**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF FLORIDA**
**TALLAHASSEE DIVISION**

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| LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., et al.,<br><br>*Plaintiffs*,<br><br>v.<br><br>LAUREL M. LEE, in her official capacity as Florida Secretary of State, et al.,<br><br>*Defendants*,<br><br>REPUBLICAN NATIONAL COMMITTEE and NATIONAL REPUBLICAN SENATORIAL COMMITTEE,<br>*Intervenor-Defendants*. | No. 4:21-cv-186-MW-MAF<br>No. 4:21-cv-187-MW-MAF<br>No. 4:21-cv-201-MW-MAF<br>No. 4:21-cv-242-MW-MAF |

**JOINT RESPONSE OF SECRETARY OF STATE AND INTERVENOR-DEFENDANTS TO ORDER FOR BRIEFING ON *ANDERSON-BURDICK***

On Friday, February 4, 2022, this Court directed the parties to submit briefs before 5:00 pm on Monday, February 7, 2022, that provide a "concise summary" (ECF No. 542 at 3) of the best controlling authority on two questions:

(1) When assessing an election law's constitutionality under *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983), how do courts determine whether that law imposes a "reasonable, nondiscriminatory restriction"? This Court specifically asked whether that analysis "look[s] to the language of the law, the intent behind the law, or the impact that the law has on certain

groups?" ECF No. 542 at 2.

(2) When considering under *Anderson-Burdick* the burdens that a challenged election law imposes, do courts consider the challenged provisions together and the cumulative burdens the provisions impose? Or do they consider the challenged provisions separately and the burdens they impose in isolation? *See* ECF No. 542 at 2.

## LIST OF RELAVANT AUTHORITY

### I. Question 1 - Courts look both to a challenged law's text to determine whether it is nondiscriminatory and its effects to determine whether it imposes reasonable burdens.[1]

There is no "litmus test" that separates "valid from invalid restrictions" in determining whether a law is a reasonable, nondiscriminatory use of state authority. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190 (2008). Instead, the Eleventh Circuit looks at the "impact" and "burden" on the right to vote against the backdrop of the electoral system as a whole. *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1281-82 (11th Cir. 2020).

*Controlling Authority*

- *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1281-82 (11th Cir. 2020)

[1] Generally, if a burden is severe, the law must be narrowly tailored to advance a compelling state interest; but if the burden is reasonable—ordinary, widespread, and usual to voting—and nondiscriminatory, important state regulatory interests usually justify it. *Crawford*, 553 U.S. at 190-91; *Clingman*, 544 U.S. at 586-87, 593-97; *Burdick*, 504 U.S. at 434, 439-40; *Common Cause/Georgia*, 554 F.3d at 1352-55.

(looking at whether the right to vote is implicated at all because of the "numerous avenues to mitigate chances that voters will be unable to cast their ballots.").

- *Libertarian Party of Ala. v. Merrill*, 2021 U.S. App. LEXIS 34383, *13-14 (11th Cir. 2021) (looking at the statutory text, the effect of the law, and weighing the alleged burdens against the states regulatory interests).
- *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197-198 (2008) (plurality op.) (burdens "arising from life's vagaries" that "are neither so serious nor so frequent as to raise any question about the constitutionality" of Indiana's voter ID law); *id.* at 200, 202-203 (plaintiffs who "seek[] relief that would invalidate the statute in all its applications"—"bear a heavy burden of persuasion." Because a facial challenge asks a court to consider "the statute's broad application to all" of a State's voters, there's a mismatch between a facial challenge and evidence limited to "a small number of voters who may experience a special burden under the [challenged] statute." Evidence of a burden specific to a small group of voters cannot disprove that a challenged "statute has a plainly legitimate sweep," thereby necessarily dooming a facial challenge).
    - *Persuasive Authority* - *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J. concurring) (a burden must "go

beyond the merely inconvenient.").

- *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 360 (1997) (holding that a law is neutral and nondiscriminatory because it "applies to major and minor parties alike."
- *Clingman v. Beaver*, 544 U.S. 581, 593 (2005) (holding that burdens are not severe if they are "ordinary and widespread." Otherwise, "virtually every electoral regulation" would be subject "to strict scrutiny"—an outcome that necessarily and improperly would "hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes.").
- *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009) (*Anderson-Burdick* plaintiffs have no right to be free from the "ordinary burdens" of voting.); *see id.* (finding burdens arising from Georgia photo-ID law were "not undue or significant").

## II. Question 2 - *Anderson-Burdick* requires courts to judge separately the constitutionality of the provisions at issue but considers the burdens imposed in light of the election code as a whole.

Defendants are aware of no binding authority that supports resolving *Anderson-Burdick* challenges by combining challenged provisions and considering the alleged burdens cumulatively. On the contrary, to the extent binding authority addresses those questions, it shows that courts must resolve challenges to each

provision separately. Courts look at the challenged provision in isolation while assessing the burden against the backdrop of the election code as a whole.

*Controlling Authority*

- *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222-33 (1989) (analyzing different challenges separately by weighing each distinct set of burdens against a corresponding distinct set of state interests proffered to support the different rules);[2] *id.* at 222-29 (analyzing burdens and state interests for anti-endorsement rule); *id.* at 229-33 (analyzing burdens and state interests for internal-party-affairs rules); *see also id. at* 230 (when resolving the challenges to the (multiple) internal-party-affairs rules, the Court concluded that "*[e]ach* restriction" *individually*—not *all* the restrictions *cumulatively*—"limits a political party's discretion in how to organize itself, conduct its affairs, and select its leaders.")
- *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1281-82 (11th Cir. 2020) (looking at whether the right to vote is implicated at all because of the "numerous avenues to mitigate chances that voters will be unable to case their ballots.")

[2] *Eu* is perhaps the only *Anderson-Burdick* Supreme Court case that addresses challenges to more than one provision of state election law. Also, because *Eu* postdates *Anderson* but predates *Burdick*, the *Eu* Court did not state the balancing test using the same sliding-scale burden framework that the Court has uniformly applied since *Burdick*. *See* 489 U.S. at 222.

- *Persuasive Authority – Luft v. Evers*, 963 F.3d 665, 671-72 (7th Cir. 2020) ("Judges must not evaluate each clause in isolation" as the "[c]ourts weigh [any] burdens against the state's interests by looking at the whole electoral system.").

In other words, *Burdick* requires weighing proffered state interests against specific burdens (of varying severity).

Dated: February 7, 2022

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on February 7, 2022, a true and correct copy of the foregoing was filed via CM/ECF, which served a copy on all parties of record.

*/s/ Mohammad O. Jazil*
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