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.

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

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1(a)(1), Plaintiffs-Appellees Florida Rising Together, UnidosUS, Equal Ground Education Fund, Hispanic Federation and Poder Latinx, through undersigned counsel, hereby submit this Certificate of Interested Persons and Corporate Disclosure Statement.

Appellees state that they have no parent corporations, nor have they issued shares or debt securities to the public. The organizations are not subsidiaries or affiliates of any publicly owned corporation, and no publicly held corporation holds ten percent of their stock.

I hereby certify that the disclosure of interested parties submitted by Defendants-Appellants is complete and correct except for the following additional interested persons:

1. Alabama Center for Law and Liberty, *Amicus*
2. American Constitutional Rights Union, *Amicus*
3. Bartolomucci, H. Christopher, *Attorney for Amicus*
4. Clark, Matthew J., *Attorney for Amicus*
5. Crosland, Edward Stewart, *Attorney for Amicus*
6. Field, Brian J., *Attorney for Amicus*

7. The Foundation for Government Accountability, *Amicus*

8. Gore, John M., *Attorney for Amicus*

9. Honest Elections Project, *Amicus*

10. Jaffee, Erik S., *Attorney for Amicus*

11. Jones Day, *Attorney for Amicus*

12. Lawyers Democracy Fund, *Amicus*

13. Mills, Christopher, *Attorney for Amicus*

14. O'Gorman, Colleen, *Attorney for Plaintiffs-Appellees*

15. Phillips, Kaylan, *Attorney for Amicus*

16. Prince, Joshua J., *Attorney for Amicus*

17. Public Interest Legal Foundation, *Amicus*

18. Redmond, Caleb P., *Attorney for Amicus*

19. Restoring Integrity and Trust in Elections, Inc., *Amicus*

20. Schaerr, Gene C., *Attorney for Amicus*

21. Spero Law LLC, *Attorney for Amicus*

22. Van Bogart, Joseph S., *Attorney for Amicus*

23. Vasa, Archana, *Attorney for Plaintiffs-Appellees*

24. Wen, Melissa, *Attorney for Plaintiffs-Appellees*

The following additional Plaintiffs-Appellees' counsel listed on Defendants-Appellants' disclosure of interested parties can be dropped:

1. Khan, Sabrina (no longer at Advancement Project)

2. Lopez, Janine (no longer at Arnold & Porter Kaye Scholer LLP)

/s/ Elisabeth S. Theodore
Elisabeth S. Theodore

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STATEMENT REGARDING ORAL ARGUMENT

The Court has scheduled oral argument in this appeal for September 15, 2022. Appellees agree with the Court that this appeal merits argument due to the important nature of the issues presented.

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STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

The *Florida Rising* Plaintiffs join the Briefs of Appellees League of Women Voters of Florida, Inc., *et al.* ("LWV"), and Florida State Conference of Branches and Youth Units of the NAACP, *et al.* ("NAACP"), in full.

JURISDICTIONAL STATEMENT

Appellants correctly identified the basis for this Court's jurisdiction. State.Br.2. Appellants have not identified clear error in the trial court's determination that the *Florida Rising* Plaintiffs have standing to challenge each of the Challenged Provisions. Op.19-21,23-24,26-29,35-37,151-56. This factual finding was amply supported by the record: each *Florida Rising* Plaintiff established its injury-in-fact traceable to the Defendants and redressable through an injunction. Doc.516 at 42-43,60,62-63,125,182-84,195-96,207-10; Doc.536 at 106-07,137-38,146-54; Doc.600 at 13-19; Doc.652-2. Appellants' assertion about Plaintiff Poder Latinx's capacity to sue (State.Br.3) was not pleaded or raised below and is thus waived. Fed. R. Civ. P. 9(a)(2). Regardless, capacity is non-jurisdictional and lack of capacity is not a jurisdictional defect. *Norris v. Causey*, 869 F.3d 360, 366-67 (5th Cir. 2017) (citing *Dunn v. Advanced Med. Specialties, Inc.*, 556 F. App'x 785, 789-90 (11th Cir. 2014)).

Conversely, no Appellant has standing to appeal the trial court's decision concerning the Solicitation Definition. *See generally* LWV.Br.§ I.

STATEMENT OF THE ISSUES

The district court ruled for Plaintiffs on claims that Sections 7, 28 and 29 of Florida Senate Bill SB90 (SB90) were adopted with unconstitutional discriminatory intent and that one provision is unconstitutionally vague and overbroad. The issues presented are:

1. Whether there was clear error in the district court's finding that the challenged provisions were adopted with discriminatory intent.

2. Whether there was clear error in the district court's finding that Section 29 is impermissibly vague and overbroad.

3. Whether the district court abused its discretion in imposing a limited preclearance remedy for violations of the Fourteenth and Fifteenth Amendments.[1]

STATEMENT OF THE CASE

After presiding over a two-week trial and performing a fact-intensive examination of an immense record, the court below found that four provisions of SB90 violated the rights of Black Floridians. SB90 made sweeping changes to the Florida election code in the wake of Florida's 2020 election, which was widely praised by then-Secretary of State Lee and others as having been run "as smoothly as possible and inspir[ing] confidence on the part of Florida's voters." Doc.465-88

[1] The trial court did not rule on Plaintiffs' discriminatory effects claims under § 2 of the Voting Rights Act (VRA), preemption under VRA § 208, *Anderson-Burdick*, or the First Amendment's limitations on content-based speech restrictions.

(RFA 33,41). The election also saw massive, unprecedented turnout of Black voters. Against this backdrop, the district court found that SB90's sweeping changes included "surgical changes to the election code" to target Black voters, as Florida had repeatedly done in the recent past. Op.127,132,135.[2]

Plaintiffs' trial evidence focused on showing that Florida intentionally discriminated against Black and Latino Floridians and violated Plaintiffs' First and Fourteenth Amendment rights. Over fourteen days, the court heard from forty-two live witnesses and received 1595 exhibits. Plaintiffs' presentation included testimony from members of the Florida Legislature, numerous Supervisors of Election ("Supervisors"), and eight experts.

That evidence and testimony was largely uncontested. Defendants did not call any legislators to explain or defend SB90, and the Supervisors who testified live for Defendants all opposed it. Facing a *Daubert* challenge, Defendants withdrew their expert on the challenged provisions' impact, and their Florida history expert acknowledged that he was offering no opinion on discrimination against Black Floridians. Consistent with their *pro forma* defense, Defendants' post-trial brief contained five pages of conclusory assertions about intentional discrimination, with no citations to the trial record. Doc.648 at 60-64.

[2] "Doc." references are to the lead docket in the consolidated actions below, No. 4:21-cv-186 (N.D. Fla.). The trial court decision ("Op.") is Doc.665.

Only the Secretary of State, Attorney General, and two (of 67) Supervisors appealed, along with certain intervenors (collectively "Appellants").

Appellants' arguments to this Court barely acknowledge that there was a trial: their briefs together use the word "trial" only thirteen times. They ignore the vast majority of the extensive evidentiary record. And they barely address the trial court's exhaustive findings and certainly do not identify clear errors. Rather, their arguments are predicated on misstating longstanding and controlling precedent.

In crafting its 288-page final order, the trial court painstakingly reviewed thousands of pages of transcripts and hundreds of exhibits to reach factual findings that easily withstand clear error review and are consistent with governing law. This Court should affirm.

A. The *Florida Rising* Plaintiffs' Complaint and Claims

The *Florida Rising* Plaintiffs are five nonprofit organizations—Florida Rising Together, Poder Latinx, Equal Ground, Hispanic Federation, and UnidosUS—that run advocacy and civic education programs around elections, including voter registration, voter education, and voter mobilization activities.[3] Doc.513 at 185-96; Doc.516 at 30-66; Doc.536 at 46-109; Doc.562 at 84-122,164-71; Doc.624 at 173-93.

[3] This subsection describes the *Florida Rising* Plaintiffs' claims. The other references to Plaintiffs refer collectively to Plaintiffs in the four consolidated actions.

Plaintiffs challenged five provisions of SB90 (the "Challenged Provisions"):

- Section 7 ("Registration Provisions") required third party voter registration organizations ("3PVROs") to inform registrants that their applications might not arrive on time ("Registration Disclaimer Provision") and imposed significant fines if 3PVROs failed to deliver applications to the Supervisor in the registrant's county of residence within 14 days ("Registration Delivery Provision");
- Section 24 required voters requesting a mail ballot to provide the driver's license or social security number matching the one provided with their registration application ("Vote-by-Mail Identification Provision");
- Section 28 reduced the availability of secure ballot drop boxes ("Drop Box Provisions"); and
- Section 29 imposed criminal penalties for "engaging in any activity with the intent to influence or effect of influencing a voter" within 150 feet of a poll ("Solicitation Definition").

Plaintiffs alleged that these provisions were passed with racially discriminatory intent in violation of the Equal Protection Clause and VRA § 2. Plaintiffs also alleged that the Solicitation Definition and Registration Provisions violated the First Amendment. Plaintiffs sued the Secretary of State and Florida's 67 Supervisors of Elections.

The *Florida Rising* case was consolidated with other cases challenging SB90.

B. The Evidence at Trial

Trial commenced on January 31, 2022 and ran for fourteen days. Plaintiffs introduced 793 exhibits and collectively presented thirty-eight live witnesses: eight experts, four Supervisors of Election,[4] four legislators, one state elections official, and twenty-one witnesses who testified about the Challenged Provisions' impact.

1. Evidence of Racial Intent and Impact

Plaintiffs' evidence established that the Challenged Provisions were intentionally racially discriminatory under the *Arlington Heights* framework and violated VRA § 2. Historian Dr. Morgan Kousser and political scientists Drs. Traci Burch and Sharon Austin testified about Florida's history of racially discriminatory voting measures, the specific sequence of events leading up to the passage of SB90, and the floor debates and legislative process. Four legislator witnesses and the Supervisor witnesses reinforced critical points. Election administration experts Drs. Daniel Smith and Michael Herron testified about the Challenged Provisions' racially disparate impact. The legislator witnesses confirmed that the Legislature was repeatedly informed that the Challenged Provisions would have such an impact.

[4] Two Supervisors testified by declaration.

a) The 2020 Election and Passage of SB90

Three points were central to the evidence concerning the sequence of events leading up to the passage of SB90. First, SB90 overhauled Florida election laws, even though Florida's 2020 election was universally praised as having, in the words of then-Secretary Lee, run "as smoothly as possible," "inspir[ing] confidence on the part of Florida's voters." Doc.461-54 at 2; Doc.465-88 (RFA 33,34,41 (Governor DeSantis: "most successful election of any state in the Country")); *see* Doc.536 at 310-11; Doc.563 at 95,98,108. This view was shared by the Defendant Supervisors, Doc.608-48, as well as the two primary sponsors of SB90: Senator Dennis Baxley and Representative Blaise Ingoglia. *E.g.*, Doc.461-34 at 9; Doc.461-35 at 2; Doc.461-36 at 2; Doc.461-37 at 10-11; Doc.461-54 at 30,43; Doc.461-98 at 2; Doc.462-9 at 2-3; Doc.462-92 at 2; Doc.652-8.

Second, SB90's sponsors disclaimed that SB90 and the Challenged Provisions were intended to address fraud or election integrity. *E.g.*, Doc.461-34 at 8-9,15-16,18; Doc.461-37 at 71-72; Doc.461-98 at 64 (Sen. Baxley: fraud is "not the purpose of our bill"),73-74,87-88. Supervisor testimony confirmed the lack of fraud in 2020. Doc.537 at 269,274; Doc.562 at 15-16,22-23; Doc.625 at 161-63; Doc.549-3 at 96,100,107-08,178; Doc.549-2 at 39-41,62,151; Doc.652-3 at 9-14.

Third, SB90 made voting disparately harder for Black and Latino Floridians directly following the 2020 election—which saw record-breaking Black and Latino

turnout and mail ballot use. Doc.537 at 89-90; Doc.584 at 289-91. The Secretary of State admitted the unprecedented Black and Latino turnout and vote-by-mail ballot usage. Doc.465-88 (RFA 11-16).

b) Historical Background of Discriminatory Voting Laws in Florida

Drs. Austin, Burch, and Kousser examined Florida's history of racially discriminatory voting restrictions, with particular focus on the twenty years preceding SB90. Dr. Austin described a pattern: when Black and Latino voters make gains at Florida's polls, there is a "backlash" to "make it hard[er] . . . to register and to turn out." Doc.536 at 199,246.

HB1355, for example, was enacted in 2011 following unprecedented Black turnout in elections—and restricted 3PVROs that focus on registering Black and Latino voters. Doc.536 at 214-17,274-77; Doc.608-25 ¶ 69. Two separate courts ultimately held that HB1355 had discriminatory effects on Black voters. Doc.608-17 ¶ 69; Doc.608-25 ¶ 73. Senator Baxley, who was the lead sponsor of HB1355 and SB90, had invoked racial tropes that Black voters were lazy during the HB1355 debates. Doc.536 at 275,279-84.

The experts collectively identified many other voting changes that targeted minority voters, including voter roll purges in 2000, 2004, 2011, and 2012, and other legislation. Doc.536 at 199-200,269; Doc.563 at 60-62; Doc. 608-5 at 15-19; Doc.608-7 ¶¶ 45,48-52; Doc.608-25 ¶¶ 44-45,72.

c) Legislative History of SB90

Evidence showed that the legislative proceedings for SB90 were irregular, including:

- Failure to consult the Supervisors, key stakeholders responsible for administration of elections, prior to SB90's introduction. Doc.652-3 at 27-35; *see* Doc.537 at 218,280; Doc.549-2 at 44; Doc.608-30. Expert, Supervisor and legislator witnesses described this as a major departure from past election legislation. *E.g.*, Doc.537 at 33-39; Doc.562 at 61-62,127-28,196,201-02; Doc. 608-5 at 47; Doc.608-28; Doc.631 at 144.
- The Supervisors' unanimous opposition to SB90, culminating in the 67 Supervisors' unprecedented statement that they "do not support SB90." Doc.608-36; Doc.537 at 34-35,219-20; Doc.562 at 128-30,196,202-03; Doc.624 at 38; Doc.652-12.
- Limitations on public comment, including hearings where no comment was permitted. Doc.537 at 43-45; Doc.563 at 161-62; *see* Doc.461-37 at 119-20,125-26; Doc.461-92 at 78. Several Challenged Provisions were introduced in the final floor debate and were never subject to public hearing. Doc.562 at 132-35,139; Doc.563 at 162; Doc.624 at 40. Curtailment of public comment is evident from hearing transcripts and corroborated by legislators. Doc.624 at 31,39-40,46,77; Doc.652-13.

- The curtailment of legislative debate, which is evident from hearing transcripts and corroborated by legislators. Doc.537 at 39-40,42-43; *see* Doc.461-92 at 51-52,55; Doc.652-13.
- The unusual use of "strike-all" amendments during floor debate to rewrite the bill at the last minute, including one introduced on the House Floor at 1:30 am, hours before final passage. Doc.537 at 41; Doc.563 at 163; Doc.608-5 at 50; Doc.608-25 ¶ 144. Legislators confirmed the use of strike-alls in this manner was extraordinary. *E.g.*, Doc.562 at 134,139; Doc.624 at 40.

During debate, SB90's sponsors invoked racial tropes. Doc.537 at 48-52. As Dr. Burch testified, "racial resentment" commonly attributes "disparate racial impact" to "a lack of effort . . . [or] personal initiative" by Black voters. Doc.536 at 282-83; Doc.537 at 50. Three separate sponsors responded to evidence that the Challenged Provisions would discriminate against Black voters by referencing those voters' intelligence or diligence. Lead sponsor Senator Baxley said that such voters would have to vote in "a little different way" and "[t]here's a learning curve"; Senator Hutson (who sponsored a strike-all) said "the only excuse you have is that you're lazy if you do not vote"; and Senator Boyd (who presented SB90 during floor debate) talked about people needing to take "responsibility to prepare to vote." Doc.537 at 47-52.

The sponsors repeatedly provided inauthentic, false, and/or pretextual explanations for the purpose or operation of the Challenged Provisions. Doc.536 at 300; Doc.537 at 14-32; Doc.563 at 157-161. For example, Senator Baxley and Representative Ingoglia falsely claimed that the Registration Provisions were necessary to comply with court orders. Doc.461-67 at 4-5; Doc.461-78 at 89; Doc.562 at 248.

d) Racial Impact of the Challenged Provisions and Legislature's Awareness of that Impact

Extensive testimony established the disparate impact of the Challenged Provisions.

- *Registration Provisions*: Drs. Smith and Herron testified that 3PVROs are particularly significant in efforts to register Black voters, estimating that 10.86% of Black voters registered using 3PVROs, compared to approximately 2% of white voters. Doc.584 at 185-87; Doc.625 at 124-26. Plaintiffs testified about their role in registering Black and Latino voters, Doc.624 at 176 (85% of voters registered were Black or Latino), as well as the impact of SB90: Equal Ground decided to stop registering voters, while the other organizations incurred large compliance costs. Doc.513 at 210-11; Doc.556 at 105-06; Doc.562 at 104-20; Doc.624 at 184-86.

- *Solicitation Definition*: Drs. Smith, Herron, and Burch testified that Black voters experience significantly longer lines than white voters, noting extensive statistical and scholarly evidence that excessive wait times cause voters to leave without voting. Doc.536 at 291-92; Doc.584 at 18-19,45-47; Doc.625 at 92,97-98,112-13. Numerous Plaintiffs testified that they stopped providing food, water, language or other assistance to Black and Latino voters because of the Solicitation Definition. Doc.513 at 222-23; Doc.516 at 51-53,73,180; Doc.536 at 76; Doc.624 at 102-05,117-18,186-88.
- *Drop Box Provisions*: Drs. Smith and Herron testified that Black voters made unprecedented use of mail ballots and drop boxes in 2020, Doc.584 at 133-39,152-53; Doc.625 at 17-18,33-37; that the restrictions would require closing 122 of the 485 drop boxes used in the 2020 election, Doc.625 at 9-10; and that the reduced availability of drop boxes would impact Black voters disproportionally. Doc.584 at 133-39,152-53,171-72; Doc.625 at 33-37.

The Legislature knew of the racial impact of the Challenged Provisions. Numerous organizations sent the Legislature analyses explaining the racially disparate impact. Doc.462-29 at 37-38; Doc.537 at 45-48; Doc.562 at 139,210; Doc.563 at 123-25; Doc.608-25 ¶¶153-54; Doc.608-100. Legislators confirmed

that they were aware of this analysis, that this analysis was sent to all senators, and that they discussed the disparate impact the Challenged Provisions would have with legislative leaders. Doc.562 at 141-42,209-13,229,233-34,247; Doc.624 at 18-20,51,52-55,57-58.

Legislators also spoke extensively during debate about the Challenged Provisions' disparate impact. *E.g.*, Doc.461-37 at 139; Doc.461-92 at 80; Doc.461-98 at 15-17,33,100; Doc.462-8 at 6-13,31-32; Doc.462-29 at 20-21,65,81-83; Doc.562 at 141-42; Doc.563 at 173-76; Doc.624 at 18-20,51-55; Doc.652-10. And Director of the Florida Division of Elections Maria Matthews testified that the Legislature had access to detailed demographic data about voter race, address, party affiliation, and method of voting. Doc.584 at 61,244-45; Doc.600 at 109; Doc.625 at 38; Doc.631 at 29, and that the Legislature specifically requested data on the demographics of "*who* uses drop boxes" and who registered through 3PVROs, Doc.631 at 30.

Drs. Burch and Kousser also testified about the Legislature's rejection of amendments that would have reduced the Challenged Provisions' racially disparate impact. Doc.537 at 52-55; Doc.563 at 167-73; Doc.608-5; Doc.608-25. Dr. Kousser identified 57 amendments that would have reduced the discriminatory impact of the Challenged Provisions, all of which were rejected. Doc.608-26 ¶¶ 37-39 & tbl.; Doc.652-7. The legislative witnesses similarly described rejection of

"many" amendments to reduce "the discriminatory impact of the bill." Doc.562 at 143-45,223-26,229-31; Doc.624 at 64-68.

e) Defendants' Trial Evidence Regarding Intentional Discrimination

The defense at trial was minimal. Defendants called no legislators to discuss or defend the Challenged Provisions or the irregular legislative process for enacting the bill. Instead, Defendants invoked legislative privilege to bar Plaintiffs from calling the legislative sponsors. Doc.313. Defendants called the Supervisors' lobbyist, David Ramba, as well as three Supervisors—all of whom confirmed that they opposed SB90 and that their counties did not experience voter fraud in 2020. Doc.617 at 37-38,86,94; Doc.631 at 125,127.

Defendants called no witnesses who addressed the Challenged Provisions' racial impact.[5] Their Florida history expert, Dr. Dario Moreno, testified that (1) he was not familiar with the *Arlington Heights* factors, (2) his opinions were limited to Hispanic voters, and (3) he was not providing opinions concerning Black Floridians. Doc.617 at 149-51,153.[6]

[5] At trial, Defendants withdrew the report of Dr. Brad Lockerbie, which addressed Drs. Herron and Smith. Tr.3076:13-17.

[6] Defendants' other expert, Dr. Quentin Kidd, acknowledged he was not addressing how the Challenged Provisions impact voters. Doc.600 at 186-87. His comparative law analysis was fundamentally flawed, Op.43 n.14, and he confirmed implicitly that the Registration Provisions and Solicitation Definition are more onerous than any other state.

2. Evidence Supporting Plaintiffs' First Amendment Claims

Plaintiffs challenged the Registration Provisions and the Solicitation Definition under the First and Fourteenth Amendments. The *Florida Rising* Plaintiffs testified about the burden these provisions had on their operations. Equal Ground stopped registering voters because of the Registration Provisions. Doc.516 at 39-40,43-44. Other organizations overhauled their programs and invested significant resources to comply. Doc.513 at 210-11; Doc.536 at 105-06; Doc.562 at 104-06,108-15,118-20; Doc.624 at 184-86.

With respect to the Solicitation Definition, Plaintiffs testified that in prior elections, they provided assistance to voters in line, predominantly in Black and Latino communities, to communicate that it was important to stay in line and cast their votes. Doc.513 at 226-27; Doc.516 at 51-52; Doc.536 at 71-72,74; Doc.624 at 187-88. These efforts were discontinued because of the Solicitation Definition. Doc.513 at 218-23; Doc.516 at 53-54; Doc.536 at 73-76,103-04; Doc.624 at 186-88.

Appellants put on no trial witnesses specifically addressing the First Amendment claims.

C. The Trial Court's Opinion and This Appeal

On March 31, 2022, the trial court issued a 288-page decision with extensive findings of fact. The court rejected Plaintiffs' challenge to the vote-by-mail

application provisions, Op.108,125,134, and concluded that Plaintiffs had failed to prove discrimination against Latino voters, Op.132-33. But the court found that the Drop Box Provision, Solicitation Definition, and Registration Provisions violated Plaintiffs' rights under the Fourteenth and Fifteenth Amendments and VRA § 2 because those provisions had been passed with an intent to discriminate, race was a motivating factor in SB90's adoption, and the Challenged Provisions had a discriminatory impact on Black Floridians. Op.134-136. The court separately found that the Solicitation Definition was unconstitutionally vague and overbroad, Op.157-187, and that the Registration Disclaimer violated the First Amendment, Op.202-218.

In addition to enjoining the unconstitutional provisions, the court ordered a limited judicial preclearance remedy under VRA § 3(c). In light of its intentional discrimination finding, the court ordered Florida to preclear for a period of ten years laws addressing the subject of the enjoined provisions—3PVROs, drop boxes, or solicitation. Op.269-81.

The Secretary of State, two of the 67 Supervisor defendants, and Intervenors appealed. Doc.667. On May 6, a panel of this Court stayed the injunction under *Purcell*.[7]

[7] Florida subsequently repealed the Registration Disclaimer Provision. For reasons discussed at LWV.Br.§ III, the repeal does not require vacatur.

STANDARD OF REVIEW

This Court "review[s] the district court's entry of a permanent injunction for an abuse of discretion" and "review[s] its underlying conclusions of law *de novo*." *Pictet Overseas Inc. v. Helvetia Trust*, 905 F.3d 1183, 1187 (11th Cir. 2018). The Court "accept[s] the district court's findings of fact that are not clearly erroneous." *Id.* (citation omitted). Following a bench trial, findings of fact subject to clear error review "includ[e] determinations of the credibility of witnesses and weight of the evidence." *Sidman v. Travelers Cas. & Sur.*, 841 F.3d 1197, 1201 (11th Cir. 2016) (citation omitted). "In a case in which the evidence is largely testimonial, like this one, the district court has the advantage of observing the witnesses and evaluating their credibility firsthand, and the standard of review imposes an especially heavy burden on an appellant." *Id.* (citation omitted); *see Bellito v. Snipes*, 935 F.3d 1192, 1209 (11th Cir. 2019).

SUMMARY OF THE ARGUMENT

The trial court correctly applied the framework of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Greater Birmingham Ministries v. Secretary of State for State of Alabama*, 992 F.3d 1299 (11th Cir. 2021) ("*GBM*"), to find that the Challenged Provisions of SB90 were adopted with discriminatory intent. Every *Arlington Heights/GBM* factor supported that conclusion. The trial court's meticulous review of the

voluminous trial record followed controlling precedent. Its conclusions easily withstand clear error review.

The trial court properly held Plaintiffs to their burden of proof, starting from the presumption that SB90 was lawful and ruling for Appellants on some claims, including rejecting Plaintiffs' claims that SB90 discriminates against Latino voters. Only after carefully evaluating the immense record did the trial court find Plaintiffs met their burden and then properly shifted it to Appellants, who did not "even try to carry … their burden." Op.136.

The trial court also correctly found that the Solicitation Definition is unconstitutionally vague and impermissibly overbroad. Plaintiffs' voter assistance activities are constitutionally protected expressive speech that is chilled by the statute's vague prohibition. The statute fails to inform regulated parties what they cannot do, and gives excessive discretion to law enforcement. And it sweeps overbroadly by chilling vast swaths of protected speech, a problem enhanced by its vagueness.

Finally, the trial court appropriately directed a targeted preclearance remedy under VRA § 3(c). Appellants waived their arguments that § 3(c) is subject to non-textual limitations and governed by *Shelby County v. Holder*, 570 U.S. 529 (2013), and those arguments in any event are wrong.

This Court should affirm.

ARGUMENT

I. The Intentional Discrimination Finding Is Fully Supported by the Evidence

The trial court properly applied *Arlington Heights* and *GBM* to hold that the Legislature unlawfully considered race in adopting the Challenged Provisions. The court conducted the "fact intensive examination of the record" that "[t]he *Arlington Heights* factors require," *GBM*, 992 F.3d at 1322 n.33, and its findings easily withstand clear error review. "If the district court's view of the evidence is plausible in light of the entire record, an appellate court may not reverse even if it is convinced that it would have weighed the evidence differently in the first instance." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021). Appellants' arguments ignore the extensive and largely uncontested evidentiary record and the trial court's factual findings, misstate controlling precedent, and portray minor quibbles with the court's reasoning as purportedly fatal errors. A trial court finding "that is 'plausible' in light of the full record—even if another is equally or more so—must govern." *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017).

A. The Trial Court Correctly Applied *Arlington Heights* and Found Intentional Discrimination on the Basis of Overwhelming Evidence and Testimony Presented at Trial

"In this Circuit," the trial court correctly explained, "the starting point for" intentional discrimination claims "is the test set out in *Arlington Heights*," as

synthesized by *GBM*. Op.39-40 (citing *GBM*, 992 F.3d at 1321-22). Courts evaluating intentional discrimination consider the "(1) the impact of the challenged law; (2) the historical background; (3) the specific sequence of events leading up to its passage; (4) procedural and substantive departures; and (5) the contemporary statements and actions of key legislators," as well as "(6) the foreseeability of the disparate impact; (7) knowledge of that impact, and (8) the availability of less discriminatory alternatives." *GBM*, 992 F.3d at 1322; *see* Op.40 (same). These factors inform an inquiry into the "totality of the relevant facts." *Washington v. Davis*, 426 U.S. 229, 242 (1976).

The trial court recognized that the *Arlington Heights* inquiry is not aimed solely at uncovering racial *animus*. Op.41-42. A bill passed with intent to limit voting by members of one race is unlawful, no matter the legislature's ultimate motive for wanting to reduce that group's participation. Legislation targeting Black voters because they overwhelmingly vote for Democratic candidates is unconstitutional—not because the sponsors may be motivated by animus, but because the Constitution prohibits enacting voting rules with race as a motivating factor. "[A]ny racial discrimination in voting is too much." *Shelby County*, 570 U.S. at 557. This is true "even if race is meant to function as a proxy for other (including political) characteristics." *Cooper*, 137 S. Ct. at 1473 n.7; *see N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016) ("[I]ntentionally

targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose"); *see also Veasey v. Abbott*, 830 F.3d 216, 241 n.30 (5th Cir. 2016) (same).

Overwhelming evidence supports the trial court's conclusion that the Challenged Provisions were adopted with a prohibited racial motive.

1. Florida's Racially Polarized Electorate and Recent History of Voting Restrictions Set the Stage for SB90 and Shed Light on the Legislature's Intent

As the trial court explained, the recent history of discriminatory voting restrictions in Florida, and the Florida electorate's longstanding and well-known racial polarization, establish the relevant historical context for SB90. Uncontroverted evidence established that Black voters in Florida overwhelmingly vote for Democrats, and that over the past two decades, Republican majorities in the Legislature have repeatedly moved to limit voting access for Black Floridians. That sequence of events matches a familiar pattern: as "[t]he Supreme Court has explained," racial partisan "polarization renders minority voters uniquely vulnerable to the inevitable tendency of elected officials to entrench themselves by targeting groups unlikely to vote for them." *McCrory*, 831 F.3d at 214 (citing *Thornburg v. Gingles*, 478 U.S. 30 (1986)). Recent Florida history supports the trial court's finding that SB90 was intentionally discriminatory.

a) Black Voters Overwhelmingly Support the Democratic Party in Florida

Appellants identify no clear error in the trial court's finding that, in Florida, "racial identification is highly correlated with political affiliation." Op.48-51. Uncontroverted expert testimony and data from the Secretary of State established that white Floridians lean Republican and that Black voters overwhelmingly support Democrats. Between 2004 and 2020, Black voters supported Democratic presidential and gubernatorial candidates at rates between 86% and 96%, while white voters averaged 38.6% support for those candidates. Op.49 (citing Doc.563 at 36-37). 78.75% of Black voters are registered Democrats. Op.49 (citing Doc.568-1). Even Defendants' expert conceded that decreasing the number of Black voters "would provide a political advantage to the Republican Party in Florida." Op.51 (citing Doc.617 at 219). The close alignment of race and partisanship in Florida is indisputable.

b) The Florida Legislature Has Repeatedly Made Voting More Difficult for Black Voters Since 2000

Appellants largely fail to address the uncontroverted evidence cited by the trial court that over the past two decades Florida has repeatedly purged voter rolls in ways that disparately impacted Black voters, while the Legislature has repeatedly restricted voting methods used disproportionately by Black voters.

Op.52-65. Citing numerous efforts to restrict Black electoral participation, the trial court reasonably concluded that this sequence of events formed a pattern:

> At some point, when the Florida Legislature passes law after law disproportionately burdening Black voters, this Court can no longer accept that the effect is incidental. Based on the indisputable pattern set out above, this Court finds that, in the past 20 years, Florida has repeatedly sought to make voting tougher for Black voters because of their propensity to favor Democratic candidates.

Op.64-65. Appellants identify no clear error in this finding.

"A history of discrimination is important evidence of both discriminatory intent and discriminatory results." *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1567 (11th Cir. 1984).[8] The trial court credited testimony of multiple experts about voter roll purges in 2000, 2004, 2011, and 2012 that primarily disenfranchised Black voters, including the 2011-2012 purge that this Court affirmed violated the National Voter Registration Act. Op.52,56 (citing *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335 (11th Cir. 2014)). That testimony covered, *inter alia*, the U.S. Commission on Civil Rights' 2001 finding of "strong and credible evidence of violations of Section 2 of the [VRA] and the disenfranchisement of people of color" resulting from the 2000 purge, including that Black voters comprised 20% of Miami-Dade County's electorate but 65% of its purge list. Doc.536 at 200, 206; Doc.608-24 at 1. Likewise, the 2004 purge, announced with

[8] The trial court's findings about racial discrimination over a longer time scale, Op.42-45, while robustly supported by evidence, were not outcome determinative.

the purported purpose of removing voters with felony convictions, was abandoned after state officials admitted that the purported felon list was disproportionately Black and exempted all Hispanic-identifying voters. Op.53-54.

The evidence also showed, and the trial court found, a consistent legislative pattern of restricting voting methods favored by Black voters following high Black voter turnout. Op.58-65. For example, after Black voter usage of early-in-person ("EIP") voting "substantially exceeded White usage" in 2008 and 2010, *Florida v. United States*, 885 F. Supp. 2d 299, 322 (D.D.C. 2012), the Legislature sharply restricted EIP in 2011. HB1355, sponsored by then-Representative Baxley (sponsor of SB90), eliminated EIP voting days disproportionately used by Black voters, including the Sunday before election day. Op.58-60 (citing Doc.563 at 78; *Florida*, 885 F. Supp. 2d at 324, 335). A three-judge panel denied preclearance. Op.60 (citing *Florida*, 885 F. Supp. 2d at 337).

The trial court also took notice of HB1355's restrictions on 3PVROs, which are disproportionately used by Black voters to register. Among other things, HB1355 mandated that 3PVROs return registrations within 48 hours. Op.61-62 (citing *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1159-63 (N.D. Fla. 2012)). A federal district court enjoined several of these restrictions under the First Amendment and the National Voter Registration Act. *Browning*, 863 F. Supp. 2d at 1165, 1167-68.

Tellingly, Appellants do not address HB1355. Reviewing this history, the trial court accurately observed that "HB1355 and SB90 are clones," noting both laws were enacted "without clearly identifying why the law needed to be changed, without creating much of a legislative record to document its reasons for the change, and against the advice of the Florida State Association of Supervisors of Elections." Op.128.

The trial court also noted SB7066, which neutered the rights-restoring impact of the 2018 passage of Amendment 4 by requiring former felons to pay all fees owed before they could vote. Op.63-64 (citing Doc.536 at 229). In uncontroverted testimony, Dr. Austin explained that SB7066 had a greater impact on Black voters because the prior felon voting rights regime disenfranchised 15% of the Black voting-age population, but just 6% of the non-Black population. *Id.*

The trial court found SB90 "fits neatly" into Florida's history of restricting voting in ways that substantially or predominantly harm Black political participation. Op.128. "[W]hen the adverse consequences of a law upon an identifiable group are … inevitable … a strong inference that the adverse effects were desired can reasonably be drawn." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 n.25 (1979). The trial court properly found that this recent history supports the finding that SB90 was intentionally discriminatory.

2. The Context of the 2020 Election and the Shifting, Nebulous, and False Purposes Proffered for SB90 Indicate Discriminatory Intent

Appellants identify no clear error in the trial court's finding that SB90 was the proverbial solution in search of a problem, "with sponsors and supporters offering conflicting or nonsensical rationales." Op.69. The context and sequence of events leading to SB90—a secure, high-turnout election, record minority voter turnout and utilization of vote-by-mail and drop boxes, and rushed passage of a bill without any clear purposes—all support the inference that the true purpose of the bill was impermissible discrimination.

a) The 2020 Election in Florida Was Widely Praised as Safe and Secure

The trial court relied on extensive testimony to find that nothing about the 2020 election in Florida suggested a need for rapid, sweeping revisions to the election code. Instead, the election was universally lauded as a "success story." Doc.402 ¶ 44; Doc.536 at 295-96,299; Doc. 537 at 210,268; Doc.562 at 14,131; Doc.563 at 95,98-101,108. This "included praise from Governor DeSantis, the Florida Supervisors of Elections, Senator Baxley (SB90's Senate sponsor), Representative Ingoglia (SB90's House sponsor), and Defendant Lee." Op.68 (citing Doc.513 at 100-01,108; Doc.536 at 295).

Importantly, as the trial court found, there was no evidence of widespread fraud in the 2020 election. "Nor was there any evidence before the Legislature that

fraud is even a marginal issue in Florida elections." Op.70; *see* Doc.584 at 89,92,99,302-03; Doc.608-5 at 36-38. The Supervisors unanimously admitted that they neither detected nor received reports of tampering or voter fraud involving drop boxes, including "24/7" drop boxes. Doc.584 at 302-03; Doc.608-6 ¶ 139; Doc.652-5. There was no substantiated evidence of so-called ballot harvesting, Doc.608-6 ¶¶ 31,139 & n.64; Doc.584 at 303, nor vandalism or tampering with drop boxes, Doc.537 at 210; Doc.625 at 219. Multiple Supervisors testified before or at trial that the election in their county was secure and fraud-free. *See, e.g.*, Doc.537 at 268-70,274-75; Doc.549-2 at 60,62; Doc.549-3 at 95; Doc.625 at 161-63; Doc.652-3 at 3-14. The trial court reasonably relied on this evidence to find that fraud was not an issue in the 2020 election in Florida.

Nor were there any issues with 3PVROs. Appellants offered no evidence that any voters were prevented from voting due to a late registration return by a 3PVRO; the vast majority of Supervisors admitted that they were aware of no examples, *e.g.*, Doc.652-3 at 13-16, and multiple supervisors so testified, Doc.537 at 169; Doc.549-2 at 130; Doc.562 at 24.

b) Amid Record-Breaking Turnout, Black Voters Disproportionately Used Voting Methods Targeted by SB90

Appellants admitted the 2020 general election had the highest voter turnout ever reported in Florida, including the highest Black voter turnout, with over 1.3

million ballots cast. Op.67,89; Doc.562 at 20; Doc.465-88 (RFA 4-8); Doc.608-8 ¶¶ 53-54,112; Doc.608-25 ¶ 84. The trial court observed that a significant portion of that turnout growth was through vote-by-mail, and the growth in vote-by-mail was much stronger for Black than white voters: vote-by-mail by Black voters doubled from 2016, while white vote-by-mail grew by about one-third. Op.66 (citing Doc.584 at 66-67). Plaintiffs' experts also demonstrated that Black voters were more likely than other racial groups to return vote-by-mail ballots using drop boxes in 2020. Doc.536 at 290-91; Doc.537 at 89-90; Doc.584 at 289-91; Doc.608-5 at 21-22. These same experts showed that before 2020, Republicans did everything they could to encourage vote-by-mail. Doc.608 ¶¶ 61-62 & tbl.1. But after record Black vote-by-mail, that approach changed, and the Legislature requested and obtained data showing these trends while considering SB90. Op.117-20; Doc.631 at 30.

Similarly, the trial court found that voters of color disproportionately registered to vote with 3PVROs. Op.113-15. Unrebutted expert testimony showed that almost 11 percent of all Black voters registered through 3PVROs, compared to 2 percent of white voters. Doc.584 at 185-87; Doc.625 at 126-27. The Legislature also requested and obtained data showing these trends while considering SB90. Doc.631 at 30.

c) The Proffered Justifications for SB90 Were Contradictory and Conflicted with the Evidence Before the Legislature

"[T]he contemporary statements and actions of key legislators," including about a bill's purposes, are a key element of the *Arlington Heights* inquiry that the trial court properly found supports discriminatory intent here. *GBM*, 992 F.3d at 1322; *see Arlington Heights*, 429 U.S. at 268. Courts evaluating racial discrimination claims focus on the legislature's stated purposes, not "*post hoc* justifications the legislature in theory could have used but in reality did not." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017). When a legislature passes a bill that addresses imaginary concerns or lacks a connection to its announced purposes, that supports an inference of discrimination. *See McCrory*, 831 F.3d at 235-37; *Veasey*, 830 F.3d at 238-39.

Appellants identify no clear error in the trial court's finding that legislators failed to proffer justifications for the Challenged Provisions that were consistent with the available evidence, and "struggled to identify a specific problem they were seeking to address." Op.72-73. While Appellants now contend that the purpose of the bill was to promote election integrity, State.Br.9,24-25,27, that is a post-hoc litigation position unsupported by and inconsistent with the legislative record. Senator Baxley disclaimed a fraud prevention rationale or even the existence of supporting evidence in multiple answers to questions from colleagues.

When asked directly whether he believed "there was vote-by-mail fraud in the last election," Senator Baxley responded: "That's not the purpose of our bill. *It's not in the bill.*" Doc.461-98 at 64 (emphasis added); *id.* at 71 ("I'm not trying to build a case on" election fraud); *see* Doc.563 at 115. Similarly, when Representative Ingoglia was asked whether any supervisor reported that "there has been a problem with integrity, fraud, et cetera," he responded "No." Doc.462-9 at 42-43.

While the bill's proponents did provide contemporaneous justifications for certain Challenged Provisions, the trial court correctly found that those claims, like the overall explanations for the bill, were contradictory, lacking in supporting evidence, or simply false. Op.73-76.

Drop Boxes: The Legislature proffered three justifications for the Drop Box Provisions: "(1) without more restrictions, people may tamper with drop boxes, (2) the Supervisors were not using drop boxes properly, and (3) 'the provision was necessary to ensure the chain of custody of the ballot.'" Op.74; *see* Doc.461-37 at 108-09; Doc.461-98 at 66-67,73-74; Doc.462-9 at 43. These explanations collapse under scrutiny.

First, no evidence of tampering was presented to the Legislature. Op.74 (citing Doc.537 at 27). Although Senator Baxley asserted that drop box tampering "is a regular phenomenon that happens," Doc.537 at 22-23; *see* Doc.461-98 at 73-74, he later disavowed that explanation, Doc.537 at 22-27,88-89; Doc.461-37 at

108 (claiming he had "never made the case that there's box tampering"). The record shows that the sponsors and Supervisors were aware of no incident involving drop box tampering or other security problems. Doc.537 at 22-27,88-89; Doc.608-5 at 41-42; Doc.652-5.

Second, while the court noted that the Supervisor uniformity justification had "more merit" than the other two, Op.74, the court found the severe curtailment of days and hours and the requirement for in-person monitoring by Supervisor employees was not tailored to the uniformity need and "serves no purpose." Op.124. A desire for uniformity, of course, did not require the Legislature to adopt a rule that curtailed (as opposed to, say, clarified or even expanded) the availability of drop boxes disparately used by Black voters.

Third, the trial court correctly rejected the "chain of custody" justification as "nonsensical." Op.74-75. Most vote-by-mail ballots are returned by mail, and there is no chain of custody for USPS boxes. *See id.* Appellant Hays himself noted this obvious contradiction, Doc.461-34 at 24, and defense witness Ramba called the justification "ridiculous," Doc.611 at 99; *see* Doc.461-38 at 17; Doc.608-5 at 42. The trial court correctly concluded that the Legislature's purported purposes do not explain the Drop Box Restrictions.

Solicitation: The trial court appropriately found that legislators offered no plausible justification for the Solicitation Definition. Op.75. Senator Baxley

alluded vaguely to protecting voters' "privacy," but could not explain why that concern was not already addressed by the existing 150-foot solicitation ban or why handing out water implicated voter privacy. Op.75,124-25; Doc.537 at 31-32. Representative Ingoglia veered back and forth: he claimed in response to one question that the provision was aimed at barring "campaigning on line," Doc.461-92 at 23-24, but then admitted "we've never said that any non-profit organization is trying to influence votes," Doc.462-31 at 30. Moreover, as numerous legislators noted, such campaigning was already barred by existing law. Doc.461-37 at 43; Doc.461-92 at 23-24; Doc.458-6 at 44; Doc.537 at 32.

Registration Provisions: The sponsors' proffered justification for the Registration Provisions, the court found, was false on its face. Op.75-76. According to Representative Ingoglia, the provisions were needed to "clean[] up statutes that have been ruled unconstitutional." Doc.461-67 at 4-5. Senator Baxley similarly stated that a federal court order required the changes. Doc.461-78 at 89; *see* Doc.462-29 at 45-46. As the trial court explained, the sponsors were alluding to *League of Women Voters of Florida v. Browning*, 863 F. Supp. 2d 1155 (N.D. Fla. 2012), but nothing in the *Browning* final order required the changes imposed by the Registration Provisions. Op.76. Appellants do not argue otherwise, and SB90's sponsors offered no other justifications for the provision.

When someone offers a demonstrably false or nonsensical purpose for an action with discriminatory effect, the court can "reasonably infer from [such] falsity … that the [defendant] is dissembling to cover up a discriminatory purpose." *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 147 (2000) (internal punctuation and citations omitted); *cf. Dep't of Commerce v. New York*¸ 139 S. Ct. 2551, 2575 (2019) (courts "cannot ignore the disconnect between the decision made and the explanation given . . . [and] are not required to exhibit a naiveté from which ordinary citizens are free") (citation omitted). The trial court reasonably found the legislators' false explanation for the Registration Provisions persuasive circumstantial evidence of discriminatory intent.

3. Statements Made During Deliberations Over SB90 and the Unusually Rushed Consideration of the Bill Signal Discriminatory Intent

Appellants show no clear error concerning the trial court's finding of discriminatory intent in the statements of the three leading proponents of SB90 in the Senate. Statements made during deliberations by "members of the decisionmaking body . . . may be highly relevant." *Arlington Heights*, 429 U.S. at 268.

These include statements by sponsors Senators Boyd (who presented the bill during floor debate) and Hutson (who offered the strike-all): After a Black Senator (Powell) described Florida's long history of racial discrimination in voting and

stated that his grandmother was barred from voting until she was 54 and faced discrimination after that, the Senators responded "it's also our responsibility to prepare to vote" and that the "only excuse" for not voting is "that you're lazy." Op.87 (quoting Doc.462-8 at 22,26-27,29).

The trial court also noted Senator Baxley's statement responding to a question whether SB90 "would have a disparate impact on Black voters" by explaining that they would have to vote in "a little different way" and "[t]here's a learning curve." Op.88, 121. These and other statements by sponsors improperly attributed "disparate racial impact" to "a lack of effort . . . [or] personal initiative" by Black voters. Doc.536 at 282-83; Doc.537 at 50. While the trial court recognized the limits of these statements, Op.87, it did not err in considering these statements in its *Arlington Heights* analysis; remarks made by a bill's sponsors during deliberations are proper evidence of a legislature's intent. *See City of Carrolton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1552 (11th Cir. 1987); *McCrory*, 831 F.3d at 229 n.7.

The trial court also considered SB90's numerous "[d]epartures from the normal procedural sequence," which "afford[ed] evidence that improper purposes are playing a role." *Arlington Heights*, 429 U.S. at 267; *see* Op.83. These included that public comment before committees considering SB90 was extremely limited and, in some instances, completely foreclosed, Op.80-81 (citing Doc.624 at

39); public access to the Senate proceedings was also more restricted than even "pre-agreed COVID procedures," Op.81 (citing Doc.562 at 199-201); and the time allotted to debate SB90 was truncated in a "highly unusual" way, Op.79-82; *see* Doc.652-13.

Finally, the court found the use of strike-all amendments introduced on the floor during final debate—especially the one at 1:30AM—was "very unusual" and prevented legislators and stakeholders from adequately reviewing the changes being made to the bill. Op.80-81. Legislators testified that strike-all amendments are for committee and are used rarely if ever on the floor. A legislature that "break[s] its own rules to engage in unusual procedures" is indicative of discriminatory intent. *McCrory*, 831 F.3d at 228.

4. The Legislature Knew or Could Foresee that the Challenged Provisions Would Have Disparate Impacts on Minority Voters and Consistently Rejected Less Discriminatory Alternatives

The foreseeability of disparate impact, knowledge of that impact, and the availability of less discriminatory alternatives support the trial court's intentional discrimination finding. *GBM*, 992 F.3d at 1322. Appellants identify no clear error in the trial court findings that (i) the Challenged Provisions would have foreseeable disparate impacts, and (ii) SB90's lead proponents were made aware of those impacts, yet (iii) repeatedly rejected less-discriminatory alternatives. Op.123-25.

Appellants misconstrue *GBM* to suggest that disparate impacts matter only when they are "so 'stark' that they reveal a pattern 'unexplainable on grounds other than race.'" State.Br.30 (quoting *GBM*, 992 F.3d at 1322). *GBM* instead explained, citing *Arlington Heights*, that the "starkness" test applies when a plaintiff's *only* evidence of discriminatory intent is disparate impact. *GBM*, 992 F.3d at 1322 (citing *Arlington Heights*, 429 U.S. at 266). As the district court recognized, in all other cases, disparate impact is merely one of several categories of intent evidence courts must review. Op.40; *see McCrory*, 831 F.3d at 231 ("[D]isproportionate impact, even if not overwhelming impact, suffices to establish one of the circumstances evidencing discriminatory intent.").

Appellants also fail to acknowledge or address that the discriminatory effect of implementing each of the Challenged Provisions is greater than the effect of any of them separately. Doc.563 at 172-73; Doc.584 at 41; Doc.608-25 ¶ 145.

a) The Legislature Knew the Reduced Availability of Drop Boxes Would Disparately Impact Black Voters and Rejected Mitigating Alternatives

Appellants identify no clear error in the trial court's findings that the Drop Box Restrictions will have a disparate impact on Black voters and that the Legislature was aware of those impacts. First, the trial court found, supported by Supervisor and expert testimony, that "SB90 targets the specific times and days Black voters most use drop boxes." Op.128; *see* Op.91-97. Multiple supervisors

testified that they will sharply limit use of drop boxes as a result of the law. Op.93-94 (citing Doc.513 at 213 (Lake will no longer have a 24/7 box); Doc. 537 at 205 (Broward will cut from forty to eight boxes during the final voting days)); *see* Doc.652-4. Examining county discovery responses and other data, Dr. Smith concluded that SB90 would require removal of 122 of the 485 drop boxes used in the 2020 election. Op.94-95; Doc.584 at 173; Doc.625 at 9-10,15. The trial court credited Dr. Smith's findings that drop boxes were "extremely popular" on days before and after the early voting period, and were substantially used outside of business hours. Op.95-96 (citing Doc.467-7 ¶¶146,160,167,189,198,195).

The trial court also credited testimony by Drs. Smith and Herron to find that Black voters will be disparately impacted by these restrictions. Op.97-99. Dr. Herron testified that counties with a larger Black vote had greater drop-box usage in 2020 and that Black voters were 14% more likely to use a drop box in the general election than white voters. Op.97-99 (citing Doc.567-1); Doc.584 at 137-42,147-56. He testified that SB90's time and location restrictions in particular will impact racially heterogenous counties more than primarily-white counties. Op.100-01. Dr. Smith's analysis showed that Black voters were more likely to deposit ballots after hours. Op.101-03.

Appellants introduced no contrary testimony or evidence, but do argue the analysis was "limited" and incomplete. State.Br.31-34. For example, Appellants

fault Dr. Herron for using data from the 46 counties who self-reported drop box usage rather than all 67, for using smaller samples for other analyses, and for not making claims of statistical significance. Appellants' criticisms are off-base for several reasons. First, Appellants cite nothing from the actual trial record on these points: they withdrew the analysis of their quantitative expert, Dr. Lockerbie, and barely inquired into these issues on cross-examination. Doc.584 at 211-14; Doc.625 at 139-42. Second, they imply Dr. Herron cherrypicked counties, when instead he examined all the data that was available. Third, they mischaracterize the trial court's findings concerning this testimony, which showed careful consideration and weighting of the evidence in light of its limitations. Op.97-104. Fourth, Appellants nowhere address the analyses of Plaintiffs' experts Dr. Burch (who testified that survey data confirmed Black voters were more likely to use drop boxes) and Mr. Cooper, who explained that Black Floridians are more likely to need after-hours voting access because of their higher rate of service-sector work and transportation limitations. *See* Doc.516 at 273-74,280,282; Doc.536 at 291. In making its findings, the trial court noted that Cooper and Dr. Burch corroborated Drs. Herron and Smith. Op.101 n.38,103. Neither the trial court's findings nor its decision to credit testimony is clearly erroneous.

The record amply supports the trial court's findings that the Legislature was aware of these impacts. As the court explained, Senator Baxley acknowledged that

the drop box restrictions would disparately impact Black voters. Op.88-89. Senator Baxley's statement, which responded to a question whether provisions "related to drop box and access to voter assistance will have a disparate impact on black voters," was that "to look at patterns of use and say, well, you may have to go about it a little different way. There's a learning curve." Doc.461-98 at 100. The trial court's understanding of those statements—that Senator Baxley understood the drop box restrictions would harm Black voters—is the most logical interpretation, and is not clearly erroneous. *See Cooper*, 137 S. Ct. at 1465 ("plausible" trial court findings "must govern … even if another [finding] is equally or more [plausible]"). On its face and in context of other testimony, the trial court properly concluded Senator Baxley's statement shows that he understood "patterns of use" of drop boxes among Black voters, had considered the restrictions' systemic impact on those voters, and knew enough about that impact's extent to concede there would be a "learning curve." Op.88-89.

The trial court also pointed to other record evidence demonstrating the Legislature's awareness of SB90's disparate impact on Black voters, including that the Legislature "specifically sought … out" information on drop box impacts by asking the Secretary of State and Supervisors for demographic information on "who uses drop boxes." Op.116-18. Nor did the district court err in considering testimony of Representative Geraldine Thompson and Senator Gary Farmer that

they "specifically discussed the disparate impact the drop-box provisions would have on minority voters" with other legislators, including Senate majority leadership. Op.120-21 (citing Doc.562 at 139,212,229).

Based on this evidence, the court reasonably concluded that the restrictions' disparate impacts were not just foreseeable but foreseen. Op.117 (citing Doc.584 at 61,245; Doc.625 at 38; Doc.631 at 29); *see* Doc.600 at 109.

Appellants' attempts to minimize the weight of this evidence fail. Appellants contend that the district court's analysis of Senator Baxley's remarks was "error," but their argument is premised on the demonstrably incorrect assertion that this "one statement" was the only evidence of the Legislature's awareness of disparate impact. *Compare* State.Br.17-18 *with* Doc.652-10 (compendium of legislative debate discussing discriminatory impact). Appellants nowhere discuss the other evidence of legislative awareness of disparate impact cited by the trial court. Op.88-89,117 (citing Doc.584 at 61,245; Doc.625 at 38; Doc.631 at 29); Op.120-21 (citing Doc.562 at 139,212,229,233-34,239,245,248-50); Op.123-24 (citing Doc.462-4; Doc.462-5; Doc.462-9; Doc.462-19; Doc.462-43; Doc.467-16 at 14-16; Doc.537 at 210; Doc.562 at 229-31); *see* Doc.563 at 73-76; Doc.600 at 109-10; Doc.652-7 at 4. With respect to Director Matthews, Appellants criticize the district court's assessment of her contradictory testimony, State.Br.19-20, in which she "backtracked" after admitting the Legislature asked "who uses drop

boxes," Op.117-18, but ignore the deference owed to a trial court's witness credibility evaluation. When a trial court's "fact findings are based on credibility determinations," reviewing courts "must give 'even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.'" *Jemison v. Simmons*, 518 F. App'x 882, 888 (11th Cir. 2013) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985)).

Ample evidence also supports the trial court's finding that the Legislature rejected less discriminatory alternatives to the Drop Box Restrictions. The Legislature repeatedly voted down amendments that would have furthered the security and uniformity concerns purportedly motivating the Drop Box Restrictions without disparately impacting minority voters, particularly amendments allowing 24/7 video monitoring. Op.123-24; *see generally* Doc.652-7 at 4 (12 rejected amendments). The Legislature also rejected amendments allowing drop box use outside early voting hours. Op.124; Doc.563 at 170-71. Appellants fail to address any of this evidence.

b) The Legislature Knew or Should Have Foreseen the Solicitation Definition Would Disparately Impact Black Voters and Rejected Mitigating Alternatives

Appellants identify no clear error in the trial court finding that Black voters were disproportionately likely to wait in voting lines and to be affected by a

prohibition on line assistance. Op.109-12. The court's finding that SB90 deterred organizations from providing assistance to voters on line, Op.29-37, was well supported by testimony from numerous Plaintiff organizations, which stated that they stopped providing such assistance due to SB90. Doc.516 at 51-52,73,166,167,180; Doc.536 at 71-72; Doc.624 at 98-104,117-18,186-87.

Dr. Smith testified about the large body of academic literature finding that minority voters in Florida face disproportionately long lines and that Florida's lines are longer than much of the country, and Drs. Smith, Herron, and Burch concluded that Black voters faced longer lines in 2020. Op.110-12. Appellants fail to address Drs. Burch or Herron's testimony and mischaracterize Dr. Smith's analysis as being limited to "five days" of "Miami-Dade" and "studies from 2012," State.Br.34-35, when his trial presentation also discussed findings from the 2014, 2016, and 2018 elections, and his 2020 analysis also covered Hillsborough, Orange, and Lee Counties. Doc.625 at 95-102,115-18; Doc.608-6 at 137-70; Doc.608-15 at 13-20. Appellants presented no counter expert testimony.

As with the Drop Box Restrictions, the trial court reasonably found that the impacts of the Solicitation Definition were foreseeable and known to the Legislature. Op.120. In particular, Appellants ignore Senator Farmer's testimony that he repeatedly conveyed concerns about the bill's disparate impacts, including about the Solicitation Definition. Op.120 (citing Doc.562 at 212,229,239,245,248-

49). And the legislative transcripts reflect that numerous other legislators spoke about the disparate impacts of the Solicitation Definition. *See, e.g.*, Doc.461-98 at 33; Doc.483 at 17-18,21-23; Doc.530 at 30. The "logical leaps" Appellants accuse the court of taking in crediting this evidence, State.Br. 35—that the legislature knew Black voters are more likely to wait in long lines and that blocking them from accepting food and water near polling places would deter them from voting—are not leaps at all, much less clearly erroneous. *See Veasey*, 830 F.3d at 236 (crediting the fact that the legislature was advised of a bill's likely discriminatory impact "by many legislators.").

The trial court's finding that less discriminatory alternatives were available was also amply supported. Op.124-25. As the court noted, existing law already banned solicitation of voters at polling places, meaning the Legislature could have done nothing and had the same effect. *Id.* And the Legislature rejected amendments that would have ameliorated the provision's disparate impacts. Doc.461-83; Doc.462-37; Doc.467-16 at 13-15; Doc.562 at 149-50,246-47; Doc.624 at 64-65; Doc.652-7. Senator Farmer testified about the rejection of his amendment to allow nonpartisan organizations to provide assistance at the polls. Doc.562 at 246-47; *see* Doc.461-78 at 37-38. The House voted down a similar amendment. Doc.462-31 at 9. The rejection of these amendments supports an inference of discriminatory intent.

c) The Legislature Knew the Registration Provisions Would Disparately Impact Black Voters and Rejected Mitigating Alternatives

Appellants identify no clear error in the trial court's finding that the Registration Provisions would have a disparate impact on Black Floridians. Op.113-15,119-21. As the court explained, Plaintiffs testified about the impact of the provision on their registration activities in Black communities, Op.28-29 (citing Doc.513 at 208-09); *see* Doc.516 at 43-44, and expert testimony from Drs. Herron and Smith, applying different methodologies, demonstrated that Black voters are far more likely to register with 3PVROs than white voters, Op.113-15. The trial court reasonably credited this testimony, which estimated that 10.86% of Black voters registered using 3PVROs, compared to 9.57% of Latinos and 1.87% of White voters. Op.114-15 (citing Doc.467-7 at 32; Doc.625 at 125-26). There can be no reasonable dispute with the trial court's conclusion that "3PVROs overwhelming serve minority communities." Op.115. Appellants' response instead is to misrepresent the court's analysis as relying exclusively on Dr. Herron, and mischaracterize as a "fatal flaw" the court's recognition that Dr. Herron's calculation was "not perfect," State.Br.36,38, because it understated the number of 3PVRO registrants. Op.114. Appellants nowhere discuss Dr. Smith's extensive analysis, which corroborated Dr. Herron's calculations, and their arguments do not come close to showing clear error.

The trial court properly concluded that the Legislature understood these disparate impacts, noting Director Matthews' testimony that the Legislature requested information about 3PVROs, and Senator Farmer's testimony that the Legislature had statistical evidence showing 3PVROs registered 10 percent of Black voters but only 1 percent of white voters. Op.119 (citing Doc.562 at 247; Doc.631 at 30). Based on this uncontroverted testimony, the trial court reasonably concluded that the Legislature knew restricting the operations of 3PVROs through SB90 would have a disparate impact on minority voters. Op.119-20. As the trial court noted, because the sponsors falsely represented the provision was required to comply with a court order, "doing nothing" was a viable less discriminatory alternative. Op.125. Appellants are silent on this finding as well.

* * *

The trial court's 99-page analysis of intentional discrimination reflects careful, scrutinizing consideration of the voluminous trial record and reflects precisely the "fact intensive examination of the record" that "[t]he *Arlington Heights* factors require." *GBM*, 992 F.3d at 1322 n.33. Measured against the extensive findings of fact, Appellants' attacks narrowly focus on a handful of points rather than the full record. Appellants are wrong on the facts, and they consistently fail to recognize that their quibbles are immaterial in light of corroborating evidence. More importantly, Appellants do not address the whole

picture. Appellants have not come close to showing error in any of the trial court's findings, much less the clear error they must show.

B. The Trial Court Accorded the Legislature the Required Degree of Good Faith

Appellants' claim that the trial court "presumed bad faith," State.Br.17, is factually incorrect, badly mischaracterizes the trial record, and misunderstands governing precedent.

The Supreme Court explained in *Abbott v. Perez*, 138 S. Ct. 2305 (2018), citing *Miller v. Johnson*, 515 U.S. 900 (1995), that state legislatures are entitled to a presumption of good faith in racial gerrymandering challenges to redistricting plans. 138 S. Ct. at 2324 (citing 515 U.S. at 915). All that means, however, is that the "challenger" bears the "burden of proof." *Id.* at 2324-25. *Miller* held that a presumption of good faith yields when "a claimant makes a showing sufficient to support" allegations of discrimination, including through the *Arlington Heights* factors. 515 U.S. at 914-15. Indeed, the whole point of the *Arlington Heights* analysis is to establish a framework for proving intentional discrimination, *i.e.*, to establish bad faith. *See N.C. State Conference of the NAACP v. Raymond*, 981 F.3d 295, 303 (4th Cir. 2016) (explaining that following a sufficient *Arlington Heights* showing, "judicial deference to the legislature 'is no longer justified'" (quoting *Arlington Heights*, 429 U.S. at 265-66)). "The ultimate question remains

whether a discriminatory intent has been proved in a given case." *Abbott*, 138 S. Ct. at 2324-25 (citation omitted).

The trial court started from the presumption that the Legislature's actions were nondiscriminatory. Indeed, it upheld the challenged vote-by-mail provisions, Op.244-257, and rejected Plaintiffs' claims that the Legislature enacted SB90 with the intent to discriminate against Latino voters, Op.38. Similarly, at trial, the court rejected aspects of reports and testimony by Plaintiffs' experts, *see, e.g.*, Op.43 n.14 (noting the court's partial acceptance and rejection of Dr. Smith's opinions), and declined to strike Defendants' expert Dr. Kidd's testimony despite finding his conclusions unreliable, *see id*. The court also repeatedly took note of favorable testimony about the legislature's motivations and procedures from defense witness David Ramba. Op.69 & n.24,74,77,82-83.

The trial court concluded that SB90 constituted intentional discrimination after careful scrutiny of the available evidence, following the *Arlington Heights/GBM* framework. Appellants' disagreements with the trial court's conclusions do not mean that the court presumed bad faith or discrimination. State.Br.17-20. Rather, the court found intentional discrimination after considering, among other things:

- Testimony of legislators, who presented uncontested evidence about the Legislature's awareness of the disparate impact of the Challenged

Provisions, the sponsors' nonsensical justifications, the wholesale rejection of less discriminatory alternatives, and significant irregularities in the legislative process, Op.69-77,79-82,119-25,130-31.

- Testimony of Supervisors that the legislation was not necessary, would make it harder to vote, and was passed over their opposition, and that the Legislature specifically requested data about the demographic impact of the provisions, Op.76-78,92-94,104,117-19;
- Testimony of experts about the sequence of events leading to the passage of SB90, as well as Florida's recent history of discriminating against Black voters, Op.42-45,48-76,132-33, and the testimony of Defendants' expert (Moreno) who expressly acknowledged his opinion was limited to Latinos and he was not opining on Black voters, Doc.617 at 149-51,153; and
- Testimony of the election administration experts on the disparate impact of the provisions, Op.90-116, to which the defense presented no expert in response.

After finding that Plaintiffs carried their burden with respect to discrimination against Black voters, the trial court explained correctly that Appellants now bore the burden under the second step of the intentional

discrimination framework, which they failed to carry by declining to present legislators, experts to address discrimination against Black Floridians, or otherwise put on a case. Op.135-36. Alluding to the fact that Appellants' *Arlington Heights* analysis in their post-trial brief was five pages and did not cite or discuss the trial record, the trial court properly concluded that "[n]ot only have Defendants failed to carry their burden, they do not even try." Op.136 (citing Doc.648 at 60-64).

The Supreme Court's decision in *Abbott* did not *sub silentio* rewrite intentional discrimination law by suggesting that *Arlington Heights* analysis is no longer sufficient. Quite the contrary. *Abbott* repeatedly explained that courts *respect* the "presumption of good faith" by placing the "burden of proof" on challengers. 138 S. Ct. at 2324-25; *see also id.* at 2325 ("[i]nstead of holding the plaintiffs to their burden of overcoming the presumption of good faith and proving discriminatory intent, [the trial court] reversed the burden of proof"). The problem in *Abbott* was that the trial court had "flip[ped] the evidentiary burden" with respect to a particular law after a "finding of past discrimination," without examining the rest of the *Arlington Heights* factors. *Id.*; *see also United States v. Georgia*, 574 F. Supp. 3d 1245, 1251 n.4 (N.D. Ga. 2021) ("even if the presumption" of good faith "applies in vote denial cases," it just means that courts "must analyze [plaintiffs' intentional discrimination] allegations under applicable law," *i.e.*, *Arlington Heights*).

Here, the trial court repeatedly held the Plaintiffs to their burden under *Arlington Heights* and *GBM*. That accords the Legislature a presumption of good faith under *Abbott*.

II. The Trial Court Correctly Found that SB90's Solicitation Definition is Unconstitutionally Vague and Overbroad

A. Line Assistance is Expressive Conduct Protected by the First Amendment

The First Amendment guarantees "the right to engage not only in 'pure speech,' but [also] 'expressive conduct.'" *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (citing *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968)). The trial court correctly concluded, in light of the record, that Plaintiffs' activities are First Amendment-protected expressive conduct. Op.160-67.

To determine if conduct is expressive and thus protected, courts apply the *Spence* test, considering "(1) whether an intent to convey a particularized message was present, and (2) whether the likelihood was great that the message would be understood by those who viewed it." Op.161 (quoting *Burns v. Town of Palm Beach*, 999 F.3d 1317, 1336 (11th Cir. 2021)). The five *Burns* factors guide analysis of the second *Spence* prong: (1) whether the plaintiff intends to distribute literature or hang banners in connection with the expressive activity; (2) whether the activity will be open to all; (3) whether the activity takes place in a traditional

public forum; (4) whether the activity addresses an issue of public concern; and (5) whether the activity "has been understood to convey a message over the millennia." *Burns*, 999 F.3d at 1343 (citation omitted).

Intervenors' claim that the message is unclear when Appellees provide assistance to voters in line (Int.Br.25) is contrary to the trial record and unsupported. Florida Rising Together, Poder Latinx, and Equal Ground witnesses provided uncontroverted testimony that their efforts are intended to communicate the message that it is important to stay in line to vote, meeting the first *Spence* prong. Doc.513 at 218-19,222-23; Doc.516 at 51-52; Doc.536 at 73-74; Doc.624 at 187-88; *see* Op.164-65.

Ample record evidence supports the trial court's finding that, under the five *Burns* factors, Plaintiffs "proved the likelihood is great that a reasonable person would interpret their 'line warming' activities to communicate an identifiable message." Op.162-67. First, while Plaintiffs do not provide literature at the polls, Plaintiffs used signs and t-shirts when providing line assistance. Op.165. For the second and third *Burns* factors, Plaintiffs provide nonpartisan assistance open to all voters waiting in lines and around polling places, including in traditional public forums such as public streets. Op.166-67 (citing *Burson v. Freeman*, 504 U.S.

191, 196-97 (1992)) (plurality op.).[9] Fourth, it was undisputed that voting for public officials is a matter of public concern. *Id*. Fifth, the *Florida Rising* Plaintiffs have engaged in their work for many years. Op.167. Defendants offered no contrary evidence that voters did not understand Plaintiffs were conveying a message.

Intervenors' objections to the trial court's findings ignore governing law, including *Burns*. They insist that only "inherently expressive" conduct is protected, Int.Br.24, but fail to address the *Burns* factors, which are how this Court evaluates expressiveness. They also claim that the message communicated by conduct must be "overwhelmingly apparent." *Id.* In this Circuit, conduct is expressive when a "reasonable person would interpret" the conduct "as some *sort* of message"—"not whether an observer would necessarily infer a *specific* message." *Holloman*, 370 F.3d at 1270.

Intervenors are wrong when they suggest (Int.Br.27-31) that the Solicitation Definition is not subject to strict scrutiny, for the reasons discussed at LWV.Br.§ II.C. Intervenors are also wrong when they suggest (Int.Br.25-26) that the activities Plaintiffs engage in are not "expressive." They miscite *Voting for America, Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013), which carefully distinguished

[9] This Court has held that the *Burson* plurality's reasoning applies to polling places. *Citizens for Police Accountability Pol. Comm. v. Browning*, 572 F.3d 1213, 1217 n.9, 1218 (11th Cir. 2009).

between voters' speech (completing a registration form) and "persuading … citizen[s] to vote," which is the persuader's protected speech. None of Intervenors' cases hold, as Intervenors contend, that "literally helping people vote" is unprotected by the First Amendment. Int.Br.26. Considering the factual context and environment in which Plaintiffs operate, the trial court properly found Plaintiffs express a sufficiently clear message at the core of protected political speech. *See* Op.167 (citing Doc.516 at 163).

B. The Trial Court Correctly Held that the Solicitation Definition is Unconstitutionally Vague

The trial court correctly found, based on a careful analysis, that the Solicitation Definition is impermissibly vague and thereby chills Plaintiffs' protected conduct. Op.180-81. "[T]he void for vagueness doctrine encompasses 'at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.'" *Wollschlager v. Governor*, 848 F.3d 1293, 1320 (11th Cir. 2017) (quoting *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)). "When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Id.* (quoting *Fox*, 567 U.S. at 253)). A statute that (1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or

(2) "authorizes or even encourages arbitrary and discriminatory enforcement" is void for vagueness. *Id.* at 1319.

The Solicitation Definition violates both principles. Op.180-81. Under the Solicitation Definition, "any activity" within the 150-foot zone is illegal if it (1) is done with the specific "intent to influence" a voter, or (2) has the "effect of influencing a voter." Op.173 (quoting Fla. Stat. § 102.031(4)(b)).

The trial court did not err in finding that the new language fails to provide fair notice of what it prohibits. "Activity" is undefined. Op.174. Worse, the statute prohibits "*any* activity" that has the effect of influencing a voter in any way, regardless of the actor's intent. *See* Op.174-75. "Influencing" is undefined. Op.176-77. As the trial court observed, the statute might (or might not) criminalize the wearing of a t-shirt that reads "MAGA," or might (or might not) criminalize offering water. Op.178. It depends on whether a particular individual who sees or hears the expressive conduct would be "influenced"—something no person of "ordinary intelligence" can predict. *See Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

Nor did the trial court err in concluding that the statute authorizes and encourages arbitrary enforcement, given testimony from the Secretary of State and Supervisors confirming that the new language has no clear meaning. Op.178-80 (citing Doc.537 at 241; Doc.549-3 at 170-71; Doc.624 at 103; Doc.600 at 95-96;

Doc.631 at 134). As Intervenors highlight, Miami-Dade's Supervisor testified it is "impossible with the volume of sites and the volume of people that we are dealing with out there to discern who is engaging in activity to influence." Int.Br.33 (quoting Doc.562 at 57-58). The new language impermissibly "giv[es] government officials the sole ability to interpret the scope of the law." *Keister v. Bell*, 29 F.4th 1239, 1258 (11th Cir. 2022). Plaintiffs are left vulnerable to criminal prosecution based on "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings" for Plaintiffs or law enforcement to draw on. *United States v. Williams*, 553 U.S. 285, 306 (2008). Given this uncertainty, Plaintiffs testified that they have decided to stop their programs; their expressive conduct has been chilled. Doc.513 at 222; Doc.516 at 53; Doc.536 at 76; Doc.624 at 188.

Intervenors have no persuasive response. They claim that the trial court should have considered the ordinary meaning of "solicit," Int.Br.36-40, but the whole problem is the statute rejects the ordinary meaning.

Intervenors themselves cannot decide what the new definition means. They say (at 36) the law "excludes innocent and normal interactions," whatever that means. They say (at 30) the provision of food or water always violates the law, but also that "influencing a voter in this context means changing his decision about whether or how to vote" (at 41), even though providing water may well be

"innocent" and will not invariably change the recipient's decision to stay in line. It might, but one cannot be sure in advance, which is precisely the problem. Nor does the statute limit the prohibited influence to "whether or how to vote," Int.Br.40; that Intervenors feel compelled to concoct a limiting principle nowhere in the statute demonstrates the actual text's vagueness.

Conspicuously, Intervenors have no response to the trial court's findings about impermissible enforcement discretion. Op.178-80. They instead simply proclaim that courts would read a scienter requirement into the statute that isn't there. Int.Br.41-42. The vagueness inquiry must focus on the actual statutory language. "The Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.'" *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999). Intervenors' own discomfort with the Legislature's actual language powerfully confirms that it is too vague to pass constitutional muster.

Finally, criminal laws are subject to exacting vagueness scrutiny regardless of whether they implicate the First Amendment. *City of Chicago*, 527 U.S. at 53-56. Accordingly, Plaintiffs' vagueness argument does not depend on whether it is protected First Amendment activity. The trial court correctly concluded the Solicitation Definition is vague.

C. The Solicitation Definition is Impermissibly Overbroad

Appellants identify no clear error in the trial court's conclusion that the challenged language in the Solicitation Definition is unconstitutionally overbroad. Overbreadth doctrine allows facial challenges to speech-restricting statutes that punish and thereby chill or deter a substantial amount of constitutionally protected speech, "judged in relation to the statute's plainly legitimate sweep." Op.181 (quoting *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003)). The court properly applied that framework to the Solicitation Definition by balancing the definition's legitimate applications against the illegitimate.

While the court acknowledged "some conduct clearly falls within the definition's scope," including bribery as well as "fraud or intimidation," Op.172,174-76, the statute also "consumes vast swaths of core First Amendment speech," including Plaintiffs' protected expressive conduct, and "*any* speech … within 150 feet of the polls" that is "intended to 'influence' a voter or has the unintended effect of 'influencing' a voter," Op.183-84. These "ambiguous meanings cause citizens to steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked." *Am. Booksellers v. Webb*, 919 F.2d 1493, 1506 (11th Cir. 1990) (citation omitted). In other words, the vagueness of a statue increases the impact of its overbreadth by enhancing its chilling effect. *See id.* The trial court did not err in finding that the combination of

the solicitation definition's vagueness and seemingly immense sweep render it intolerably overbroad. Op.181-84.

Intervenors acknowledge the statute prohibits "[p]ersons interested in speaking about the election, informing voters about the resources available to them, encouraging people to vote, expressing appreciation for voting," and "providing food, water, or other items" within the 150-foot zone. Int.Br.21. Through its blanket prohibition of those activities, as well as other speech and conduct potentially swept under the statute due to its vagueness, the solicitation provision fails to "strike any balance to allow for *any* discourse." Op.184. The trial court properly concluded that the new provision thus extends far beyond just Plaintiffs' activities to chill an impermissibly broad range of protected speech. This Court should affirm.[10]

III. The Trial Court Appropriately Imposed a Targeted Preclearance Remedy Under VRA Section 3(c)

Under VRA § 3(c), after finding intentional discrimination in violation of the Fourteenth or Fifteenth Amendment, a federal court "*shall* retain jurisdiction for such period as it *may deem appropriate* and during such period" must preclear changes to the state's voting regulations. 52 U.S.C. § 10302(c) (emphasis added). For the reasons explained above, the trial court correctly concluded that the

[10] Appellants do not challenge the trial court's findings as to severability, which should be affirmed.

Challenged Provisions constituted intentional discrimination triggering § 3(c). After careful consideration, the court then ordered a preclearance remedy "targeted and limited in duration," applying to voting regulations governing 3PVROs, drop boxes, and "line warming" activities. Op.270-81. The court explained that § 3(c) by its terms ("shall") requires preclearance after a finding of intentional discrimination, but that even if preclearance was discretionary, it was amply warranted under a modified version of the non-exhaustive factors outlined in *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990).

Appellants' argument that the trial court "applied the wrong standard" is waived. State.Br.40. Appellants' sole argument below was that § 3(c) relief was inappropriate because "Plaintiffs have failed to prove intentional racial discrimination"; they did not dispute that it would be appropriate if the court concluded otherwise. Doc.648 at 64-65. Appellants now argue that the trial court should have applied an "exceptional conditions" standard purportedly from *Shelby County v. Holder*, 570 U.S. 529 (2013), rather than considering the *Jeffers* factors. State.Br.40-41. But Appellants themselves *cited Jeffers* (as well as *Perez v. Abbott*, 390 F. Supp. 3d 803 (W.D. Tex. 2019)) as the governing standard and nowhere argued that the court was required to find "exceptional conditions" under *Shelby County*. *See* Doc.648 at 65.

Nor did Appellants preserve the constitutional arguments they now raise. State.Br.42. To the contrary, they "assume[d]" below that "Section 3(c) is a constitutional delegation of authority to the judiciary." Doc.648 at 65 n.18. Their single footnoted reference to "concerns" about "federalism and dual sovereignty," *id.*, unaccompanied by any explanation or argument, is insufficient to preserve a claim of unconstitutionality. *LaCroix v. Town of Fort Myers Beach*, 38 F.4th 941, 947 n.1 (11th Cir. 2022) ("Because the Officers make only a passing reference to this argument in a footnote of the Town's brief, it is waived.").

Waiver aside, § 3(c) preclearance does not require "exceptional conditions." Such a vague standard appears nowhere in § 3(c)'s text and has never been imposed by any court. *Shelby County* did not concern § 3(c). It explained that "exceptional conditions" were required to justify the § 5 preclearance coverage formula, which "treat[ed] States differently from one another" and singled out certain states for decades of "disfavored" status. *Shelby County*, 570 U.S. at 552-53. But § 3(c) treats all equally: no jurisdiction is preemptively subject to preclearance, but every jurisdiction is potentially subject to preclearance if it engages in intentionally discriminatory voting regulation. *Shelby County*'s reference to "pervasive" and "rampant" discrimination, State.Br.42, likewise concerned § 5's coverage formula. *See Shelby County*, 570 U.S. at 544.

Even if *Shelby County* required "exceptional conditions," a finding of *current* intentional discrimination—a prerequisite to § 3(c) bail-in—qualifies. Indeed, such a finding is precisely what *Shelby County* said § 5's coverage formula lacked. *Id.* at 553, 557 (explaining the need to focus on "current conditions"). And Appellants fail to explain why the Constitution would bar a federal court from preventing a jurisdiction that just passed a law discriminating on the basis of race from enacting similar laws in the future. That is far narrower than barring enactment of *any* laws concerning voting, as § 5 did.

In any event, the trial court's remedial decision was not an abuse of discretion under any standard. While "doubt[ing]" that "more than one violation must be shown," Op.275, the court nonetheless found multiple violations: Florida has "repeatedly, recently, and persistently acted to deny Black Floridians access to the franchise," Op.277. Florida did so three times in SB90. Appellants puzzlingly argue that parts of SB90 do not discriminate, State.Br.43, but § 3(c) does not exempt jurisdictions from preclearance merely because they pass omnibus legislation that includes non-discriminatory provisions. Nor did the trial court abuse discretion in determining that preclearance was "appropriate," *see* § 3(c), to prevent Florida from passing new restrictions that will remain in place pending trial and require Plaintiffs to spend immense resources to challenge. Op.278. Appellants assert that preclearance "increases" costs, State.Br.43, but the trial court

specifically found otherwise. Op.278 & n.79. Appellants' remaining arguments attempt to relitigate the merits of the intentional discrimination finding.

CONCLUSION

This Court should affirm.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and 32(g)(1), the undersigned counsel for appellees certifies the following:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,829 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared using Microsoft Office Word 365 and is set in Times New Roman font in a size equivalent to 14 points or larger.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was filed electronically on August 10, 2022 and will therefore be served electronically upon all counsel.

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