as an interpretive guide here given the stark differences in syntax and structure between these two definitions, and because courts "must presume that a legislature says in a statute what it means and means in a statute what it says there" when engaging in a vagueness analysis. *Wollschlaeger*, 848 F.3d at 1322 (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

Far from adding clarity to the common law definition of riot, Defendants instead "take[] the plain word and render[] it incomprehensible by appending a wholly nebulous [phrase]." *Id.* at 1321. Because it is unclear from the face of Section 15 what conduct is prohibited, it is impermissibly vague.

Section 15 is also unconstitutionally vague because it invites arbitrary enforcement. Specifically, it leaves the door open for law enforcement officers to arrest peaceful protestors who are at a public assembly that turns violent. A statute which is susceptible to many different interpretations "readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure" and could "result[] in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." *Thornhill v. Alabama*, 310 U.S. 88, 97–98 (1940).

Section 2 is similarly impermissibly vague and subject to many different interpretations. Section 2 imposes criminal liability against a person who willfully

obstructs "the free, convenient, and normal use of a public street, highway, or road by: (1) Impeding, hindering, stifling, retarding, or restraining traffic or passage thereon; (2) Standing on or remaining in the street, highway, or road; or (3) Endangering the safe movement of vehicles or pedestrians traveling thereon." Fla. Stat. § 316.2045.

On its face, Section 2 could prohibit an individual from momentarily blocking the street while walking during a demonstration. Furthermore, Section 2's key terms are undefined and contain no limitations. One has to guess how much traffic or "safe movement of vehicles or pedestrians" must be impeded in order to fall under Section 2's purview. Just as with Section 15, Section 2 sweeps up such a broad range of conduct that it is impossible to know exactly what is prohibited. This is the hallmark of vagueness.

C. Plaintiffs Have Sufficiently Alleged Three Sections of HB1 Are Unconstitutionally Overbroad

i. Sections 15, 2 and 14 Prohibit and Chill Significant Protected Speech Activities

Plaintiffs allege Sections 15, 2 and 14 of HB1 are overbroad because they prohibit and chill "a substantial amount of protected speech." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244–51, 253–55 (2002).

Specifically, Section 15 is impermissibly overinclusive. *See Ward*, 491 U.S. at 799. Section 15 is open to an interpretation that expands the "riot" definition to

encompass not just those with the intent to commit violence, but also those who willfully participate in a disturbance that turns violent—even if they were not aware of, and never intended to commit, any violence themselves. *See supra* § V.B. But guilt-by-association laws are impermissible under the First Amendment. *See NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 908 (1982) ("The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected."). Instead, "[f]or liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals *and that the individual held a specific intent to further those illegal aims*." *Id*. at 920 (emphasis added); *see also Scales v. United States*, 367 U.S. 203, 229 (1961) (to punish group association, there must be "clear proof that a defendant 'specifically [intends] to accomplish [the aims of the organization] by resort to violence'" (quoting *Noto v. United States*, 367 U.S. 290, 299 (1961))). Thus, Section 15 is not, as Defendants argue, the functional equivalent of the common law riot definition. Nor can Plaintiffs rely on Defendants' post hoc reinterpretations of Section 15 to ensure that they are not subject to criminal liability for engaging in protected First Amendment activities. To remedy the harm caused to Plaintiffs by the overbreadth of this section, any narrowing construction of this Section must be judicially enforceable and clearly defined.

Defendants' remaining counterargument that HB1 only proscribes conduct causing "violence and imminent danger of injury," ECF No. 38 at 26, also misses the mark. Unlike the rioting statute at issue in *Ferguson v. Estelle*, Section 15 does not have a clear mens rea requirement, nor does it provide for an affirmative defense that an individual attended an assembly that was lawful at first, and left when the assembly turned riotous. 718 F.2d 730, 732 (5th Cir. 1983). If one takes Section 15 as written—which this Court must for the purposes of this overbreadth inquiry—then Section 15 has the potential to impose criminal liability on individuals engaged in protected First Amendment activities simply because they happen to be in proximity to others engaged in riotous behavior.

Section 2 is also overbroad because it prohibits a wide range of protected expressive conduct, including by those who participate in public demonstrations in the street and hinder any traffic, for even brief periods of time. ECF No. 1 ¶ 153.

On its face, Section 2 does not contain any limiting principles, and thus could impose criminal liability for merely standing on the street and hindering any amount of traffic, even temporarily. *Id.* ¶ 75. Section 2 is therefore not a reasonable time, place and manner restriction because it sweeps up far too much protected speech. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45–46 (1983). Nor is it akin to the statute at issue in *One World One Fam. Now v. City of Miami Beach*, as it does not leave open ample channels for alternative

communication. 175 F.3d 1282, 1288 (11th Cir. 1999). Instead, Section 2 directly and expansively regulates protected speech and expressive conduct.

Finally, Section 14, which makes it unlawful for a person to electronically publish another person's personal identification information with the intent to incite violence or commit a crime is overbroad as a matter of law under *Brayshaw v. City of Tallahassee*, 709 F. Supp. 2d 1244 (N.D. Fla. 2010). *Brayshaw* concerns a nearly identical harassment by publication statute that was struck down by this court on overbreadth grounds. Specifically, this court found that the statute criminalized protected speech activities, such as the publication of personal information about law enforcement officers. *Id.* at 1248–49. Although the governmental defendants in *Brayshaw* argued the statute was not overbroad because it only addressed true threats and fighting words, another court in this district explained: "the release of personal information, even with the intent to intimidate, is not per se a true threat," nor can it be "a serious expression of intent to commit an unlawful act of violence." *See id.* at 1248. Section 14—which criminalizes the publication of another's personal information with "intent" to incite violence or commit a crime—is similarly overbroad because it seeks to criminalize speech even when it is unlikely to produce imminent and violent disorder. *See*, *e.g.*, *Hess v. Indiana*, 414 U.S. 105, 109 (1973). Because the core conduct it seeks to prohibit is protected speech under *Brayshaw*, Defendants' attempted reliance on *Brandenburg v. Ohio*,

395 U.S. 444 (1969), and *Virginia v. Black*, 538 U.S. 343 (2003), is completely misplaced.

ii. HB1 Cannot Be Saved by Severing the Overbroad Sections

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)). Here, Sections 15, 2 and 14 cannot be saved in this manner because the overbroad portions are the heart of these sections and define the conduct prohibited. If the overbroad sections are removed, there would be nothing left for this court to enforce.[11] As such, HB1 is impermissibly overbroad.

VI. The Equal Protection Claims Are Adequately Pleaded

Plaintiffs adequately allege HB1 intentionally discriminates against Black-led organizations and Black protestors (Count 1 – Racially Discriminatory Purpose) as well as their viewpoints and those of their allies advocating for racial justice and police reform (Count 2 – Targeting Racial Justice Advocacy). Rather than acknowledge Plaintiffs' well-pleaded allegations, Defendants misconstrue these allegations and the applicable law.[12]

[11] *See also* ECF No. 38 at 31–32.

[12] All Defendants have incorporated by reference the Equal Protection arguments made in the memorandum of law filed by Attorney General Moody.

A law is unconstitutional under the Equal Protection Clause so long as race is a "motivating" factor in its enactment; Plaintiffs need not allege "a particular purpose was the 'dominant' or 'primary' one." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) ("*Arlington Heights*"). The *Arlington Heights* factors, as supplemented by the Eleventh Circuit, guide this inquiry. *See Greater Birmingham Ministries v. Sec'y of State of Ala.*, 992 F.3d 1299, 1322 (11th Cir. 2021) ("*GBM*"); *id.* at 1328 (explaining that Equal Protection claims require allegations about both "discriminatory purpose and effect") (citations omitted).

The *Arlington Heights* factors are: "(1) the impact of the challenged law; (2) the historical background; (3) the specific sequence of events leading up to its passage; (4) procedural and substantive departures; and (5) the contemporary statements and actions of key legislators." *Id.* at 1322. Courts in the Eleventh Circuit also consider: "(6) the foreseeability of the disparate impact; (7) knowledge of that impact, and (8) the availability of less discriminatory alternatives." *Id.* Because claims of intentional discrimination are fact-intensive, they are rarely decided pre-trial. *See Hunt v. Cromartie*, 526 U.S. 541, 549 (1999).[13]

[13] Once discriminatory intent and effect are established, "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this [racial discrimination] factor." *GBM*, 922 F.3d at 1321 (alteration in original) (quoting *Hunter v. Underwood*, 471 U.S. at 222, 228 (1985)).

Plaintiffs' allegations amply support an inference of discriminatory purpose and effect—far beyond what is required at the pleading stage. As the Complaint alleges, HB1 was proposed and enacted in direct response to the overwhelmingly peaceful racial justice protests of summer 2020. *See, e.g.*, ECF No. 1 ¶¶ 4, 5, 47, 56, 67. The Act "was enacted, at least in part, with the purpose to discriminate against Black-led organizations and Black protestors" and "to deter the exercise of First Amendment rights by certain individuals—namely, those interested in changing the way police interact with Black communities." *Id.* ¶¶ 1, 127. And the Act has, in fact, chilled Black-led organizations and Black protestors from engaging in speech and demonstrations regarding racial justice issues. *See, e.g.*, *id.* ¶¶ 12, 19–20, 22, 25, 27.

Plaintiffs support these assertions by addressing each of the *Arlington Heights* factors in detail. *See, e.g.*, *id.* ¶¶ 12, 19–20, 22, 25, 27, 64–66, 101–02 (disproportionate impact on Black protestors that was also known and reasonably foreseeable, including based on history, testimony, and statistics regarding (i) discriminatory enforcement of criminal laws in Florida overall and during the summer 2020 racial justice protests, (ii) the Act's enhanced criminal penalties and law enforcement discretion, and (iii) Plaintiffs' resulting fear of arrest or other consequences under the Act); *id.* ¶¶ 1, 4, 45, 49, 56–58, 60–61, 106, 120 (historical background including statements by Governor DeSantis and bill sponsors indicating that HB1 was a direct response to summer 2020's racial justice protests and calls for

a reimagining of public safety, notwithstanding that such protests were overwhelmingly peaceful); *id.* ¶¶ 5, 107, 113–19 (evidence of procedural and substantive departures in HB1's passage, including the legislature's rushed timeline for consideration, curtailment of public comment, refusal to study its discriminatory impact, bypassing of multiple Senate committees, and revision to give it an unusual immediate effective date to coincide with the eve of the verdict in the murder trial of Minneapolis police officer Derek Chauvin over the killing of George Floyd); *id.* ¶¶ 108–12 (availability of less discriminatory alternatives, including pre-existing criminal laws).

Despite these extensive factual allegations, Defendants contend Plaintiffs have "failed to allege facts sufficient to establish discriminatory intent or impact." ECF No. 38 at 19. With respect to Count 1 (Racially Discriminatory Purpose), Defendants raise several spurious arguments—not one of which undermines Plaintiffs' claim.

First, Defendants argue that Plaintiffs fail to plead discriminatory purpose because "the Complaint is rife with allegations regarding purportedly discriminatory statements on the part of the Governor but is devoid of any such allegations on the part of the legislature—the governing body that enacted the law." *Id.* As an initial matter, the Complaint does include allegations going to "the contemporary statements and actions of key legislators," *GBM*, 992 F.3d at 1322. *See, e.g.*, ECF

No. 1 ¶¶ 61, 106 (alleging statements and conduct by various legislative sponsors and proponents). Moreover, the *Arlington Heights* analysis "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. Accordingly, statements by Governor DeSantis—the highest elected official in the State and who is alleged to have played a significant, if not singular, role in the drafting, promotion, and promulgation of HB1—are plainly relevant to establishing an inference of discriminatory intent at this pleading stage. *See, e.g.*, *Caron Found. of Fla., Inc. v. City of Delray Beach*, No. 12-80215-CIV, 2012 WL 12855473, at *3 (S.D. Fla. June 6, 2012) (explaining that there is "authority for the proposition that a legislative body acting under heavy discriminatory political pressure becomes tainted with discriminatory intent"); *see also Tracy P. v. Sarasota Cnty.*, No. 8:05-CV-927-T-27EAJ, 2007 WL 9723801, at *6 (M.D. Fla. Sept. 5, 2007) ("Government officials are generally held to act with discriminatory intent, regardless of their personal views, when they implement the discriminatory desires of others.").[14]

Second, Defendants contend that Plaintiffs fail to plead discriminatory purpose because the curtailment of public comment "is hardly a departure from

[14] *Cf. Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349–50 (2021) (upholding district court's post-trial finding of a lack of discriminatory intent as not clearly erroneous, where based on the full evidentiary record the court determined that the legislature undertook a full and good faith consideration of the law untainted by a sponsor's potentially-discriminatory intent).

common practice" and "the Act was not the only bill from the 2021 legislative session that took immediate effect." ECF No. 38 at 20–21. But the Complaint's allegations support an inference of discriminatory intent, including the allegations regarding the legislature's arbitrary time limits imposed during public hearings despite "significant interest in public comment," hurried timeline for the Act overall, and revision of the Act to have immediate effect upon the Governor's signature, which ultimately took place on the eve of Derek Chauvin's verdict. ECF No. 1 ¶¶ 113–19. Plaintiffs' allegations must be taken as true at this stage, even if Defendants would characterize them differently.[15]

Third, Defendants suggest that Plaintiffs "have not established discriminatory impact" but instead rely on a "blanket, conclusory allegation that the Act will disproportionately impact Black-led organizations." ECF No. 38 at 20–21. This again has no merit. As discussed, the Complaint contains specific and detailed allegations regarding (i) statistics and other history evidencing discriminatory enforcement of criminal laws against Black Floridians, *see* ECF No. 1 ¶¶ 64–66, 102; (ii) the enhanced criminal penalties and law enforcement discretion created by the Act, *see id.* ¶¶ 128, 139, 168; and (iii) Black Floridians' resulting fear of arrest

[15] Even if the Court could consider Defendants' explanation on a motion to dismiss regarding the time limits and other curtailment measures imposed by the legislature during public hearings, *see, e.g.*, ECF No. 38 at 19-20, such self-serving statements would only create a question of fact and would not undermine the plausibility of Plaintiffs' claim.

or other harm because of the Act, *see id.* ¶¶ 12, 19–20, 22, 25, 27, 74. Of course, in a pre-enforcement challenge, allegations of actual discriminatory impact in enforcement are not required—and Plaintiffs' allegations here more than support their Equal Protection claim. *Cf. City of S. Miami v. DeSantis*, 424 F. Supp. 3d 1309, 1344 (S.D. Fla. 2019) (denying motion to dismiss Equal Protection claim where complaint "set[] forth statistics and data indicating that racial minorities are more likely to be targeted, questioned, and detained" as a result of challenged law).

With respect to Count 2 (Targeting Racial Justice Advocacy), Defendants do not contest that laws burdening the fundamental right of expression and targeted at certain messages violate the Equal Protection Clause. *See Police Dep't of Chi. v. Mosely*, 408 U.S. 92, 102 (1972). Instead, Defendants baselessly complain that "no facts are alleged" regarding what "various viewpoints" are targeted by HB1 and "which sections of the Act allegedly suppress viewpoints." ECF No. 38 at 21. Defendants further state that "the Act does not discriminate against any viewpoints or otherwise raise First Amendment concerns." *Id.*

But as explained, the Complaint contains numerous allegations supporting the inference that "the Act's intent is to suppress the viewpoints of Black-led organizations and their allies . . . while advancing the viewpoints of those who support the government's 'law and order' message." ECF No. 1 ¶ 138. The Complaint also alleges that the Act has the discriminatory impact of suppressing

viewpoints, with provisions like Section 15 which "vest[] the police with wide discretion in determining whom to arrest" and thus "rais[e] a substantial risk that police will target for arrest individuals advocating messages with which the police disagree," *id.* ¶ 139. Indeed, Governor DeSantis touted HB1 as "the strongest . . . pro-law-enforcement piece of legislation in the country." *Id.* ¶ 120. Plaintiffs' allegations are thus more than sufficient to establish their Targeting Racial Justice Advocacy claim—and Defendants cannot (and do not) seriously contend otherwise. And as discussed *supra* § V, such targeting also violates the guarantees of the First Amendment.

VII. Plaintiffs' Complaint Does Not Constitute an Impermissible Shotgun Pleading

Finally, Plaintiffs' Complaint is not an impermissible "shotgun" pleading. The Eleventh Circuit defines a shotgun complaint as a pleading that fails "to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1323 (11th Cir. 2015). A shotgun pleading dismissal is appropriate only where "it is virtually impossible to know which allegations of facts are intended to support which claim(s) for relief." *Id*. at 1325 (citation omitted). In contrast, Plaintiffs' clear and well-organized Complaint provides Defendants ample notice of the claims alleged against them. Each of its counts specifies the applicable legal basis and re-asserts the pertinent supporting factual allegations for that count.

Plaintiffs' Complaint includes four separate counts, with "each claim for relief" from HB1 "clearly labeled" by legal theory and "separate[d] into a different count." *Surgery Ctr. of Viera, LLC v. Meritain Health, Inc.*, No. 6:19-cv-1694-Orl-40LRH, 2020 WL 7389987, at *9 (M.D. Fla. June 1, 2020).

Additionally, the factual bases for each count are concisely stated in the body of the count. Count 1 expressly challenges the racially discriminatory purpose of the HB1 in its entirety under the Equal Protection Clause of the Fourteenth Amendment. Count 1 then describes various grounds for finding discriminatory intent—including the history surrounding the adoption of the HB1, unusual events leading up to its signing, substantive departures from the normal legislative process, statements from various governmental officials, and testimony surrounding HB1's enactment. Count 2 similarly expressly challenges the act as a whole under the theory that it violates the Equal Protection Clause of the Fourteenth Amendment because it targets racial justice advocacy.

Counts 3 and 4 are no less straightforward. They each challenge both the act as a whole and specific subsections of the act as violating the First Amendment (Count 3), and the Due Process Clause of the Fourteenth Amendment (Count 4).

"Although lengthy, the factual allegations in the Complaint are clearly stated and well-organized." *Villarino v. Pacesetter Pers. Serv., Inc.*, 481 F. Supp. 3d 1252, 1255 (S.D. Fla. 2020). To the extent the four counts cite to overlapping allegations,

it is because those allegations "are generally relevant to each count." *Middleton v. Morgan*, 3:17cv346/MCR/GRJ, 2018 WL 11202672, at *4 (N.D. Fla. Mar. 1, 2018). As an example, allegations regarding the legislative intent behind the passage of HB1 are pleaded both in Count 1's racially discriminatory intent claim and in Count 2's claim that HB1 impermissibly targets certain messages, because those allegations support both counts. *See* ECF No. 1 ¶¶ 128–29, 137–38*; see also Davis v. City of Lake City*, No. 3:10-cv-1170-J-34TEM, 2011 WL 13295721, at *3 (M.D. Fla. Nov. 14, 2011) (sustaining complaint that re-alleged identical factual allegations for discrimination and retaliation counts and noting that "the facts set forth in the general allegations are relevant to both types of claims"). Furthermore, although each count does incorporate the factual pleadings from Paragraphs 1–120, "counts are not re-alleged and re-incorporated into successive counts." *Villarino*, 481 F. Supp. 3d at 1255; *see also Weiland* 792 F.3d at 1324 (distinguishing between the incorporation of factual allegations on the one hand and incorporation of prior *count*s on the other).

The Complaint clearly alleges all claims are brought against all Defendants and that the relief sought is an injunction against all Defendants from enforcing HB1 in its parts and its entirety. *See* ECF No. 1 ¶¶ 131–33, 142–44, 161–63, 173–75; *id.* at 60. Thus, there can be no cognizable argument that any of the Defendants is not on fair notice of which claims are brought against them and on what basis. Indeed,

it is evident from Defendants' motions to dismiss Plaintiffs' Complaint for failure to state a claim that they are keenly aware of which claims have been brought by Plaintiffs and against whom.

Because the Complaint gives each Defendant ample "notice of [the] plaintiff[s'] allegations and claims" against them, it cannot be deemed a shotgun pleading. *Charudattan v. Darnell*, No. 1:18cv109MW/GRJ, 2019 WL 12043587, at *4 (N.D. Fla. Feb. 7, 2019) (Walker, C.J.) (citing *Weiland*, 792 F.3d at 1323).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny all Defendants' motions to dismiss in their entirety.

Dated: July 23, 2021

Respectfully submitted,

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LOCAL RULE 7.1(F) CERTIFICATION

Pursuant to Local Rule 7.1(F) and in accordance with the Court's July 16, 2021 ruling, the foregoing Consolidated Opposition contains 9,962 words, excluding the case caption, signature block, this certification, and the certificate of service.

CERTIFICATE OF SERVICE

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 23, 2021.

/s/ Rachel M. Kleinman
Rachel M. Kleinman

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LDF
DEFEND EDUCATE EMPOWER

Testimony of

Sherrilyn Ifill, President and Director-Counsel
NAACP Legal Defense and Educational Fund, Inc.

Before the United States House Judiciary Committee

for

Oversight Hearing on Policing Practices and Law Enforcement Accountability

June 10, 2020

I. Introduction

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (LDF), I would like to thank Chairman Nadler and Ranking Member Jordan for convening this timely Oversight Hearing on Policing Practices and Law Enforcement Accountability. LDF is the nation's premiere civil rights legal organization working to achieve racial justice and equity in the areas of education, economic justice, political participation, and criminal justice. For 80 years, LDF has consistently worked to promote unbiased and accountable policing policies and practices at the national, state, and local levels through litigation and policy reform advocacy. In 2015, LDF launched its Policing Reform Campaign to transform policing culture and practices, eliminate racial bias and profiling in policing, and end police violence against residents of this country.[1]

For the past several months, the nation has grappled with incident after incident of violence against Black Americans by former and current law enforcement officers. In February 2020, Ahmaud Arbery, a 25-year-old Black man was taking his usual jog through a white suburb of Brunswick, Georgia when a former local police officer and his son chased him with their pick-up truck and savagely killed him with a shot gun.[2] On March 13, 26-year-old Breonna Taylor, a Black woman and devoted Emergency Medical Technician, was sleeping in her bed when six Louisville Metropolitan Police Department officers executed a no-knock warrant by bursting into her apartment and shooting Ms. Taylor multiple times killing her.[3] In May, George Floyd, a 46-year-old Black father and brother, made a purchase at a local store where the owner accused him of using a counterfeit $20 bill. Four Minneapolis Police Department officers approached Mr. Floyd to question him. Ultimately, one officer handcuffed Mr. Floyd, wrestled him to the ground and pinned him down by placing his knee on Mr. Floyd's neck for almost nine minutes as he pleaded for his life crying "I can't breathe" until he succumbed to the officer's brutal treatment. Two other officers kneeled on Mr. Floyd's handcuffed body and another watched and did nothing.[4]

For three weeks, sustained demonstrations have erupted worldwide after the release of graphic videos of Mr. Floyd's slow and excruciating death. Only after the protests began and these brutal killings received national attention, local law enforcement officials expedited their investigations and arrested the killers of Mr. Arbery and Mr. Floyd.[5] Protesters demand an end to

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[1] *See*, LDF Thurgood Marshall Institute, *Policing Reform Campaign*, https://tminstituteldf.org/advocacy/campaigns/policing-reform/about/.

[2] Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, The New York Times, June 4, 2020, //www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html.

[3] AJ Willingham, *Breonna Taylor would have been 27 today. Here's where her case stands*, CNN, June 5, 2020, https://www.cnn.com/2020/06/05/us/breonna-taylor-birthday-charges-arrests-case-trnd/index.html.

[4] Phil P. Murphy, *New video appears to show three police officers kneeling on George Floyd*, CNN, June 3, 2020**,** https://www.cnn.com/2020/05/29/us/george-floyd-new-video-officers-kneel-trnd/index.html

[5] Meredith Deliso and Christina Carrega, *Man who filmed shooting of Ahmaud Arbery charged with murder*, ABC News, May 22, 2020, https://abcnews.go.com/US/man-filmed-shooting-ahmaud-arbery-charged-murder/story?id=70820910; *See also*, Lorenzo Reyes, *New charges in George Floyd's death: Derek Chauvin faces second-degree murder; 3 other officers charged*, USA Today, June 3, 2020,

police violence, accountability of the officers involved in the killings and police reforms. The response to activists' demands must be swift, decisive, and transformative. After years of focusing on training and supervision, it is time to demand action by the elected officials and policymakers who are responsible for funding police departments, managing police leadership, and making and implementing laws governing police misconduct and accountability.

While public safety is primarily the responsibility of state and local governments, the federal government influences this local function for better or for worse. For example, almost 30 years ago following the highly-publicized beating of Rodney King and after acknowledging that nationwide police violence against people of color was real, Congress passed the Violent Crime Control and Law Enforcement Act of 1994, which allows the U.S. Attorney General to investigate police departments suspected of engaging in a pattern or practice of unlawful policing.[6] Since its enactment, various administrations have taken a measured approach to utilizing this authority opening about 69 investigations and resolving findings of civil rights violations with 40 agreements between 1994 and 2017.[7]

Yet, the Trump Administration has abdicated its authority to investigate police departments and instead has incited unlawful policing. Specifically, President Trump has encouraged police to abuse arrestees by allowing them to hit their heads as they are seated in police cars;[8] and, U.S. Attorney General Barr warned that if people of color who protest police violence do not show respect from law enforcement, then they may not receive protection from officers.[9] Even as demonstrators peacefully protested police violence in Washington, D.C. in the aftermath of George Floyd's death, President Trump and Attorney General Barr, ordered federal law enforcement to disperse crowds by throwing smoke canisters and pepper balls.[10] It is in this climate that we find our country in a policing crisis; and you, Members of Congress, a coequal branch of the federal government are called upon to act through your oversight and legislative authority.

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https://www.usatoday.com/story/news/nation/2020/06/03/george-floyd-death-charges-derek-chauvin-police/3134766001/

[6] 34 U.S.C. § 12601.

[7] Civil Rights Division, U.S. Dep't of Justice, *The Civil Rights Division's Pattern and Practice Police Reform Work: 1994-Present*, 3, Jan. 2017, https://www.justice.gov/crt/file/922421/download.

[8] Associate Press, *WATCH: Trump to police: Don't worry about people in custody hitting their heads on squad cars*, July 28, 2017, nhttps://www.pbs.org/newshour/politics/watch-trump-police-dont-worry-people-custody-hitting-heads-squad-cars.

[9] Owen Daugherty, *Barr warns that communities that don't show respect to law enforcement may not get police protection: report*, Dec. 4, 2019, The Hill, https://thehill.com/homenews/news/472946-barr-warns-that-communities-that-dont-show-respect-to-law-enforcement-may-not.

[10] Ben Gittleson and Jordan Phelps, *Police use munitions to forcibly push back peaceful protesters for Trump church visit*, ABC News, https://abcnews.go.com/Politics/national-guard-troops-deployed-white-house-trump-calls/story?id=71004151.

We welcome the Justice in Policing Act of 2020 (the Act), a comprehensive policing reform bill introduced by House and Senate members this week.[11] The legislation includes policing reforms we have advocated for years to ensure greater accountability of police officers who engage in misconduct. Indeed, The Leadership Conference on Civil and Human Rights, LDF and over 400 organizations sent a letter to Congress presenting an eight-point reform platform calling for an end to the defense of qualified immunity that shields officers from accountability, creation of a national public police misconduct database, and an end to the transfer of military equipment, to name a few.[12] Members of Congress incorporated our proposed reforms in the Act, which is a step in the right direction toward ensuring police accountability nationwide. We offer recommendations below on how to strengthen several provisions. We also urge Congress to use its oversight authority to ensure that federal agencies providing funding to state and local law enforcement comply with civil rights laws, such as Title VI of the Civil Rights Act of 1964.

II. Limitations on qualified immunity should apply retroactively

Qualified immunity, a defense that shields officials from the unforeseeable consequences of their reasonable acts, has been interpreted by courts so expansively that it now provides near-impunity for police officers who engage in unconstitutional acts of violence. According to an investigative report by Reuters, from 2017 to 2019, appellate courts granted police qualified immunity in 57% of use of force civil cases.[13]

For example, in 2018, LDF filed a petition to the U.S. Supreme Court appealing a decision of the U.S. Court of Appeals for the Eleventh Circuit affirming summary judgment in favor of a law enforcement officer in an excessive use of force lawsuit.[14] The case involved a 2013 fatal incident during which a Lee County, Alabama sheriff's deputy used excessive force by tasing our client, an unarmed Black man, Khari Illidge, with a taser 13 times for trespassing. Mr. Illidge died from cardiac arrest. His mother filed a civil rights law suit alleging that the deputy violated her son's constitutional right to be free from the unreasonable use of force.[15] The deputy's use of the taser violated both taser guidelines and police training, yet the Eleventh Circuit Court of Appeals ruled that the trial court was correct to dismiss the case on qualified immunity grounds

[11] Claudia Grisales, *et al*, *Democrats Unveil Police Reform Legislation Amid Protests Nationwide*, June 8, 2020, https://www.npr.org/2020/06/08/871625856/in-wake-of-protests-democrats-to-unveil-police-reform-legislation

[12] NAACP LDF, Diverse Coalition Sends Letter to Congressional Leaders Urging Swift Action in Response to Police Killings, June 1, 2020, https://www.naacpldf.org/press-release/diverse-coalition-sends-letter-to-congressional-leaders-urging-swift-action-in-response-to-police-killings/.

[13] Andrew Chung, *et al*, *Shielded*, Reuters Investigates, May 8, 2020, https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/.

[14] NAACP LDF, *LDF Files Supreme Court Petition in Alabama Police Excessive Force Case*, May 18, 2018 https://www.naacpldf.org/files/our-work/Callwood%20Cert%20Petition%20FINAL.pdf. *See also*, Petition for Writ of Certiorari, *Callwood v. Jones*, https://www.naacpldf.org/files/our-work/Callwood%20Cert%20Petition%20FINAL.pdf.

[15] *Callwood v. Jones*, 727 Fed.Appx. 552 (11th Cir. 2018)

because the deputy did not violate clearly established law relating to the excessive use of force.[16] The appellate court concluded that Mr. Illidge's thrashing movements as he was being tased meant he was resisting arrest and the deputy's use of over a dozen tases was not "so utterly disproportionate that any reasonable officer would have recognized that his actions were unlawful."[17] The U.S. Supreme Court denied LDF's petition. This case was not a one-off. Every year cert petitions are filed in the Court seeking review of cases in which law enforcement officers have successfully eluded accountability for the most violent forms of brutality by raising the qualified immunity defense.

The Justice in Policing Act seeks to address the qualified immunity shield by amending the civil rights statute used in most police excessive use of force civil cases, 42 U.S.C. §1983, to state that a law enforcement or correctional officer cannot assert a defense that he was acting in good faith or reasonably believed his conduct was lawful at the time of an incident or that a person's civil right was not clearly established when the defendant allegedly violated a victim's legal rights. LDF welcomes this amendment and recommend that it apply to all civil suits that are pending or filed after enactment of the Act. We will continue to work toward the elimination of qualified immunity.

III. A national police misconduct database would prevent problem officers from moving from one police department to another

The law enforcement professionals, like other professionals, such as lawyers and doctors, must have access to a system that collects and reports the revocation of membership or licenses for violations of standards. Doing so would prevent officers fired for misconduct to leave one state and be hired in another without the receiving agency knowing about previous bad acts.[18] The Justice in Policing Act creates a public national police misconduct registry that would collect use of force complaints and termination and certification records concerning federal and local law enforcement officers. We strongly urge this Committee to expand the categories of complaints that can be collected by this database to include other acts of misconduct such as discourtesy and bias, particularly racial bias.

Access to these records would allow members of the public and law enforcement executives to identify officers with problematic backgrounds. State Bar Associations often publish the names of attorneys who have been disbarred, so too must there be a public national registry of officers who have lost their licenses or have had multiple complaints filed against them due to misconduct. Indeed, former President Barack Obama's Task Force on 21st Century Policing noted in its final report that "[a] national register would effectively treat "police professionals the way

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[16] *Id.* at 561.

[17] *Id.*

[18] *See, e.g.,* Minyvonne Burke, *Officer who fatally shot Tamir Rice quits Ohio police department days after he was hired*, Oct. 11, 2018, https://www.nbcnews.com/news/us-news/officer-who-fatally-shot-tamir-rice-quits-ohio-police-department-n919046; Timothy Williams, *Cast-Out Police Officers Are Often Hired in Other Cities*, Sept. 11, 2016, https://www.nytimes.com/2016/09/11/us/whereabouts-of-cast-out-police-officers-other-cities-often-hire-them.html

states' licensing laws treat other professionals. If anything, the need for such a system is even more important for law enforcement, as officers have the power to make arrests, perform searches, and use deadly force."[19]

IV. Limitations to the transfer of military equipment is encouraging, but ending the transfer of this equipment is necessary

Without question, the images of the military-style response by local police to public demonstrations in the aftermath of George Floyd's death are jarring. Converting the streets of this nation into war zones only escalate already tense community-police relations.[20] Following a similar response to mass demonstrations after the police killings of Michael Brown in Ferguson, Missouri, former President Barack Obama adopted the recommendations of an interagency task force created by executive order, which banned the transfer of certain surplus federal military equipment to state and local law enforcement agencies through the U.S. Department of Defense's (DOD) 1033 Excess Property Program.[21] This occurred after LDF and other advocates urged the Obama Administration to end the transfer of military equipment to all law enforcement agencies, including those that serve schools.[22]

In 2017, despite a Government Accountability Office report detailing deficiencies in DOD's process for transferring equipment that resulted in the delivery of $1.2 million of military weapons and equipment to a fake law enforcement agency,[23] President Trump ended Obama era restrictions allowing local police departments to access mine-resistant, ambush-protected vehicles, grenade launchers and bayonets among other equipment.[24]

Congress has and must act to rid our nation's streets of military equipment. The Justice in Policing Act includes a provision that would limit the transfer of certain military equipment,

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[19] President's Task Force on 21st Century Policing, Final Report of the President's Task Force on 21st Century Policing, 30, Office of Community Oriented Policing Services (2015) https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf at 30.

[20] Michelle Nichols and Catherine Koppel, *Should U.S. police get free military equipment? Protests revive debate*, Reuters, June 5, 2020. https://www.reuters.com/article/us-minneapolis-police-protests-militariz/should-us-police-get-free-military-equipment-protests-revive-debate-idUSKBN23C2IV

[21] Christi Parsons, *Obama bars some military equipment from going to local police*, May 18, 2015, https://www.latimes.com/nation/la-na-obama-military-equipment-police-20150518-story.html.

[22] NAACP LDF, *Supplemental Statement by the NAACP Legal Defense and Educational Fund, Inc. To the President's Task Force on 21st Century Policing*, Feb. 17, 2015, https://www.naacpldf.org/wp-content/uploads/NAACP-LDF-Supplemental-Statement-to-Presidents-Task-Force-on-21st-Century-Policing.pdf.

[23] U.S. Gov't Accountability Office, *DOD Excess Property: Enhanced Controls Needed for Access to Excess Controlled Property*, Jul. 18, 2017, https://www.gao.gov/mobile/products/GAO-17-532.

[24] Dartunorro Clark, *Trump Makes It Easier for Police to Get Military Equipment*, Nov. 13, 2017, https://www.nbcnews.com/politics/white-house/trump-makes-it-easier-police-get-military-equipment-n815766.

similar to the Obama Administration's ban. We urge Congress to do more by banning the transfer of all excess military vehicles and weapons.

V. Congress Must Use Its Oversight Authority to Ensure that Federal Agencies that Provide Financial Assistance to State and Local Police Departments Enforce Civil Rights Laws

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal funds from discriminating in their programs and activities based on race, color and national origin. Failure to comply with this requirement could result in the termination of funds.[25] Yet, despite providing billions in grant funding to police jurisdictions around the country, the U.S. Department of Justice (DOJ) has never fully enforced this provision through compliance reviews or pattern or practice investigations. For example, Minneapolis has received over $7 million in federal grants since 2009,[26] yet claims of racially biased policing in that city abound.[27]

There must be an immediate review of all DOJ and other federal agency grant funding to police departments to ensure compliance with Title VI. Federal funds should be withheld from departments that hire officers previously fired for misconduct or those with suspicious levels of in-custody deaths or assaults. The House and Senate Judiciary Committees have oversight power over the DOJ—and must hold it accountable.

VI. Conclusion

The recommendations for federal police reforms submitted by LDF and its coalition partners focus on police accountability because that is what this moment requires. Communities of color are weary of efforts that pour more funding into police departments to purchase equipment, such as body-worn cameras, and provide training to officers while Black and Brown Americans continue to suffer violence at the hands of police. It is critical that Congress change its approach to police department funding by using its legislative and oversight authority to require federal agencies that provide grants to law enforcement to aggressively enforce civil rights laws or risk termination of those funds.

Also, movements to drastically reduce police funding are at the core of a revised vision of public safety that prioritizes social services, youth development, mental health, reentry support, and meaningful provisions for homeless individuals that strengthen community resources to

[25] 42 U.S.C. § 2000d. *See also*, U.S. Dep't of Justice Federal Coordination and Compliance Section, Title VI of the Civil Rights Act of 1964, https://www.justice.gov/crt/fcs/TitleVI.

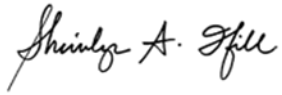
[26] LDF Thurgood Marshall Institute National Police Funding Database, *Federal Grant Spotlight Minneapolis* (2009-2018), https://policefundingdatabase.tminstituteldf.org/report.

[27] Matt Furber, et al, *Minneapolis Police, Long Accused of Racism, Face Wrath of Wounded City*, The New York Times, May 27, 2020, https://www.nytimes.com/2020/05/27/us/minneapolis-police.html.

proactively address underlying factors that can contribute to public safety concerns.[28] Most public safety issues and community conflicts do not require the intervention of an armed officer. It is time to reimagine how we allocate our public safety dollars at the federal and local levels.

We look forward to working with this Committee and other Members of Congress to improve provisions of the Justice in Policing Act as it moves toward passage.

Sincerely yours,



Sherrilyn A. Ifill
President and Director Counsel

[28] Communities United for Police Reform, *More than 110 Organizations Call on Mayor De Blasio and Speaker Johnson to Cut the NYPD's Budget, Redirect Resources to City Agencies that Can Help Communities Hardest HIt by COVID-19*, April 30, 2020, https://www.changethenypd.org/releases/more-110-organizations-call-mayor-de-blasio-and-speaker-johnson-cut-nypd%E2%80%99s-budget-redirect.

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February 10, 2021

Via Electronic Delivery

William C. Smith, Jr., Chair
Jeff D. Waldstreicher, Vice Chair
Senate Judicial Proceedings Committee
Miller Senate Office Building, 2 East Wing
11 Bladen St.
Annapolis, MD 21401 - 1991

RE: Senate Bill 786: Baltimore City – Control of the Police Department of Baltimore City- **Favorable with Amendments**

Dear Chairperson Smith and Vice Chairperson Waldstreicher:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (LDF),[1] we appreciate the opportunity to submit written testimony on Senate Bill (SB) 786, which would amend the Public Local Laws of Baltimore City to transfer control of the Baltimore Police Department (BPD) from the State of Maryland to Baltimore City, create an advisory board that would study and release reports on the impact of this transfer of control, and require SB 786 to become effective on January 1, 2025 only if Baltimore City voters pass an amendment to the Baltimore City Charter that provides for the transfer of control of the BPD to city officials and residents. LDF supports SB 786 with amendments that would expand the membership of the advisory board to include residents of Baltimore City who have been directly impacted by unlawful or otherwise problematic policing practices or policies. Additionally, the reports of the advisory board should be publicly released no later than January 1, 2022 and the transfer of control should become effective no later than January 1, 2023 after the passage of a charter amendment during the 2022 general election.

1. Baltimore City residents must regain authority over its police department.

SB 786 takes important steps toward returning control of the BPD to Baltimore City officials and residents. Unlike other jurisdictions in Maryland, Baltimore City has had limited power over its police

[1] Since its founding in 1940, LDF has used litigation, policy advocacy, public education, and community organizing strategies to achieve racial justice and equity in the areas of education, economic justice, political participation, and criminal justice. It has been a separate organization from the NAACP since 1957. LDF's work to address police violence and misconduct dates back to its inception. *See, e.g., Shepherd v. Florida*, 341 U.S. 50 (1951) (reversing the convictions of Black men falsely accused of raping a white woman in 1949; the men were brutally beaten by sheriff's deputies to force confessions). Today, LDF's Justice in Public Safety Project uses litigation, policy advocacy, research, community organizing, and strategic communications to: (1) ensure accountability for police brutality and misconduct through community oversight and changes to laws and policies; (2) promote policing and public safety practices that eliminate the pernicious influence of racial and other biases; and (3) support a new paradigm of public safety that drastically reduces the presence of armed law enforcement in communities of color. For the past six years, we have partnered with advocates, activists, and attorneys to reform unlawful policing practices in Baltimore City by supporting community demands for a federal investigation of the police department, advocating for fair provisions in the police union contract, and calling for more transparency regarding police misconduct complaints.

department since the 1860's when state officials took over the city's police force to root out corruption.[2] Yet, in the over 160 years that state officials have controlled the BPD, the agency continues to grapple with corruption and its aftermath, including the criminal acts of the BPD's Gun Trace Task Force.[3] While Baltimore City taxpayers pay civil settlements for police misconduct,[4] they are unable to adopt laws and policies that would hold police officers accountable for misconduct.[5] Instead, Baltimore City officials and residents must ask the Maryland General Assembly to enact policies relating to police accountability and public safety issues that are entirely local to Baltimore City.[6] Returning control of BPD to Baltimore City would result in greater police accountability and oversight of the agency.

2. SB 786 must ensure that Baltimore residents have a seat at the table of discussions about the impact of the transfer of control of the BPD from the State to the City.

The issue of whether the Maryland General Assembly should restore local control of the BPD to Baltimore City has been studied and debated for years.[7] Yet, SB 786 would create an advisory board to further study and report on issues related to the transfer of control of BPD from the State to the City, including the implementation of the consent decree between the BPD and U.S. Department of Justice and financial impacts of local control, including liability issues, which could be resolved in short order.

It seems clear from the very terms of the consent decree that Baltimore City and BPD alone are responsible for the implementation of the agreement, including financial support to BPD to fulfill the terms of the consent decree;[8] and, City officials already have recognized that local control will have little impact

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[2] *See e.g.*, George A. Nilson, The Abell Foundation, *The Baltimore Police Department: Understanding its status as a state agency*, 2-3 (March 2019), https://abell.org/sites/default/files/files/Abell%20Baltimore%20Police%20Department%20Report.pdf; *See also*, Danielle Kushner, *The Community Oversight Task Force's Recommendations for Strengthening Police Accountability and Police-Community Relations in Baltimore City*, COMMUNITY OVERSIGHT TASK FORCE 38, (Aug. 2018), https://consentdecree.baltimorecity.gov/sites/default/files/Final%20COTF%20Report.pdf.

[3] Justin Fenton, *Baltimore expected to pay $8 million to settle Gun Trace Task Force lawsuit*, WASH. POST (Nov. 15, 2020), https://www.washingtonpost.com/local/public-safety/baltimore-expected-to-pay-8-million-to-settle-gun-trace-task-force-lawsuit/2020/11/15/d3e8be22-2785-11eb-9b14-ad872157ebc9_story.html.

[4] Jayne Miller, *Report details taxpayer payouts in Baltimore police misconduct cases*, WBALTV (Jan. 31, 2020), https://www.wbaltv.com/article/report-payout-baltimore-police-misconduct-cases/30733232#.

[5] Edward Ericson Jr., *As City Council and public clamor for police body cameras, mayor hires group to clarify questions raised*, BALT. SUN (Nov. 4, 2014), https://www.baltimoresun.com/citypaper/bcp-as-city-council-and-public-clamor-for-police-body-cameras-mayor-hires-group-to-clarify-questions-rai-20141104-story.html.

[6] Even so, attempts to pass laws that regulate BPD fail when introduced in the Maryland General Assembly, such as the 2016-2017 effort to require the BPD Commissioner to notify Baltimore City officials of the development of new tactics, technologies, and devices. *See* H.B. 58, 2017 Leg., 437th Gen. Assemb., Reg. Sess. (Md. 2017), available at https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/hb0058?ys=2017RS&search=True

[7] *See* Kushner, *supra* n. 2, at 38.

[8] The federal consent decree explicitly states: "The City and BPD will require compliance with this Agreement by their respective officials, officers, employees, agents, assigns, or successors. The City will be responsible for providing necessary and reasonable financial resources to BPD to enable BPD to fulfill its obligations under the Agreement." *See* Consent Decree, at ¶¶ 499-500, *United States v. Police Department of Baltimore City, et. al.*, No. 1:17-cv-00099-JKB, Doc. 2-2, (D. Md. Jan. 12, 2017), https://www.justice.gov/crt/case-document/file/925036/download.

on the City's payouts toward BPD misconduct settlements.[9] But, even if local control does increase Baltimore City's liability, that realization must not prevent City officials and residents from regaining control of their police department and holding it accountable for misconduct.[10]

That said, we urge members of the Senate Judicial Proceedings Committee to amend SB 786's advisory board to include Baltimore City residents who are directly impacted by unlawful or otherwise problematic policing practices. It is important that individuals who have had concerns about BPD's practices are at the table to share the impact that lack of police accountability for misconduct has on their lives every day. Additionally, any report from the advisory board must be finalized by no later than January 1, 2022 instead of the December 1, 2022 deadline in SB 786 for the reasons stated in the next section.

3. SB 786 must ensure the immediate transfer of control of the BPD from the State to Baltimore City.

The Maryland General Assembly has the authority to transfer control of BPD to Baltimore City and amend the Baltimore City Charter to effectuate that transfer.[11] However, SB 786 bypasses that authority and instead requires Baltimore voters to make changes to the City Charter through a ballot initiative to be considered during the next presidential election in 2024. The residents of Baltimore City deserve and have demanded the immediate transfer of local control of the BPD to the City.[12]

At base, the Maryland General Assembly is empowered to and should amend all relevant local laws and charters to return control of BPD to Baltimore City effective this legislative session. If, however, state and local officials insist on presenting the issue to voters, they must do so as soon as possible after the release of the advisory board's reports and no later than the 2022 general election during which state and local races will be decided along with any local ballot initiatives.[13] If Baltimore City voters support the transfer of control of the BPD from the State to the City, then it must become effective January 1, 2023.

While SB 786 is promising, as currently drafted it is unlikely to accomplish the intended goal of restoring control of the BPD to the communities it serves. We strongly urge amendments to SB 786 consistent with the comments provided above.

Thank you for considering our testimony. If you have questions, please do not hesitate to contact

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[9] Ethan McLeod, *Advocates, city senators punt to 2020 on push to bring BPD under city control*, BALT. FISHBOWL (Apr. 4, 2019), https://baltimorefishbowl.com/stories/advocates-city-senators-punt-to-2020-on-push-to-bring-bpd-under-city-control/.

[10] BPD's liability for misconduct is the natural outgrowth of its failure to police in a lawful and professional manner. Where the rights of residents are violated by BPD officers, they must be vindicated as provided for by Maryland's laws with all appropriate remittance in damages. Doing otherwise, would send the message that the magnitude of BPD officer misconduct and unlawful practices have become too great for the public to hold them accountable.

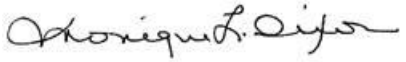
[11] Article XI-A of the Maryland State Constitution provides that the Maryland General Assembly is authorized to amend, extend, modify, or repeal any powers of the Baltimore City Charter. *See* Md. Const. art. XI, § 9, https://msa.maryland.gov/msa/mdmanual/43const/html/11art11.html. Indeed, a previous bill to restore local control of the BPD to Baltimore City included an amendment to the Baltimore City Charter. *See*, H.B. 1504 - Baltimore City – Control of Baltimore City Police Department (Feb. 10, 2017), http://mgaleg.maryland.gov/2017RS/bills/hb/hb1504F.pdf.

[12] *See, e.g.*, Maryland Coalition for Justice and Police Accountability, *Restore control of the Baltimore City Police Department to Baltimore City residents*, https://www.mcjpa.org/local-control.

[13] In 2022, Maryland voters will elect its next governor and several local officials permitting greater engagement on the issues that matter to local communities, including Baltimore City.

us at 202-682-1300.

Sincerely yours,



Monique L. Dixon
Deputy Director of Policy & Director of State Advocacy

Allen Liu
Law and Policy Fellow

cc: Senator Cory McCray
Senate Judicial Proceedings Committee Members

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***Overview of Dream Defenders, et al. v. DeSantis, et al.*, 21 Civ. 191 (N.D. Fla.)**

On May 11, 2021, LDF, the American Civil Liberties Union of Florida, the Community Justice Project and the law firm Akin Gump Strauss Hauer & Feld LLP filed a Complaint seeking declaratory and injunctive relief against Florida House Bill 1 (HB1) against Governor Ron DeSantis, Attorney General Ashley Moody, Leon County Sheriff Walt McNeil, Jacksonville/Duval County Sheriff Mike Williams and Broward County Sheriff Gregory Tony. HB1 was enacted on April 19, 2021, and, among other things: creates several new crimes, including rioting, aggravated rioting, mob intimidation and cyber-intimidation by publication; enhances criminal penalties for conduct committed during a riot; and creates an affirmative civil defense for injuries committed against an individual found to have participated in a riot.

In their Complaint, Plaintiffs raised claims under the First Amendment as well as the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Plaintiffs are Black-led organizations in Florida that regularly organize and participate in protest activities related to racial justice and police accountability, and are therefore more likely to face liability under HB1 due to the messages they express and racial disparities in how Black Floridians are policed. The lawsuit was filed in the U.S. District Court for the Northern District of Florida and assigned to Chief Judge Mark Walker.

All Defendants filed motions to dismiss the Complaint. On August 9, 2021, the Court denied the motions in large part, allowing Plaintiffs' challenges to three key provisions of HB1 to move forward (including Section 15, as discussed below). Attorney General Ashley Moody was dismissed on standing grounds, with the case proceeding against all of the other Defendants.

On July 14, 2021, Plaintiffs also filed motion for a preliminary injunction to enjoin Section 15 of HB1—one of the law's key provisions—on overbreadth and vagueness grounds under the First and Fourteenth Amendments, respectively. Section 15 re-defines the crime of "riot" and imposes harsh penalties for those arrested under the law. Plaintiffs allege that Section 15 is unconstitutional because it may be used to hold people criminally responsible for participating in protest merely because of unrelated individuals commit acts of violence or other crimes while attending the same protest. Plaintiffs further allege that because of the law's overbroad and vague language, it has had a chilling effect on their fundamental right to protest.

The Court held a preliminary injunction hearing on August 30, 2021. On September 9, 2021, in a powerful opinion that evokes Florida's long history of leveling charges of incitement and rioting against racial justice advocates, the Court granted Plaintiffs' motion and preliminarily enjoined the remaining Defendants (Governor DeSantis and the three Sheriff-Defendants) from enforcing the riot definition created by Section 15. Last week, on October 8, 2021, Governor DeSantis and Sheriff Williams filed notices of appeal of that preliminary injunction ruling.

At present, the parties are continuing to engage in discovery.