No. 22-11143 (consolidated with Nos. 22-11133, 22-11144, 22-11145)

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,

APPEAL FROM THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, NOS. 21-CV-186, 187, 201, 242, HON. MARK E. WALKER, PRESIDING

BRIEF OF HONEST ELECTIONS PROJECT AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND REVERSAL

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JULY 15, 2022

CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

League of Women Voters of Florida, Inc., et al. v. Florida Secretary of State, et al., Nos. 22-11133, 22-11143, 22-11144, 22-11145:

The undersigned counsel of record certifies that the following listed persons and entities, in addition to those listed in the briefs of the Appellants, have an interest in the outcome of this case. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

1. Honest Elections Project (*amicus*) does not have a parent corporation, and no corporation owns 10% or more of its stock.

2. Mills, Christopher (counsel for *amicus*) of Spero Law LLC.

/s Christopher Mills
Christopher Mills

Counsel for *Amicus Curiae*

July 15, 2022

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE ISSUES

1. Is the district court's imposition of preclearance constitutional?

2. Is Florida's solicitation provision constitutional?

INTEREST OF *AMICUS CURIAE*

The Honest Elections Project is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that voters put in place to protect the integrity of the voting process. The Project supports common-sense voting rules and opposes efforts to reshape elections for partisan gain. It thus has a significant interest in this important case.[1]

[1] No party's counsel authored this brief in whole or in part; and no party, party's counsel, or other person—other than the *amicus curiae*, its members, or its counsel—contributed money intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

This case involves commonsense voting rules adopted by Florida that promote election order and integrity, including regulations on voting drop boxes, how third parties register voters, and soliciting voters near a polling place. Despite States' authority over voting rules and the reasonable nature of Florida's rules, the district court issued an extraordinary opinion holding that the State had intentionally discriminated based on race in adopting them. The court did not even mention the presumption of good faith that attaches to legislative enactments, instead relying on circumstantial and cherry-picked snippets from the plaintiffs' "experts." In an even more extraordinary holding, the court subjected Florida voting rules to judicial preclearance for the next decade, even though the court identified no previous violation and even after it remedied the supposed violation here. Last, the court invalidated a solicitation provision that mirrors those adopted by many States.

Though the flaws in the district court's 288-page opinion are many, we focus on two. First, the remedy of preclearance under Section 3(c) of the Voting Rights Act is unconstitutional. The judicial power of Article III courts is limited to resolution of cases or controversies through longstanding remedial principles. That power does not include subjecting a State to potentially indefinite judicial veto power over future laws not challenged by any party. Section 3(c) preclearance also violates core principles of federalism and separation of powers. The Supreme Court in *Shelby*

County v. Holder, 570 U.S. 529 (2013), invalidated Section 5's preclearance formula, even though that formula was enacted by Congress with expiration dates and a tailored geographic focus on areas with a historical pattern of discrimination. Section 3(c) preclearance is much worse: It is imposed on a State by an unelected judge based on (at most) a single violation, even an old violation committed by another political entity. It can be imposed forever and extends to *every* voting law. And it forces a State to beg unelected federal authorities for permission to adopt new laws even after any violation has been fully remedied. Thus, Section 3(c) preclearance is not a congruent or proportional response to any constitutional violation, and it is unconstitutional. At a minimum, the district court's imposition of Section 3(c) preclearance is unconstitutional, for the court identified no history of violations—and applied a woefully inadequate intentional discrimination standard.

Second, Florida's solicitation provision is easily constitutional. Many States have similar provisions; New York, for example, prohibits giving voters in the buffer zone food or drink worth more than $1. Solicitation is not protected speech, but conduct. In any event, the only limit placed by the State's law is a reasonable time, place, and manner restriction that furthers compelling interests in election integrity. Further, because the plaintiffs' conduct easily falls within the law's scope, any supposed overbreadth or vagueness problems are irrelevant.

The Court should reverse.

ARGUMENT

I. Requiring Florida to submit to preclearance is unconstitutional.

Invoking Section 3(c) of the Voting Rights Act, the district court put Florida's voting laws under federal receivership for the next decade. That mandate, imposed on top of an injunction that fully remedied the plaintiffs' alleged injuries, is unconstitutional. Preclearance is "one of the most extraordinary remedial provisions in an Act noted for its broad remedies" and "a substantial departure . . . from ordinary concepts of our federal system." *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting). It requires States to "beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own." *Shelby County*, 570 U.S. at 544. The Supreme Court has upheld other preclearance requirements only when *Congress* has shown that voting discrimination "persists on a pervasive scale," reasoning that "exceptional conditions can justify legislative measures not otherwise appropriate." *Id.* at 535, 538 (cleaned up).

Yet the Supreme Court has never upheld Section 3(c), and for good reason. First, preclearance as a *judicial remedy* is a dramatic departure from traditional principles of equity that constrain Article III courts in resolving cases or controversies. It permits a court to impose requirements that go far beyond resolving the case before it, limiting States in enacting laws not challenged by any plaintiff. Second, Section

3(c) is especially egregious. It permits a single judge to impose indefinite preclearance on all a State's voting laws based on, at most, a single violation—including a long-past violation not even committed by the State itself. With no recent congressional evidence justifying this extraordinary, nationwide departure from traditional remedial and federalism principles, Section 3(c) is unconstitutional. At a minimum, the district court's application of Section 3(c) violates the Constitution.

A. Section 3(c) is unconstitutional.

1. Section 3(c) exceeds the judiciary's Article III powers.

To begin, Section 3(c) contradicts Article III, which limits "the judicial Power" to resolving "Cases" or "Controversies." U.S. Const. art. III, § 2. "The exercise of judicial power involves adjudication of controversies and imposition of burdens on those who are parties before the Court." *Missouri v. Jenkins*, 495 U.S. 33, 66 (1990) (*Jenkins II*) (Kennedy, J., concurring in part and in judgment). Proper remedies "operate with respect to specific parties," not "on legal rules in the abstract." *California v. Texas*, 141 S. Ct. 2104, 2115 (2021) (cleaned up). Section 3(c), by contrast, allows courts to preemptively and in perpetuity veto laws not challenged by any party.

The Constitution constrains "district courts' authority to provide equitable relief" to "longstanding principles of equity that predate this country's founding." *Trump v. Hawaii*, 138 S. Ct. 2392, 2426 (2018) (Thomas, J., concurring). "[T]he

long-understood view of equity" was "that courts issue judgments that bind the parties in each case over whom they have personal jurisdiction." *Arizona v. Biden*, __ F.4th __, 2022 WL 2437870, at *15 (6th Cir. July 5, 2022) (Sutton, C.J., concurring). A century ago, the Supreme Court explained that "[w]e have no power per se to review and annul acts of Congress." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). Instead, the judicial power "amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right." *Id.*; *see generally* Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 457–82 (2017).

Thus, "there is no early record of the exercise of broad remedial powers"; "[c]ertainly there were no 'structural injunctions' issued by the federal courts, nor were there any examples of continuing judicial supervision and management of governmental institutions." *Missouri v. Jenkins*, 515 U.S. 70, 130 (1995) (*Jenkins III*) (Thomas, J., concurring). "[O]rdering the government to take (or not take) some action with respect to those who are strangers to the suit" takes a court out of "the judicial role of resolving cases and controversies." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring); *see Florida v. Dep't of Health & Hum. Servs.*, 19 F.4th 1271, 1282 (11th Cir. 2021) (questioning "both the wisdom and propriety of granting relief to nonparties"). "Such extravagant uses of judicial power are at odds with the history and tradition of the equity power and the

Framers' design," as well as with "principles of state sovereignty." *Jenkins III*, 515 U.S. at 126, 130 (Thomas, J., concurring).

Conditioning on federal court approval future laws not before the court, not challenged by a plaintiff, and not yet contemplated by the People departs even farther from longstanding equitable remedies. Apart from the federalism and state sovereignty problems with that relief—addressed more below—it falls far outside the bounds of resolving an Article III case or controversy. No traditional principle of equity permits courts to require governments to submit proposed laws for pre-approval. *Cf. Dep't of Homeland Sec.*, 140 S. Ct. at 600 (Gorsuch, J., concurring) ("Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit.").

To be sure, the Supreme Court approved of Section 5's preclearance mechanism in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). But that opinion did not address the argument above or Section 3(c). Section 5 as a matter of *legislative text* "automatically suspend[ed] the operation of voting regulations enacted after November 1, 1964" in "limit[ed]" "geographic areas." *Katzenbach*, 383 U.S. at 328, 335. Section 3(c), by contrast, makes preclearance a question of *judicial remedy*. But "the Judiciary is not free to exercise all federal power; it may exercise only the judicial power." *Jenkins II*, 495 U.S. at 67–68 (Kennedy, J., concurring in part and in

judgment). Because Section 3(c)'s preclearance remedy exceeds the judicial power, it is unconstitutional.

2. Section 3(c) is not tailored to pervasive constitutional violations.

Even assuming preclearance can ever be a permissible judicial remedy, Section 3(c) is unconstitutional. Congress's authority to enact Section 3(c) comes from the Fourteenth and Fifteenth Amendments, which Congress may enforce "by creating private remedies against the States for actual violations." *United States* v. *Georgia*, 546 U.S. 151, 158 (2006) (emphasis omitted).

Section 3(c) preclearance, however, "goes beyond the prohibition[s] of the [Fourteenth and] Fifteenth Amendment[s] by suspending all changes to state election law—however innocuous—until they have been precleared by" a federal authority. *NAMUDNO v. Holder*, 557 U.S. 193, 202 (2009). The Supreme Court has held that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *City of Boerne* v. *Flores*, 521 U.S. 507, 518 (1997). Even under that dubious rule, *see Tennessee* v. *Lane*, 541 U.S. 509, 555–65 (2004) (Scalia, J., dissenting), the Supreme Court has required "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Allen v. Cooper*, 140 S. Ct. 994, 1004 (2020) (cleaned up). "On the one hand, courts are to consider the constitutional problem Congress faced—

both the nature and the extent of state conduct violating the [Constitution]. That assessment usually . . . focuses on the legislative record." *Id.* "On the other hand, courts are to examine the scope of the response Congress chose to address that injury." *Id.*

This test applies particularly stringently to Section 3(c)'s preclearance remedy. Beyond its questionable Article III propriety, preclearance constitutes "a drastic departure from basic principles of federalism." *Shelby County*, 570 U.S. at 535. The federal government does not "have a general right to review and veto state enactments before they go into effect," and "States retain broad autonomy in structuring their governments and pursuing legislative objectives." *Id.* at 542–43. "This 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." *Id.* at 543 (cleaned up). Alexander Hamilton emphasized the point: "Suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it . . . as a premeditated engine for the destruction of the State governments?" Federalist No. 59. "State autonomy with respect to the machinery of self-government defines the States as sovereign entities rather than mere provincial outposts subject to every dictate of a central governing authority."

NAMUDNO, 557 U.S. at 217 (Thomas, J., concurring in judgment in part and dissenting in part).

The VRA—especially its preclearance provisions—"sharply departs from these basic principles." *Shelby County*, 570 U.S. at 544. "States must beseech" some federal authority "for permission to implement laws that they would otherwise have the right to enact and execute on their own." *Id.* Thus, preclearance "authorizes federal intrusion into sensitive areas of state and local policymaking" and "represents an extraordinary departure from the traditional course of relations between the States and the Federal Government." *Id.* at 545 (cleaned up).

Originally, Section 5's preclearance provision "could be justified by 'exceptional conditions.'" *Id.* (quoting *Katzenbach*, 383 U.S. at 334). But the law's "current burdens . . . must be justified by current needs," and over "50 years later, things have changed dramatically." *Id.* at 542, 547. Because "conditions that originally justified these measures no longer characterize voting," the Supreme Court in *Shelby County* struck down the coverage formula that governed Section 5. *Id.* at 535. If the conditions that justified preclearance in the most egregiously discriminatory jurisdictions in America no longer existed by 2013, necessarily those conditions no longer exist *nationwide* to justify Section 3(c). Congress has made little effort to compile any record of proven constitutional problems addressed by Section 3(c). *See* Thomas Boyd & Stephen Markman, *The 1982 Amendments to the Voting Rights Act: A*

Legislative History, 40 Wash. & Lee L. Rev. 1347, 1394 n.231 (1983) ("Virtually no substantial evidence was introduced during the hearings related to voting rights problems outside [Section 5-covered] jurisdictions."); Richard Hasen, *The Supreme Court and Election Law: Judging Equality from* Baker v. Carr *to* Bush v. Gore 132 (2003) ("[M]ore recent evidence of intentional racial discrimination in voting" only "appears to be diminishing." (emphases omitted)).

The rarity of Section 3(c)'s use confirms that it does not address serious on-going problems. *Cf. Shelby County*, 570 U.S. at 570 (Ginsburg, J., dissenting) ("The surest way to evaluate whether that remedy remains in order is to see if preclearance is still effectively preventing discriminatory changes to voting laws."). Between 1965 and 2017, courts ordered Section 3(c) preclearance in only 20 jurisdictions, and 18 of those cases involved consent decrees. Edward K. Olds, *More Than "Rarely Used": A Post*-Shelby *Judicial Standard For Section 3 Preclearance*, 117 Colum. L. Rev. 1, 12 (2017). Yet Congress has not reconsidered Section 3(c).

Section 3(c)'s boosters claim that Congress's failure to articulate justifications for preclearance since 1965 "is a virtue," even while admitting that "rampant racial discrimination in voting is no longer the norm." Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 Yale L.J. 1992, 2023, 2028 (2010) ("*Secret Weapon*"). That claim is difficult to understand. "[H]istory did not end in 1965." *Shelby County*, 570 U.S. at 552. "In

assessing the current need for a preclearance system" the last 57 years of "history cannot be ignored." *Id.* at 552–53 (cleaned up). "During that time," "voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers." *Id.* at 553. Congress's "failure to act" in response to this history is not a virtue, but a reason "to declare" Section 3(c) "unconstitutional." *Id.* at 557.

Next consider Section 3(c)'s means. This Court has looked to limitations like "termination dates, geographic restrictions, [and] egregious predicates" "to ensure Congress' means are proportionate to [legitimate] ends." *City of Boerne*, 521 U.S. at 533. Section 3(c)'s "indiscriminate scope offends th[ese] principle[s]." *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647 (1999). It has no limits in time, space, or scope. Unlike Section 5, it applies nationwide, to every water district and county council, state legislature and school board. Unlike Section 5, it has no expiration dates. Unlike Section 5, it can apparently be triggered by a single constitutional violation—even one decades old. It imposes no time limitation on judicially-mandated preclearance remedies.

Nor does its text seem to leave judges discretion to do anything but impose preclearance on *every* new or different "voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting" in the entire jurisdiction. 52 U.S.C. § 10302(c). This portion of the statute mirrors Section 5, which

"suspend[ed] *all* changes to state election law." *NAMUDNO*, 557 U.S. at 202; *see* 52 U.S.C. § 10304(a). Downplaying Section 3(c)'s severity, its defenders note that "district courts have construed section 3 to permit targeted preclearance." *Secret Weapon* 2007. But even those defenders recognize that this "construction" is atextual; they have suggested that Congress amend Section 3(c) to "make explicit that courts are permitted to impose 'targeted' preclearance."[2] The district court did not explore this problem, though it did suggest that the statute requires courts to mandate preclearance in *every* case. DE665:276, 281.[3]

Despite Section 3(c)'s sweeping scope, some commentators have argued that it is not as unconstitutional as was Section 5's coverage. That is dubious. Their lead claim, echoed by the district court, is that Section 3(c) only comes into play after *some* constitutional violation, so the statute is supposedly "perfectly targeted." *Secret Weapon* 2025; DE665:273. But the Court in *Katzenbach* held that Section 5 was "was justified to address 'voting discrimination where it persists *on a pervasive scale*.'" *Shelby County*, 570 U.S. at 538 (quoting *Katzenbach*, 383 U.S. at 308) (emphasis added). "[T]he constitutionality of § 5 has always depended on the proven existence of intentional discrimination so extensive that elimination of it through

[2] Travis Crum, *The House Should Pass an Effects-Test Bail-in Provision*, Take Care, Nov. 15, 2018, https://bit.ly/3OOSBAF.
[3] The opinion below is at Docket Entry 665 ("DE665"), and the page number follows.

case-by-case enforcement would be impossible." *NAMUDNO*, 557 U.S. at 225 (Thomas, J., concurring in judgment in part and dissenting in part).

Hinging indefinite, limitless preclearance on a *single* violation, as Section 3(c) apparently does (DE665:275), is much more severe. That single violation can be (and seemingly has always been) remedied by a typical injunction. Thus, no apparent (much less proven) need exists for Section 3(c)'s preclearance remedy. *See Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 368 (2001) (requiring a "history and pattern of unconstitutional" actions). And certainly no need exists for a remedy that a district court can impose for all time.[4]

Moreover, even the supposed prerequisite of a single constitutional violation turns out to be less meaningful than Section 3(c)'s defenders suggest. First, courts have rejected the proposition that Section 3(c) is limited to cases in which "a violation of the Constitution is shown with respect to the very election law or practice that" was "pleaded in the complaint." *Jeffers v. Clinton*, 740 F. Supp. 585, 591 (E.D. Ark. 1990). In these courts' views, Section 3(c) plaintiffs "need not prove their claim that the defendant . . . committed violations of the Constitution in formulating the

[4] Section 3(c)'s defenders argue that judicial discretion to impose *indefinite* preclearance somehow helps the statute's constitutionality by "tak[ing] the termination decision out of the political branches and giv[ing] it to the courts." *Secret Weapon* 2027. Beyond the remedial and nondelegation questions raised by that argument, taking away decisions that infringe on federalism and state sovereignty from politically accountable branches only heightens these constitutional concerns.

[challenged rule] (and thereby obtain equitable relief) as a condition to entitlement to preclearance." *Id.* at 606 (Eisele, C.J., dissenting). Courts have also rejected the proposition "that bail-in relief may be awarded only upon a final judgment" of liability. *Perez v. Abbott*, 390 F. Supp. 3d 803, 812 (W.D. Tex. 2019). Under these interpretations, Section 3(c) preclearance may attach even absent an adjudicated, relevant predicate offense, if some constitutional violation existed at any point in history.

Further, the predicate violation need not have been committed by the political entity before the court. Section 3(c) preclearance has been imposed on States "even though the predicate offenses were committed by municipalities." *Secret Weapon* 2020. Section 3(c)'s boosters embrace this result, suggesting in one case that "the fact that a jurisdiction within Texas has violated the Fourteenth Amendment is persuasive evidence . . . that Texas should also be bailed-in."[5] A random water district's single historical violation is a thin reed for preclearance's imposition on a State and all its subdivisions.

Making matters worse, States have been prohibited from implementing neutral rules just because a county subject to preclearance adopted the same rule. *Lopez v. Monterey County*, 525 U.S. 266 (1999). Conversely, a single violation by a State

[5] Travis Crum, *A Lone Star Bail-in?*, Take Care, Feb. 14, 2019, https://bit.ly/3PbUzuY.

may subject all of its subdivisions to preclearance for *any* rule touching on voting. *Cf. Sheffield*, 435 U.S. at 129 ("where a political subdivision has been separately designated for coverage" "all political units within it are subject to the preclearance requirement"). Section 3(c)'s boosters again consider this a feature, urging plaintiffs to "[c]halleng[e] a redistricting plan" to "maximize[] section 3's impact" and impose preclearance on "an entire state." *Secret Weapon* 2020. This underscores Section 3(c)'s unconstitutionality in two ways: First, it means that countless entities with no history of violations will be subject to preclearance. Second, invoking Section 3(c) in the context of redistricting—in which other provisions of the VRA *force* States to toe discriminatory lines—confirms the frequent irrelevance of a single violation.

On this point, Section 3(c)'s defenders ignore that the VRA sets States up to fail by forcing them to intentionally discriminate based on race. "At the same time that the Equal Protection Clause restricts the consideration of race in the districting process, compliance with the [VRA] pulls in the opposite direction: It often insists that districts be created precisely because of race." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018). Indeed, the "principal use" now of the VRA "is to coerce state and local jurisdictions into drawing districts with an eye on race." Roger Clegg, *The Future of the Voting Rights Act after* Bartlett *and* NAMUDNO, 2009 Cato Sup. Ct. Rev. 35, 40 (2009).

Thus, the blasé response of Section 3(c)'s defenders that preclearance "cover[s] only those jurisdictions that have violated the Constitution" (*Secret Weapon* 2025) disregards all these issues, including the lose-lose scenario imposed by the VRA. "Weigh race too heavily and a legislature risks violating the Constitution" and getting slapped with Section 3(c) preclearance; "weigh it too lightly and a legislature risks violating the VRA." *Robinson v. Ardoin*, 37 F.4th 208 (5th Cir. 2022); *Abbott*, 138 S. Ct. at 2315 (noting "competing hazards of liability"). Imposing indefinite preclearance because a State failed to guess just how much intentional discrimination a federal court would decide the VRA required in a particular case is hardly a banner application of Equal Protection.

Next, even the requirement of a single historical violation (including by a different entity) has little purchase. In the few Section 3(c) cases, "a showing of discriminatory intent" has almost always been "unnecessary, given that most jurisdictions have consented to coverage" because of Section 3(c)'s *in terrorem* effects. *Secret Weapon* 2034; *see id.* at 2012–14. The threat of preclearance is a "bargaining chip" that "increases the payoffs to civil rights groups and the Justice Department." *Id.* at 2032. Jurisdictions, "particularly local ones, are financially strapped and may view a preclearance settlement to be in their best interest."[6] Thus, defendants have

[6] Travis Crum, *An Effects-Test Pocket Trigger?*, Election Law Blog, July 8, 2013, https://electionlawblog.org/?p=52659.

generally consented to Section 3(c) preclearance after well-funded interest groups sue them into submission for political gain. And localities' inability to fight off professional plaintiffs will hamstring entire States both in implementing their policies and in defending against statewide preclearance in future suits. The losers in this scheme are States and the People, who are forced to cede control of their own governance to unelected federal authorities.

A final problem with Section 3(c) is that it "not only switches the burden of proof to the supplicant jurisdiction" that later seeks to enact voting rules, "but also applies substantive standards quite different from those" that would govern a challenge otherwise. *Shelby County*, 570 U.S. at 545. That is because Section 3(c) forbids judicial approval for a new law "until the court finds" that the law "does not have the purpose *and will not have the effect* of denying or abridging the right to vote on account of race or color." 52 U.S.C. § 10302(c) (emphasis added). By going beyond intentional discrimination to discriminatory effect, Section 3(c)'s preclearance exceeds the Fourteenth and Fifteenth Amendment's coverage. *See Washington v. Davis*, 426 U.S. 229, 242 (1976); *City of Mobile v. Bolden*, 446 U.S. 55, 60–62 (1980) (plurality opinion). This only "exacerbate[s] the substantial federalism costs that the preclearance procedure already exacts." *Shelby County*, 570 U.S. at 549.

The Fourteenth and Fifteenth Amendments are "not designed to punish for the past"; their "purpose is to ensure a better future." *Id.* at 553. Imposing indefinite,

near-limitless preclearance on the People's governments for (at best) a single past, already-remedied violation is both inconsistent with Article III and with our federalist system of government. Section 3(c) is unconstitutional.

B. As applied here, Section 3(c) is unconstitutional.

At a minimum, the district court's application of Section 3(c) here violates the Constitution. Because of its significant intrusion into state sovereignty, preclearance could apply only when jurisdictions are engaged in "pervasive," "flagrant," "widespread," and "rampant" discrimination. *Shelby County*, 570 U.S. at 554. Yet the district court had nothing of this sort before it. The court agreed that its injunction "remedies the discrimination at issue." DE665:277. Thus, forestalling hypothetical laws that could be challenged by hypothetical plaintiffs goes beyond remedying any actual constitutional violation. The district court's reasoning shows many of the inherent preclearance deficiencies above.

The district court's primary justification for preclearance was that "over the past 20 years, Florida has repeatedly targeted Black voters because of their affiliation with the Democratic party." DE665:275–76. Putting aside that party discrimination is not race discrimination,[7] the district court reached this conclusion based on a long

[7] *See, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("[A] jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact.").

line of Florida voting rules that had *not* been held to constitute race discrimination. DE665:53 n.19, 52–65. Then, the court baldly asserted that "Florida has a horrendous history of racial discrimination in voting." DE665:64. This assertion, divorced from *any* cases finding racial discrimination, does not show "an extraordinary problem" warranting the "unprecedented" remedy of preclearance. *Shelby County*, 570 U.S. at 534–35.

The district court's other rationales for preclearance fare no better. The district court's findings "that preclearance would prevent future violations" and "that violations are likely to recur" are equally based on a conflation of "party" and race (DE665:277) and inferences drawn from cases that did not find race discrimination. And the district court specifically acknowledged that Florida has consistently followed judicial orders and "endeavored to fix [any] deficienc[ies]" in its voting laws. DE665:6.

The district court's concerns that normal "litigation is expensive" and "takes time" (DE665:278) are irrelevant. That some "procedure is efficient, convenient, and useful" "will not save it if it is contrary to the Constitution." *INS v. Chadha*, 462 U.S. 919, 944 (1983). The Constitution's system of adjudication, with all its costs and delays, makes Article III "the guardian of individual liberty and separation of powers." *Stern v. Marshall*, 564 U.S. 462, 495 (2011).

Moreover, preclearance itself imposes delays and costs by subjecting to federal scrutiny laws that would not be challenged. Judicial preclearance "can take years." *Shelby County*, 570 U.S. at 545. And giving the decision to the Justice Department trades the proper constitutional order for giving "basic decisions about the structure of elections" to "a small number of federal bureaucrats"—in reality, their "unpaid college interns"—"with very limited knowledge of race and politics in particular jurisdictions." Abigail Thernstrom, *Voting Rights and Wrongs* 31 (2009). They "substitute their judgment for that of state elected officials, many of whom, by now, are black." *Id.*

Pointing to Florida's repeal of one challenged provision, the district court's last justification for preclearance was that "jurisdictions quickly change tactics in the face of unfavorable rulings." DE665:278. Only in the topsy-turvy world of modern-day VRA jurisprudence would replacing a restriction that was not even "challenged as discriminatorily motivated" (DE665:12) with one that the district court itself said that Florida "could certainly" adopt (DE665:215) show nefarious motives.

Finally, preclearance's inherent problems are exacerbated by the district court's loose application of the Supreme Court's *Arlington Heights* test for intentional discrimination. As Appellants explain, the district court ignored the presumption of legislative good faith, the State's valid reasons for the law, and the other stringent requirements to find that a neutral law has a discriminatory intent. Br. 16–

38; *see Greater Birmingham Ministries v. Sec'y of State*, 992 F.3d 1299, 1327 (11th Cir. 2021) ("combatting voter fraud" and "increasing confidence in elections" are "valid neutral justifications"). If the district court were right to find discrimination based on conspiratorial inferences from supposed experts, that is all the more reason to reject the drastic remedy of preclearance. Section 3(c) violates the Constitution.

II. The solicitation provision preserves order and prevents fraud.

The district court's constitutional analysis of the solicitation provision is equally wrong. Florida has "compelling interests" in "protecting voters from confusion and undue influence" and "preserving the integrity of the election process." *Citizens for Police Accountability Pol. Comm. v. Browning*, 572 F.3d 1213, 1219 (11th Cir. 2009). "The State wants peace and order around its polling places," and courts must "accord significant value to that desire for it preserves the integrity and dignity of the voting process and encourages people to come and to vote." *Id.* at 1220. "[P]roblems of fraud, voter intimidation, confusion, and general disorder" have "plagued polling places." *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1886 (2018). Thus, "all 50 States and the District of Columbia have laws curbing various forms of speech in and around polling places on Election Day." *Id.* at 1883.

Following this historical tradition, Florida has long prohibited persons from "solicit[ing] voters inside the polling place" or within a standard buffer zone. Fla. Stat. § 102.031(4)(a). Though the district court inexplicably declined to assign any

relevance to the meaning of "solicit" (DE665:173), that term has a well-settled legal meaning—so much so that courts have rejected vagueness challenges to "solicit" standing alone. *E.g.*, *Sun-Sentinel Co. v. City of Hollywood*, 274 F. Supp. 2d 1323, 1333 (S.D. Fla. 2003) (collecting cases). Florida's more specific definition of "solicit" should be read in the context of the term's settled meaning, as "there is a presumption against" reading a provision contrary to the ordinary meaning of the term it defines. Antonin Scalia & Bryan Garner, *Reading Law* 232 (2012).

The plaintiffs attack only the last phrase of the definition—"engaging in any activity with the intent to influence or effect of influencing a voter" (Fla. Stat. § 102.031(4)(b))—asserting that it renders the statute overbroad and vague, and the district court agreed. This conclusion is wrong. First, properly understood, the solicitation provision regulates conduct, not speech. Second, even if it extended to speech, it is a reasonable time, place, and manner regulation that promotes the State's significant interests in protecting the integrity of Florida's elections. It is neither overbroad nor vague.

A. The solicitation provision only regulates conduct.

"The First Amendment does not prevent restrictions directed at" "conduct from imposing incidental burdens on speech." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2373 (2018) (cleaned up). "Where conduct and not merely speech is involved, the overbreadth of a statute must not only be real, but substantial

as well, judged in relation to the statute's plainly legitimate sweep." *Horton v. City of St. Augustine*, 272 F.3d 1318, 1332 (11th Cir. 2001) (cleaned up). Facial overbreadth's "function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid" laws. *Los Angeles Police Dep't v. United Reporting Pub. Corp.,* 528 U.S. 32, 40 (1999).

Laws against "solicitation" are "long established" and "are categorically excluded from First Amendment protection." *United States v. Williams*, 553 U.S. 285, 297–98 (2008). In other words, even though "speech" might be involved, the laws are treated as regulations of conduct because they do not implicate *protected* speech. Here, no one challenges the State's general regulation of solicitation or most of the definition. Yet, disregarding the guiding meaning of "solicit," the district court held that the statute's prohibition on any "activity" influencing a voter includes "speech" and thus is constitutionally overbroad. DE665:184–85.

As the motions panel explained, this reasoning fails to judge the statute's alleged overbreadth in relation to the "plainly legitimate applications" expressly outlined (and unchallenged). Order 14. Those "legitimate applications" include the plaintiffs' own conduct of approaching voters on the line to give refreshments. *E.g.*, DE665:186. This conduct, like the other acts regulated by the solicitation provision,

is not protected speech. *See Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1292 (11th Cir. 2021); *id.* at 1298 (Hull, J., concurring). Even assuming it has expressive elements—which would only confirm the need for the provision—any overbreadth is far too "attenuate[d]." *United Reporting,* 528 U.S. at 40.

B. If the solicitation provision covers speech, it is a legitimate time, place, and manner restriction.

Even if the challenged provision affects protected speech, the provision is a "reasonable restriction[] on the time, place, or manner of protected speech" because it is "narrowly tailored to serve a significant governmental interest" and "leave[s] open ample alternative channels for communication." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (cleaned up). The provision "simply does not 'ban' any messages"; "[i]t merely regulates the places where communications may occur." *Hill v. Colorado*, 530 U.S. 703, 731 (2000). The plaintiffs can engage in any expressive conduct outside the buffer zone around the polling place, which is "a special enclave, subject to greater restriction." *Mansky*, 138 S. Ct. at 1886.

Further, the provision is narrowly tailored to Florida's compelling interests in protecting the order and integrity of elections. A good indicator of that tailoring is that many States have similar laws. Twenty-eight states ban "solicitation" or "electioneering" within a buffer zone ranging from 10 (Pennsylvania) to 250 feet (Maine). *E.g.*, Cal. Elec. Code § 319.5 (prohibiting "dissemination of information that

advocates for or against any candidate or measure on the ballot within the 100 foot limit" and "loitering"); Oregon Rev. Stat. § 260.695 ("A person may not do any electioneering . . . within 100 feet," even if it does "not relate to the election being conducted."). Several of those laws are even more broadly applicable and would explicitly prohibit the plaintiffs' conduct. *E.g.*, N.Y. Elec. Law § 17-140 (prohibiting giving "any meat, drink, tobacco, refreshment or provision" worth more "than one dollar"); 10 Ill. Comp. Stat. Ann. 5/17-29 (prohibiting "engag[ing] in any political discussion" and "interrupt[ing], hinder[ing] or oppos[ing] any voter").

This "widespread and time-tested consensus" "is entitled to respect." *Mansky*, 138 S. Ct. at 1888 (cleaned up); *cf. McCullen v. Coakley*, 573 U.S. 464, 490 (2014) ("Respondents and their amici identify no other State with a law that creates fixed buffer zones around abortion clinics."). "Voter intimidation and election fraud are difficult to detect," *id.* at 496 (cleaned up), which is why States need to have latitude to "take steps to ensure that partisan discord not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most," *Mansky*, 138 S. Ct. at 1888.

Florida presented evidence from the Department of Elections that campaigners inside the 150-foot zone were hindering voters. The Miami-Dade County Supervisor of Elections, for instance, witnessed campaigners "obstructing the ability for

the voters to pull in" to parking spots and "get[ting] in fights with each other," forcing her "to call the police." DE562:69, DE318-54:17.

Further, the more "expressive" plaintiffs' conduct allegedly is, the more troubling that conduct is in terms of election peace and integrity. First, plaintiffs do not arbitrarily "warm" the lines; they say that the purpose is to encourage voters to stay and vote. DE665:164–65. But many voters will know that the plaintiffs' policy positions align heavily with those of the Democratic Party. Others may inquire during their encounter with the plaintiffs' volunteers about their organizations and learn of their political investment in the voters' imminent decision. The overall message is no different from the types of solicitation widely prohibited around polling places.

Second, the plaintiffs' efforts are targeted at areas with a much higher percentage of Democratic voters.[8] Republican voters in those communities may feel pressured by forced line engagement with Democrat-aligned political organizations. The situation is little different than if Democratic Party volunteers were providing refreshments: political operatives' presence would engender a feeling of isolation and out grouping in Republican minorities.

[8] For example, Florida Rising almost exclusively operates in counties won by President Biden in 2020. *Where We Work*, Florida Rising Together, 2021, https://floridarisingtogether.org/.

C. The solicitation provision is not void for vagueness.

Finally, the district court erred in invalidating the last phrase of the solicitation provision as impermissibly vague. First, "a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Stardust, 3007 LLC v. City of Brookhaven*, 899 F.3d 1164, 1176 (11th Cir. 2018) (cleaned up).

Second, the district court's "basic mistake"—evidenced by its parade of hypotheticals (DE665:177–78)—"lies in the belief that the mere fact that close cases can be envisioned renders a statute vague." *Williams*, 553 U.S. at 305. But "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Id.* at 306. Here, the challenged provision's predicate facts are simple: an "activity" engaged in with the "intent" or "effect" "of influencing a voter." The plaintiffs' real concern appears to be that these terms are *broad*, but "[t]he mere fact that a term covers a broad spectrum of conduct does not render it unconstitutionally vague." *United States v. Brenson*, 104 F.3d 1267, 1281 (11th Cir. 1997) (cleaned up).

Florida's solicitation provision is well within the long historical tradition of state regulation that protects and preserves the election process.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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JULY 15, 2022

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Dated: July 15, 2022

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I, Christopher Mills, an attorney, certify that on this day the foregoing Brief was served electronically on all parties via CM/ECF.

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