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

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

Plaintiff-Appellees,

v.

FLORIDA SECRETARY OF STATE, et al.,

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.)

BRIEF OF THE FOUNDATION FOR GOVERNMENT ACCOUNTABILITY AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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FGA has no parent corporation, and no corporation owns 10% or more of their stock. No publicly traded company or corporation has an interest in the outcome of this case or appeal. FGA certifies that the CIP contained in this motion is complete.

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INTEREST OF AMICUS CURIAE[1]

The Foundation for Government Accountability ("FGA") is a nonpartisan, nonprofit organization that seeks to enhance the lives of all Americans by improving welfare, workforce, healthcare, and election integrity policy at the state and federal levels. Launched in 2011, FGA promotes policy reforms that seek to free individuals from government dependence, restore dignity and self-sufficiency, and empower individuals to take control of their futures, including through free, fair elections that inspire confidence and encourage participation.

Since its founding, FGA has helped achieve more than 500 reforms impacting policies in 42 states and 20 federal regulatory reforms in policy areas related to welfare, healthcare, workforce, and election integrity. FGA supports its mission by conducting innovative research, deploying outreach and education initiatives, and equipping policymakers with the information they need to achieve meaningful reforms. Over the past eighteen months, FGA has filed *amicus* briefs with the United States Supreme Court in *Gresham v. Azar*, the Missouri Supreme Court in *Doyle v. Tidball*, the Federal District Court in the Northern District of

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[1] Counsel for *Amicus Curiae* certifies that no party has objected to the filing of this brief, though not all parties have responded to notification emails sent by *Amicus Curiae* to all parties notifying of the intent to file this brief. Therefore, pursuant to 11th Cir. R. 35-8 and FRAP 29(a)(3) this brief is accompanied by a motion for leave to file. Pursuant to FRAP 29(a)(4)(E), counsel for *Amicus Curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Georgia in *U.S. v. Georgia*, and the Federal District Court in the Western District of Texas in *La Union Del Pueblo Entero v. Abbott*, with the two most recent briefs filed in defense of election integrity laws passed in Georgia and Texas, similar to the Florida law at issue here.

In this case, Florida has passed election reforms that strike a lawful and proper balance between making it easy to vote, but hard to cheat. Now several groups that oppose all laws designed to prevent election fraud and inspire voter confidence have stepped forward in opposition. This case directly implicates FGA's core mission relating to election integrity. Accordingly, FGA files this *amicus curiae* brief in support of Appellants and SB 90, Florida's election integrity law.

SUMMARY OF ARGUMENT

For a court to find Florida's SB 90 to be the product of intentional racial discrimination, it must first find, based on the facts, that "the legislature as a whole was imbued with racial motives" when it passed SB 90. *Brnovich v. DNC*, 141 S. Ct. 2321, 2348-50 (2021). Here, the Court failed to meet this burden, relying primarily on "old, outdated intentions of previous generations" and a misguided application of *Arlington Heights*, both of which run afoul of well-established precedent. *Greater Birmingham Ministries v. Sec'y of State for State of Ala.* ("*GBM*"), 992 F.3d 1299 (11th Cir. 2021), citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). This misguided application of the law included wrongly shifting the burden of proof to Defendants without direct

evidence of discriminatory intent, failing to find even a single statement or action showing a racially discriminatory intent on the part of the whole legislature as required under the law, and relying on past incidents of purported discrimination, most dating back to the 1800s, to infer discriminatory intent in the face of neutral election integrity justifications. Op. 42-45; 84-89; 135-36; *GBM*, 992 F.3d at 1321-27. Thus, the lower court erred in finding intentional racial discrimination, and its decision must be reversed.

The District Court also erred by invoking Section 3(c) of the Voting Rights Act (VRA), forcing Florida into the strictures of preclearance for the next decade. Op. at 270-73. In justifying this extraordinary measure, the Court did not cite any prior decisions showing actual past violations of the constitution, a fatal mistake since the VRA requires a court to find multiple "violations . . . of the fourteenth or fifteenth amendments" to invoke preclearance. 52 U.S.C. §10302(c). Not only did the Court fail to find multiple violations of the constitution as the law requires, the Court failed to find even one.

Apart from a misapplication of the law, the Court's new, novel approach for imposing Section 3(c) preclearance presents other problems including a new requirement that any time a state is found to have violated the VRA, a Judge *must* impose preclearance for whatever amount of time the Judge sees fit. Op. at 276. This extraordinarily aggressive approach for invoking Section 3(c) preclearance cannot be allowed to become a new, legal framework for other plaintiffs to use

elsewhere to sidestep *Shelby County* and resurrect preclearance. *See Shelby County, Ala. v. Holder*, 570 U.S. 529 (2013).

Lastly, this case raises an important question as to whether Section 3(c) has become outdated and unconstitutional in the same way Sections 4 and 5 of the VRA have. Well-established precedent coupled with current reality and a lack of a "current need" for such an extraordinary remedy makes clear that it has. *See Shelby County*, 570 U.S. at 553-54. The same constitutional arguments that the Supreme Court used in 2013 to end preclearance under Sections 4 and 5, apply to Section 3(c), since preclearance, whether from Sections 4 and 5, or from Section 3(c), renders the state upon which it is imposed a second-class state, impinging on its status as an equal sovereign among the other states, and constitutes an unwarranted and "extraordinary departure from the traditional course of relations between the States and the Federal Government." *Shelby County*, 570 U.S. at 535-45 (quoting *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999) and *Presley v. Etowah County Comm'n*, 502 U.S. 491, 500-01 (1992)).

In the end, the Court's assertion that "the right to vote, and the VRA particularly, are under siege" is wrong. Op. at 3. Instead, it is the equal sovereignty of the states and their constitutional right to regulate their own elections that are under siege. *See* U.S. CONST. art. I, §4, cl. 1. This Court must not allow preclearance to be resurrected and refashioned into a tool to oppose any meaningful election reforms designed to prevent election fraud and inspire voter confidence.

For all the reasons outlined *infra*, the lower court's ruling must be reversed.

ARGUMENT

I. The District Court Erred in Finding Intentional Discrimination Relying on a Misapplication of Well-Established Precedent

To justify its ruling that the challenged provisions of SB 90 violate the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act (VRA), the lower court had to find, based on the facts, that "the legislature as a whole was imbued with racial motives" when it passed SB 90. *Brnovich*, 141 S. Ct. at 2348-50. Discriminatory motives do not include "partisan motives" or "sincere" (even if mistaken) beliefs about the existence of fraud or the wisdom of election reforms. *Id.*

Thus, the bar for finding that Florida's SB 90 was the product of intentional racial discrimination is high, rightfully so, and based upon the facts here, too high for any court to have reached. Nonetheless, in holding to the contrary, the lower court relied primarily on "old, outdated intentions of previous generations" and a misguided application of *Arlington Heights*, both of which run afoul of well-established Eleventh Circuit and Supreme Court precedent. *GBM*, 992 F.3d 1299 (citing *Arlington Heights*, 429 U.S. at 252).

First, under both an equal protection analysis under the Fourteenth Amendment and a denial or abridgement analysis under the Fifteenth Amendment, before the evidentiary burden may shift to require defendants "to demonstrate that the law would have been enacted without this [racial discrimination] factor,"

plaintiffs must first "establish *both* intent and effect." *GBM*, 992 F.3d at 1321 (emphasis added). "If Plaintiffs are unable to establish both intent and effect, their constitutional claims fail." *Id.*

Here, the Court wrongly shifted the burden without direct evidence of discriminatory intent, and then, relying on the mistaken shift, and the Defendants' supposed failure to carry that burden by showing that the challenged provisions would have been passed regardless of racial motivations, the Court ruled in favor of the Plaintiffs. Op. at 135-136. The Court asserted, "[n]ot only have Defendants failed to carry their burden, they [did] not even try." Op. at 136. But the burden was never theirs to carry. Regardless, Defendants did, in fact, carry this burden, offering evidence of the true motivations behind SB 90, including promoting voter confidence in the outcome of elections which had been greatly shaken in Florida and across the country in the wake of the 2020 election. However, they needn't have bothered, as the burden still rested squarely upon the shoulders of the Plaintiffs. Dismissing what was obviously the true motivation behind the law – a response to the general goal of improving election administration and security while promoting voter confidence – only because the legislature, in the Court's words, failed to "carpet-bomb" the entire election code, is nonsensical. Op. at 132.

Second, attempting to support its finding of a racially discriminatory intent behind SB 90, the Court, as it is required to do, examined the record in search of contemporary statements or actions of key legislators to use as supporting evidence.

See, e.g., GBM, 992 F.3d at 1323-24. It found none. As the Court readily admitted, after reviewing 3,632 pages of transcripts, 1,224 pages of post-trial briefings and attachments, and thousands of pages of evidence, and after hearing more than two weeks' worth of testimony from 42 witnesses, it could not find even a single statement or action showing a racially discriminatory intent on the part of the whole legislature as the law requires. Op. at 2; 84-89; *Brnovich*, 141 S. Ct. at 2348-50. "No reasonable fact-finder could find a discriminatory intent or purpose underlying [Florida's SB 90] from the statements identified by Plaintiffs." *GBM*, 992 F.3d at 1325. Discriminatory purpose cannot be established here, because the facts needed to justify the claim simply do not exist.

Finally, a State's alleged historical racism "cannot…ban[] its legislature from ever enacting otherwise constitutional laws about voting," but here the Court relied on past incidents of purported discrimination, most dating back to the 1800s, to infer discriminatory intent in the face of neutral election integrity justifications. Op. at 42-45; *GBM*, 992 F.3d at 1325. This it cannot do. While the Court acknowledged precedent prohibiting the Court from using Florida's racial history to strike down otherwise constitutional laws, it blithely brushed aside that precedent, finding that "Florida's painful history remains relevant; it echoes into the present and sets the stage for SB 90." Op. at 45.

While the historical background of SB 90's "enactment is 'one evidentiary source' relevant to the question of intent," acts of racism that occurred on the heels

of the Civil War are not. *See Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018) (quoting *Arlington Heights*, 429 U.S. at 267). "The presumption of legislative good faith [is] not changed by a finding of past discrimination." *Id.* at 2324. No matter how "grotesque" the Court finds Florida's history to be, the legislature's actions during the late 1800s have no bearing on the actions or motivations of Florida's legislature today. None. To claim otherwise is flatly counter to well-established precedent. *See, e.g., GBM*, 992 F.3d at 1325.

As the Eleventh Circuit noted in *GBM*, Justice Scalia's *Crawford* concurrence is particularly applicable here: "[W]ithout proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional. The Fourteenth Amendment does not regard neutral laws as invidious ones, even when their burdens purportedly fall disproportionately on a protected class." *Id.* at 1327 (quoting *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 207 (2008) (Scalia, J., concurring) (internal citation omitted)). The key question is whether SB 90 was passed "because of" its adverse effect on black voters, not merely "in spite of" that supposed effect. *Pers. Adm't v. Feeney*, 442 U.S. 256, 279 (1979).

Here, the Court devotes much of its opinion attempting to show that the legislature must have known of the supposed disparate impact SB 90 would have on black voters, because the disparate impact was alleged by the bill's opponents, and despite these allegations, the legislature passed SB 90 regardless. Op. at 120-21. Assuming, *arguendo*, this to be true, this still falls short of satisfying the

evidentiary burden of proof needed to establish discriminatory intent under the Fourteenth and Fifteenth Amendments because it does not show that racial discrimination was a motivating factor in passage of the law, but merely that the legislature passed SB 90 "in spite of" claims by the bill's opponents that SB 90 would have an adverse effect on black voters.

The Court's finding of intentional discrimination contravenes binding Eleventh Circuit and Supreme Court precedent. It must be reversed.

II. The District Court Erred in Invoking Section 3(c) Preclearance

Relying on a dubious finding of intentional racial discrimination on the part of the Florida legislature, the lower court then took an inexplicable step by not only enjoining the challenged provisions, but by forcing Florida into the strictures of preclearance wherein, for the next decade, the state "must beseech the Federal Government for permission to implement laws [Florida] would otherwise have the right to enact and execute…" *Shelby County*, 570 U.S. at 544. Invoking Section 3(c) of the VRA, even while recognizing that the parties did not fully brief the issue, the Court imposed this extraordinary remedy, attempting to justify its decision through a misapplication of precedent. Op. at 270-73.

First, the Court misapplied the test in *Jeffers v. Clinton*, which found Section 3(c) preclearance to be warranted only where (1) the state has committed multiple constitutional violations, and (2) preclearance is necessary because the state's multiple constitutional violations are persistent and repeated, are recent, have not

been remedied, or are likely to recur. *Jeffers v. Clinton*, 740 F.Supp. 585 (E.D. Ark. 1990). Misapplying the first prong, the Court found multiple constitutional violations because, according to the Court, "over the past 20 years, Florida has repeatedly targeted Black voters because of their affiliation with the Democratic party." Op. at 275-76. In arriving at this conclusion, the Court did not cite any prior decisions showing actual past violations of the constitution, a fatal mistake since the VRA requires a court to find multiple "violations . . . of the fourteenth or fifteenth amendments" to invoke preclearance. 52 U.S.C. §10302(c). Not only did the Court fail to find multiple violations of the constitution as the law requires, the Court failed to find even one.

Besides misapplying the law, the Court's approach presents other problems. For instance, under the Court's new, novel approach, any time a state is found to have violated the VRA, a Judge *must* impose preclearance for whatever amount of time the Judge sees fit. Op. at 276. Such an approach would water down the extraordinary nature of this remedy, making it a more readily available weapon in the arsenal of progressive groups that routinely use the courts to launch costly legal attacks against any new reform that promotes election integrity no matter how fair and reasoned the reform might be. While this would certainly be a convenient outcome for such groups, it would be disastrous for the rest of the country and would result in a wave of new baseless and costly lawsuits.

Since its creation almost 60 years ago, Section 3(c) has been a "rarely used" remedy "invoked fewer than twenty times in [its first] forty-eight years." Op. at 274 (quoting Edward K. Olds, *More Than 'Rarely-Used: A Post-Shelby Judicial Standard For Section 3 Preclearance*, 117 Colum. L. Rev. 2185, 2188 (2017)). In fact, as the Court itself admitted, it has been over 35 years since the Northern District of Florida has invoked Section 3(c), yet the Court did so here in a haphazard fashion with minimal analysis. *Id.* (citing *NAACP v. Gadsen Cnty. Sch. Bd.*, 589 F. Supp. 953, 958 (N.D. Fla. 1984)).

The Court's extraordinarily aggressive approach in invoking Section 3(c) preclearance cannot be allowed to become a new, legal framework for other plaintiffs to use elsewhere to sidestep *Shelby County* and resurrect preclearance. The lower Court's ruling must be reversed.

III. Section 3(c) Preclearance is Outdated and Unconstitutional

At its core, this case presents a blatant misuse of Section 3(c) of the VRA to resurrect preclearance, a misuse that will surely spread to other courts if not forcefully stopped. It also raises an important question as to whether Section 3(c) has become outdated and unconstitutional in the same way Sections 4 and 5 of the VRA have. Well-established precedent coupled with current reality and a lack of a "current need" for such an extraordinary tool makes clear that it has. *See Shelby County*, 570 U.S. at 553-53.

In this case, the Court invoked Section 3(c) preclearance with no meaningful explanation as to how it crafted the remedy it imposed. In a single paragraph devoid of supporting analysis, the Court locked the state of Florida into the extraordinary remedy of preclearance for ten years, prohibiting the state from enacting any law or regulation governing third party registration, drop boxes, or "line warming" activities without first obtaining approval from the federal government. Op. at 281. In imposing this draconian measure, the Court failed to explain why ten years of preclearance was necessary or why preclearance was required for all three provisions. This is particularly troubling given that Florida's legislature had already passed a law to repeal the third-party registration law the Court subjected to preclearance, which, the day the Court signed its order, required only the Governor's signature to go into effect. *See* Fla. CS for SB 524, §6 (2022) (proposed amendment to §97.057(3)(a), Fla. Stat.). While the Court acknowledged that Florida was seeking to repeal the law with passage of SB 524, and that SB 524 "moots Plaintiffs' claims challenging the registration disclaimer," and while recognizing its "duty to avoid addressing constitutional issues unnecessarily," it imposed preclearance anyway, thus bizarrely prohibiting the Governor from signing the repeal without the Court's permission. Op. at 190.

This misapplication of the law will impact others as well. States who are already facing a barrage of frivolous lawsuits challenging their commonsense measures, will surely see new claims arise calling for Section 3(c) preclearance,

citing the lower court's flawed opinion as legal justification. Given how little precedent there is addressing Section 3(c), the result could be other states forced into preclearance with a gradual reshaping of the law by the courts. To avoid this calamity this Court must quickly and forcefully reverse the lower court's ruling.

Apart from the clear threat of other courts, absent a strong rebuke by this Court, employing this new, novel application of the law, there is another practical reason why the life of Section 3(c) must come to an end: the same constitutional arguments that the Supreme Court used to end preclearance under Sections 4 and 5 almost a decade ago, apply to Section 3(c), and even more so today. *See Shelby County*, 570 at 543-45.

The Tenth Amendment provides that all powers not specifically granted to the Federal Government, nor prohibited by it to the States, are reserved to the States or citizens. U.S. CONST. amend. X. This includes "the power to regulate elections." *Gregory v. Ashcroft*, 501 U.S. 452, 461-462 (1991). This carefully crafted "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States…[and] secures to citizens the liberties that derive from the diffusion of sovereign power." *Shelby County*, 570 at 543 (quoting *Bond v. United States*, 564 U.S. 211, 221 (2011)). "Not only do States retain sovereignty under the Constitution, but there is also a 'fundamental principle of equal sovereignty' among the States," that demands they be treated equally by the federal government. *Id.* at 544 (quoting *Northwest Austin Mun. Util. Dist. No. One v.*

Holder, 557 U.S. 193, 203 (2009)). "Our nation 'was and is a union of states, equal in power, dignity and authority," and "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." *Id.* (quoting *Coyle v. Smith*, 221 U.S. 559, 567, 580 (1911)).

But preclearance, whether from Sections 4 and 5, or from Section 3(c), "sharply departs from these basic principles," by suspending "all changes to state election law – however innocuous – until they have been precleared by federal authorities in Washington, D.C." *Id.* (quoting *Northwest Austin*, 557 U.S. at 202)). Preclearance "authorizes federal intrusion into sensitive areas of state and local policymaking," and constitutes an "extraordinary departure from the traditional course of relations between the States and the Federal Government." *Id.* at 545 (quoting *Lopez*, 525 U.S. at 282 and *Presley*, 502 U.S. at 500-01).

While Section 3(c) preclearance is imposed by a Judge, not the Department of Justice, it still relegates the state upon which it is imposed to second-class status, undermining the sovereignty of some states, but not others. *See Shelby County*, 570 U.S. at 535. "The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem," and preclearance is "a drastic departure from basic principles of federalism." *Id.* at 534. In determining whether these "stringent," "potent," and "extraordinary measures," "intended to be temporary" from the start, justified only by "exceptional conditions," are still warranted, the question is not whether any form of voting discrimination still rears its ugly head from time to

time, but rather, do the extraordinary conditions that existed in 1965 that justified this extraordinary response then, still exist. *Id.* at 534-38; *South Carolina v. Katzenbach*, 383 U.S. 301, 308-37 (1966). Clearly, they do not.

In the end, forcing a sovereign state to seek permission from federal authorities before it enacts a law in accordance with its constitutionally prescribed duty to determine the "[t]imes, [p]laces, and [m]anner of holding elections" is extraordinary, especially in light of how much "[o]ur country has changed" since 1965. U.S. CONST. art. I, §4, cl. 1; *Shelby County*, 570 U.S. at 557.

In its ruling, the Court wrongly asserted that "the right to vote, and the VRA particularly, are under siege." Op. at 3. Neither the right to vote nor the VRA are under siege, but rather, it is the equal sovereignty of the states and their right to regulate their own elections in accordance with the Constitution that are under siege. *See* U.S. CONST. art. I, §4, cl. 1. This Court must not allow preclearance to be resurrected and refashioned into a tool to oppose any meaningful election reforms designed to prevent election fraud and inspire voter confidence. The lower court's ruling must be reversed.

CONCLUSION

For the foregoing reasons, FGA respectfully urges the Court to reverse the lower court's ruling, and uphold the constitutionality of Florida's election integrity law, SB 90.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-column limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 3,923 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). 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 it has been prepared in a proportionally spaced typeface using Microsoft Word version 16.60 in 14-point Times New Roman.

Dated: July 12, 2022

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of July, 2022, the foregoing *Amicus Curiae* Brief for the Foundation for Government Accountability was filed electronically through the court's CM/ECF system. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system.

Dated: July 12, 2022

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