Nos. 22-11143; 22-11133; 22-11144; 22-11145

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., ET AL.,
Plaintiffs-Appellees,

v.

FLORIDA SECRETARY OF STATE, ET AL.,
Defendants-Appellants,

Consolidated Appeals from the United States District Court for the Northern District of Florida, Mark E. Walker, Chief District Judge
4:21-cv-00186, 4:21-cv-00187, 4:21-cv-00201, 4:21-cv-00242

MOTION OF RESTORING INTEGRITY AND TRUST IN ELECTIONS, INC. FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (CIP)

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, 26.1-2, and 26.1-3, Restoring Integrity and Trust in Elections, Inc. ("RITE") states that it is 501(c)(4) non-profit organization. It has no parent corporation and no publicly held corporation holds a 10% or greater ownership interest in it. RITE provides the following Certificate of Interested Persons and Corporate Disclosure Statement:

1. Crosland, E. Stewart – Counsel for *Amicus Curiae* RITE
2. Davis, Charlotte – Counsel for *Amicus Curiae* Public Interest Legal Foundation
3. Foundation for Government Accountability ("FGA") – *Amicus Curiae*
4. Gore, John M. – Counsel for *Amicus Curiae* RITE
5. Honest Elections Project – *Amicus Curiae*
6. Jones Day – Counsel for *Amicus Curiae* RITE
7. Malisa, Madeline K. – Counsel for *Amicus Curiae* FGA
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9. Phillips, Kaylan – Counsel for *Amicus Curiae* Public Interest Legal Foundation

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11. Redmond, Caleb P – Counsel for *Amicus Curiae* RITE

12. Restoring Integrity and Trust in Elections, Inc. – *Amicus Curiae*

13. Spero Law LLC – Counsel for *Amicus Curiae* Honest Elections Project

Besides those listed above and in Defendants-Appellants' Certificate of Interested Persons and Corporate Disclosure Statement, no other associations of persons, and no other firms, partnerships, or corporations have an interest in the outcome of this case or appeal.

July 18, 2022

/s/ John M. Gore
Counsel for Amicus Curiae

MOTION FOR LEAVE

Pursuant to Federal Rule of Appellate Procedure 29(a)(2)–(3) and Eleventh Circuit Rule 29-1, Restoring Integrity and Trust in Elections, Inc. ("RITE") respectfully moves for leave to file an amicus brief in this case. A copy of the proposed brief is attached to this motion.

RITE is a 501(c)(4) non-profit organization with the mission of protecting the rule of law in the qualifications for, process and administration of, and tabulation of voting throughout the United States. It thus supports laws and policies that promote secure elections and enhance voter confidence in the electoral process. RITE has a particular interest in ensuring that the federal judiciary does not subvert "each State . . . Legislature" as the primary authority over the "Times, Places and Manner of Holding Elections for Senators and Representatives." U.S. Const. art I, § 4. Its expertise and national perspective on election law will assist the Court evaluate the district court's 288-page opinion.

As the proposed brief explains, the district court erred by second-guessing Florida's efforts to update its election laws, ultimately finding several provisions unconstitutional. Among other serious errors, the district court failed to presume that the Legislature acted in good faith—a presumption required by settled law that proves dispositive of several issues here. The court then exacerbated the problem by wrongly imposing a federal preclearance regime on the Florida Legislature.

All parties consent to, do not oppose, or take no position on this motion.

Respectfully, this Court should grant RITE's motion to file an amicus brief, consider its brief, and reverse the district court's judgment.

July 18, 2022

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitations contained in Federal Rule of Appellate Procedure 27(d)(2)(A) because, excluding the portions exempted by Rule 32(f), the brief contains 263 words, as determined by the Microsoft Word program used to prepare it.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ John M. Gore
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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2022, the foregoing was electronically filed with the Clerk of Court using the Appellate PACER system, which automatically serves e-mail notification of such filings to the attorneys of record who are registered participants in the Court's electronic notice and filing system and each of whom may access this filing via the Court's Appellate PACER system.

I further certify that, on July 18, 2022, seven copies of the foregoing document were dispatched via UPS Next-Day delivery for filing to the following:

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BRIEF OF *AMICUS CURIAE* RESTORING INTEGRITY AND TRUST IN ELECTIONS, INC. IN SUPPORT OF APPELLANTS AND REVERSAL

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Besides those listed above and in Defendants-Appellants' Certificate of Interested Persons and Corporate Disclosure Statement, no other associations of persons, and no other firms, partnerships, or corporations have an interest in the outcome of this case or appeal.

July 18, 2022

/s/ John M. Gore
Counsel for Amicus Curiae

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Restoring Integrity and Trust in Elections, Inc. ("RITE") respectfully submits this brief as *Amicus Curiae* in support of Appellants and reversal. RITE is a 501(c)(4) non-profit organization with the mission of protecting the rule of law in the qualifications for, process and administration of, and tabulation of voting throughout the United States. Recognizing that Article I, Section 4 of the United States Constitution vests primary authority over the "Times, Places and Manner of Holding Elections for Senators and Representatives" in "each State . . . Legislature," RITE has a particular interest in ensuring that courts do not legislate election rules from the bench—especially mere months before an election. RITE also supports laws and policies that promote secure elections and enhance voter confidence in the electoral process. Its expertise and national perspective on voting rights, election law, and election administration will assist the Court in reaching a decision consistent with the Constitution and the rule of law.[1]

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that the Florida Legislature enacted provisions of SB 90 with the purpose of discriminating against Black voters.

2. Whether the district court erred in holding that the First Amendment

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amicus Curiae*, made a monetary contribution to the preparation or submission of this brief.

guarantees a right to engage in so-called "line warming" activities within 150 feet of a polling place or drop box.

3. Whether the district court erred by subjecting Florida to federal preclearance for the next decade.

INTRODUCTION AND SUMMARY OF ARGUMENT

Florida makes voting accessible and convenient. Floridians may vote in person on several days leading up to, and on, election day. Fla. Stat. § 101.657(1)(d). They may also vote by mail—for any reason or no reason at all—and may return their ballots to one of several drop boxes. *Id.* §§ 101.69(2)(a); 101.62(1); 101.62(4)(b). Florida law also provides many avenues to register to vote, including online or with the assistance of third-party voter registration organizations ("3PVROs"). *Id.* §§ 97.0525, 97.0575.

At the same time, "as a practical matter" Florida must—and does—"substantial[ly] regulat[e] . . . elections" in order to ensure that they are "fair and honest" and that "some sort of order, rather than chaos, . . . accompan[ies] the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974); *see* U.S. Const. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]"). In May 2021, Florida fulfilled its constitutional role by enacting SB 90 to facilitate free and fair elections while safeguarding the ballot. Passed in the wake of the chaotic

2020 election, Op. 68–69, SB 90 contains some 30 provisions making Florida elections more uniform, transparent, and secure.

While the Elections Clause of the Constitution anticipates laws of this sort, *see* U.S. Const. art. I, § 4, it "never contemplated that *federal courts* would dictate the manner of conducting elections," *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1269 (11th Cir. 2020) (emphasis added). But that is exactly what the district court has done here. The district court invalidated three commonsense and constitutional provisions of SB 90 that help guarantee drop box security, safeguard the integrity of voter registration applications, and prevent undue influence of voters outside the polling place or drop box. And the district court was not content merely to enjoin those provisions: it also imposed a drastic preclearance regime requiring—for the next decade—that the State of Florida secure federal approval before enforcing any new law or regulation touching on drop boxes, 3PVROs, or solicitation at the polling place or drop box. The district court's order marks only the second time in history that a federal court has imposed preclearance on a state over its objection.

The district court's sweeping order rested on a series of legal errors, each of which warrants reversal. *First*, the district court's conclusion that the Florida Legislature enacted SB 90 with discriminatory intent wholly ignores the presumption of legislative good faith and contravenes controlling Supreme Court precedent. *Second*, the district court's holding that SB 90 unconstitutionally restricts

Plaintiffs' "line warming" activities misconstrues and misapplies the First Amendment. *Third*, the district court's imposition of an extraordinary preclearance remedy fails under Section 3(c) of the Voting Rights Act.

If left uncorrected, the district court's order will imperil crucial and commonplace voting laws and erode public confidence in elections nationwide. The district court's order will chill states from exercising their "power to regulate elections," *Shelby Cnty. v. Holder*, 570 U.S. 529, 543 (2013), and from pursuing their "legitima[te]" and "unquestionably relevant" interests in "preventing voter fraud," curbing undue influence in elections, and "protecting public confidence 'in the integrity and legitimacy of representative government,'" *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191, 197 (2008). After all, state legislature will have a significant disincentive to adopt new election measures if they face the prospect of a federal court injunction and a decade of federal preclearance. But such measures are to be encouraged, not discouraged, because they facilitate "citizen participation in the democratic process." *Id.* at 197. The district court got this precisely backwards when it punished Florida's laudable effort to strengthen the integrity and trustworthiness of its elections. This Court should reverse.

ARGUMENT

I. THE DISTRICT COURT REVERSIBLY ERRED IN ITS INTENTIONAL DISCRIMINATION HOLDING

A plaintiff claiming intentional discrimination bears the demanding burden to prove that the challenged law results in "adverse effects upon an identifiable group" and that the legislature enacted the law "'because of,' not merely 'in spite of,'" those effects. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Thus, courts "*must* afford the state legislature a 'presumption' of good faith" when adjudicating such claims. *N.C. State Conf. of NAACP v. Raymond*, 981 F.3d 295, 303 (4th Cir. 2020) (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018)); *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1325 (11th Cir. 2021) ("*GBM*").

Here, however, the district court "failed to apply—or even mention—the presumption of legislative good faith to which the [Florida Legislature] was entitled." *Raymond*, 981 F.3d at 303; *see also* Stay Order at 12. To the contrary, the court's analysis *reversed* the presumption and Plaintiffs' burden of proof, including in its analysis of (i) the relevant history, (ii) the Legislature's rationale for SB 90, and (iii) the Legislature's partisan motivation. These "fundamental legal errors . . . permeate the opinion" and therefore "irrevocably affected its outcome." *Raymond*, 981 F.3d at 311. The Court should reverse.

A. The District Court Improperly Rested Its Holding On Distant History And Recent Cases Rejecting Allegations Of Discriminatory Intent

"[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980). Nor does past intentional discrimination "justify shifting the [plaintiff's] burden" to the state or defeat the presumption of legislative good faith. *Abbott*, 138 S. Ct. at 2325. For this reason, "outdated intentions of previous generations" cannot "taint" "legislative action forevermore on certain topics." *GBM*, 992 F.3d at 1325. Thus, the relevant "historical background" to be considered in an intentional discrimination case is "the precise circumstances surrounding the passing of the [challenged] law," not some other history. *Id.* at 1325–26; *accord Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021).

The district court's analysis of SB 90 ran afoul of these principles, many times over. To begin, the court framed its entire assessment of Plaintiffs' intentional discrimination claims on its contention that "Florida has a grotesque history of racial discrimination." Op. 42. Rather than focusing on the "precise circumstances" of SB 90's passage, *GBM*, 992 F.3d at 1325, the court looked back more than 150 years to examples of race-based "terrorism" and other brutal acts of mistreatment from the Civil War Era to the mid-1900s, *see* Op. 42–45. The court's assertion that this history of despicable racism "sets the stage for SB 90," *id.* at 45, is irreconcilable

with the presumption of good faith, *see Abbott*, 138 S. Ct. at 2324; *GBM*, 992 F.3d at 1325.

To the extent that the district court considered more recent events, its assessment of them was equally flawed. It "found that, over the past 20 years, Florida has repeatedly targeted Black voters because of their affiliation with the Democratic party." Op. 275–76. According to the district court, "[o]nce is an accident, twice is a coincidence, three times is a pattern." *Id.* at 64. But the court *acknowledged* that for every such case over the past 20 years, "well-respected judges from multiple courts examined the provisions . . . and they all found that the Florida Legislature did not enact them with the intent to discriminate based on race." *Id.* In other words, *all* the prior cases on which the district court relied *rejected* allegations of discriminatory intent. *See id*. But even a *finding* of recent intentional discrimination cannot shift the "allocation of the burden of proof" or remove the "presumption of legislative good faith," so certainly *rejection* of allegations of intentional discrimination cannot either. *Abbott*, 138 S. Ct. at 2324. The district court's contrary conclusion alone warrants reversal.

B. The District Court Improperly Second-Guessed The Legislature's Rationale For SB 90

States may legislate to advance their "strong and entirely legitimate" interests in curbing voter fraud and preventing undue influence on voters. *Brnovich*, 141 S. Ct. at 2340. Such legislation "protect[s] public confidence 'in the integrity and

legitimacy of representative government,'" which in turn "encourages citizen participation in the democratic process." *Crawford*, 553 U.S. at 197.

Moreover, state lawmakers may "respond to potential deficiencies in the electoral process with foresight rather than reactively." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). Thus, "it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Brnovich*, 141 S. Ct. at 2348; *Crawford*, 553 U.S. at 194 (upholding photo ID requirement for in-person voting even though "[t]he record contain[ed] no evidence of any [in-person] fraud actually occurring in Indiana at any time in its history").

Ignoring these principles, the district court nitpicked Florida's efforts to fine-tune its election rules after the tumultuous 2020 election. Although the district court acknowledged that "SB 90's stated purpose was to proactively 'instill . . . voter confidence by ensuring election integrity and security,'" it deemed that rationale "suspect" because no evidence before the Florida Legislature proved "that fraud is even a marginal issue in Florida elections." Op. 70. But as Appellants have explained, the legislative record was more than ample to support SB 90. *See* Sec'y Br. 24–28. More to the point, the Florida Legislature could act to prevent voter fraud—which is notoriously "difficult to detect and prosecute," *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 396 (5th Cir. 2020)—*before* it happens. *See Brnovich*,

141 S. Ct. at 2348; *Crawford*, 553 U.S. at 194. It need not adduce evidence of such fraud to the district court's "satisfaction" before legislating. *Brnovich*, 141 S. Ct. at 2342; *Crawford*, 553 U.S. at 194.

Moreover, the district court gave short shrift to Florida's legitimate interest in protecting "public confidence" in elections, which is broader than its interest in preventing fraud. *Crawford*, 553 U.S. at 194. The district court discounted that rationale for SB 90 based on 2020 survey evidence of high voter confidence. Op. 70. But just as lawmakers need not wait for instances of fraud, *Brnovich*, 141 S. Ct. 2348; *Crawford*, 553 U.S. at 194, so too they need not await data that voters lack confidence in elections before acting to further secure elections. Indeed, Florida's proactive attentiveness to election integrity, clarity, and uniformity is precisely what helps ensure high voter confidence to begin with. The Florida Legislature thus took action to remain a leader in election security and to guard against future threats to election security. *See* Sec'y Br. 25. At any rate, the district court itself admitted that the surveys upon which it relied "came *before* some of the most troubling events of late 2020 and early 2021." Op. 70 (emphasis original). The court nevertheless treated the Legislature's legitimate response to those "troubling events" as evidence of a race-based motive for SB 90, again flipping the presumption of good faith on its head.

The district court also expressed concern that "sponsors and supporters offer[ed] conflicting" rationales for SB 90. *Id.* at 69. But there is nothing nefarious in lawmakers being motivated by different ends; they might reasonably view SB 90 (with its 32 provisions) as accomplishing multiple goals, including election integrity and "consistency in election administration." *Id.* at 72.

Nor is there anything questionable about the rationales for the specific provisions under consideration, all of which the district court wrongly discounted or rejected outright. *Id.* at 74–75. In direct conflict with binding precedent, *Brnovich*, 141 S. Ct. at 2348; *Crawford*, 553 U.S. at 194, the court improperly dismissed the Legislature's concern over potential "drop box tampering" because of a lack of evidence of such tampering, Op. 74. The court also treated with skepticism legitimate privacy or undue-influence justifications for the solicitation provision, based merely on its observation that "voting is 'very often a communitarian act'—especially in the Black community." *Id.* at 75. But even if accurate, that observation has never overridden the need for ballot secrecy and safeguards to prevent voter coercion.

The district court rejected explanations that the registration-return rules were enacted as "good commonsense regulation" because some lawmakers *also*—incorrectly, in the court's view—thought the rules were required by court order. *Id.* Those rules make perfect sense: they guarantee timely submission of registration

applications and allocate the burden of processing those applications to officials in the county where the registrant lives. *See* Sec'y Br. 27–28. And even if some legislators misunderstood a court order, such confusion cannot be *presumed* to cloak invidious racial discrimination.

Compounding these errors, the district court second-guessed whether the Legislature should have pursued other alternatives to SB 90, including "doing nothing." Op. 124–25. But if the presumption of good faith has any meaning, it cannot be that the Legislature's mere decision to act counts in favor of finding racial discrimination.

In sum, the district court's approach substitutes federal judges for state lawmakers in contravention of the bedrock federalism and separation-of-powers principles that animate the Elections Clause and the Constitution. Allowing state legislatures room to craft their own election administration laws "allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic processes, and makes government more responsive by putting the [s]tates in competition for a mobile citizenry." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015) (quotation marks omitted). Election administration is constantly evolving based on lessons learned from past elections, examples from other jurisdictions, new policy ideas, or even national

headlines of chaotic elections. Florida should be able to respond to these changes, without having to "prove to the satisfaction of the courts" that its interest "could not be served by any other means." *Brnovich*, 141 S. Ct. at 2342.

C. The District Court Failed To Decouple Race And Politics

The district court's suggestion that the State Legislature was not truly concerned about election integrity does not support the conclusion that the Legislature acted with discriminatory intent. It is undisputed that the vast majority of SB 90's provisions, 32 in all, were not enacted to target Black voters. The district court even acknowledged that several provisions regulating voting by mail would disproportionately affect White and Latino voters as they "have generally used vote by mail in greater percentages than Black voters." Op. 66.

Even with respect to the three provisions it invalidated, the district court concluded that "the real purpose behind SB 90" was "to favor the Republican Party over the Democratic Party." *Id.* at 129. It then conflated this purported intent to disadvantage a political party with an intent to "specifically target Black voters." *Id.* at 134. But "partisan motives are not the same as racial motives," *Brnovich*, 141 S. Ct. at 2349, and at most, the record shows that partisanship—not race—motivated the Legislature.

That is certainly true with respect to the drop box provision. The district court acknowledged that "race's effect on drop-box use appears *less pronounced* than the

effect of party on drop-box usage." Op. 99 (emphasis added). The court nonetheless speculated that the Legislature "would have simply banned drop boxes" if it had "targeted Democrats writ large." *Id.* at 134. That guess work cannot substitute for Plaintiffs carrying their "heavy burden of persuasion." *Crawford*, 553 U.S. at 200.

While the court also concluded that the provision "effectively bans drop-box use at the specific times" when Black voters "are most likely to use them," Op. 134–35, the "limited data" reflects only a 2.1% difference between Black and White voters who use drop boxes outside of normal business hours, *id.* at 101. These minimal differences do not show a "stark" and "clear pattern, unexplainable on grounds other than race" that may arouse judicial suspicion of intentional discrimination. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *see also Brnovich*, 141 S. Ct. at 2343; *GBM*, 992 F.3d at 1322.

Similarly, the evidence did not show that race motivated the solicitation or registration-return provisions. The district court wrongly assumed that the solicitation and registration-return provisions were "aimed" at Black voters, based on its view that "White Democrats do not wait in long lines, nor do they use 3PVROs to register." Op. 135. But the purported evidence on which the court relied for its assertions about disparate wait times and use of 3PVROs among Black voters was flawed. *See* Sec'y Br. 34–36. Even if the solicitation and registration-

return provisions have a disparate impact—and even if the Legislature were aware of such impact—that alone does not prove racial discrimination. *See Feeney*, 442 U.S. at 279.

It is also telling that the solicitation and registration-return provisions are not "aimed" at voters at all. Rather, they are directed at the conduct of *third parties*—those who seek to "influence" voters waiting in line to vote, Fla. Stat. § 102.031(4), or to register voters, *id.* § 97.0575(3)(a). If the goal were to discourage Black voters from exercising the franchise by indirectly regulating these third parties, the Legislature chose peculiarly light burdens to carry out its purpose. Indeed, under the district court's own logic, one would have expected the Legislature to have banned outright all line warming and 3PVRO efforts. *See* Op. 134. There was no intentional discrimination. The Court should reverse.

II. SB 90'S SOLICITATION PROVISION COMPORTS WITH THE FIRST AMENDMENT

The district court's holding that SB 90's solicitation provision is void for vagueness and overbreadth is erroneous, as Appellants have explained. *See* Sec'y Br. 44; Intervenors' Br. 17–42. Plaintiffs' challenge to the solicitation provision also fails for another fundamental reason: the First Amendment permits the State to prohibit Plaintiffs from engaging in so-called "line warming" activities within 150 feet of a polling place or drop box.

The First Amendment permits Florida to prohibit even protected speech in a buffer zone around a polling place or drop box. *See Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality op.); *Citizens for Police Accountability Pol. Comm. v. Browning*, 572 F.3d 1213, 1221 (11th Cir. 2009). Indeed, this Court already upheld Florida's buffer-zone solicitation ban in *Browning*. There, the plaintiffs sought to engage in "exit solicitation" asking voters who had already voted to sign a petition as they exited the polling place. *See* 572 F.3d at 1221. Even though the State conceded that those activities were "political speech," *id.* at 1216, the Court upheld Florida's ban as applied to them because "the practical need to keep voters and voting undisturbed all prove that the ban is warranted," *id*. at 1221.

Plaintiffs' now challenge SB 90's amendment of that ban, which extends the definition of "solicitation" to include "engaging in any activity with the intent to influence or effect of influencing a voter." Fla. Stat. § 102.031(4)(a)–(b). Plaintiffs rest that challenge on their "line warming" activities, which "refer[] generally to the non-partisan provision of aid to voters waiting in line to vote, such as giving out water, fans, snacks, chairs, ponchos, and umbrellas." Op. 12. That challenge fails in all events: even if, as Plaintiffs incorrectly suggest, those activities are core "political speech," the State still may constitutionally ban them within 150 feet of a polling place or drop box. *Browning*, 572 F.3d at 1221; *see also Burson*, 504 U.S.

at 211 (plurality op.); *id.* at 214–16 (Scalia, J., concurring in the judgment). The Court should reverse for that reason alone.

Moreover, if more were needed, the First Amendment does not protect Plaintiffs' line warming activities. "[N]ot every procedural limit on election-related conduct automatically runs afoul of the First Amendment." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 392 (5th Cir. 2013). Rather, "[t]he challenged law must restrict political discussion or burden the exchange of ideas," not merely regulate conduct. *Id.* (emphasis omitted).

That is because the First Amendment does not protect all conduct, but only conduct that is "inherently expressive." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006); *see also Texas v. Johnson*, 491 U.S. 397, 404 (1989). To determine whether conduct is inherently expressive, courts apply a two-part test examining whether (1) the conduct shows an intent "to convey a particular[] message" and (2) "the likelihood was great that the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404.

Applying these authorities, the Ninth Circuit held in *Knox v. Brnovich*, 907 F.3d 1167 (9th Cir. 2018), that the activity of assisting voters by collecting and delivering their absentee ballots is not protected by the First Amendment. The plaintiff in that case engaged in "door-to-door canvassing of prospective voters to educate, register, and encourage them to vote" and brought suit challenging a new

Arizona ballot harvesting ban that generally prohibited individuals from collecting another voter's ballot. *Id.* at 1172. The plaintiff contended that her collection of ballots was intended to "communicate the message" that "voting is the most fundamental right in a democratic society and that [she is] committed to helping qualified electors exercise their right to vote." *Id.*

The Ninth Circuit rejected the plaintiff's First Amendment claim, reasoning that the Supreme Court has "rejected the concept that 'an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express a message.'" *Id.* at 1181 (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). The Ninth Circuit further held that—even though the plaintiff's ballot collection activities took place as part of an effort to encourage other people to vote—she failed to prove that "the conduct of collecting ballots would reasonably be understood by viewers as conveying any of [her] messages or conveying a symbolic message of any sort." *Id.*

The Fifth Circuit's decision in *Voting for America, Inc. v. Steen*, on which the *Knox* court relied, is also instructive. The plaintiffs in that case challenged Texas laws limiting who could serve as "volunteer deputy registrars ('VDRs'), individuals trained and empowered to receive and deliver completed voter registration applications." 732 F.3d at 385. Among other challenges, the plaintiffs claimed that rules requiring VDRs to be Texas residents and to be registered in the county where

they volunteered violated their free speech rights to participate in "voter registration drives." *Id.* at 388.

The Fifth Circuit acknowledged that the many activities undertaken as part of a voter registration drive—such as "'urging' citizens to register," "'distributing' voter registration forms," and "'asking' for information to verify that registrations were processed successfully"—are "constitutionally protected speech." *Id.* at 389. It nonetheless rejected the plaintiffs' free speech challenges to the residency and registration rules. *See id.* at 388–92. After all, "non-expressive conduct does not acquire First Amendment protection whenever it is combined with another activity that involves protected speech." *Id.* at 389. Instead, a court must "analyze" each "discrete step[]" of a voter-assistance activity to determine whether it qualifies for free speech protections. *Id.* at 388.

Applying that "hard judgment[]," the Fifth Circuit concluded that the residency and registration requirements "do not in any way restrict or regulate who can advocate pro-voter-registration messages, the manner in which they may do so, or any communicative conduct." *Id.* at 389, 391. Rather, those rules "merely regulate the receipt and delivery of completed voter-registration applications, two non-expressive activities," and therefore did not violate any free speech rights. *Id.* at 391.

Here, Plaintiffs predicated their vagueness and overbreadth challenges on the allegation that their "'line warming' activities are protected under the First Amendment." Op. 160. But "[c]onduct does not become speech for First Amendment purposes merely because the person engaging in the conduct intends to express an idea." *Voting for Am., Inc.*, 732 F.3d at 388; *see also Rumsfeld*, 547 U.S. at 66. In all events, Plaintiffs' line warming activities fail the second part of the expressive-conduct test: there is no "likelihood," "great" or otherwise, that "the message would be understood by those who viewed" Plaintiffs giving out water, fans, snacks, chairs, and umbrellas to voters waiting in line. *Johnson*, 491 U.S. at 404. Providing assistance of this kind does not "inherently express[]" anything. *Voting for Am., Inc.*, 732 F.3d at 388. An observer is more likely to conclude that the person providing assistance is doing so at the voter's request, is a family member or friend of the voter, or is an election official, than is someone expressing a message. Plaintiffs' line warming activities are not entitled to First Amendment protection. *See, e.g.*, *Johnson*, 491 U.S. at 404; *Rumsfeld*, 547 U.S. at 66; *O'Brien*, 391 U.S. at 376; *Knox*, 907 F.3d at 1180–82; *Voting for Am., Inc.*, 732 F.3d at 389.

The district court committed several legal errors in concluding otherwise. *First*, it noted that various Plaintiffs display "a banner" or "signage," wear "t-shirts," or otherwise "communicate to . . . voters" receiving line warming services "that their determination to exercise the franchise is important and celebrated." Op. 163–65.

But "non-expressive conduct does not acquire First Amendment protection whenever it is combined with another activity that involves protected speech." *Voting for Am., Inc.*, 732 F.3d at 389. After all, "[i]f combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." *Rumsfeld*, 547 U.S. at 66; *see also O'Brien*, 391 U.S. at 376.

Thus, where a voter assistance activity involves both speech and conduct, a court must "analyze" each "discrete step[]" to determine whether it qualifies for free speech protections. *Voting for Am., Inc.*, 732 F.3d at 388. That step-by-step analysis is required even when the plaintiff intends to "communicate the message" that "voting is the most fundamental right in a democratic society and that [it is] committed to helping qualified electors exercise their right to vote." *Knox*, 907 F.3d at 1172. The district court, however, wholly failed to address, much less make, this "hard judgment[]." *Voting for Am., Inc.*, 732 F.3d at 385, 389.

Second, the district court recounted testimony that "voters who receive assistance have expressed an understanding of and gratitude for" it. Op. 163; *see also id.* at 164–67. But whether line warming activities are "well-received by voters," *id.* at 164, has no bearing on whether "the likelihood was great that the message would be understood by those who viewed it," *Johnson*, 491 U.S. at 404; *see also Burns v. Town of Palm Beach*, 999 F.3d 1317, 1337 (11th Cir. 2021) (second

part of the expressive-conduct test "focuse[s] on the perspective of those who 'view[]' the expressive conduct").

Finally, the district court cited testimony that one Plaintiff "ha[s] previously set up about 50 feet from polling locations with signage and t-shirts" but, due to SB 90, "will now have to invest in larger signs to communicate its message of support." Op. 164–65. Even if SB 90 has made it more expensive for Plaintiffs to conduct voter-assistance activities, "the difficulty of the process alone is insufficient to implicate the First Amendment" because "the communication of ideas . . . is not affected." *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997). Indeed, under SB 90, Plaintiffs remain free (outside the buffer zone) to display "a banner" or "signage," wear "t-shirts," or otherwise "communicate to . . . voters that their determination to exercise the franchise is important and celebrated." Op. 163–65.

* * * * *

Plaintiffs' conduct of "giving out water, fans, snacks, chairs, ponchos, and umbrellas," Op. 12, is not inherently expressive and, therefore, does not qualify for First Amendment protection. *See, e.g.*, *Rumsfeld*, 547 U.S. at 66; *Voting for Am., Inc.*, 732 F.3d at 388; *Knox*, 907 F.3d at 1180–82. But even if it did, Florida's ban on that activity within the 150-foot buffer zone around polling places and drop boxes is constitutional because it is a neutral time, place, and manner restriction and Florida's interest in protecting the zone of voting clearly outweighs any minimal

burden on Plaintiffs' activities. *See, e.g.*, *Burson*, 504 U.S. at 211 (plurality op.); *Browning*, 572 F.3d at 1221. The Court should reverse.

III. THE DISTRICT COURT REVERSIBLY ERRED IN SUBJECTING FLORIDA TO FEDERAL PRECLEARANCE

A preclearance mandate requiring a state "to obtain federal permission before enacting a[] law related to voting" is "a drastic departure from basic principles of federalism." *Shelby Cnty.*, 570 U.S. at 535, 542. "The Federal Government does not . . . have a general right to review and veto state enactments before they go into effect." *Id.* Rather, "federalism secures to citizens the liberties that derive from the diffusion of sovereign power," and "the Framers of the Constitution intended the States to keep for themselves . . . the power to regulate elections." *Id.* at 543. Preclearance, however, requires a sovereign state to "beseech the Federal Government for permission to implement laws that [it] would otherwise have the right to enact and execute on [its] own." *Id.* at 544. Preclearance thus constitutes "federal intrusion into sensitive areas of state and local policymaking" and represents an "extraordinary departure from the traditional course of relations between the States and the Federal Government." *Id.* at 529, 545.

Two federal appellate courts have considered requests to impose Section 3(c) preclearance on a state over its objection. Both have rejected those requests. *See N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 241 (4th Cir. 2016); *Veasey v. Abbott*, 888 F.3d 792, 804 (5th Cir. 2018).

In fact, the district court is just the second court in history to impose such relief. The district court arrived at this drastic remedy only by ignoring Section 3(c)'s plain text, misconstruing the governing case law, and giving short shrift to the State's sovereign prerogative to enact laws to protect the integrity of Florida's elections. At a minimum, the Court should reverse the Section 3(c) order and restore to Florida its "power to regulate elections" free from federal intrusion. *Shelby Cnty.*, 570 U.S. at 543.

A. No Pattern Of Constitutional Violations Sufficient To Trigger Section 3(c) Exists In Florida

Section 3(c) requires a threshold showing of multiple "*violations* of the fourteenth [and] fifteenth amendment[s]" by the defendant jurisdiction "justifying equitable relief." 52 U.S.C. § 10302(c) (emphasis added). The only "violations" that can trigger Section 3(c) are "violations of Fourteenth and Fifteenth Amendment protections against intentional racial discrimination in voting." *Perez v. Abbott*, 390 F. Supp. 3d 803, 813–14 (W.D. Tex. 2019) (three-judge court); *Jeffers v. Clinton*, 740 F. Supp. 585, 589 (E.D. Ark. 1990) (three-judge court). Moreover, the multiple "violations," 52 U.S.C. § 10302(c), must be "systematic and deliberate," *Conway Sch. Dist. v. Wilhoit*, 854 F. Supp. 1430, 1442 (E.D. Ark. 1994) (cited at *McCrory*, 831 F.3d at 241), and "persistent and repeated" within a recent timeframe, *Jeffers*, 740 F. Supp. at 601.

The Fourth Circuit's decision in *McCrory* is instructive. There, the Fourth Circuit upheld the district court's conclusion that an omnibus North Carolina election law resulted in five instances of intentional racial discrimination in voting that "target[ed] African Americans with almost surgical precision." 831 F.3d at 214; *see also id.* at 216–18. The Fourth Circuit nonetheless declined to impose upon North Carolina the "rarely used" Section 3(c) preclearance remedy. *Id.* at 241.

Similarly, a three-judge court of the Western District of Texas declined to impose preclearance upon the State of Texas despite court holdings that the Texas Legislature had committed several instances of intentional discrimination in a voter identification law and a redistricting law enacted during the same legislative session. *See Perez*, 390 F. Supp. 3d at 820. The court concluded that these violations were "an insufficient basis upon which to award" preclearance relief, *id.*, in part because they were neither "persistent and repeated" nor "systematic and deliberate," *id.* at 818–19; *see also Veasey*, 888 F.3d at 804.

The district court's Section 3(c) order also fails this threshold requirement. In the first place, as explained, the court's rulings that SB 90 violates the Fourteenth and Fifteenth Amendments are flawed, *see supra* Part I, so there are no "violations of the fourteenth [and] fifteenth amendment[s]" in this case to trigger Section 3(c) relief, 52 U.S.C. § 10302(c). But even if these rulings could be upheld, they still would be insufficient to support preclearance because they fail to establish

"persistent and repeated" and "systematic and deliberate" intentional racial discrimination in voting. *Perez*, 390 F. Supp. 3d at 818–19.

The district court reasoned that Section 3(c)'s threshold requirement was satisfied because it "found that, over the past 20 years, Florida has repeatedly targeted Black voters because of their affiliation with the Democratic party." Op. 275–76. But as discussed above, *see supra* Part I—and as the district court acknowledged, *see* Op. 64—*all* of those prior cases *rejected* allegations of "violations of Fourteenth and Fifteenth Amendment protections against intentional racial discrimination in voting," so they cannot trigger Section 3(c) preclearance, *Perez*, 390 F. Supp. 3d at 813–14; *Jeffers*, 740 F. Supp. at 589.

Moreover, in all events, many of the district court's examples from "the past 20 years," Op. 275, are too remote in time to trigger preclearance today, *see Jeffers*, 740 F. Supp. at 599 (concluding that even "serious constitutional violations" of voting rights predating 1976 did not establish "the need for equitable relief in 1990"). And all of those examples "already [have] been remedied by judicial action" in the prior cases. *Id.* at 601; *see also* Op. 275. Such past remedied violations do not "justify[] equitable relief" now and cannot trigger Section 3(c) preclearance. 52 U.S.C. § 10302(c).

That leaves the constitutional violations in SB 90 that the district court identified in this case—but those purported violations likewise are insufficient to

uphold the Section 3(c) order. In particular, the district court pointed to constitutional violations it identified in SB 90's provisions "governing 3PVROs, drop boxes, [and] 'line warming' activities." Op. 281. But these three purported instances of intentional racial discrimination in voting are even *less* "persistent and repeated" and "systematic and deliberate," *Perez*, 390 F. Supp. 3d at 818–19, than the five instances of intentional racial discrimination the Fourth Circuit deemed insufficient, *see McCrory*, 831 F.3d at 241, or the several such instances across two separate laws that the Western District of Texas found to be "an insufficient basis," *Perez*, 390 F. Supp. 3d at 820, to trigger Section 3(c) preclearance. At a minimum, the Court should reverse the preclearance order.

B. Equitable Factors Foreclose Section 3(c) Preclearance

The equitable factors that courts consider in determining whether "the remedy of preclearance should be imposed," *Perez*, 390 F. Supp. 3d at 813; *Jeffers*, 740 F. Supp. at 601, also foreclose that relief here. *First*, as the district court recognized, one of those factors "weighs against imposing preclearance" because the district court's injunction "remedies the discrimination at issue" in this case. Op. 277; *see McCrory*, 831 F.3d at 241 (Section 3(c) relief "not necessary here in light of our injunction").

Second, the district court made the baffling suggestion that Section 3(c) relief is appropriate because the State has repealed an SB 90 provision that the court found

"unconstitutional." Op. 278. This suggestion turns the law on its head: a state's decision to repeal an unconstitutional statute *eliminates* any basis for Section 3(c) or other relief. *See, e.g.*, 52 U.S.C. § 10302(c) (requiring constitutional violations presently "justifying equitable relief"); *Veasey*, 888 F.3d at 804 (state's enactment of an "effective remedy" forecloses Section 3(c) relief); *Perez*, 390 F. Supp. 3d at 819–20 (same). Indeed, a state's remedial action demonstrates that the violations have "already been remedied," are not likely "to recur," and that political developments through the state's duly elected officials make recurrence "less likely." *Perez*, 390 F. Supp. 3d at 818.

Third, the district court suggested that preclearance is warranted because litigation challenging state voting laws "is expensive" and "takes time." Op. 278. But the costs of litigation must be borne by *every* litigant who challenges a state law and seeks to rebut the presumption of legislative good faith. The district court's reasoning would justify subjecting *all* state enactments to preclearance, in contravention of states' sovereign "right to enact and execute" laws free from federal intrusion. *Shelby Cnty.*, 570 U.S. at 544. It therefore comes as no surprise that no other court has considered the cost of litigation relevant in determining whether to impose Section 3(c) preclearance. *See, e.g.*, *McCrory*, 831 F.3d at 241; *Veasey*, 888 F.3d at 804; *Perez*, 390 F. Supp. 3d at 818; *Jeffers*, 740 F. Supp. at 601.

Finally, the district court asserted that "section 3(c) does not raise the same constitutional concerns that animated the Court in *Shelby County*." Op. 273. The district court cited no support for this proposition—and, in fact, did not consistently embrace it. After all, it elsewhere *quoted Shelby County* for the proposition that "preclearance is 'strong medicine' and 'a drastic departure from basic principles of federalism.'" *Id.* at 270 (quoting *Shelby Cnty.*, 570 U.S. at 535). And other courts have invoked *Shelby County* and the extraordinary federalism costs imposed by preclearance when adjudicating—and denying—claims for Section 3(c) relief. *See Perez*, 390 F. Supp. 3d at 819 (quoting *Shelby County* and noting "[i]n the wake of *Shelby County*, courts have been hesitant to grant § 3(c) relief"); *see also McCrory*, 831 F.3d at 241; *Veasey*, 888 F.3d at 804.

CONCLUSION

This Court should reverse.

July 18, 2022

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I hereby certify that on July 18, 2022, the foregoing was electronically filed with the Clerk of Court using the Appellate PACER system, which automatically serves e-mail notification of such filings to the attorneys of record who are registered participants in the Court's electronic notice and filing system and each of whom may access this filing via the Court's Appellate PACER system.

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