Nos. 22-11133-GG, 22-11143-GG, 22-11144-GG, 22-11145-GG (consolidated)

In the 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.

BRIEF OF *AMICUS CURIAE* THE PUBLIC INTEREST LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLANTS

Appeal from the U.S. District Court for the Northern District of Florida,
Nos. 4:21-cv-242, 4:21-cv-186, 4:21-cv-187, 4:21-cv-201 (Walker, C.J.)

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The Public Interest Legal Foundation is a not-for-profit corporation exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). It does not have a parent corporation, and no publicly held company has a 10 percent or greater ownership interest in the entity.

The undersigned counsel of record certifies that the following listed person and entities as described in 11th Cir. R. 26.1-2(a) have an interest in the outcome of this case:

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/s/ Kaylan Phillips
Kaylan Phillips

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

IDENTITY AND INTERESTS OF *AMICUS CURIAE*

The Public Interest Legal Foundation, Inc., (the "Foundation") is a non-partisan, public interest organization incorporated and based in Indianapolis, Indiana. The Foundation's mission is to protect the civil right to vote. It does so by promoting the integrity of elections nationwide through research, data analysis, remedial programs, and litigation regarding compliance with the Voting Rights Act and the National Voter Registration Act. The Foundation has sought to maintain state control over elections and preserve the constitutional balance between a state's power to control its own elections and Congress's legitimate constitutional authority to protect against racial discrimination. Preserving this balance serves to protect the interests and rights of citizens to participate equally and fully in our electoral processes, while ensuring that federal statutes are not used to rearrange the constitutional mandate in which states run their own elections.

The Foundation's President and General Counsel, J. Christian Adams, served as an attorney in the Voting Section at the Department of Justice. Mr. Adams has been involved in multiple enforcement actions under the Voting Rights Act. The Foundation's Litigation Counsel, Maureen Riordan, served in the Civil Rights Division of the Department of Justice for over twenty years both as a Voting Section attorney as well as Senior Counsel to the Attorney General for Civil Rights. Additionally, one of the members of the Foundation's Board of Directors, Hans von

Spakovsky, served as counsel to the assistant attorney general for civil rights at the Department of Justice, where he provided expertise in enforcing the Voting Rights Act and the Help America Vote Act of 2002, as well as a commissioner on the Federal Election Commission. The Foundation believes that this brief—drawing, in part, from the expertise of the Foundation's counsel—will aid in the Court's consideration of the lower court's decision.

Pursuant to Fed. R. App. P. 29(a)(4)(E), no party's counsel authored this brief in whole or in part and no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief. Pursuant to Fed. R. App. P. 29(a)(3), the Foundation has separately moved for leave of court to file this brief.

STATEMENT OF THE ISSUE

Whether the district court erred in enjoining the challenged portions of SB90 and subjecting the State of Florida to preclearance under Section 3(c) of the Voting Rights Act.

SUMMARY OF ARGUMENT

The lower court erred in enjoining portions of SB90 and in taking the extraordinary step of subjecting the entire State of Florida to preclearance under the Voting Right Act.

As to the latter, in addition to the arguments raised in the Appellants' Initial Brief for Secretary Byrd, Attorney General Moody, and Supervisors Hays and

Doyle, the imposition of Section 3(c) of the Voting Rights Act is inappropriate here because of the extraordinary cost on our system of federalism along with the potential for partisan gamesmanship within the Civil Rights Division at the Department of Justice. Far from neutral arbiters of the law, the United States' Department of Justice has a history of utilizing preclearance requirements to achieve partisan or ideological goals.

As to the former, the challenged laws survive constitutional muster. Florida's reasonable and nondiscriminatory restrictions are justifiable because of the State's important regulatory interests in ensuring fair and honest elections.

ARGUMENT

I. The Lower Court Erred in Subjecting Florida to Preclearance under the Voting Rights Act.

The lower court determined that "without preclearance, Florida can pass unconstitutional restrictions…with impunity." *League of Women Voters of Florida, Inc. v. Byrd*, Final Order Following Bench Trial, No. 4:21-cv-186-MW-MAF (N.D. Fla. Mar. 31, 2022) at 279 (hereinafter "Op.") As the lower court noted, such a remedy is "'strong medicine' and 'a drastic departure from basic principles of federalism.'" Op. 270 (quoting *Shelby County v. Holder*, 570 U.S. 529, 535 (2013)). Yet the lower court imposed this strong medicine without fully considering the history of abusive exercise of this power as documented by other federal courts.

A. The Drastic Departure from Basic Principles of Federalism Is Not Warranted Here.

The lower court imposed this strong medicine when even the parties to this case "treat[ed] this issue as an afterthought." Op. 270. The court admitted that the parties devoted less than six pages total of briefing to the entire issue of preclearance. Op. 270. Despite even the challengers' reluctance to devote time and energy to their own request, the court determined that it was appropriate to subject Florida to preclearance requirements for *ten years*. Op. 281.

The Voting Rights Act already provides mechanisms by which private parties and the Department of Justice can challenge election procedures, including Sections 2, 52 U.S.C. § 10301, 11(b), 52 U.S.C. § 10307, and 203, 52 U.S.C. § 10503. Even with the robust authority provided to the Department of Justice through Section 2, the Department has only brought nine such cases in the near decade that has passed since *Shelby County* struck down the preclearance coverage formula. *See* Cases Raising Claims under Section 2 of the Voting Rights Act, U.S. Department of Justice, https://www.justice.gov/crt/voting-section-litigation#sec2cases.

B. The Department of Justice Has a History of Abusing Its Preclearance Authority.

Importantly, subjecting Florida to preclearance requirements may subject Florida to abusive Justice Department preclearance authority. Sadly, there is a long history of the Voting Section at the Department of Justice abusing preclearance

authority and improperly collaborating with partisan entities when it reviewed submissions under Section 5 of the Voting Rights Act.

For example, in *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), the United States District Court admonished the Voting Section for collusive misconduct by Voting Section lawyers. There, the State of Georgia submitted its Congressional redistricting plan to the Department of Justice pursuant to Section 5 of the Voting Rights Act. In its previous decennial districting plan, Georgia had ten congressional districts. *Johnson*, 864 F. Supp. at 1360. Based upon new census data in 1990, Georgia gained a congressional district. *Id*. According to the court, the plan Georgia created "was the culmination of committee meetings, public hearings, examination of various districting proposals, and many hours spent with an extremely sophisticated computer." *Id*. at 1363. Yet, the Department of Justice refused to clear the Georgia plan. *Id*. at 1364. The State of Georgia was forced to submit its redistricting plan a total of three times before it received preclearance. *Johnson*, 864 F. Supp. at 1367. However, the precleared plan was ultimately struck down by the court because it violated the 14th Amendment. *Id*. at 1393.

In striking down the plan, the court noted that the American Civil Liberties Union ("ACLU") was "in constant contact" during the preclearance process. *Id*. at 1362. Pronouncing the communications between the DOJ and the ACLU "disturbing," *id*., the court declared,

> It is obvious from a review of the materials that [ACLU attorney] Ms. Wilde's relationship with the DOJ Voting Section was informal and familiar; the dynamics were that of peers working together, not of an advocate submitting proposals to higher authorities….DOJ was more accessible—and amenable—to the opinions of the ACLU than to those of the Attorney General of the State of Georgia.

Id. at 1362. After a Voting Section lawyer professed that she could not remember details about the relationship, the court found her "professed amnesia" to be "less than credible." *Id*. Unfortunately, abuse of power in the Section 5 process is not confined to *Johnson v. Miller*.

In a 2006 letter to then-Chairman of the Committee on the Judiciary, Congressman F. James Sensenbrenner, then-Assistant Attorney General William E. Moschella detailed additional instances where the Civil Rights Division paid "attorneys' fees or settlement fees for purportedly unfounded litigation," particularly litigation related directly to abuses of this preclearance power. Letter from Assistant Attorney General William E. Moschella (April 12, 2006) at 2, *available at* https://docs.house.gov/meetings/JU/JU10/20220120/114336/HHRG-117-JU10-Wstate-RiordanM-20220120-SD002.pdf. According to the letter, "[i]n total, the Division was ordered to pay or agreed to pay $4,107,595.09 from 1993 to 2000" in a total of eleven cases. Letter at 7.

Other examples exist of the Department of Justice abusing preclearance powers. For example, in September 2001, the Department's Voting Section sent a letter to the State of Alabama warning that Alabama could not enforce a 1994 law

that required the collection of DNA samples from convicted felons applying for parole because the law had not been submitted to the DOJ for preclearance under Section 5.[1] After Alabama contested whether a DNA sample procedure for parole applicants was something required to be submitted for preclearance under the Voting Rights Act, the Department of Justice relented, and sent Alabama a letter withdrawing the preclearance demand.

II. Florida Has an Important Regulatory Interest in Ensuring Election Integrity.

In this case, the district court applied an incorrect standard to review Florida's new election law, Senate Bill 90 ("SB90"). *See* SB90 (2021), Fla. Senate, *found online at* http://laws.flrules.org/2021/11. This flawed analysis is contrary to Supreme Court precedent on the law and should be overturned.

A. The Anderson/Burdick Framework Applies when Analyzing an Alleged Burden on the Right to Vote from a Challenged Law.

"[V]oting is of the most fundamental significance under our constitutional structure." *Grizzle v. Kemp*, 634 F.3d 1314, 1326 (11th Cir. 2011) (internal quotations removed). "It does not follow, however, that the right to vote in any manner ... [is] absolute." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). The

[1] The full account of this particular abusive preclearance demand can be found at Adams, *Injustice* (Regnery, 2011), at 165-66.

Constitution explicitly provides State legislatures with authority to regulate the "Times, Places and Manner of holding Elections[.]" U.S. Const. art. I, § 4, cl. 1.

Reasonable and nondiscriminatory restrictions are justifiable because of a state's important regulatory interests in ensuring a fair and honest election.

> Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.

Burdick, 504 U.S. at 433 (internal citations and quotations omitted). State laws regarding "the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (internal citations and quotations omitted). "Nevertheless, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Id*.

When a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, a "more flexible standard" is to be applied. *Burdick*, 504 U.S. at 434. That balancing test is derived from *Anderson*, *supra*, and *Burdick*, *supra*, and requires:

> A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as

> justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.

Id. (internal citations and quotations omitted). Under this test, the State's important regulatory interests are generally sufficient to justify the restrictions. *Id. See also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("Lesser burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'").

"[A] state has an important regulatory interest in deterring election fraud." *Libertarian Party of Ala. v. Merrill*, 2021 U.S. App. LEXIS 34383, *21-22, 2021 WL 5407456 (11th Cir. 2021) (internal quotation removed). *See also Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("A State indisputably has a compelling interest in preserving the integrity of its election process"); *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (affirming that "a state has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process"). As the Supreme Court has stated:

> There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

Crawford v. Marion County Election Bd., 553 U.S. 181, 196 (2008). Indeed, the Eleventh Circuit has found that combatting or preventing voter fraud is a valid neutral justification for requirements or restrictions on voting. *See, e.g.*, *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1327 (11th Cir. 2021) (upholding a voter ID requirement); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020) (upholding a "reasonable ballot-receipt restriction"); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1354-1355 (11th Cir. 2009) (upholding the requirement to produce photo identification).

States also have a valid interest in ensuring the efficient and organized administration of elections, and safeguarding voter confidence in the electoral process. "[C]onducting an efficient election, maintaining order, [and] quickly certifying election results," are important functions of government as states administer elections. *New Ga. Project v. Raffensperger*, 976 F.3d at 1282. Ensuring "peace and order" at polling places is important to the electoral process. *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1220 (11th Cir. 2009). Furthermore, "public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process. As the Carter-Baker Report observed, the 'electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.'" *Crawford*, 553 U.S. at 197. And states have an

interest "if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Storer v. Brown*, 415 U.S. 724, 733 (1974).

Finally, states have a legitimate interest in ensuring that elections are conducted in such a way as to decrease the probability that the election be overturned. When there is no opportunity to confirm the registration of a voter before that voter casts a ballot, there is a risk of fraud, which can lead to overturned elections. Indeed, elections that had to be overturned due to the inappropriate counting of absentee ballots are not uncommon. *See, e.g.*, *Townson v. Stonicher*, 933 So. 2d 1062, 1067 (Ala. 2005) (affirming the trial court's overturning of an Alabama mayoral election, though reversing the reasoning for the judgment); *Adkins v. Huckabay*, 755 So. 2d 206, 225 (La. 2000) (calling for a new election when certain absentee votes were disqualified); *Meade v. Williamson*, 745 S.E.2d 279, 286 (Ga. 2013) (reversing a trial court's order invalidating election results).

B. Florida Has a Valid Interest in Preventing Voter Fraud and in Protecting Voter Confidence in the Integrity of Elections.

Four provisions of SB90 were improperly enjoined by the district court: (1) the drop box provision, § 101.69(2)-(3); (2) the registration-delivery provision, § 97.0575(3)(a); (3) the registration-disclaimer provision, § 97.0575(3)(a); and (4) the solicitation provision, § 102.031(4)(a)-(b). *See* Op. 283-88. These are four facially neutral laws, that apply to Floridians of all races. The State of Florida's regulatory

interests justify the existence and enforcement of each of the challenged provisions under the *Anderson/Burdick* framework.

The drop box provision of the law requires drop boxes for vote-by-mail ballots to only be used during regular voting hours and to be continuously monitored by the office of the Supervisor of Elections during those hours. *See* Ch. 2021-11, § 101.69(2)-(3). Secure drop boxes offer another method of voting to Floridians and are available during the early voting period, and election day. They allow those who prefer to manually fill out their ballots to turn them into a secure location without a third party (the postal service, an employee at the elections office, or a bad actor) ever touching the ballots. They protect the ballot from potential tampering or getting lost in the mail.

Such a system of safeguarding ballots protects the integrity of the electoral process and instills confidence in the voter that the process is worth his participation. Requiring drop boxes to be monitored adds the same protection to ballots submitted via a drop box that are given to ballots submitted electronically or via mail. *See* Fla. Stat. § 101.67. Secure drop boxes protect the integrity of the election by ensuring that the ballots of voters are actually delivered and are kept secure, and in turn, they prevent litigation over lost or vandalized ballots that can overturn an election. Secure drop boxes give confidence to the voter that the ballot was submitted securely, and without interference. Florida's new laws regarding secure drop boxes serve to further

the State's constitutionally legitimate interests in protecting the electoral process and instilling confidence.

The registration-delivery provision of § 97.0575(3)(a) requires third party voter registration organizations to deliver the applications they collect to the Supervisor of Elections in the county where the applicant resides within fourteen days, but not after before registration closes. This law aides in the efficient administration of Florida's elections by requiring that the voter registration organizations return the applications they collect in a prompt manner so they can be processed accordingly. *See New Ga. Project v. Raffensperger*, 976 F.3d at 1282. Further, local officials are more likely to spot fake or suspect addresses than a state official unfamiliar with the area. Local officials are also more likely to be aware of recent deaths in the county than an official in Tallahassee not plugged into the community. Such local knowledge is key for preventing fraudulent registrations. The State of Florida has an important regulatory interest in preventing voter fraud and ensuring an orderly election process, and the registration-delivery provision helps Florida work towards both goals.

Similarly, the registration-disclaimer provision of SB90 provides for a more organized election. The provision, which has since been repealed by the Florida legislature in SB524, required third-party voter registration organizations to notify the applicants that they might not deliver the applications within the registration

deadline, that applications can be returned in person or by mail, and that applicants can go online to register or check whether their applications were timely delivered. *See* SB90, § 97.0575(3)(a) (provision in challenged law) and SB524 (2022), Fla. Senate, *found online at* http://laws.flrules.org/2022/73 (repealing the new provision). The State of Florida has a real interest in making sure that those who attempt to register to vote through a third party are aware of their individual ability to return their application and check their registration status, recognizing the drawbacks of relying on another to return the application.

Finally, the solicitation provision of SB90 amends Florida law to prevent "engaging in any activity with the intent to influence or effect of influencing a voter" both inside the polling place, and within 150 feet of a drop box. *See* § 102.031(4)(a). The definition of "solicitation" does not "prohibit an employee of, or a volunteer with, the supervisor from providing nonpartisan assistance to voters within the no-solicitation zone such as, but not limited to, giving items to voters…" § 102.031(4)(b). The State of Florida has legitimate interests in wanting to control who is outside its polling places and how those people are treating voters attempting to cast their vote. Wanting "peace and order around its polling places" is a valid desire, as "it preserves the integrity and dignity of the voting process and encourages people to come and to vote." *Citizens for Police Accountability Political Comm.*, 572 F.3d

at 1220. The solicitation regulations are in accord with these goals, as they protect the voter from harassment.

In conclusion, the State of Florida has compelling interests in the four challenged laws. Their initiatives to prevent voter fraud, instill voter confidence in the election process, and maintain an orderly, efficient, and peaceful election process justify the minimal, reasonable restrictions the new laws may place on Plaintiffs.

CONCLUSION

For these reasons and the reasons contained in the briefs of Appellants, the lower court decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,373 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. Rule 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word (14-Point Times New Roman) and is double-spaced.

/s/ Kaylan Phillips
Kaylan Phillips

CERTIFICATE OF SERVICE

I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit on July 18, 2022, by using the appellate CM/ECF system, and service was accomplished on all counsel of record by the appellate CM/ECF system.

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