UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., et al.,

Plaintiffs,

v. Case No. 4:21cv186-MW/MAF

LAUREL M. LEE, Florida Secretary of State, et al.,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Intervenor-Defendants.
_____/

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

[1] Attorney General Ashley Moody joins arguments related to the notification provision. Supervisors Hays and Doyle join arguments related to the VBM-Request Provision and Non-Solicitation Provision.

ARGUMENT

I. PLAINTIFFS' *ANDERSON-BURDICK* CLAIM FAILS AS A MATTER OF LAW.

Plaintiffs have failed to show that there exist any disputed questions of fact (material or otherwise) that would justify allowing their *Anderson-Burdick* claim to survive Defendants' summary-judgment motion. Their opposition underscores that the four provisions they challenge impose no burden on their voting rights. ECF-352 at 17. Without a burden, they cannot maintain an *Anderson-Burdick* claim, and for this reason, summary judgment in favor of Defendants is warranted.

A. Defendants have correctly characterized the legal standard.[2]

Contrary to the 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

[2] Defendants maintain that *Anderson-Burdick* is not the correct standard for evaluating the constitutionality of the remaining claims in this case. As the U.S. Supreme Court made clear in *McDonald v. Board of Election Commissioners*, vote-by-mail regulations do not implicate the right to vote at all. 394 U.S. 802, 807-08 (1969). Simply put, changes to "absentee statutes…do not themselves deny [Plaintiffs] the exercise of the franchise." *id.*; *see also Tully v. Okeson*, 977 F.3d 608, 614 (7th Cir. 2020) (applying rational-basis review in challenge to absentee voting rules that did "not impact Plaintiffs' fundamental right to vote"). Neither do the other SB90 changes that Plaintiffs challenge. Recognizing that the Court has previously disagreed with Defendants' interpretation of this precedent, *see* ECF-274 at 45-48, Defendants incorporate their previous summary-judgment arguments on this point by reference, *see* ECF-321-1 at 16-17, and expressly preserve it for appeal.

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 v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202 (2008).

Plaintiffs have not, and cannot, make this showing. For purposes of their facial challenge, the question is whether Plaintiffs have been "absolutely prohibited from exercising the franchise." *McDonald*, 394 U.S. at 809. Plainly, they have not. No provision of SB90 "affirmatively excludes" anyone from exercising the franchise, especially given the wide variety of voting options offered by Florida's election code (including Florida's mandate that counties offer dropboxes). Plaintiffs have not suggested that any provision does.

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 wide variety of voting options offered in Florida plainly "mitigate[s] the…impact" of SB90. *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1281-82 (11th Cir. 2020). For instance, changes to the VBM request requirement do not affect anyone's ability to vote in-person on Election Day. Because the franchise remains accessible to all eligible voters, SB90's aggregate changes do not amount to an unconstitutional burden.

This is especially true because not all of SB90's changes cut in the same direction. Although SB90 mandates in-person dropbox monitoring, it also for the first time requires drop boxes to be "geographically located so as to provide all voters in the county with an equal opportunity to cast a ballot, insofar as is practicable." Fla. Stat. § 101.69(2)(a). Despite Plaintiffs' First Amendment arguments, the Notification Requirement makes it easier for individuals to register because it informs them that they have several ways to do so and need not rely on a 3PVRO. Plaintiffs have given this Court no record-based reason to credit their blanket proclamation that "the Challenged Provisions work together to make the entire process of voting more difficult and burdensome." ECF-352 at 21-22. Their failure to do so means that no issue of material fact (genuine or otherwise) remains.

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 v. Democratic National Comm.*, 141 S. Ct. 2321, 2338 (2021). 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-274 at 36. And, naturally, "if a plaintiff offers *no* evidence that the

challenged law burdens the right to vote, the [C]ourt cannot assume that such a burden exists." *Id*.

As noted above, *see supra* at 2-4, "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 (emphases added); *see also Luft v. Evers,* 963 F.3d 665 (7th Cir. 2020) (considering the effect of alternative voting options as part of assessing the burden the challenged law imposed on voters); *McDonald*, 394 U.S. at 807-09. 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 a voter forgets to request a VBM ballot, it follows that his or her forgetfulness is the reason why he or she 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; 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); *see also Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004).

Conceptually, to prove that SB90 imposes a burden at all, Plaintiffs must also quantify the difference in access to the franchise before and after SB90's enactment. They claim that Dr. Michael Herron did so (while conceding that Dr. Orville Burton did not). ECF-352 at 31. But Dr. Herron acknowledged that only six "disproportionately White" Florida counties produced lists of the voters who used drop boxes in 2020, which made "detect[ing]" any demographic variances in dropbox usage "difficult" and any extrapolation impossible. Herron Report ¶¶128-31. And although Dr. Herron speculates that fourteen Florida counties might reduce the hours of drop box availability, whether that comes to fruition depends on funding, and whether it will impact on voters remains unclear given the availability of other options.[3] *Id.* ¶213. In any event, predicting future trends in dropbox or VBM based on the unparalleled nature of voting during the COVID-19 pandemic renders wholly unreliable any prediction offered by Dr. Herron.

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.[4] That some supervisors

[3] This is also a highly speculative assertion that introduces issues of ripeness. *See, e.g.*, *Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (internal quotation omitted).

[4] Plaintiffs' reliance on *Duke v. Cleland*, 5 F.3d 1399 (11th Cir. 1993), is unavailing. *See* ECF-352 at 22-23. *Duke* predates all the authority offered by Defendants in their Motion and in this Reply. *Compare Duke,* 5 F.3d 1399 (1993)

criticized SB90 does not change this fact. ECF-352 at 3, 23.[5] Nor does the fact that cases underscoring the State's compelling (and self-evident) interest in election integrity often addressed voter ID requirements; the language used in those cases sweeps broadly and is not confined solely to that arena.[6] 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-

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with, e.g., Brnovich, 141 S. Ct. at 2239-2240 (2021); *Crawford*, 553 U.S. at 195-96 (2008) *and Greater Birmingham Ministries*, 992 F.3d at 1334 (2021). Therefore, the *Duke* court's assertion that evidence of state interest is required has been overruled by subsequent Supreme Court and Eleventh Circuit case law.

[5] Because Plaintiffs bring a facial attack on *state* law, only state-level officers can speak to the State's interest. Indeed, the Court must "weigh the asserted injury to the right to vote against the precise interests put forward by *the state* as justifications for its proposed rule." *Crawford*, 553 U.S. at 190 (quotation omitted) (emphasis added). 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).

[6] For example, "the Supreme Court has already held that deterring voter fraud is a legitimate policy on which to enact *an election law*, even in the absence of any record evidence." *Greater Birmingham Ministries v. Sec'y State for State of Ala.*, 992 F.3d 1299, 1334 (11th Cir. 2021) (emphasis added) (citing *Crawford*, 553 U.S. at 192-97). This language plainly encompasses election-law cases generally and not only "voter-ID" cases specifically. *See also Brnovich*, 141 S. Ct. at 2334 (holding that "[o]ne strong and entirely legitimate state interest is the prevention of fraud" and "[e]nsuring that every vote is cast freely, without intimidation or undue influence, is also a valid and important state interest").

318-54, ¶1. As such, Ms. Matthews can speak directly to Florida's interests in maintaining election integrity. And she has done so. Specifically, she states that SB90 "furthers the State's interest in increasing voter confidence and making election administration both more efficient and secure." ECF-318-54, ¶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-318-54, ¶21. The Vote-By-Mail Request Provision, according to Ms. Matthews, prevents both fraud and sending VBM ballots to outdated addresses. ECF-318-54, ¶24-25. And, finally, Ms. Matthews notes that the Drop Box Provisions promote voter confidence in the election system. ECF-318-54 ¶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) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). 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.

II. THE NON-SOLICITATION PROVISION IS NOT UNCONSTITUTIONALLY VAGUE.

The State's interest in preserving "peace and order around its polling places" has not come out of left field. *Citizens for Police Accountability Pol. Comm v. Browning*, 572 F.3d 1213, 1220 (11th Cir. 2009). The Eleventh Circuit has recognized that it "preserves the integrity and dignity of the voting process and encourages people to come and to vote." *Id.* While not all voters will be dissuaded by solicitation within 150 feet of their polling location, "it [i]s probable that some—maybe many—voters faced with *running the gauntlet* will refrain from participating in the election process merely to avoid the resulting commotion." *Id.*

Florida's Non-Solicitation Provision animates the State's interest in maintaining order at polling sites and preventing voter harassment. The Provision's meaning is clear: The definition of "solicitation" sets a permissible-conduct floor within the non-solicitation zone that prohibits activity inconsistent with the state interest in peace and order around the polls, as described in *Citizens for Police Accountability*. *See id.* at 1220-21.

A floor, however, is not a ceiling, and the Non-Solicitation Provision is not the only Florida statute that regulates activity at polling sites. Supervisors must "maintain order at the polls," and to do so, Florida law grants them the prerogative

to determine whether activity within a non-solicitation zone threatens public order. Fla. Stat. § 102.031(a); *see also* Fla. Stat. § 101.031(2) (providing right to "[v]ote free from coercion or intimidation by elections officials or any other person"); *id.* § 101.051(2) (prohibiting people from accosting voters in line to vote with offers of disability-related assistance).

For example, Miami-Dade County Supervisor Christina White explained that "in order to maintain order . . . we have everybody be outside of the 150 feet, except for exit pollers." ECF 318-25 at 77:22-24. She imposes such bright-line rules because "it's impossible for [her] to discern what is partisan and what is non-partisan activity with the volume of people doing whatever it is that they're doing out there," ECF 318-25 at 101:19-102:3, and because her jurisdiction has a need for such restrictions. *E.g.*, ECF-318-25 at 246-49 (Exhibit 7) (detailing "[a]ggressive and [i]ntrusive" campaigning at polling sites in Miami-Dade County).

Yet, like other supervisors, Supervisor White manages the polls with appropriate accommodations for her voters. She uses a proxy process whereby a voter who needs to leave the line and venture beyond the 150-foot non-solicitation zone may do so. ECF-318-25 at 23:2-7 ("We have what's called the proxy process, that a person who is in line with them or just . . . another voter who is willing to hold the line for them is able to do so.").

Importantly, Supervisor White correctly testified that SB90 "hasn't affected . . . the way that we administer our policy at the polls." ECF 318-25 at 104:1-8. What was prohibited before remains prohibited. There is nothing vague or untoward about the proscription.

Plainly, a challenge to SB90's Non-Solicitation Provision cannot succeed based on Plaintiffs' concern that an entirely separate provision of Florida's election code grants the supervisors too much discretion. As more fully set out in Defendants' motion, ECF-321-1 at 31-35, the Non-Solicitation Provision "provide[s] people with ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). As such, Plaintiffs' void-for-vagueness argument fails.

III. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON THE NOTIFICATION PROVISION BECAUSE IT IS CONSISTENT WITH PLAINTIFFS' FIDUCIARY DUTY.

Plaintiffs' Notification Provision argument rises and falls on the premise that 3PVROs must provide "misleading, not factual and uncontroversial," information to would-be registrants. ECF-352 at 45. This premise, in turn, is demonstrably untrue. Because 3PVROs (including some of the Plaintiff organizations) have in fact delivered registration applications after book-closing, *see* ECF 318-54 at 4-6, 18-34, requiring 3PVROs to tell registrants that (1) late return of registration applications might occur and (2) Florida law provides other ways to register, is simply a

requirement to provide factually accurate information. For that reason, it should be evaluated under *Zauderer*, and for the reasons set out in Defendants' motion for summary judgment, ECF-321-1 at 38-40, the Notification Provision survives this inquiry.

Plaintiffs also claim that *Central Hudson* cannot apply because they claim this is a compelled-speech case. ECF-352 at 45-46. Not so. Laws concerning menu labels, airline warnings, radon notices, and innumerable other requirements call on (or compel in Plaintiffs' parlance) one party to share factual information with another party. But that is okay. Indeed, in *Central Hudson*, the Supreme Court stated that a potential less restrictive alternative to the regulation challenged there was a requirement that advertisers offer additional, factual information about the proffered services. 447 U.S. at 571. That is what the Notification Provision does here—it provides more information to potential voters so they can make an informed decision.

Finally, it matters that 3PVROs have fiduciary duties to registrants. *See* Fla. Stat. § 97.0575(3)(a) (2021) ("A [3PVRO] that collects voter registration applications serves as a fiduciary to the applicant."). Although Plaintiffs are not challenging the "common law duty" Defendants discuss, *see* ECF-352 at 40-41, this duty exists, it includes a duty to disclose, and this duty to disclose is all that the Notification Provision enumerates. In other words, the Notification Provision

advances the State's interest in ensuring that 3PVROs meet their fiduciary obligation to inform voters of risks associated with relying on a 3PVRO. At bottom, the fiduciary duty and the attendant notification requirement exist to ensure that more, as opposed to fewer, potential registrants submit timely applications. *See* ECF-318-21 at 83:24-84:3, 85:8-17. For all these reasons, the Court should find that the Notification Provision survives Plaintiffs' constitutional challenge.

IV. *AMICI* STATES' BRIEF MISSES THE MARK.

Finally, it bears noting that the brief submitted by *Amici* States does not change any of the foregoing analysis. ECF-348-1 at 9-11. Each State must prescribe "[t]he Times, Places and Manner of holding [its] Elections." U.S. Const. art. I, § 4, cl. 1. "Local variety . . . can be justified by concerns about costs, the potential value of innovation, and so on." *Wexler v. Anderson*, 452 F.3d 1226, 1233 (11th Cir. 2006). The State of Florida thus remains best-positioned to discuss the interests of its over 14-million diverse voters spread across over 6,000 precincts in two time zones. And, with respect, one State should not second-guess "the manner in which another State conducts its elections," *see Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020), or question the balance that another State strikes between accessibility and election integrity.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion for summary judgment in its entirety.

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 3028 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