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

FLORIDA RISING TOGETHER, *et al.*,

Plaintiffs,

v.

LAUREL M. LEE, in her official capacity as Secretary of State of Florida, *et al.*,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Intervenor-Defendants.

Case No. 4:21-cv-201-MW-MJF

REPLY IN SUPPORT OF DEFENDANTS'[1]
MOTION FOR SUMMARY JUDGMENT[2]

I. PLAINTIFFS FAIL TO CARRY THEIR *ARLINGTON HEIGHTS* BURDEN.

To prevail on their intentional discrimination claims, Plaintiffs must prove

[1] Supervisors Hays and Doyle join arguments related to the VBM-Request Provision and Non-Solicitation Provision.

[2] For the reasons set forth in Defendants' Corrected Motion for Summary Judgment, ECF-245-1, Defendants maintain that Plaintiffs lack Article III standing, *id.* at 6–22, that the non-solicitation provision complies with the First Amendment, *id.* at 69–74, and the voter-registration disclaimer and voter-registration delivery provisions comply with the First Amendment, *id.* at 74–84.

there was *both* an intent to discriminate *and* actual discriminatory effect. *See Davis v. Bandemer*, 478 U.S. 109, 127 (1986). This high bar requires demonstrating a "clear pattern, unexplainable on grounds other than race." *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977). Discriminatory "impact alone is not determinative." *Id.* Plaintiffs have failed to show any triable issues regarding intent under *Arlington Heights*.

Proportion of Burden. At no point have Plaintiffs' experts adequately quantified the burden that SB90 allegedly imposes on people of color. Although they cite alleged discrepancies from Dr. Smith's report, they make no attempt to show how those differences make SB90 more onerous for minority voters throughout Florida. For example, Plaintiffs state that "[o]f post-2006 registrants who cast ballots in 2016, but did not 'have a valid ID on file with the Division of Elections that would allow them to obtain a VBM ballot under SB90, 30.3% were Black, 21.5% were Hispanic…and just 13.7% were white.'" ECF-280 at 44. This data set, however, includes only 1,585 voters. ECF 271-27 ¶92. Similarly, Plaintiffs claim that drop-box restrictions "were also likely to have a disparate impact on Black and Hispanic voters." ECF-280 at 45. As justification, Plaintiffs state that "in one county Black voters were more likely than whites to use a drop box on a day prohibited by SB90." *Id.* That county, however, is Columbia County, and involved roughly 2,200 voters. ECF-271-27 ¶147.

Plaintiffs assert "that in another county Black and Hispanic voters were approximately 18 percent more likely to use a drop box after hours." ECF-280 at 45. The true difference between the demographic groups, however, is nearly meaningless. That analysis was based on an examination of "[o]ver 51,000 Manatee County VBM ballots," which found that 13.51% of Black, 13.43% of Hispanic, and 11.42% of White voters likely returned VBM ballots after hours. ECF 271-27 ¶¶155–57. Despite Plaintiffs' selective (some would say manipulative) use of this data, viewing the raw numbers shows that Plaintiffs have not demonstrated any quantifiable disproportionate impact.

Even if the Court were to credit these assertions, SB90 is facially race-neutral, which means it is not "invidious…even when [its] burdens purportedly fall disproportionately on a protected class." *Greater Birmingham Ministries v. Sec'y of Ala.*, 992 F.3d 1299, 1327 (11th Cir. 2021). Plaintiffs' attempts to quantify relatively small data sets and extrapolate outwards, and arguments that potential areas or segments of the population *might* be impacted by SB90, create no triable issue of fact.

Florida's Past. Caselaw is clear: Plaintiffs may not invoke "the old, outdated intentions of previous generations [to] taint [Florida's] legislative action forevermore." *Id.* at 1325. The legislature enjoys a good-faith presumption that is "not changed by a finding of past discrimination," *Abbot v. Perez*, 183 S.Ct. 2305,

2324 (2018), and history does not ban Florida "from ever enacting otherwise constitutional laws," *Greater Birmingham*, 992 F.3d at 1325. HB1355, although recent, does not call into question the intent behind SB90. No court adjudicating whether to preclear HB1355 found that it was enacted with discriminatory purpose. *See Florida v. United States*, 885 F.Supp.2d 299, 351 (D.D.C. 2012). Simply put, this history is "largely unconnected to the passage of [SB90]," *Greater Birmingham*, 992 F.3d at 1324, and failure to connect Florida's history to SB90's enactment guts Plaintiffs' argument.

Legislative Processes. Nothing about SB90's enactment was procedurally unusual; Plaintiffs' complaints about rushed legislative processes, limited debate, and the use of strike-all amendments, see ECF-280 at 51–52, are ultimately just complaints about Florida's standard legislative process[3] that cannot "overcome the presumption of legislative good faith," *Abbott v. Perez*, 138 S.Ct. 2305, 2328–29 (2018); *Brown v. Detzner*, 895 F.Supp.2d 1236, 1246–47 (M.D. Fla. 2012). Nor does Florida's successful 2020 General Election morph SB90 into a substantive departure; "deterring voter fraud is a legitimate policy on which to enact an election law, even in the absence of any record evidence of voter fraud," *Greater Birmingham*, 992 F.3d at 1334. Florida (commendably) wants to continue its recent

[3] If anything, the only departure from the ordinary legislative process in SB90 was at NAACP Plaintiffs' urging. *See* https://twitter.com/stevebousquet/status/1387399280852447234.

history of free, fair, and secure elections, and it is "not required to prove that voter fraud exists" before acting prophylactically to maintain this success.[4] *See id.* In any event, SOEs have testified that voter fraud in Florida did indeed occur in 2020.[5] Many supervisors believe that one instance of voter fraud is one too many, *see, e.g.*, ECF-289-3 at 87:11–14, and the State's agreement is not evidence of discriminatory intent.

Contemporaneous Statements. Florida takes pains to make voting safe, secure, and accessible to everyone eligible to cast a ballot.[6] Contrary to Plaintiffs' expert's unsubstantiated claims that contemporaneous statements may indicate "racial resentment," see ECF-244-15 at 185:22–192:25, a legislator who notes that failing to vote might be caused by failure to prepare or to take initiative—given the multitude of accommodations in Florida—says nothing about race whatsoever. Indeed, Plaintiffs fail to cite a single legislative statement referring to race at all.

[4] Certainly, "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.

[5] *See, e.g.*, ECF-244-32 at 33:9–15; ECF-244-33 at 50:25–52:7; ECF-289-4 at 34:17–21; ECF-244-28 at 106:17–21; ECF-244-29 at 48:2–50:12.

[6] As numerous SOEs confirmed, it is easy to vote in Florida today, particularly in juxtaposition with narrower voting options available historically. *See* ECF-244-33 at 144:21–145:2 (affirming that "even with [SB90] in effect" it is "easy to vote in Lee County," and "voters have more options than they have ever had in the past to cast their ballot"); ECF-244-32 at 138:1–139:5 ("[W]e have made voting so easy…I don't know what else you can do[.]").

Asking this Court to cast far-fetched aspersions regarding hidden racial animus on Florida's lawmakers has no basis in law, fact, or logic. It cannot create a genuine question of fact.

Disparate Impact Knowledge. Mere "speculations and accusations of…[SB90's] opponents simply do not support an inference of the kind of racial animus discussed in…*Arlington Heights*." *Butts v. N.Y.C.*, 779 F.2d 141, 147 (2d Cir. 1985). For this reason, and those in Defendants' motion for summary judgment, ECF-245-1 at 32–37, Plaintiffs cannot demonstrate foreseeability and knowledge of disparate impact.

Less Discriminatory Alternatives. Plaintiffs presuppose, without support, that SB90 is more discriminatory than the status quo. They fail to support this proposition, and they also fail to mention that the Florida Legislature chose the least restrictive iteration it considered. *See* ECF-245-1 at 37–39.

Accordingly, Plaintiffs' intentional-discrimination claims fail.

II. PLAINTIFFS' VRA SECTION 2 CLAIMS FAIL.

VRA Section 2 prohibits states from "den[ying] or abridg[ing] of the right...to vote on account of race or color," and claims are assessed based on "the totality of circumstances," 52 U.S.C. §10301(a)–(b). The key is whether the nomination or election process is "equally open to participation." *Brnovich*, 141 S.Ct. at 2337–38. The Court has explained that "[t]he statute's reference to equal 'opportunity' may

stretch that concept to some degree to include consideration of a person's ability to *use* the means that are equally open," "[b]ut equal openness remains the touchstone." *Id.* ("equal openness and equal opportunity are not separate requirements"). Because the totality of circumstances raises no triable issue regarding SB90's compliance with Section 2, the Court should grant summary judgment for Defendants.[7]

A. The *Brnovich* Guideposts Weigh in Favor of Summary Judgment.

Minimal burden/multiple opportunities. In *Brnovich*, the Court held that "[m]ere inconvenience" cannot sustain a Section 2 violation because "every voting rule imposes a burden of some sort." *Id.* at 2338. To illustrate, the Court noted that even though a museum exhibit may be free to the public, residents may choose not to see it due to the inconvenience of "finding parking, dislike of public transportation, anticipation that the exhibit will be crowded, a plethora of weekend chores and obligations, etc." *Id.* at 2338 n.11. Although Plaintiffs gloss over this distinction, see ECF-280 at 57, it remains true and applies to each of the provisions they challenge.

For example, drop boxes at some locations might be available for less time in future elections. But any alleged drop-box inconvenience is *de minimis* considering the myriad ways that Floridians can vote. Requiring a person to visit a drop box

[7] Contrary to the United States' position, both the Section 2 and Section 208 claims are ripe for summary judgment. Case 187, ECF 304.

during business hours when he would prefer to use it at midnight is the sort of inconvenience that does not suffice under *Brnovich*. The voting process remains "equally open" to that voter—especially considering the availability of VBM, voting in person, or using a different drop box. Regardless, Florida is one of only ten states that require drop boxes. ECF-244-1 ¶35. Consequently, truncated hours, without more, does not constitute a legally sufficient burden.

Evolution in Florida's voting laws since 1982. "[I]n 1982 States typically required nearly all voters to cast their ballots in person on election day," *Brnovich*, 141 S.Ct. at 2339. Since that time, Florida has made voting easier by, *inter alia*, offering at least eight early voting days, allowing no-excuse VBM without a notary or witness requirement, and providing drop boxes, ECF-245-1 at 44–45. Given this evolution, Plaintiffs' statement that "SB90 is in some respects more restrictive" because in 1982 "the law only prohibited the distribution of campaign material or selling of any item within 100 feet of a polling place," ECF-280 at 58, is misleading. In the broader context of the multitude of ways that voting in Florida has become easier, this sole example cited by Plaintiffs is quite feeble. Since Plaintiffs offer nothing else, this guidepost weighs heavily in Defendants' favor.

Minimal disparate impact. Just as voting inconveniences do not equate to burdens, the "mere fact that there is some disparity does not necessarily mean that a system is not equally open [or] does not give everyone an equal opportunity to vote,"

Brnovich, 141 S.Ct. at 2339. In support of their disparate-impact claims, Plaintiffs rely on Dr. Smith. *See* ECF-280 at 58–59. Despite noting differences between minority and nonminority voting practices in 2020, neither he nor Plaintiffs explain how these alleged discrepancies demonstrate that the franchise is now less open to Black and Hispanic voters due to SB90.

Strong state interests. According to the Supreme Court, "[r]ules that are supported by strong state interests are less likely to violate §2." *Id.* at 2330–40. Those interests include, *inter alia*, preventing voter fraud, "[e]nsuring that every vote is cast freely, without intimidation or undue influence," and maintaining the integrity of the election system as a whole, including confidence in the system. *Id.* These interests are not, as Plaintiffs would have it, diminished based on their allegations that "the legislative sponsors expressly disclaimed that the purpose of the bill was to address fraud" and rejected certain amendments to SB90. *See* ECF-280 at 59. Not only are these strong state interests amply supported in the record—*see, e.g.*, ECF-244-34 at 49:14–21, 58:5–24, 90:19–91:16, 160:9–23—but the sponsors' statements and rejection of amendments, without more, provides minimal insight into legislative intent. At bottom, the Court has held that these interests are legitimate, and Plaintiffs have offered nothing to call those interests into question.

B. The *Gingles* Factors Weigh in Favor of Summary Judgment.

Because SB90 imposes neutral time, place, and manner rules, "the only

relevance of" the applicable *Gingles* factors "is to show that minority group members suffered discrimination in the past (factor one) and that effects of that discrimination persist (factor five)." *Brnovich*, 141 S.Ct. at 2340 (citation omitted). Notably, the relevance of these factors "is much less direct." *Id.* Plaintiffs point to Florida's history and posit that it affects "various areas of life." ECF-280 at 55–56. But their failure to connect this history to SB90 means that they have not created a triable issue of fact, and it should be accorded little weight in the Court's §2 analysis.

III. THERE IS NO TRIABLE ISSUE UNDER *ANDERSON-BURDICK*.[8]

A. Defendants have correctly characterized the legal standard.

Contrary to Plaintiffs' mischaracterization, Defendants have not argued that Plaintiffs can *never* prevail when bringing an *Anderson-Burdick* facial challenge. It remains true, however, that a facial challenge is quite different from, and harder to demonstrate than, an as-applied challenge. To succeed, Plaintiffs must show that "no set of circumstances exists under which [SB90] would be valid" and that SB90 has no "plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008); *Crawford*, 553 U.S. at 202.

Plaintiffs have not, and cannot, make this showing. For purposes of their facial challenge, the question is whether Plaintiffs have been "absolutely prohibited from

[8] Resolution of *Anderson-Burdick* claims is often appropriate at the summary judgment stage. *See e.g.*, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

exercising the franchise." *McDonald v. Board of Elec. Commissioners*, 394 U.S. 802, 809 (1969). Plainly, they have not. No provision of SB90 "affirmatively excludes" anyone voting, especially given the wide variety of options offered by Florida's election code. Because courts assessing a law under *Anderson-Burdick* must evaluate "the landscape of all opportunities that [the State] provides to vote," *Mays v. LaRose*, 951 F.3d 775, 785 (6th Cir. 2020), the myriad voting options offered in Florida plainly "mitigate the…impact" of SB90. *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1281–82 (11th Cir. 2020). Because the franchise remains accessible to all eligible voters, SB90's aggregate changes do not amount to an unconstitutional burden.

B. The burdens imposed by SB90 are indeed *de minimis*.

Even though "slight" burdens "must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation," *Crawford*, 553 U.S. at 191 (quotation omitted), "the size of the burden imposed by a challenged voting rule is highly relevant," because "every voting rule imposes a burden of some sort," *Brnovich*, 141 S.Ct. at 2338. This Court has already correctly concluded that, "[u]nder *Anderson-Burdick*, when plaintiffs fail to show that the law creates more than a de minimis burden, rational basis review applies." ECF-201 at 38.

"Courts *must* consider the opportunities provided by a State's *entire* system of voting when assessing the burden imposed by a challenged provision." *Brnovich*,

141. S.Ct. at 2339 (emphasis added). Although *Brnovich* addressed a VRA Section 2 claim, this principle necessarily applies to *Anderson-Burdick* claims. Simply put, the Court cannot understand the lack of any burden imposed by SB90 without considering both SB90 and the rest of Florida's election code holistically. Nor can the Court assume that voters bear no responsibility to comply with commonsense voting regulations. If voters forget to request a VBM ballot, it follows that their forgetfulness is the reason why they cannot vote by mail. This forgetfulness, however, is not grounds to find SB90's VBM amendments unconstitutional. "[E]very voting rule imposes a burden of some sort," *Brnovich*, 141 S.Ct. at 2339, and a voter's "own failure to take…steps to" comply with the State's requirements does not mean that the State's requirements fail, *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973).

C. Florida has a valid and undisputable interest in election integrity.

The State of Florida has an undeniable interest in maintaining election integrity and maximizing voter confidence in elections. That some supervisors criticized SB90 does not change this fact. ECF-280 at 9–10.[9] Nor does the fact that cases underscoring the State's compelling (and self-evident) interest in election

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[9] Because Plaintiffs bring a facial attack on *state* law, only state-level officers can speak to the State's interest. To that end, the Plaintiffs' consistent invocations of certain supervisors' opinions is of no consequence. The Supervisors do not represent *the State*; by virtue of their position as constitutional officers, they speak only for the *county* in which they were elected. *See* Fla Stat. 98.015(1).

integrity often addressed voter ID requirements; the language used in those cases sweeps broadly and is not confined solely to that arena. And even if election integrity was not a *self-evident* compelling State interest (and it is), Florida has provided specific evidence demonstrating its interest in election integrity.

The Division of Elections is a Department of State component. Fla. Stat. § 20.10(2)(a). Maria Matthews is the Director of the Division of Elections. ECF-289-2 ¶2. As such, Ms. Matthews can speak directly to Florida's interests in maintaining election integrity. Specifically, she states that SB90 "furthers the State's interest in increasing voter confidence and making election administration both more efficient and secure." ECF-244-36 ¶15. She also states that the Notification Requirement "serves the State's interests in ensuring that as many eligible Floridians as possible timely and accurately register for elections." ECF-244-36 ¶21. The Vote-By-Mail Request Provision, according to Ms. Matthews, prevents both fraud and sending VBM ballots to outdated addresses. ECF-244-36 ¶24–25. And, finally, Ms. Matthews notes that the drop-box provisions promote voter confidence in the election system. ECF-289-2 ¶34.

D. The *Anderson-Burdick* balance tips in favor of Defendants.

At this stage, Plaintiffs were tasked with "'go[ing] beyond the pleadings' to establish that there is a 'genuine issue for trial'"—*i.e.*, that "the evidence is such that a reasonable jury could return a verdict for" them on their *Anderson-Burdick* claim.

Whitehead v. BBVA Compass Bank, 979 F.3d 1327, 1328 (11th Cir. 2020) (citation and quotation marks omitted). There is, however, nothing in the record to create a genuine issue regarding the burden imposed by SB90—it is *de minimis* at its most severe. Nor is there anything in the record to create a genuine issue regarding the State's interest in election integrity—it is a self-evidently vital interest to which Maria Matthews specifically speaks. Taken together, Plaintiffs' *Anderson-Burdick* challenge fails, and, accordingly, Defendants are entitled to summary judgment.

IV. Section 208 Does Not Preempt the Non-Solicitation Provision.

Nothing in Florida law[10] prevents a disabled voter or a voter requiring language assistance from getting help, as required by Section 208. By its plain terms, SB90 does not "make[] it unlawful to provide voters within 150 feet of the polls with any assistance, including language assistance or assistance to disabled voters," ECF-280 at 68. *See* ECF-289-1 ¶¶5–6, 9. Plaintiffs' Section 208 claim therefore fails as a matter of law.

CONCLUSION

For the foregoing reasons, this Court should grant Defendants' Motion for Summary Judgment.

[10] In fact, Florida law mirrors Section 208 by allowing voters to seek and obtain assistance from persons of their choice. *Compare* Fla. Stat. § 101.051(1) *with* 52 U.S.C. § 10508.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing complies with the size and font requirements in the local rules. It contains 3,186 words.

/s/ Mohammad Jazil

CERTIFICATE OF SERVICE

I certify that I served the foregoing on all counsel of record through this Court's CM/ECF system.

/s/ Mohammad Jazil