



FLORIDA'S OVERVOTE PROBLEM:

Could Thousands of Lost Votes Change the Result of the 2022 Governor's race?

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PREFACE

It has been 14 years since we published our first reports warning about tens of thousands of lost votes in the Presidential and Governor's races in Florida. In the intervening years, nothing has changed. Overvotes in the Governor's race and Presidential race, *but not in other statewide races*, remain much too high. We are revisiting the subject in hopes that the Florida Secretary of State and the Florida Division of Elections will finally address a problem that disenfranchises many thousands of voters in every General Election. The problem can be easily fixed by a few common-sense changes.

First, we want to emphasize that overvotes are not valid voter choices, but mistakes. That's why voting machines used for in-person voting are required to provide overvote protection. So, when the overvote rate in Florida increased by 1400% from 2004 to 2008, due primarily to the flaws in one voting machine, the ES&S DS200 digital scanner, those thousands of overvotes were lost votes. In 2008, ES&S served about half the voters in Florida; by 2020, more than 9 in 10 of Florida's 11.1 million voters used ES&S equipment.

In a state that often has very close races, overvotes have the potential to alter outcomes—a worrying prospect. If the overvote problem is not addressed by the state, we are concerned that high overvotes in Florida could affect the outcome of the Governor's race in 2022 or in some future election or even the outcome of the next or some future Presidential election.

Although this report is about Florida, the problem is almost assuredly happening across the U.S. While the overvote problem in Florida for in-person voting is limited to one voting machine, the DS200, other digital scanners also have a history of allowing extremely high overvotes. Plus, the increase in voting by mail nationwide means many more voters will not have overvote protection. We hope that this report will spur readers to address overvote problems (lost votes) wherever they are happening.

Much of the information in this report is a partial summary of several of our past reports. These reports are listed and linked in the bibliography at the end of this report, along with links to the state's Overvote/Undervote Reports (with accompanying data in an Excel spreadsheet), statutorily required to be issued by the Florida Department of State after each General Election. There is also a link to the state's outdated Voting System Standards issued in January 2005, which are still being used to certify Florida's voting systems. We also look at violations of state law with respect to high overvotes.

This report is based on our understanding of the causes of excessive overvoting from our extensive research of the overvote problem in 2008. Without a real analysis of the relevant data for recent elections, however, no one can claim to know the precise causes of current excessive overvoting. That is the statutorily mandated job of the Florida Department of State, but by its own admission, it doesn't even look at overvotes by ballot design nor does it explicitly compare overvoting based on the overvote features on the machines required to provide this protection. We suggest that the state has a wonderful new tool for obtaining and analyzing data on ballot design—ballot images. Digital scanners produce a digitized image of each ballot that can be used to look at actual overvoted ballots and see the kinds of mistakes associated with particular designs. Now the state just needs to make sure all counties are saving these indispensable audit tools. We also suggest that they compare overvote rates for machines with particular types of overvote features. And, finally, we suggest that usability testing of ballot design and instructions, prior to elections, would prevent excessive overvoting in the first place.

EXECUTIVE SUMMARY

Votes Are Lost Because of Voting System Flaws

- In every general election, thousands of Florida voters *accidentally* lose their votes in the contests for Governor and for President due to unintentional overvoting, with the greatest impact being on racial and language minority voters. Other races on the ballot do not generally experience this problem.
- This problem dates from a change in Florida voting systems in 2008, when the DS200 digital scan voting machine from Election Systems & Software (ES&S) was first used for in-person voting.
 - From 2004 to 2008, overvotes increased by a whopping 1400% in Florida’s Presidential race—from 928 overvotes statewide in 2004 to 14,999 in 2008. *Those thousands of overvotes were all lost votes.*
 - *The problem continues today, largely because the state has failed to attribute those overvotes to poor voting machine performance as it is required to do by statute and has failed to require the vendor to make the simple changes necessary to prevent high overvotes.*
- An overvote—making more than the allowed number of choices in a race—is a common voter error usually attributable to a poor ballot design or faulty instructions.
- Because this error is common and preventable, all voting machines used for in-person voting—early or precinct voting—are required by law to provide overvote protection.
- Since the in-person voting machines should prevent overvoting, high numbers of overvotes on Early or Election Day ballots indicate voting machine problems. This is why Section [101.595\(2\)\(b\)](#), Fla. Stat., directs the Florida Department of State to evaluate for each general election the performance of each type of voting system, based on the total number of overvotes and undervotes in the “President and Vice President” or “Governor and Lieutenant Governor” races.
- Even though it is vital to know overvote rates in order to evaluate voting system performance, the actual number remains unknown because some Florida counties *change their overvotes to undervotes for reporting purposes*, as explained in the state’s Overvote and Undervote report. This means that overvotes are even higher than reported. This practice is allowed because of the state’s wrongful interpretation of state law, explained further in Section 4 of this report.
- Using the state’s own data, we found that the astronomical overvote increase between 2004 and 2008 was almost entirely attributable to a single voting machine first used in Florida in 2008 for in-person voting and still used today—the Election Systems & Software (ES&S) DS200 digital scan voting machine. The problems with the DS200, which were first noted in Ms. Garber’s reports, are further explained in Section 3 of this report.
- 2008 offered the perfect comparison between two different voting systems, provided by two different vendors, which served most of the state for in-person voting. One voting machine, the DS200, served 2.8 million in-person voters and had 12,181 overvotes statewide. The second voting machine, the Diebold/Premier AccuVote optical scanner, served 2.6 million in-person voters, but only had 848 overvotes statewide. *The overvote rate on the DS200 was nearly 15 times as high as on the Diebold optical scanners.*
- Ms. Garber’s research in Miami-Dade County showed that racial and language minority voters were far more likely than others to lose their votes through overvoting. Other groups who may be disproportionately affected are first-time voters, voters with reading difficulties and the elderly.

- The difference between the low overvotes on the Diebold/Premier optical scanners and the high overvotes on the ES&S digital scanners was caused by the different ways that the two voting systems handle in-person overvotes, as further described in this report.
- The problems with the DS200 overvote feature are exacerbated by the fact that it does not “reject” the ballot as required by Florida state law, even though it can easily be set to do so. Voters who accidentally overvote may walk away with no idea that they have just lost their vote in a top-of-the-ballot race.
- The DS200 is even more broadly used in Florida today, despite the fact that it still generates excessive overvotes because of its faulty overvote feature. In 2008, the DS200 served 2.8 million voters in Florida. In 2020, the DS200 served 5.8 million voters, 92% of all votes cast in person in the state.
- Aside from disenfranchising voters, the high number of lost votes in both the Gubernatorial and Presidential races could potentially alter the outcome of those races:
 - In 2018, there were 23,299 *reported* overvotes in the Governor’s race, which was decided by a margin of only 32,463 votes. The vast majority of these overvotes were on ES&S voting equipment, both in-person and vote-by-mail. As indicated above, because some counties turn overvotes into undervotes, the actual number of overvotes was even higher than reported.
 - In 2020, there were 21,707 overvotes in the Presidential race. The vast majority of these overvotes—both in-person and vote-by-mail—were cast on ES&S voting equipment.
- Based on Ms. Garber’s research, and with assistance from the Brennan Center for Justice, the NAACP successfully brought a lawsuit against ES&S in 2010 in New York State for the way the DS200 handles overvotes.
- ES&S has failed to correct the problem with the DS200 overvote feature, even though it has known about this problem since at least 2008, when Ms. Garber first published her reports. Despite the fact that it could easily fix the problem, ES&S has instead used the DS200 overvote problem to market its ballot-marking devices (BMDs), which do not allow overvotes but which have other problems that make them far less desirable than hand-marked paper ballots.
- The Florida Department of State and the Florida Division of Elections, likewise, have failed to require ES&S to make the simple changes to its voting system that would prevent thousands of overvotes (lost votes) in every major Florida election.
- The state’s statutorily required “Analysis and Report of Overvotes and Undervotes,” published after each Gubernatorial election and Presidential election, is supposed to address both voting machine problems and ballot design problems that led to high overvotes. Instead, the report *ignores the fact that the overvotes are astronomically high in these two races* and provides no analysis of either voting-machine or ballot-design problems.

Votes Are Lost Because of Poor Ballot Design

- There is an underlying problem with the presentation of the Governor’s race and the Presidential race on the Florida ballot, evidenced by the fact that other statewide races have a much lower overvote rate. These two races are inducing voters to overvote and the machines are not providing protection from those overvotes.
- Vote-by-mail, which has become increasingly more popular, provides no overvote protection. Why? Because once the ballot is logged in and the signature is verified, it is removed—still in its privacy envelope—from the outer envelope which identifies the voter. Consequently, when the

ballot is run, there is no way to associate the ballot with the voter. Thus, a badly designed ballot will generate overvotes that *cannot* be corrected by the voter

- Even if there is a good process for trying to ascertain the voter's intent on vote-by-mail ballots (which isn't always the case), many thousands of votes will still be lost.
- The Overvote/Undervote Report is supposed to evaluate whether problems with ballot design or instructions caused voter confusion, thus increasing voter errors. (See FL Statute [101.595\(2\)\(a\)](#).) While the report does compare overvote rates by specific voting machines, the data tables do not compare overvote rates by ballot design or the content or placement of instructions. Despite a clear difference in the overvote rates between ES&S and Dominion, and despite no comparisons of ballot design, the report confidently concludes that no evidence exists of a problem with either the voting machines or with ballot design or instructions.
- When a ballot design does generate high rates of overvoting, the only way to determine the cause is to examine the actual overvoted ballots to see what kinds of errors were made. In 2008, Ms. Garber had to travel to Miami-Dade County and laboriously look through precinct paper ballots to find and analyze overvotes—a slow, tedious, and time-consuming task. Fortunately, however, with the introduction of digital scanners, the DS200 produces an image of every ballot and saves these to a sortable file, making it easy to examine the actual overvoted ballots. These ballot images are an indispensable tool for investigating ballot design problems as well as other issues.
- ***IMPORTANT: To mitigate excessive overvotes in the 2022 Governor's race—a race that has consistently generated high overvotes and has often been decided by a thin margin—it is essential to ensure poll workers are well trained about how to prevent voters from being disenfranchised by accidental mistakes. Section 6 of this report contains specific but simple recommendations for informing elections staff and poll workers about the overvote problem prior to Election Day and ensuring that they know how to assist voters to prevent unnecessary vote loss.***

DISCUSSION

1) OVERVIEW OF FLORIDA'S OVERVOTE PROBLEM

In every general election, thousands of Florida voters lose their votes in the Presidential and Gubernatorial race in Florida because of overvoting. Our research has shown that this problem has the greatest negative effect on racial and language minorities, meaning these voters lose thousands more votes through overvoting than do other voters.

An **overvote**--making too many choices in an election contest—is almost always *unintentional* – a mistake. This is because an overvote does not result in a valid choice, and voters want their votes to count. In contrast, an **undervote**—not voting in an election contest--is generally *intentional* – voters decide not to vote in a particular race. An undervote is a valid choice that reflects the voter's choice in that race, that is, none of the candidates. *Well-designed voting systems are supposed to prevent overvoting because it disenfranchises voters and produces results that do not accurately reflect the will of the voters in that contest.*

Excessive overvotes nearly always indicate a problem with ballot design or instructions. Something about the directions or the layout of the ballot causes some voters to be confused. If those overvotes are occurring on ballots cast in person, then the voting machine is not providing effective overvote protection as required by law. When a voter overvotes, *the voting machine is supposed to reject the ballot and alert the voter, enabling the voter to correct it.* In 2020, more than 9 in 10 Florida voters who cast their ballots in person—5.8 million--used a voting machine that does not effectively handle overvotes for in-person voting. The DS200 allows the voter to click on an “ACCEPT” button or a “CAST” button that makes voters *think* their votes have been accepted but which actually means they have just lost their vote(s) in the race or races where they overvoted. Once they have hit the “ACCEPT” or “CAST” button, the ballot cannot be retrieved or corrected. Their vote is lost in the overvoted race(s).

These overvotes have occurred, by the thousands, in Florida Gubernatorial and Presidential races, held in alternating General Elections held since 2008 when the DS200 was first introduced. By contrast, other statewide races have generated much lower overvotes.

The two interconnected reasons for the persistent high overvotes in Florida's Presidential and Gubernatorial contests are as follows:

- 1) **The underlying problem for all high overvotes is poor ballot design**, which includes the wording or placement of instructions. Typically, this is the most problematic for vote-by-mail ballots where the voter has no protection against this common mistake, but in Florida the in-person overvote rate in some counties is as high as the overvote rate on vote-by-mail ballots.
- 2) The overvote feature on the DS200, used by the vast majority of Florida voters who cast their ballots in person, is not effective at preventing overvoting. This feature should physically reject the ballot immediately and inform the voter that his vote will be lost if he doesn't correct it. But the DS200 does not physically reject the ballot immediately to prevent the voter from inadvertently losing his or her vote, even though we believe the machine can be set to reject the ballot as specified by Florida law. We know, for example, that the DS200s in use in North Carolina physically reject the ballot if there is an overvote. Some DS200 screens do display a notice in small print, above the RETURN and CAST buttons that informs the voter they have overvoted. But the screen is very busy, with lots of writing on it. Even if they notice the inconspicuous overvote warning, the vast majority of voters have no idea what an overvote is. This confusing display is not sufficient to inform voters of the problem and its consequences. There is also unspoken pressure on voters to “hurry up” because other people are waiting to cast their ballots, so hitting the “Accept” or “Cast” button is the easiest and fastest option without the voter having any awareness that they just lost their vote in the overvoted race.

Overvote Rates First Skyrocketed in 2008

High overvotes in the Presidential and Gubernatorial contests were first experienced in 2008, the first year that the DS200 was used in a Florida election. Overvotes in these races have remained high ever since. In 2004, there were only 928 overvotes statewide in the Presidential race. In 2008, the overvotes in the Presidential race increased to 14,999, a 1400% increase. One voting-machine manufacturer was responsible for the vast majority of overvotes, and that was Election Systems and Software (ES&S), with the introduction of its DS200 digital scan voting machine. By 2020, the DS200 was used for in-person voting in 49 of 67 counties; however, because these machines serve all of the very large counties, they count the votes of 92% of ALL Florida voters who choose to vote in person.

Former Secretary of State Kurt Browning incorrectly blamed the 2008 overvote increase on the state's switch from touchscreen direct recording electronic (DRE) machines to hand-marked paper ballots, but only *one* of the hand-marked paper ballot voting systems in use in 2008 had high overvotes – the ES&S DS200 digital scanner. The second major voting system in the state in 2008, the Premier (formerly Diebold) AccuVote optical scanner, had a very low overvote rate even though it served almost the same number of voters.

The ES&S DS200 served 2.8 million voters in 2008 and had 12,181 overvotes statewide. In contrast, the Premier/Diebold optical scan voting machines in use in Florida in 2008 served almost the same number of voters, 2.6 million, but only had 848 reported overvotes statewide. (The other voting systems in use in Florida in 2008 also had overvote rates higher than the Premier/Diebold system, but those voting systems are no longer in use in Florida).

Why was there such a huge difference between those two systems? The short answer is that the AccuVote OS immediately rejected (kicked back) the ballot to the voter, preventing the voter from losing his vote accidentally before understanding the consequences of not correcting his ballot. By contrast, the DS200 kept (swallowed) the ballot and only gave the voter a confusing notice about the problem, which it continues to do today. (The specific problem with the DS200 is explored in more detail later in this report.) In short, the new digital scanner made overvoting much easier so it was hardly surprising that the number of votes lost to overvoting skyrocketed.

Overvotes Remain High

The statutorily required Overvote/Undervote report produced by the Florida Division of Elections after every general election notes that the overvote percentages have remained consistent since 2010.¹ But the report completely ignores the 1400% increase from 2004 to 2008 that occurred with the introduction of the DS200. *Thus, the Florida Division of Elections has now accepted high overvote rates as the norm and glosses over the continuing high numbers, saying, in essence, "nothing to see here."*

The fact is that overvotes have remained high since they first spiked in 2008, both in the Presidential and Gubernatorial races. In 2018, there were 23,299 reported overvotes statewide in the Gubernatorial race, where the margin of victory was only 32,463 votes. The overvote rate on the ES&S DS200 at 0.33% was at least three times that of the tabulators made by Premier (later called Dominion)--0.08% and 0.11%. In 2020, the Presidential race, which usually has many fewer overvotes than the Governor's race, had 21,707 overvotes statewide, an increase of 26% over the Presidential race in 2016% (from 0.15% to 0.19%).

By 2020, ES&S dominated the voting machine market in Florida, with more than 9 in 10 (92.5%) of Florida's 11.1 million voters casting their ballots on ES&S equipment in the 2020 general election. The state's only other vendor, Dominion Voting system, served 18 of Florida's 67 counties, but less than 10

¹ Overvotes in the U.S. Senate race in 2010 were also high, but that is likely because of the presence of an additional well-known candidate, other than the two major party candidates. This seemed to have caused confusion among some voters.

percent of the state's voters. Concerns about transmission of COVID-19 at in-person voting sites in 2020 also drove a higher number of voters to choose vote-by-mail, a fact that would necessarily exacerbate ballot-design problems. Of the nearly 22,000 overvotes reported statewide, 70%—more than 15,000—were on vote-by-mail ballots. Of the overvotes cast at Early Voting and on Election Day, only a fraction—355—occurred on Dominion voting machines, with the remainder (6,276) on the ES&S DS200.

Some Overvotes Go Unreported

As bad as these numbers are, the actual number of overvotes is even greater, as acknowledged in the state's Overvote/Undervote report. An unknown number of Florida counties turn overvotes into undervotes on vote-by-mail ballots,² skewing the statewide count of overvotes. One of these is Duval County, which includes the city of Jacksonville and is one of Florida's largest counties. This practice is allowed due to a misinterpretation of state law by the Florida Division of Elections, as explained in Section 4 of this report.

Overvoting Problems Affect Some Voters More than Others

In 2009, a study of overvotes in Miami-Dade county's 2008 Presidential election by FFEC research director, Mary K. Garber, showed that Florida's overvotes were more prevalent among Hispanic and Black voters. Although the study was based on 2008 data, the same problems exist today. An excerpt from Ms. Garber's report states:

Miami-Dade had the highest overvote rate in the state for Election Day voting (0.87%); its rate for early voting was the fourth highest in the state (0.37%). More than 4,000 voters lost their votes even though overvote protection was supposedly provided by the DS 200. Nearly half (46%) of majority-Black precincts and more than a quarter (26%) of majority Hispanic precincts in Miami-Dade had overvote rates of more than 1%. In contrast, fewer than 6% of Miami-Dade's majority white precincts had an overvote rate in excess of 1%. While both Hispanic and Black voters were disproportionately harmed by problems with the DS 200, the effect on Black voters was much more severe. Preliminary research in other DS 200 counties suggests that this trend will hold up statewide.

2) BALLOT CONFUSION IN THE PRESIDENTIAL AND GUBERNATORIAL RACES--THE UNDERLYING CAUSE OF HIGH OVERVOTES

A well-designed ballot should prevent voters from overvoting to begin with. If the ballot design or instructions are confusing and induce overvotes, and the voter casts his ballot in person, the voting machine is legally required to provide overvote protection. Florida law says the machine must "reject" (kick back) the ballot to allow the voter to correct the overvote. Since 2008, however, both the Presidential and Gubernatorial races have generated high overvotes, and the voting machines are not kicking back the ballots as they are required to do by law. Overvoting, therefore, is not just high on vote by mail, but also on ballots cast in person, a result of both a ballot design problem *and* the failure of the DS200 to protect the voter from casting a ballot with overvote(s) on it.

The Florida Governor is not elected in the same year as the U.S. President, but in the general election that falls between Presidential years. Therefore, the Presidential race is the subject of the state overvote and undervote report in years with a Presidential election, but focuses on the Governor's race in the general election in between Presidential years—popularly referred to as the mid-term election. Because the Presidential and Gubernatorial races usually generate the most interest, they should be the ones best known by the voters. Thus, you would think these races would generate fewer errors than other races, but instead they generate far *more* errors.

² Overvotes on some ballots cast during early voting and Election Day may also be converted to undervotes by some counties.

Overvotes in the 2018 Governor's Race

In Presidential election years, the state report analyzes the overvote and undervote data for the Presidential race. In the General Election that falls between Presidential years, Florida elects its governor, and the state report examines the overvote and undervote data for this race. In 2006 and 2010, the state report looked at two races—the U.S. Senate race and the Gubernatorial race, but that is no longer done. This means that it is now difficult for us to get the data to compare the overvote rate in the U.S. Senate race to the overvote rate in the Governor's race for each of the counties in Florida because many counties do not publish the number of overvotes and undervotes on their website. For those counties, the only way to get those numbers is through public records requests.

Fortunately, however, we are able to get overvote and undervote numbers for comparison in some counties that are more transparent. As seen below, in the 2018 General Election, Volusia County had low overvotes in the U.S. Senate race, but *much higher overvotes in the Governor's race*, both of which are statewide races.

In 2018, the U.S. Senate Race had low relatively overvotes in Volusia County:

United States Senator	
(VOTE FOR) 1	
(WITH 125 OF 125 PRECINCTS COUNTED)	
Rick Scott (REP)	125,719
Bill Nelson (DEM)	102,775
WRITE-IN	737
Over Votes	67
Under Votes	1,706

By contrast, the 2018 Governor's race in Volusia had *six times* the number of overvotes as the U.S. Senate race:

Governor and Lieutenant Governor	
(VOTE FOR) 1	
(WITH 125 OF 125 PRECINCTS COUNTED)	
Ron DeSantis (REP)	124,811
Andrew Gillum (DEM)	100,486
Darcy G. Richardson (REF)	1,618
Ryan Christopher Foley	734
Kyle "KC" Gibson	644
Bruce Stanley	466
WRITE-IN	241
Over Votes	406
Under Votes	1,598

If the ballot design is confusing, there will be overvotes on vote-by-mail ballots where there is no overvote protection, but overvotes should be caught and corrected for in-person voters in Early Voting and on Election Day because the machines are supposed to provide this protection. However, you can see in the numbers below that the percentage of overvotes occurring on in-person voting on Election Day on the DS200 in Volusia County in 2018 was similar to the percentage of overvotes on vote-by-mail, meaning the DS200 provided no overvote protection whatsoever.

The percentage of overvotes in Early Voting was half the percentage on Election Day. This difference between Election Day overvotes and Early Voting overvotes is also seen in many other Florida counties, almost assuredly because staff or more experienced poll workers are generally in charge at Early Voting sites and available to inform and assist voters who have overvoted. By contrast, Election Day polling sites are often staffed by poll workers who are less familiar with the machines and with state law.

	TOTAL VOTES	%	Absentee	Early Vot	Election
Governor and Lieutenant Governor (VOTE FOR) 1 (WITH 125 OF 125 PRECINCTS COUNTED)					
Ron DeSantis (REP)	124,811	54.50	43,071	31,734	49,887
Andrew Gillum (DEM)	100,486	43.88	33,807	30,903	35,628
Darcy G. Richardson (REF)	1,618	.71	820	243	552
Ryan Christopher Foley	734	.32	346	117	271
Kyle "KC" Gibson	644	.28	323	80	240
Bruce Stanley	466	.20	217	73	176
WRITE-IN	241	.11	102	56	83
Over Votes	406		154	90	159
Under Votes	1,598		772	232	583

Source: [Summary Report—Group Detail](#), Official Results, November 6, 2018, Volusia County.

An examination of the data from the state overvote and undervote report on the 2018 Governor’s Race shows that what we see in Volusia County holds up statewide. Overvotes in the Governor’s Race were very high overall, but especially on vote-by-mail. However, some counties that used the DS200 for in-person voting also had quite high rates of overvoting on Election Day ballots—0.27% compared to 0.15% for the Dominion machine. Overvotes on Early Voting ballots on both systems were lower than on Election Day ballots, but the difference was more dramatic for the DS200. The overvote rate for early voting on the Dominion machine only dropped slightly to 0.12%; for the DS200 its rate of overvoting on early voting was much lower, dropping from 0.27% on Election Day to 0.16% on early voting.

Overvoting in the 2020 Presidential Race

In 2020, the Presidential race, which usually has many fewer overvotes than the Governor’s race, had 21,707 overvotes statewide, an increase of 26% over the Presidential race in 2016 (from 0.15% to 0.19%). Part of that increase was driven by the fact that mail-in ballots were a much larger percentage of the total votes than usual, mostly because of COVID transmission concerns about in-person voting. But the increase was also driven by the fact that the DS200 now counted a much larger number of the ballots cast in person—92% of Florida voters who voted in person voted on the DS200 rather than the Dominion machine. For Election Day ballots, the DS200 had an overvote rate of 0.16%, while the overvote rate on the Dominion machine was half that at 0.08%. Both systems had a lower overvote rate for early voting, with the DS200 still slightly higher at a rate of 0.08% compared to 0.06%.

Conclusion: Ballot design is the underlying problem driving higher overvote rates. This overvote problem is exacerbated by a higher percentage of voters choosing to vote by mail, which offers no overvote protection as well as by the failure of the state’s most widely used tabulator, the ES&S DS200, to offer adequate overvote protection.

Who Is Responsible for Ballot Design?

The faulty design of the U.S. Senate race on the 2018 Broward County ballot was addressed by the state only *after* the election was over. That race was located below the instructions on the left column of the ballot and was overlooked by about 10,000 voters in the state’s second largest and most Democratic county. The *New York Times* concluded that Dem. Senator Bill Nelson would probably have won in 2018 were it not for the flawed ballot design. State law prohibiting certain ballot designs was subsequently changed to prevent this from occurring again, but it was too late for Senator Nelson and the Democrats.

[Florida Statute 101.151](#), which provides specifications for ballots, allows or even requires some of the very features that may be confusing for voters. Florida Administrative Rule [1-S-2.032](#) “Uniform Design in Election Ballots” presents more detailed ballot design requirements. But neither the statute nor the rule

address the need to conduct usability testing to determine which features are causing the overvote problem in the Presidential and Governor’s races and make changes to state law based on those findings and other findings that relate to design and layout flaws. These standards should be established by usability testing of different ballot designs, layouts, and instructions—with real voters—focusing on new voters, elderly voters, language-minority voters, and voters with comprehension or reading difficulties who may be more reliant on visual clues.

Florida law ([FS 101.595](#)) mandates that the state Overvote/Undervote Report use these measures, not only to evaluate voting system performance, but to investigate whether problems with ballot design or instructions caused voter confusion, thus raising overvote or undervote rates. Each of the state Overvote/Undervote Reports since 2008 references this mandate but concludes that no evidence exists that voter confusion generated by ballot design or instructions drove up overvote or undervote rates. Their rationale for this conclusion is shown, in its entirety, below:

*The compiled Presidential contest data do not show anything to suggest or conclude that voter confusion existed during the election as a result of ballot design and/or ballot instructions issues, or that the voting equipment manifested any anomalies. A historical overview of the overvote and undervote data consistently shows no demonstrable correlation as to issues with ballot design and/or instructions which confused voters, or manifestation of any anomalies with county voting systems.*³

But what is the basis for this conclusion? The data tables that accompany the state’s report do compare overvote and undervote rates for each of the types of vote tabulators. Although this data points to problems with the DS200, it is never mentioned in the report itself. There is no comparable comparison by ballot design or instructions in the data tables and no mention of ballot-design issues in the report itself.

Despite the statutory requirement for uniformity in ballot design in the state’s top races and the very precise specifications in the state’s administrative rule, there are significant differences in ballot design and instructions across the state. For example, some ballots are only in English, while others are in English and Spanish. Still others, such as Miami-Dade’s ballot, are in three languages—English, Spanish, and Haitian Creole. Some ballots use color or shading—others are black and white. Instructions vary both in placement and content. Further, we haven’t been able to discover any mechanism for enforcement of these ballot design standards and specifications. We know from our inspections that not all these standards are met.

We assume that the report’s author knew that ballots and instructions were not exactly the same statewide, but might differ by county. While the data tables show wide discrepancies in overvote and undervote rates by county, there is no comparison of county data in the report itself. Even the most cursory glance at the county data indicates that some counties had far higher overvote rates than others. Further, there is nothing to suggest that the authors looked at the actual ballots from the counties to see if there were differences in ballot design or instructions that could possibly have driven the obvious differences in overvote rates. And the report doesn’t address whether voter confusion might be greater among certain specific groups of voters—such as the elderly or language minorities.

To be fair, the state report’s author in 2018 did note that he needed more information in order to evaluate the effects of ballot design on voter confusion and, thus, on overvotes and undervotes, and he suggested revising a particular questionnaire as a way of getting that information from the counties. In 2020, however, the report’s author found that the information gathered from the counties by this newly revised form was not sufficient to draw any conclusions and suggested that it be revised again. The

³ “Analysis and Report of Overvotes and Undervotes, 2020 General Election,” p. 1.

author does not suggest, however, what seems obvious—that the counties attach the first page (or all pages) of their actual ballot to the form.

In sum, by the author’s own admission, the state report does not actually look at the possible contribution of ballot design and/or instructions to overvoting. To do so, it would have, at a minimum, required comparing ballot designs/instructions for counties with high overvote rates to the ballot designs/instructions for counties with low overvote rates. Yet, the report never compares counties and confidently concludes that the overvote rates are acceptable and ballot design/instructions are not a problem.

Finally, the report does not even note that these races have much higher rates of overvoting than other statewide races on the same ballot. When we looked at the overvoted ballots in Miami-Dade, we noted that the voters who overvoted did not overvote on other races on the ballot. The other races on the ballot had differences in the instructions and in how the candidates were presented, as noted in the next section of this report.

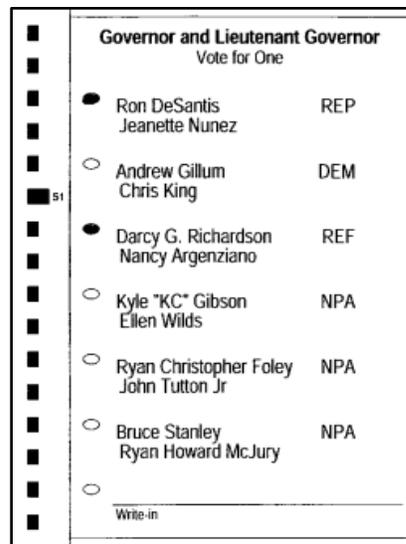
Obviously with a state report that explicitly concludes that there are no problems with voting system performance or ballot design/instructions, the state has been able to justify its failure to address these problems. After all, if it isn’t broken, they don’t need to fix it. As a consequence, tens of thousands of voters will continue to *unnecessarily* lose their votes in the Presidential and Gubernatorial races, something that could easily be prevented by adequate overvote protection and better ballot design.

Specific Ballot Design Problems Identified on Inspected Ballots

Unlike the authors of the state report, we examined actual overvoted ballots to determine why voters found them confusing. The ballot design problems we found on Miami-Dade’s 2008 ballot in the Presidential race are the same ones that we have seen on the small number of overvoted ballot images we have inspected from the 2018 Governor’s race and the 2020 Presidential race.

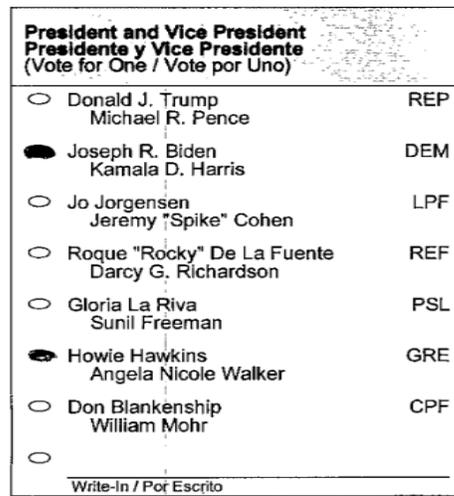
Figures 1 and 2 below show examples of actual overvoted ballots from those races where the voter may have been confused by the instruction to vote for governor *and* lieutenant governor.⁴ Note that in both cases, the voter has picked one of the major party candidates and then one additional candidate:

Figure 1. 2018 Governor’s Race, Wakulla Co., FL, Wakulla Station, Ballot Image #11674i



⁴ Photocopies of actual overvoted ballots from the 2008 Miami-Dade presidential race are available upon request.

Figure 2: 2020 Presidential Election, Volusia County, FL, Poll Site 717A, Ballot Image #115086



Conclusions: From our inspection of *all* overvoted ballots from the precinct in Miami-Dade that had the worst overvote rate in the 2008 Presidential race, we were able to conclude that the high rate of overvoting was driven by problems in two areas: (1) Design of the Presidential race; and (2) Location and content of instructions, specifically addressed below.

Problems with design of the Presidential race:

Those who overvoted on the 2008 Miami-Dade Presidential race seemed to be confused by the way the candidates were presented in the Presidential race, which was unlike the other races on the ballot. *None of the overvoters overvoted in the other races on their ballot.* We also found this to be true for the 2018 Gubernatorial ballots we inspected, which had the same basic layout.

- 1) Some voters seemed to believe that the instruction to vote for President **and** Vice President, or for Governor **and** Lieutenant Governor, meant they should mark two sets of names. The “and” is grammatically confusing, implying one vote for Governor and one vote for Lieutenant Governor. Many voters may not know that the Governor and Lieutenant Governor are elected as a pair. Also, voters who have moved to Florida may come from a state where the Governor and Lieutenant Governor are elected separately, not as a pair.
- 2) The fact that names for President and Vice President were stacked led some voters to believe they should vote for one of each pair, which is what many overvoters did. That is still the design of both the Presidential and Gubernatorial races. And that is still what confuses some voters.
- 3) The length of the contest seems to have been confusing to some who overvoted. All the overvoters seemed to know the major candidates and picked one of them, but some seemed to believe that the remaining names were a different race. This remains a source of confusion.

Problems with location and content of instructions on the Miami-Dade ballots:

- 1) The instructions on the Miami-Dade ballots were poorly located. Instead of being across the top of the ballot or at the top of the first column as is generally recommended, they were located at the

top of the middle column. Voters could easily have started marking ovals in the Presidential race before they even saw the instructions.

- 2) Necessary information for marking the ballot and correcting mistakes was missing. Ballot instructions should contain all the required information for marking the ballot and correcting mistakes. It is especially important that the voter is told the consequences of mismarking the ballot. Yet this information was missing. Instead, the instructions directed voters to refer to information that was not on the ballot, but on *a separate piece of paper*.
- 3) We subsequently discovered that the instructions referenced on the ballot were worded as follows: “Check the screen to see whether there are any issues with the ballot, such as overvoting or blank ballots. Press RETURN to get the ballot back. Press ACCEPT to submit the ballot.” ***It does not define “overvoting” nor does it explain the consequences (losing their vote) of hitting ACCEPT if the voter sees an overvote message on the screen.***
- 4) The general instructions as well as the instructions for the various races were difficult to read. Three languages—Haitian Creole, Spanish, and English-- crowded together on the same ballot made text denser, print smaller, and spacing tighter. Even with different colors used for the three languages, it was difficult for many voters to locate and read the instructions in their own language.

Recommendations:

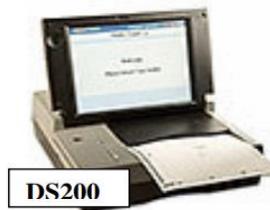
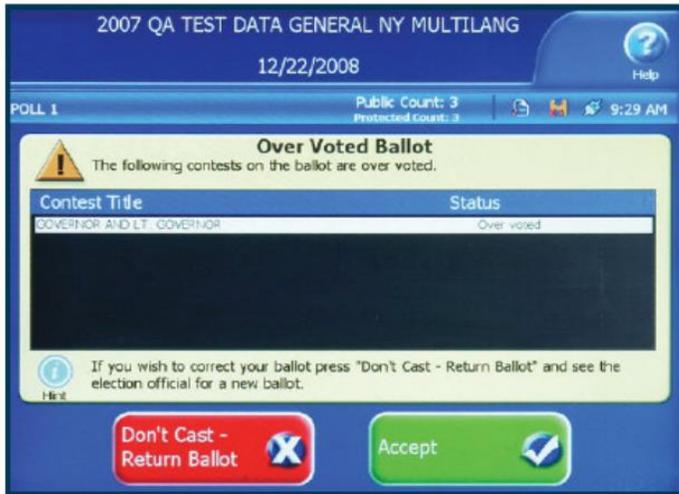
- The state needs to look at ballot design for all statewide races, especially the problematic Gubernatorial and Presidential ballot design and instructions. Ironically, these are the two races that are analyzed in alternating General Elections in the state’s mandatory Overvote/Undervote report. But because they are not comparing these races to other statewide races on the ballot, they seem unaware that the Presidential and Gubernatorial races have extraordinarily high overvotes compared to other races.
- Ideally, the state should review ballot design in all 67 counties *before* each election for compliance with established, well-tested standards. Alternatively, the state could create the ballot design for the top races in each election and make that design uniform throughout the state, with an alternate uniform designs depending on the number of languages required, which varies from county to county. Also, [Florida Statute 101.151\(8\)](#) allows multi-lingual counties to petition the U.S. Dept. of Justice for authorization for the supervisor to print and deliver single-language ballots for each minority language required, a possibility that would reduce ballot-design confusion but which requires more evaluation.
- It is especially important that instructions are properly located so that they are seen and read by the voter and that they contain all required information for marking the ballot, including what to do if the voter makes a mistake as well as the *consequences* of submitting an overvoted ballot.
- Further, the state should conduct forensic testing on ballot designs subsequent to each general election to determine if any elements of the design were confusing or misleading to voters as evidenced by high rates of overvoting. They should especially consider whether particular groups of voters were more adversely affected than others—the elderly, language minorities, low literacy voters, and those who have reading disabilities. This means doing what we did—actually looking at the overvoted ballots (ballot images) to see the specific mistakes that were made. Ballot images in each county can be sorted by overvotes and undervotes, making such an analysis far easier than having to look at the paper ballots themselves.
- Fortunately, the DS200 produces an image of every ballot and saves these to a file. These ballot images are an indispensable tool for analyzing the problems with ballot design as well as other issues. As stated above, a county’s ballot images can be sorted by overvotes and undervotes, making it much simpler than having to look at the paper ballots themselves. Unfortunately, about half of Florida’s counties, including the state’s largest counties, are refusing to retain ballot images in violation of state and federal law.
- Finally, the state needs to produce an overvote and undervote report based on a rigorous, objective analysis of the relevant data. The current report consistently ignores obvious problems, fails to analyze relevant data, admits that it has problems obtaining needed data, and yet consistently finds no problems. This report needs to be taken out of the hands of the Dept. of State and assigned to an entity that can be more objective.

3) FLAWED OVERVOTE FEATURE ON THE ES&S DS200 RESULTS IN LOST VOTES

Even with a confusing ballot design that causes voters to overvote, the voting machines used for in-person voting are supposed to reject (kick back) any ballot with overvotes to give voters an opportunity to understand and correct their mistakes. But this does not happen on the ES&S DS200, used by almost 6 million voters in the Florida 2020 election. *That means that 92% of all the Florida voters who voted in person in 2020 cast their ballot on a machine with inadequate overvote protection—the DS200.* Of the thousands of in-person voters who have accidentally cast overvotes in every General Election in Florida beginning in 2008 and continuing to the present day, most are unaware that their votes did not count. Also, they may unknowingly repeat the same error in subsequent elections.

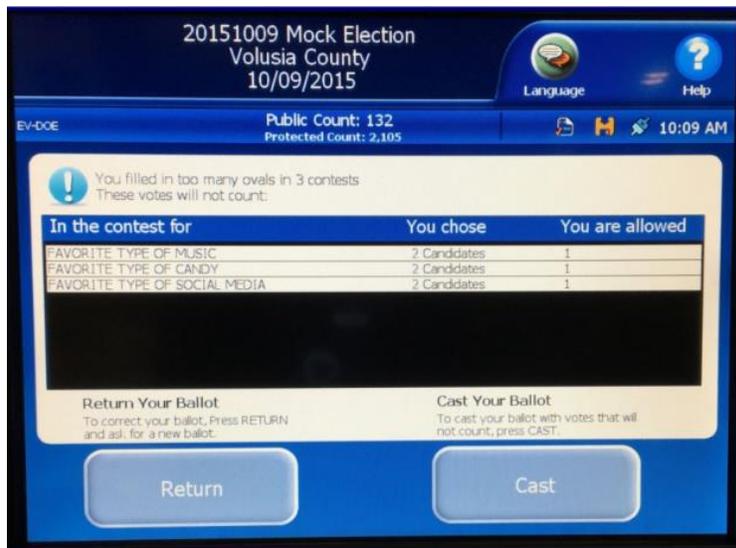
The DS200 does NOT automatically reject overvoted ballots as the law requires (see pictures below), but instead shows the voter a screen with two choices: One large rectangle that says “Accept” or “Cast” and another rectangle that says, “Return” or “Don’t Cast.”⁵

Figure 3. The ES&S DS200 Overvote Screen:



Source: ES&S IntElect DS200, Product Overview, Election Systems & Software,

Figure 4: Current ES&S DS200 Overvote Screen provided by Volusia County Supervisor of Elections



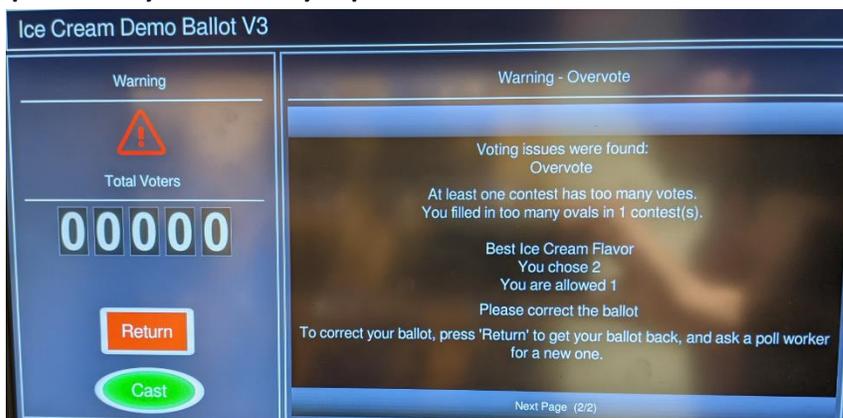
The DS200 overvote screen, as shown above, appears to violate Florida law and the requirements for Florida certification of a voting system (see law and voting system requirements below). The DS200 does NOT reject (kick back) a ballot that has been overvoted as required by law. Instead, the DS200 “swallows” the ballot and shows the voter a very busy screen with little time to make a decision about which button to push. Without poll worker assistance, most voters simply press the “Accept” or “Cast” button, not realizing they have just lost their vote. The screen is even more difficult for voters voting in another language, since the “language” button is in English and not immediately visible with such a cluttered screen. (Note: Some screens may have variations from the above illustrations, but the notification remains inadequate and overvotes remain uncorrected because the ballot is not physically rejected.)

Dominion Voting Systems

This report focuses on the high overvote rate on the ES&S DS200, but we wanted to at least mention the other voting system in use in Florida, which is provided by Dominion Voting Systems. This system serves 18 of Florida’s 67 counties, but only 6% of the total in-person (early voting and Election Day) voters in the state. The Dominion system is used by some of the smallest counties in Florida, while ES&S serves most of the large and medium-sized counties.

Like the ES&S DS200, the Dominion overvote screen, shown below, does not meet the requirements of state law to automatically reject the ballot in case of an overvote. While its screen appears to be somewhat better designed than that of the DS200, it would take more research to determine why the overvote rate on this scanner is so much lower than on the DS200. In 2020, the early voting overvote rate on the Dominion scanner was 0.06%, only somewhat lower than on the DS200 at 0.08%, but for Election Day, the difference was much greater, with the Dominion scanner having an overvote rate half that of the ES&S scanner (Dominion: 0.08%; ES&S: 0.16%). Aside from the design of the screen, other relevant factors could be differences in the demographics of the voting population and in poll worker training and assistance. We do want to note that even though the Dominion scanner has a lower overvote rate than the DS200 it is still higher than the rate on the older scanners that physically rejected the ballot.

Figure 5. Current Dominion Voting Systems overvote screen provided by Leon County Supervisor of Elections



Florida Law

Florida law specifically states that a voting machine must “reject” (kick back) an overvoted ballot, which makes it clear to the voter that there is a problem and allows them to correct their ballot, as follows:

Florida Statute 101.5606 Requirements for approval of systems.—

<https://www.flsenate.gov/Laws/Statutes/2021/0101.5606>

No electronic or electromechanical voting system shall be approved by the Department of State unless it is so constructed that:

- (1) It permits and requires voting in secrecy.
- (2) It permits each elector to vote at any election for all persons and offices for whom and for which the elector is lawfully entitled to vote, and no others; to vote for as many persons for an office as the elector is entitled to vote for; and to vote for or against any question upon which the elector is entitled to vote.
- (3) ***It immediately rejects a ballot where the number of votes for an office or measure exceeds the number which the voter is entitled to cast or where the tabulating equipment reads the ballot as a ballot with no votes cast.***

Florida’s manual of Voting System Standards, which the state uses to certify voting systems, states the following on Page 18: Undervotes and Overvotes. Marksense systems ***shall reject blank ballots and ballots with overvoted races.*** <https://files.floridados.gov/media/693718/dsde101.pdf>

But the DS200 does not reject overvoted ballots. It gives the voter a choice whether to accept or reject, which makes no sense to the voter. Without further guidance, most pick the “ACCEPT” or “CAST” button with no realization that they have just lost their vote in an overvoted race. Based on Ms. Garber’s research, the Brennan Center for Justice assisted the NAACP in bringing a successful lawsuit against ES&S in 2010 to correct the way that the DS200 handles overvotes in New York, but Florida has not made any corrections based on the same research.

Conclusion: Adequate overvote protection is vital to prevent mismarked ballots from being discarded without giving voters a chance to correct their mistakes. If voters have mismarked their ballot because they do not understand the ballot or the voting process, then the overvote protection is only the first, but vital, step in the process. It warns that there is a problem, but it cannot solve the problem. At that point, *there is no substitute for a human being who can answer the voter’s questions about the error (overvote)—in the language understood by the voter.* Our research has shown unless a poll worker is stationed at the voting machine to instruct voters *that they are about to lose their vote* when they receive an overvote notification, voters almost always choose the “ACCEPT” or “CAST” button. The machine keeps their ballot, and they are unaware that they have just lost their vote in the overvoted race.

Recommendations:

- In-person tabulators must be set to reject the ballot. Voters cannot be expected to understand the problem if they cannot see their ballot. Also, rejecting the ballot means that they cannot inadvertently lose their vote before understanding the problem.
- Even when changes to the overvote feature are made, it will still be necessary for poll workers to interact with voters to answer their questions and explain how the ballot and machine work. There is no substitute for a real human being who can interact with the voter. Poll workers must be trained to make sure votes are not lost unnecessarily.
- Finally, the state must produce an Overvote/Undervote Report that actually evaluates voting system performance and ballot design, using overvote and undervote rates as the law requires, as well as utilizing other reasonable measures, e.g., reported problems, staff or voter dissatisfaction.
- It may be necessary to have this report removed from the Department of State to the Inspector General to improve objectivity.

4) THE STATE SHOULD NOT ALLOW COUNTIES TO CONVERT OVERVOTES TO UNDERVOTES

Floridians never get an accurate count of overvotes because Florida counties are allowed to turn vote-by-mail overvotes into undervotes, a fact that is acknowledged in the state's Overvote/Undervote report. This means that unknown thousands of overvotes go unreported, and it also means that the number of overvotes and undervotes in the state report is wrong, as acknowledged in the report itself. Allowing overvotes to be turned into undervotes, by duplicating the overvoted ballot, inaccurately decreases the number of reported overvotes and increases the number of reported undervotes.

The following *inaccurate* statement is found in several consecutive state Overvote/Undervote reports including the most recent (2020):

As stated in previous reports, an inherent bias continues to exist in actual overvote rates (or conversely higher than actual undervote rates) due to the current ballot duplication requirements in law. Specifically, section 101.5614(5), Fla. Stat., requires a vote-by-mail ballot with an overvoted contest to be duplicated as a ballot with only valid votes. This means that the overvoted contest on that ballot will be remade as a blank (undervoted contest). This in turn skews the number of actual undervotes reported.

But the above statement is wrong. The Division of Elections is mistaken about the requirements of the law. Florida Statute 101.5614(5), referenced in the above paragraph in the state's report, says nothing about converting overvotes to overvotes. It reads:

(5) If there is no clear indication on the ballot that the voter has made a definite choice for an office or ballot measure, the elector's ballot shall not be counted for that office or measure, but the ballot shall not be invalidated as to those names or measures which are properly marked.

Most counties out stack the vote-by-mail overvoted ballots, then run them back through the scanners with the overvote-rejection switch turned off. This allows the other races on the overvoted ballots to be counted while retaining an accurate overvote count. Other counties, however, are manually duplicating the ballots with the overvoted race, turning those overvotes into undervotes so that the scanners will accept them when they are rescanned. It appears that the state is allowing counties to avoid reporting the overvotes through a **mistaken interpretation of the law**. In the state Overvote/Undervote report, for example, one of the largest counties in the state, Duval County, which has an ES&S voting system and assuredly has high overvotes, shows "N/A" in the state's data tables instead of the number of overvotes.

Recommendation: The state should **not** allow overvotes to be reported as undervotes. The current practice of converting overvotes to undervotes should stop in order to allow an accurate reporting of the number of overvotes (and undervotes) statewide. Accurate overvote and undervote numbers are important for assessing voting system performance and ballot design, layout, and instructions.

5) FLORIDA'S VOTING SYSTEM STANDARDS HAVE NOT BEEN UPDATED SINCE 2005

Florida does not require Federal certification of its voting systems. Instead, it certifies those systems through the Bureau of Voting Systems Certification (BVSC), a department of the Florida Division of Elections. (Florida Statute FS 101.017 created the Bureau of Voting Systems Certification: <https://www.flsenate.gov/Laws/Statutes/2021/0101.017>)

But Florida's Voting System Standards, which are used to certify the state's voting systems, have not been updated since January 2005, before digital scanners were even considered for use in the state. How can the state be approving these systems without adequate testing guidelines and in apparent violation of state law?

Florida Statute 101.015 includes the following paragraphs:

(1) The Department of State shall adopt rules which establish minimum standards for hardware and software for electronic and electromechanical voting systems. Such rules shall contain standards for:

- (a) Functional requirements;
- (b) Performance levels;
- (c) Physical and design characteristics;
- (d) Documentation requirements; and
- (e) Evaluation criteria.

(2) ***Each odd-numbered year the Department of State shall review the rules governing standards and certification of voting systems to determine the adequacy and effectiveness of such rules in assuring that elections are fair and impartial.***

(7) The Division of Elections shall review the voting systems certification standards and ensure that new technologies are available for selection by boards of county commissioners which meet the requirements for voting systems and meet user standards. ***The Division of Elections shall continuously review the voting systems certification standards to ensure that new technologies are appropriately certified for all elections in a timely manner. The division shall also develop methods to determine the will of the public with respect to voting systems.***

[Link to Voting System Standards](#)

Conclusions and Recommendations: The state is clearly not reviewing the rules and standards governing voting system certification as it is required to do by FS 101.015(2). It should begin doing so immediately. At a minimum, the state should update the state's outdated 2005 Voting System Standards, which are used by the state to certify voting systems. The rate of accidental overvoting should be part of the state's assessment for voting system re-certification. It should also consider whether it should seek Federal certification for state-approved voting systems.

6) INTERIM MEASURES TO BRING DOWN OVERVOTES IN THE UPCOMING GENERAL ELECTION—NOTIFYING ELECTIONS STAFF AND POLL WORKERS

➤ **THE MOST IMPORTANT RECOMMENDATION FOR SUPERVISORS OF ELECTIONS WHO HAVE ES&S VOTING SYSTEMS:**

- ❖ Notify voting-machine attendants stationed at the DS200 that they need to be attentive and be aware when a voter overvotes. The attendant needs to tell the voter who has overvoted that they ***are about to lose their vote*** if they hit the ACCEPT or CAST button without correcting their ballot. Our research has shown that just this simple intervention can make a huge difference in preventing votes from being lost accidentally. Notifying or telling a voter that he/she has overvoted **IS NOT ENOUGH** because most voters have no idea what an overvote is or any idea they will lose their vote if they don't correct their ballot.

➤ **OTHER POSSIBLE INTERVENTIONS:**

- ❖ Post a notice in voting booths that voters should only fill in ONE oval in the Governor's race or notify voters at the ballot table when they sign in.
- ❖ Post a notice at the DS200 that, in case of an overvote notification, a voter should summon a poll worker to explain the problem. The notice should clearly state that the voter will LOSE THEIR VOTE if they hit the "ACCEPT" or "CAST" button without correcting their ballot.

THE FOCUS SHOULD BE ON ELECTION DAY WHEN THE GREATEST NUMBER OF OVERVOTES OCCUR FOR IN-PERSON VOTING.

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Note: For reference, Florida Department of State Overvote and Undervote Reports for 2002 to 2010 can be found at <https://www.ffec.org/public-records-state/>