

Nos. 22-11133(L), 22-11143, 22-11144, 22-11145

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., *et al.*,
PLAINTIFF-APPELLEES,

v.

FLORIDA SECRETARY OF STATE, *et al.*,
DEFENDANT-APPELLANTS.

ON APPEAL FROM JUDGMENTS OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

**BRIEF FOR THE DISTRICT OF COLUMBIA AND THE STATES OF
NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS,
MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA,
NEVADA, NEW MEXICO, OREGON, PENNSYLVANIA, RHODE
ISLAND, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF
APPELLEES AND AFFIRMANCE**

LETITIA JAMES

*Attorney General for the
State of New York*

BARBARA D. UNDERWOOD

Solicitor General

JUDITH N. VALE

Deputy Solicitor General

ANDREA W. TRENTO

Assistant Solicitor General

Office of the Attorney General

28 Liberty Street

New York, NY 10005

(212) 416-8020

barbara.underwood@ag.ny.gov

KARL A. RACINE

*Attorney General for the
District of Columbia*

CAROLINE S. VAN ZILE

Solicitor General

ASHWIN P. PHATAK

Principal Deputy Solicitor General

JEREMY R. GIRTON

ADAM J. TUETKEN

Assistant Attorneys General

Office of the Solicitor General

Office of the Attorney General

for the District of Columbia

400 6th Street, NW, Suite 8100

Washington, D.C. 20001

(202) 724-2029

jeremy.girton@dc.gov

**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Under Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, and in addition to those persons and entities identified by the Appellants, Appellees, and amici, counsel for the District of Columbia, New York, California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, Oregon, Pennsylvania, Rhode Island, and Washington identify all additional attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case:

1. Balderas, Hector, *Attorney General for New Mexico*
2. Bonta, Rob, *Attorney General for California*
3. Commonwealth of Massachusetts
4. Commonwealth of Pennsylvania
5. District of Columbia
6. Ellison, Keith, *Attorney General for Minnesota*
7. Ferguson, Robert F., *Attorney General for Washington*
8. Ford, Aaron D., *Attorney General for Nevada*
9. Frey, Aaron M., *Attorney General for Maine*
10. Frosh, Brian, *Attorney General for Maryland*
11. Girton, Jeremy R., *Assistant Attorney General for the District of Columbia*
12. Healey, Maura, *Attorney General for Massachusetts*

League of Women Voters of Fla., Inc., et al. v. Fla. Sec'y of State, et al.

13. James, Letitia, *Attorney General for New York*
14. Jennings, Kathleen, *Attorney General for Delaware*
15. Neronha, Peter F., *Attorney General for Rhode Island*
16. Nessel, Dana, *Attorney General for Michigan*
17. Phatak, Ashwin P., *Principal Deputy Solicitor General for the District of Columbia*
18. Racine, Karl A., *Attorney General for the District of Columbia*
19. Raoul, Kwame, *Attorney General for Illinois*
20. Rosenblum, Ellen, *Attorney General for Oregon*
21. Shapiro, Josh, *Attorney General for Pennsylvania*
22. State of California
23. State of Connecticut
24. State of Delaware
25. State of Illinois
26. State of Maine
27. State of Maryland
28. State of Michigan
29. State of Minnesota
30. State of Nevada
31. State of New Mexico

League of Women Voters of Fla., Inc., et al. v. Fla. Sec'y of State, et al.

32.State of New York

33.State of Oregon

34.State of Rhode Island

35.State of Washington

36.Tong, William, *Attorney General for Connecticut*

37.Trento, Andrea W., *Assistant Solicitor General for New York*

38.Tuetken, Adam J., *Assistant Attorney General of the District for Columbia*

39.Underwood, Barbara D., *Solicitor General for New York*

40.Vale, Judith N., *Deputy Solicitor General for New York*

41.Van Zile, Caroline S., *Solicitor General of the District for Columbia*

Counsel for amici state that no publicly traded company or corporation has an interest in the outcome of this case or appeal. Fed. R. App. P. 26.1; 11th Cir. R. 26.1.

Dated: August 16, 2022

/s/ Jeremy R. Girton

JEREMY R. GIRTON

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENTC-1

TABLE OF AUTHORITIES ii

INTRODUCTION AND INTEREST OF AMICI STATES1

SUMMARY OF ARGUMENT3

ARGUMENT4

 I. Florida Must Show That The District Court Clearly Erred In Its Factual Findings Regarding The Intent Behind SB 904

 II. Florida’s Asserted Interests In Preventing Voter Fraud And Restoring Voter Confidence Are Pretextual9

 A. Voter Fraud.9

 1. There is no evidence that ballot drop boxes are associated with widespread fraud.9

 2. States have myriad ways to protect election integrity without stripping voters of reliable and safe voting methods16

 B. Voter Confidence.20

 1. Voter confidence is a complex problem, which SB 90 does not address20

 2. Voter confidence remains high by relevant measures22

 3. States have other means to promote voter confidence25

CONCLUSION27

TABLE OF AUTHORITIES

Cases

Bolden v. Potter, 452 So. 2d 564 (Fla. 1984) 15

**Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021)..... 5, 6, 7, 8, 9

Brooks v. Miller, 158 F.3d 1230 (11th Cir. 1998) 6

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Democratic Exec. Comm. of Fla. v. Lee, 915 F.3d 1312 (11th Cir. 2019)..... 10

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830 F.3d 1242 (11th Cir. 2016) 8

Fla. State Conf. of NAACP v. Browning,
569 F. Supp. 2d 1237 (N.D. Fla. 2008) 15

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992 F.3d 1299 (11th Cir. 2021)..... 5, 6, 7, 8

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Election for the City of Miami*,
707 So. 2d 1170 (Fla. Dist. Ct. App. 1998)..... 15

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Nos. 4:21cv186, 4:21cv187, 4:21cv201, 4:21cv242, 2022 WL 969538
(N.D. Fla. Mar. 31, 2022) 3, 7, 8, 9, 10, 11, 15, 16, 19, 20, 21, 23, 25

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831 F.3d 204 (4th Cir. 2016) 5, 9, 16, 24

Oregon v. Mitchell, 400 U.S. 112 (1970) 2

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429 U.S. 252 (1977)..... 5, 6, 7

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Colo. Rev. Stat. § 1-7.5-107(4)(b)(I)(A)12

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Haw. Rev. Stat. § 11-109(d)12

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Wash. Rev. Code § 29A.40.170.....13

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INTRODUCTION AND INTEREST OF AMICI STATES

Pursuant to Fed. R. App. P. 29(a)(2), the District of Columbia and the States of New York, California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, Oregon, Pennsylvania, Rhode Island, and Washington (collectively, “Amici States”) file this brief as amici curiae in support of the appellees in *Florida Secretary of State v. Florida State Conference of Branches and Youth Units of the NAACP*, No. 22-11144, and *Florida Secretary of State v. Florida Rising Together*, No. 22-11145.

Amici States have a profound interest in ensuring that their citizens have access to the ballot while at the same time protecting the integrity and security of their elections. The balancing of those objectives is reserved primarily to the states by the Constitution, which allows states to “structur[e] and monitor[] the election process,” consistent with principles of federalism. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000). No one disputes that states have significant discretion to structure their election systems as they see fit, within reason and as permitted by law, to pursue legitimate interests such as protecting ballot access and preventing fraud.

But those interests must be real, not pretextual. And they must actually be furthered by the relevant legislation, particularly where that legislation retrogressively restricts opportunities to vote. Although states have leeway to pursue bona fide state interests, jurisdictions cannot invoke such interests as pretexts to

harm discrete blocs of voters. The history of American democracy is replete with regrettable examples of states doing just that: for example, even indisputably discriminatory disenfranchisement devices, like the poll tax, were once “justified as a means of preventing voter fraud.” Orville Vernon Burton, *Tempering Society’s Looking Glass: Correcting Misconceptions About the Voting Rights Act of 1965 and Securing American Democracy*, 76 La. L. Rev. 1, 14 (2015).

As the constitutional actors responsible for “the power to regulate elections,” *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (quoting *Oregon v. Mitchell*, 400 U.S. 112, 124-25 (1970)), Amici States have expertise in administering elections and safeguarding the integrity of their democratic systems. Indeed, Amici States have pursued free and fair elections while *expanding* voter opportunities in ways that do not risk malfeasance, maladministration, or fraud. But Florida has taken a different tack. Florida’s Senate Bill 90 (“SB 90”) sharply contracts voting opportunities, including by retrogressively limiting the use of drop boxes for ballot collection. *See* Fla. Stat. § 101.69(2)-(3).

In defending SB 90, Florida asserted interests in preventing voter fraud and restoring voter confidence. But Amici States’ extensive experience show that it is possible to increase drop-box use, and thus increase voting opportunities, while maintaining election security and voter confidence. And after reviewing “thousands of pages of evidence” and hearing “two weeks’ worth of testimony from 42

witnesses,” the district court here found that “the evidence shows that SB 90 was not motivated by a desire to prevent voter fraud and ensure voter confidence.” *League of Women Voters of Fla., Inc. v. Lee*, Nos. 4:21cv186, 4:21cv187, 4:21cv201, 4:21cv242, 2022 WL 969538, at *1, *52 (N.D. Fla. Mar. 31, 2022). Accordingly, the district court found that the drop-box provisions violated the Voting Rights Act of 1965 (“VRA”), 52 U.S.C. § 10301, and the Fourteenth and Fifteenth Amendments. *Id.* at *53.¹ That conclusion was amply supported by the record as well as Amici States’ own experiences administering secure elections, so this Court should affirm.

SUMMARY OF ARGUMENT

1. On appeal, Florida has the heavy burden of showing that the district court clearly erred when it made factual findings regarding the Legislature’s discriminatory intent in passing SB 90. For claims alleging unlawful discriminatory intent under both the VRA and the Fourteenth and Fifteenth Amendments, the inquiry into intent is inherently factual, and the district court correctly performed that inquiry here in finding that SB 90 was not motivated by a desire to prevent voting fraud or improve voter confidence. There is no merit to Florida’s attempt to avoid those detailed factual findings by misconstruing precedent as requiring the

¹ Given Amici States’ expertise with drop boxes, this brief only addresses the successful VRA and constitutional claims directed at SB 90’s drop box provisions, Fla. Stat. § 101.69(2)-(3).

district court to rubberstamp its mere assertions about SB 90's true purpose—rather than conduct a thorough review of the trial evidence.

2. Florida's claims of voter fraud and low voter confidence are unsupported by the record and further undermined by Amici States' experiences. To begin, voter fraud is rare, and states can prevent it effectively while expanding voting opportunities. In addition, voter confidence is a complex issue, and, to the extent there is any consistent way to measure it, voter confidence is currently high. Regardless, states can address voters' concerns without imposing additional burdens on voting, and SB 90 itself does not target the known drivers of voter confidence.

ARGUMENT

I. Florida Must Show That The District Court Clearly Erred In Its Factual Findings Regarding The Intent Behind SB 90.

To prevail here, Florida must show that the district court clearly erred in its factual findings regarding the Legislature's intent in enacting SB 90's drop-box provisions. In making its findings, the district court correctly applied this Court's long-standing precedent and inquired into the genuineness of Florida's proffered purposes because "a tenuous explanation" for a law "is circumstantial evidence that the [law] is motivated by discriminatory purposes." *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1571 (11th Cir. 1984); *see also Veasey v. Abbott*, 830 F.3d 216, 237 (5th Cir. 2016) (en banc) (holding that evidence that a law was "only tenuously related to the legislature's stated purpose of preventing voter fraud" was

relevant to the question of discriminatory intent). If a voting restriction does not respond to any real problem but instead “target[s]” voting methods preferred by minority voters, then the law “bears the mark of intentional discrimination.” *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214-15 (4th Cir. 2016) (internal quotation marks and citation omitted).

That question of intent is one of fact, requiring an “intensive examination of the record,” *Greater Birmingham Ministries v. Sec’y of State*, 992 F.3d 1299, 1322 n.33 (11th Cir. 2021), using factors identified in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). As such, an appellate court may only reverse a district court’s factual findings on intent for clear error. *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2348-49 (2021). Under that standard, “when ‘the record indicates that the court engaged in a searching and meaningful evaluation of all the relevant evidence,’ and when ‘there is ample evidence in the record to support the court’s conclusions, [appellate] review is at an end.’” *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1301 (11th Cir. 2020) (quoting *Solomon v. Liberty Cnty. Comm’rs*, 221 F.3d 1218, 1228 (11th Cir. 2000)). Thus, Florida has “a steep hill to climb on appeal” here “because the district court ruled against [it] following a bench trial.” *Thai Meditation Ass’n of Ala., Inc. v. City of Mobile*, 980 F.3d 821, 835 (11th Cir. 2020).

Rather than demonstrate that the district court's factual findings are clearly erroneous, Florida instead argues that it need only assert an interest in preventing voter fraud and improving voter confidence. Appellants' Initial Br. for Sec'y Byrd, Att'y Gen. Moody, & Supervisors Hays & Doyle ("Fla. Br.") 24-25. Georgia, as amicus, echoes this argument. Br. of the State of Ga. as Amicus Curiae 26. But Florida and its amicus are wrong. The entire purpose of the *Arlington Heights* inquiry is to determine, as a factual matter, "why [the law] was passed." *Brooks v. Miller*, 158 F.3d 1230, 1242-43 (11th Cir. 1998). The court considers "the totality of legislative actions" to decide whether "the law remains what it purports to be," *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979), or if the state's "ostensibly neutral" reasons are "pretext," *id.* at 272. If the district court was required to accept Florida's mere invocation of voter fraud and voter confidence, then *Arlington Heights* and its progeny would be a nullity.

Greater Birmingham and *Brnovich* do not support Florida's argument. First, Florida relies mostly on the portions of those opinions addressing a VRA Section 2 results claim. Fla. Br. 24-25 (citing *Greater Birmingham*, 992 F.3d at 1334, and *Brnovich*, 141 S. Ct. at 2348). A results claim looks to the "totality of the circumstances" to determine whether a voting restriction results in "members of a protected class hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," but

does not involve an inquiry into intent. *Greater Birmingham*, 993 F.3d at 1329 (internal quotation marks omitted) (second quotation quoting *Chisom v. Roemer*, 501 U.S. 380, 388 (1991)); *see also Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). Instead, a results claim simply looks at “the strength of the state’s interests.” *Brnovich*, 141 S. Ct. at 2339; *see also id.* at 2347-48. By contrast, the claims on appeal here are a Section 2 discriminatory *intent* claim and Fourteenth and Fifteenth Amendment claims—which also require a showing of discriminatory *intent*. *Greater Birmingham*, 993 F.3d at 1321. Both *Greater Birmingham* and *Brnovich* analyzed such intent claims separately, applying the usual *Arlington Heights* analysis and probing whether voter fraud actually motivated the legislature. *Greater Birmingham*, 992 F.3d at 1323-24; *Brnovich*, 141 S. Ct. at 2348-50. Nowhere did those cases suggest that a state can defeat an *intent* claim just by citing voter fraud.

Second, the procedural postures and evidentiary records in *Greater Birmingham* and *Brnovich* distinguish those cases. In *Greater Birmingham*, this Court accepted the state’s justifications because the plaintiffs presented no evidence from the legislature regarding its motives for the legislation at issue, 992 F.3d at 1325, and there were “well-documented and public cases of voter fraud that occurred in Alabama,” *id.* at 1323. Contrast that with the record and findings here: After a ten-day bench trial, the court found that “SB 90 was not motivated by a desire to prevent voter fraud and ensure voter confidence.” *League*, 2022 WL 969538, at *52.

Indeed, and unlike in *Greater Birmingham*, SB 90’s sponsors said just that. *E.g., id.* at *29 (“Senator Baxley responded to a question about [vote-by-mail] fraud by stating ‘[t]hat’s not the purpose of our bill.’”). And because those findings were made after a ten-day bench trial, this Court must employ a “decidedly more deferential standard” of review than in *Greater Birmingham*, which was decided on summary judgment. *Fla. Int’l Univ. Bd. of Trs. v. Fla. Nat’l Univ., Inc.*, 830 F.3d 1242, 1253 (11th Cir. 2016).

The record in *Brnovich*, which affirmed a district court’s fact-bound finding on intent, is also starkly different than the evidentiary record here. *See* 141 S. Ct. at 2349-50. In *Brnovich*, the district court had evidence of “sincere” beliefs by legislators in the fraud-preventative purposes of the bill and “serious legislative debate.” *Id.* at 2349. In particular, the Supreme Court pointed to statements by “[p]roponents,” “support” from outside “minority officials and organizations,” and even a statement from an opposing senator. *Id.* Here, by contrast, the evidence before the district court—including testimony from several experts, floor statements, text messages by legislators, and testimony to the Legislature by Supervisors of Elections and the Secretary of State—showed that the Legislature did not enact SB 90 to prevent voter fraud. *League*, 2022 WL 969538, at *28-36. Among other things, the sponsors here “repeatedly” denied that preventing voter fraud was a purpose of the bill, and there was little discussion—and no evidence—of fraud

associated with drop boxes to support a sincere belief in the need for SB 90. *Id.* at *29. Thus, like in *Brnovich*, “[t]he District Court’s finding on the question of discriminatory intent had ample support in the record.” *Brnovich*, 141 S. Ct. at 2349. Although Florida cherry-picks other evidence it says shows a genuine concern for voter fraud and voter confidence, Fla. Br. 25-27, Florida simply takes a different (and cramped) view of the record—which does not come close to demonstrating that the district court clearly erred. *See Brnovich*, 141 S. Ct. at 2349 (“[A]n appellate court may not reverse even if it is convinced it would have weighed the evidence differently . . .”).

II. Florida’s Asserted Interests In Preventing Voter Fraud And Restoring Voter Confidence Are Pretextual

The district court’s findings comport with Amici States’ experiences and reveal that SB 90 is not supported by a genuine interest in preventing voter fraud or restoring voter confidence. SB 90’s drop-box restrictions are “inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that d[o] not exist.” *McCrary*, 831 F.3d at 214.

A. Voter Fraud.

1. There is no evidence that ballot drop boxes are associated with widespread fraud.

No one disputes that there is a state interest in combatting voter fraud. But a voting restriction must be genuinely aimed at advancing that interest, *Veasey*, 830 F.3d at 237, and reasonably calibrated to the scope of the problem, *McCrary*, 831

F.3d at 238. Here, the scope of the targeted problem is vanishingly small: the use of drop boxes, and mail ballots more generally, are well-established practices in Florida and around the country, and neither has given rise to substantial fraud. As this Court has held, Florida’s “interest in preventing voter fraud . . . is not mutually exclusive of vote-by-mail.” *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1322 (11th Cir. 2019).

To start, absentee voting (i.e., casting a vote outside a polling place) is nothing new and is not a driver of fraud. From 2000 until the 2020 election, more than 250 million votes were cast using mail-in ballots in all fifty states. Wendy R. Weiser, *The False Narrative of Vote-by-Mail Fraud*, Brennan Ctr. for Just. (Apr. 10, 2020), <https://bit.ly/3iUkbvz>. In the 2018 midterms alone, over 31 million Americans—or 25.8% of voters—cast their ballots by mail. *Id.* Nor are ballot drop-off sites a novel phenomenon. “Drop boxes first appeared in Florida in the early 2000s” and “slowly grew in popularity.” *League*, 2022 WL 969538, at *28. By the 2016 election, about 16% of voters nationwide submitted their ballots via drop boxes. Pam Fessler, *Ballot Drop Boxes Become Latest Front in Voting Legal Fights*, NPR (Aug. 11, 2020), <https://n.pr/2GM9E8V>.

The number of Americans voting by mail and using drop boxes spiked in the 2020 election—approximately 43% (over 66 million) cast their ballots using these ways. Zachary Scherer, U.S. Census Bureau, *Majority of Voters Used*

Nontraditional Methods to Cast Ballots in 2020 (Apr. 29, 2021), <https://bit.ly/30GnHac>. In Florida, the use of mail ballots jumped across racial groups. *League*, 2022 WL 969538, at *27. But the jump was most significant among Black voters, whose use of mail ballots “doubled to around 40%.” *Id.* What is more, “Black voters favor drop boxes more than other racial groups,” as the district court found based on the credible testimony of two experts. *Id.* at *39-40.

Despite the historic nature of the 2020 election, which was conducted amid a novel pandemic, states implemented systems to ensure election integrity. *See, e.g.,* Cybersec. & Infrastructure Sec. Agency, Press Release, *Joint Statement from Elections Infrastructure Government Coordinating Council and the Election Infrastructure Sector Coordinating Executive Committees* (Nov. 12, 2020), <https://bit.ly/39VmfCL> (declaring the November 2020 election “the most secure in American history”). That was especially true in Florida, where the “2020 election went relatively well.” *League*, 2022 WL 969538, at *28. Indeed, Florida officials—including the Governor, Secretary of State, Supervisors, and SB 90’s sponsors—“praised Florida’s election performance.” *Id.* Florida achieved this success despite a 78% increase in the number of votes by mail-ballot (i.e., ballots mailed or submitted through drop boxes) compared with the 2016 general election. *See Fla. Div. of Elections, 2016 General Election 1*, <https://bit.ly/3xDHlzw> (last visited Aug. 10, 2022) (showing that 2,732,075 Florida voters voted by mail-ballot in the 2016

general election); Fla. Div. of Elections, *2020 General Election 1*, <https://bit.ly/32N3wba> (last visited Aug. 10, 2022) (showing that 4,855,677 Florida voters voted by mail-ballot in the 2020 general election). There is accordingly nothing about the 2020 election that justifies SB 90's restrictions on drop boxes.

The election security Florida enjoyed in 2020 is no outlier. A sizable portion of the electorate has historically voted through drop boxes, without issue. For instance, during the 2016 presidential election, nearly three-quarters of all ballots in Colorado were returned by drop box. Edgardo Cortés, et al., *Preparing for Election Day: Deadlines for Running a Safe Election*, Brennan Ctr. for Just. (May 11, 2020), <https://bit.ly/2If5AOJ>. That same year, about 57% of Washingtonians voted by drop box. Wash. Sec'y of State, *Ballot Drop Box Usage by Year*, <https://bit.ly/2FkYQxT> (last visited Aug. 10, 2022).

Yet, there is no evidence from *any* jurisdiction that voting by drop box—or voting by mail more generally—threatens election integrity. Prior to 2020, five states—including Amici States Oregon and Washington—used all-mail voting systems in which “all registered voters are sent a ballot in the mail.” Nat'l Conf. of State Legis., *Table 18: States with All-Mail Elections* (Feb. 2, 2022), <https://tinyurl.com/vma2p2r>. Each of those states has also allowed drop-off sites for absentee ballots in the past. *See* Colo. Rev. Stat. § 1-7.5-107(4)(b)(I)(A); Haw. Rev. Stat. § 11-109(d); Or. Rev. Stat. § 254.470(1); *Learn About Voting by Mail*,

Vote.Utah.gov, <https://bit.ly/3nD2N29> (last visited Aug. 10, 2022); Wash. Rev. Code § 29A.40.170. None has encountered widespread voter fraud. Weiser, *supra*.

In fact, a *Washington Post* analysis of data collected by Colorado, Oregon, and Washington “identified just 372 possible cases of double voting or voting on behalf of deceased people out of about 14.6 million votes cast by mail in the 2016 and 2018 general elections.” Elise Viebeck, *Miniscule Number of Potentially Fraudulent Ballots in States with Universal Mail Voting Undercuts Trump Claims About Election Risks*, Wash. Post (June 8, 2020), <https://wapo.st/3ixefbJ>. That amounts to a rate of just 0.0025%. *Id.* Data collected by the Heritage Foundation from the five states using vote-by-mail prior to 2018 also found few cases of fraud: only 29 cases of fraudulent votes attempted by mail and 24 cases of duplicative voting or absentee ballot fraud out of nearly 50 million votes cast. Elaine Kamarck & Christine Stenglein, *Low Rates of Fraud in Vote-by-Mail States Show the Benefits Outweigh the Risks*, Brookings Inst. (June 2, 2020), <https://brook.gs/2F4NM7X> (reproducing data from the Heritage Foundation’s database). This evidence illustrates that, contrary to Florida’s claims, fraud in expanded vote-by-mail systems, especially those that use drop boxes, is miniscule in comparison to the tens of millions of votes legally cast.

More generally, election and security experts have time and again voiced confidence in voting by mail, including through drop boxes. Before the 2020

election, a commissioner on the Federal Election Commission said that there is “simply no basis for the conspiracy theory that voting by mail causes fraud.” Reality Check Team, *US Election: Do Postal Ballots Lead to Voting Fraud?*, BBC News (Nov. 6, 2020), <https://bbc.in/2GJvUQA>. Senior intelligence officials, “who ha[d] been consulting with election workers across all 50 states,” similarly stated that they found no “evidence of a coordinated effort to commit mail-in voting fraud”—let alone any evidence of drop-box-related plots. Alfred Ng, *Election Security Officials Find No Evidence of Coordinated Fraud with Mail-In Ballots*, CNET (Aug. 26, 2020), <https://cnet.co/3nnmYRu>. Moreover, the Presidential Advisory Commission on Election Integrity, established by President Trump following the 2016 election, “uncovered no evidence to support claims of widespread voter fraud.” Marina Villeneuve, *Report: Trump Commission Did Not Find Widespread Voter Fraud*, Associated Press (Aug. 3, 2018), <https://bit.ly/2GMTpZf>. Audits of ballots cast in the 2020 general election in Georgia and Arizona have likewise revealed almost no fraud. See Mark Niese, *No Fraud: Georgia Audit Confirms Authenticity of Absentee Ballots*, Atlanta J.-Const. (Dec. 29, 2020), <https://bit.ly/3r3xCRX>; Bob Christie & Christina A. Cassidy, *GOP Review Finds No Proof Arizona Election Stolen From Trump*, Associated Press (Sept. 24, 2021), <https://bit.ly/3cy5Pk3>.

Consistent with this reality, there was no “evidence before the Legislature that fraud is even a marginal issue in Florida elections,” as the district court’s findings

reveal. *League*, 2022 WL 969538, at *29. The Secretary of State and SB 90’s sponsor both stated that they had never seen any evidence of drop box or vote-by-mail fraud. *Id.* In addition, “to the extent that legislators claimed that SB 90 prophylactically prevents fraud that has yet to occur, [a senator on the Rules Committee] testified that the Legislature was never presented with an example of any type of [vote-by-mail] fraud that SB 90 *might* prevent.” *Id.* at *30. Indeed, SB 90’s sponsors repeatedly denied that preventing fraud was the purpose of the bill, *id.* at *29, and instead “offer[ed] conflicting or nonsensical rationales,” *id.* at *28.

Florida’s supposed “rich history of absentee-ballot fraud,” Fla. Br. 9 (quoting *Fla. State Conf. of NAACP v. Browning*, 569 F. Supp. 2d 1237, 1251 (N.D. Fla. 2008)), is not to the contrary. The cases referenced in *Florida State Conference of NAACP* involved conduct that not only predated—and thus could not have been facilitated by—the use of drop boxes in Florida, but that would not be prevented by the drop-box restrictions of SB 90. See *In re Protest of Election Returns & Absentee Ballots in the Nov. 4, 1997 Election for the City of Miami*, 707 So. 2d 1170, 1172 (Fla. Dist. Ct. App. 1998) (describing the use of “false voter addresses,” “stolen ballots,” and “falsely witnessed” ballots associated with vote-by-mail ballots); *Bolden v. Potter*, 452 So. 2d 564, 565-66 (Fla. 1984) (describing fraudulent vote-buying scheme associated with vote-by-mail ballots). So, again, the problems Florida identifies would not be remedied by the law it enacted.

At bottom, although preventing fraud is a legitimate state interest, this is a case where the evidentiary record dispelled any notion that Florida genuinely sought to prevent fraud. After plaintiffs presented the evidence outlined above and more, Florida did “not even try” “to show that the Legislature would have passed the drop-box provisions” for non-discriminatory reasons like preventing fraud. *League*, 2022 WL 969538, at *53. And even if Florida had tried to make that showing, its regulations must still be amply justified by the prospective problems they purport to address. *McCrary*, 831 F.3d at 233-34. Yet, as discussed above, decades of data across multiple states and many elections indicate that there is no encroaching fraud problem that the drop-box provisions of SB 90 could address.

2. States have myriad ways to protect election integrity without stripping voters of reliable and safe voting methods.

States can also combat voter fraud through less burdensome means than those SB 90 uses. Amici States are deeply committed to protecting the integrity of their elections and have deployed an array of safeguards to ensure the security of their absentee voting systems. There are also many common-sense practices to secure ballot drop boxes specifically, none of which require constricting access. Thus, as Amici States’ experiences reinforce, the district court correctly concluded that “several less restrictive alternatives” were available, and the Legislature’s rejection of them “weigh[ed] in Plaintiffs’ favor.” *League*, 2022 WL 969538, at *48.

For example, the experience of other states shows that it is possible to *expand* opportunities to vote while protecting election integrity. Although each state has approached these issues differently, the prevailing trajectory of election-procedure changes in many states has been toward increased ballot access—without any impact on election security and integrity. For example, numerous states have consistently expanded methods for voters to cast their ballots beyond the traditional practice of visiting polling places on Election Day. Since 2001, California has offered all registered voters the option of voting by mail on a permanent basis. Cal. Elec. Code §§ 3001, 3003. During the pandemic, California also enacted legislation to mail ballots to every active registered voter, *id.* § 3000.5, a change the state subsequently made permanent, A.B. 37, 2021-2022 Reg. Sess. (Cal. 2021). Nevada has similarly enacted a law requiring that each active registered voter receive a ballot by mail, A.B. 321, 81st Sess. (Nev. 2021), as has Vermont, S. 15, 2021 Gen. Assemb. (Vt. 2021). In short, Amici States and others have *expanded* access to the ballot while still administering secure elections, so Florida’s argument that it has to *decrease* access to the ballot in order to administer secure elections is tenuous at best.

Moreover, there are many standard ways that states—including Florida—can and do protect mail-ballots, however they are returned. Many states require that ballots be “printed on the proper type of paper” and “include specific technical markings.” Andy Sullivan, *Explainer: Fraud Is Rare in U.S. Mail-In Voting. Here*

Are the Methods That Prevent It, Reuters (July 7, 2020), <https://reut.rs/33zi7oE>. Most states also print unique bar codes on mail-in ballot envelopes, which enable election officials to track ballots and “identify and eliminate duplicate ballots.” Weiser, *supra*. Florida itself implements a rigorous system in which elections supervisors and county canvassing boards “determine the legality of . . . vote-by-mail ballot[s].” Fla. Stat. § 101.68(2)(c)(1).

In addition, criminal and civil penalties provide a strong deterrent to voter fraud. An individual convicted of voter fraud in a federal election is subject to a \$10,000 fine and/or a five-year term of imprisonment. 52 U.S.C. §§ 10307(c), (e), 20511. And many states—including Florida—also punish voter fraud with fines and potential prison time under state law. *See, e.g.*, Fla. Stat. §§ 104.041 (punishing as a third-degree felony “any fraud in connection with any vote cast, to be cast, or attempted to be cast”), 104.047 (punishing as a third-degree felony the improper request or completion of a mail-in ballot on behalf of another), 104.17 (punishing as a third-degree felony willfully voting both in person and by mail).

In terms of drop boxes specifically, the United States Election Assistance Commission has promulgated guidance on how states can “provide[] a secure and convenient means for voters to return their mail ballot.” U.S. Election Assistance Comm’n, *Ballot Drop Box 1* (2020), <https://bit.ly/3dgz0HV>. For example, for unstaffed drop boxes, the Commission recommends that election officials construct

boxes of “durable material such as steel and be permanent cemented into the ground,” among other things. *Id.* at 5. For staffed drop boxes, the Commission suggests that the ballot box be locked (with keys limited to election officials) and that tamper evident seals should be used. *Id.* at 6.

Measures like these were put into place in Florida as part of a comprehensive drop-box legislation enacted in 2019. *League*, 2022 WL 969538, at *36; *see also* Fla. Stat. § 101.69(2) (2020) (describing drop boxes as “secure” and requiring drop boxes at early voting sites to be staffed by election officials or “sworn law enforcement officer[s]” during early-voting hours); Allison Ross, *Late Guidance from Florida’s Elections Chief Could Affect Counties’ Plans for Mail Ballot Drop Boxes*, Tampa Bay Times (Oct. 16, 2020), <https://bit.ly/3x5anI5> (explaining how Florida counties “us[e] locks and seals to prevent tampering” and employ “surveillance cameras” at 24-hour drop boxes). Clearly, they were effective because Florida officials praised the state’s election administration despite exceptionally high turnout and unprecedented use of drop boxes and vote-by-mail. *League*, 2022 WL 969538, at *28. Unsurprisingly, there was no evidence that drop-box tampering occurred or that the drop-box rules in place had been violated. *Id.* at *29-30. Thus, “the need for reform was minimal,” *Veasey*, 830 F.3d at 239 n.25, as Florida already employed common measures and best practices. So SB 90’s new restrictions on drop boxes restricting drop-box use was, as the district found, motivated not by a

desire for reform, but by a dislike of *who* used that method of voting and a desire to curtail their ability to access the franchise through it. *League*, 2022 WL 969538, at *52.

In sum, states have used a variety of methods to ensure election integrity. Florida itself put certain methods into place before SB 90. But instead of enacting other, less restrictive reforms—like those used by Amici States—Florida made “surgical changes to the election code that targeted specific groups.” *Id.* Accordingly, given the alternatives available, Florida cannot genuinely claim that the drop-box provisions of SB 90 were enacted solely to prevent voter fraud.

B. Voter Confidence.

Florida’s alleged interest in voter confidence fares no better. Voter confidence is a multifaceted concept, yet its few documented drivers are unaffected by SB 90. And regardless, voter confidence, by many measures, remains high—meaning there is no real problem to fix. In any event, states have many means of promoting voter confidence that, unlike SB 90, do not restrict the right to vote.

1. Voter confidence is a complex problem, which SB 90 does not address.

Florida argues that SB 90 is justified by its concerns about voter confidence, but there is no reason to believe—based on the evidence presented here or more broadly—that SB 90 would advance that interest. Voter confidence encompasses beliefs ranging from how democratic a system is in general to how fair specific

election practices are. Jesse T. Clark & Charles Stewart III, *The Confidence Earthquake: Seismic Shifts in Trust in the 2020 Election 2* (July 15, 2021), <https://bit.ly/3Em2lx2> (download PDF). Rates of voter confidence likewise vary depending on whether voters are “asked about their confidence in the parts of the electoral process with which they have direct contact, such as their own vote” or “parts of the electoral process they have indirect contact with, such as the process in the nation as a whole.” MIT Election Data & Sci. Lab, *Voter Confidence* (Apr. 2, 2021), <https://bit.ly/3cLpm0B> (emphasis omitted). Despite the complexity of voter confidence, “an exhaustive review of relevant legislative materials” revealed that the Legislature never explained what it meant by “voter confidence,” how SB 90’s specific measures would improve voter confidence, or what evidence supported the alleged problem with voter confidence in the state. *League*, 2022 WL 969538, at *29.

Although voter confidence is complex, political scientists have documented a few key drivers of confidence—none of which are affected by SB 90. One of the strongest influences on voter confidence is the “winner’s effect,” in which voters perceive election efficacy positively or negatively depending on whether their preferred candidate won. *Voter Confidence, supra*. Another strong influence is messaging from the media or politicians. *See id.*; Ctr. For Election Innovation, *Confidence in the 2020-2021 Elections in Georgia 2* (2021), <https://bit.ly/3ctGibs>

(download PDF). Finally, voters' individual experiences at the polls, particularly their interactions with poll workers, influence how they see the election as a whole. Thad E. Hall, et al., *The Human Dimension of Elections: How Poll Workers Shape Public Confidence in Elections*, 62 Pol. Rsch. Q. 507, 519 (2009).

SB 90's restrictions on drop boxes are unrelated to these three influences, so there is no reason to think that those restrictions will have a substantial effect on voter confidence. Indeed, "there's little evidence" that changes to election administration, other than improvements in polling place experiences (which SB 90 does not meaningfully affect), have "a direct effect on voter confidence." *Voter Confidence, supra*. Thus, Florida cannot support SB 90 by citing an interest that is unlikely to be affected by its reforms.

2. Voter confidence remains high by relevant measures.

Regardless of whether SB 90 can address the drivers of voter confidence, there is no real problem to address. In general, voter confidence remains high, especially regarding how voters perceive election administration close to home. Pew Rsch. Ctr., *Voters' Evaluations of the 2020 Election Process* (Nov. 20, 2020), <https://pewrsr.ch/3DA1mJs> (finding that 90% of all voters, 98% of Biden voters, and 81% of Trump voters said that the 2020 elections in their communities went well). Indeed, as the district court found, "in 2020, there was high confidence in the election outcome among Floridians," who "were among the highest in the nation in terms of

voter confidence.” *League*, 2022 WL 969538, at *29 (internal quotation marks and alteration omitted).

What is more, confidence in vote-by-mail improves over time following implementation. Jesse T. Clark, *Lost in the Mail? Vote by Mail and Voter Confidence*, 20 *Election L.J.: Rules, Pol., & Pol’y* 382, 392 (2021); see Natalie Adona & Paul Gronke, Democracy Fund, *Understanding the Voter Experience: The Public’s View of Election Administration and Reform* 24 (Oct. 2018), <https://bit.ly/3rmhfQi> (explaining that some older studies showing lower confidence in vote-by-mail may be becoming outdated as vote-by-mail has become more widespread). As the district court found, “once voters become habituated to using more convenient forms of voting—such as [vote-by-mail]—we should expect many voters to continue using that form of voting.” *League*, 2022 WL 969538, at *27. Indeed, Supervisors testified that, based on their observations, Florida voters in the 2020 election “saw that [vote-by-mail] was easy and secure and something they felt comfortable doing” and will “plan to continue voting by mail in the future.” *Id.*

To be sure, there are a few areas where voter confidence is lower, namely confidence in national results and confidence in initial changes to vote-by-mail procedures. But these issues do not justify the law Florida enacted. First, political scientists have noticed a dip in voter confidence in the conduct of national elections relative to the conduct of elections in voters’ own jurisdictions. R. Michael Alvarez,

et al., Cal. Inst. Tech., *Voter Confidence in the 2020 Presidential Election: Nationwide Survey Results 1* (Nov. 19, 2020), <https://bit.ly/3CCbL5Y> (finding that 81% of voters surveyed were confident that votes were counted as intended in their county, 78% in their state, and 58% across the nation). Specifically, voters are least confident in how elections are administered in other states. *Id.* This, however, is “a polling truism: People are generally more positive about things closer to home than what is happening nationally.” Karlyn Bowman & Samantha Goldstein, *Voices on the Vote: Impediments and Confidence in the 2020 Election 11* (May 2021), <https://bit.ly/3FtpCNS>. If Florida’s goal is to improve Floridians’ confidence in local election administration, then SB 90 is a solution to a problem that hardly exists. And of course, SB 90 could not possibly address how voters feel about election security in *other* states.

Nonetheless, Florida construes SB 90 as a response to an alleged drop in voter confidence caused by federal court injunctions in election cases around the 2020 election. Fla. Br. 6. But Florida points to no evidence in the record supporting this newly manufactured rationale for SB 90, so its “*post hoc* rationalizations during litigation provide little evidence as to the actual motivations of the legislature.” *McCrary*, 831 F.3d at 238. Plus, it strains credulity to think that injunctions in myriad cases unrelated to drop boxes had anything to do with Florida’s specific

changes to drop-box rules that targeted Black voters with “surgical” precision. *League*, 2022 WL 969538, at *52.

If anything, SB 90 may *undermine* voter confidence. After reviewing all the evidence, the district court found that SB 90 was intended “to suppress turnout among” Black voters. *Id.* at *107. Public perceptions of voter suppression decrease voter confidence. For example, when voters in one study were asked why they doubted the fairness of elections, the biggest problem was voter suppression. Katherine Ognyanova, et al., *The COVID States Project: A 50-State COVID-19 Survey, Report #29: Election Fairness and Trust in Institutions* 13 (Dec. 2020), <https://bit.ly/3DLraSM>. By making it more challenging for voters—especially Black voters—to vote using their preferred method, SB 90 may create the very problem it purports to solve.

3. States have other means to promote voter confidence.

Finally, even if there were significant concerns among voters about election fairness or security, states can and have addressed them without imposing burdens on voters. Because messaging is a key driver of voter confidence, states can combat inaccurate messaging about elections—and avoid spreading disinformation themselves. For example, Connecticut hired disinformation experts who tracked and flagged disinformation campaigns, allowing election officials to publicly dispel falsities before they spread. Kasturi Pananjady & Dave Altimari, *Weeks After the*

Election, Secretary of the State's Efforts to Monitor Disinformation Campaigns Ended, Conn. Mirror (Jan. 18, 2021), <https://bit.ly/3nAQQMB>. Colorado bought Google ads to run along with search terms related to disinformation campaigns, so when someone Googled such a term, the top results were public service ads dispelling the disinformation. Nick Corasaniti & Davey Alba, *Facing a Deluge of Misinformation, Colorado Takes the Offensive Against It*, N.Y. Times (Oct. 20, 2020), <https://nyti.ms/3qQXpfN>. California launched a public education campaign in which voters who included an email address with their registrations would receive emails from the Secretary of State to increase voter awareness about election misinformation. Cal. Sec'y of State, *California Secretary of State Launches VoteSure Public Education Campaign Encouraging Voters to be Vigilant of Election Misinformation* (Oct. 29, 2018), <https://bit.ly/30G1MzU>. Thus, tools exist to attack one of the main sources of voters' lack of confidence—tools that, unlike SB 90, do not restrict voting methods.

States can also improve voter confidence through transparency. Before elections, officials can introduce themselves and voting equipment to the public through public service announcements and open houses, thereby increasing familiarity and trust. See Kelsey Kimber, *BOE Holds Open House Prior to Election*, The Register-Herald (Oct. 22, 2019), <https://bit.ly/2Z8s8d0> (describing an open house given by a local board of elections); Lonna Rae Atkeson & Kyle L. Saunders,

The Effect of Election Administration on Voter Confidence: A Local Matter?, 40 PS: Pol. Sci. & Pol. 655, 659 (2008) (suggesting that increasing voters' connections to their local election administrators will improve voter confidence). During elections, states can allow voters to track their mail-in ballots, so they know that their votes are counted. Steven Mulroy, *How to Track Your Mail-In Ballot*, The Conversation (Oct. 22, 2020), <https://bit.ly/3HGjoMs>. Indeed, Florida itself already has rigorous and transparent processes for approving voting systems, tabulating votes, and verifying mail-in ballots—which may explain the already-high rate of confidence in the state. *See, e.g.*, Fla. Stat. §§ 101.5601-101.595, 101.6925. Put simply, a state need not curtail ballot access to promote confidence.

* * * *

As Amici States' experiences demonstrate, it is possible to prevent fraud and promote confidence without constricting the right to vote. Moreover, there is no real problem with fraud or confidence to address. Even if there were, SB 90's specific provisions restricting the use of drop boxes would not help. Instead, those targeted provisions were, as the district court found, aimed at disenfranchising a specific group of voters.

CONCLUSION

The Court should affirm the district court's permanent injunction enjoining enforcement of SB 90's drop-box provisions.

Respectfully submitted,

LETITIA JAMES
Attorney General for the State of
New York

KARL A. RACINE
Attorney General for the District of
Columbia

BARBARA D. UNDERWOOD
Solicitor General

CAROLINE S. VAN ZILE
Solicitor General

JUDITH N. VALE
Deputy Solicitor General

ASHWIN P. PHATAK
Principal Deputy Solicitor General

ANDREA W. TRENTO
Assistant Solicitor General

/s/ Jeremy R. Girton
JEREMY R. GIRTON
ADAM J. TUETKEN
Assistant Attorneys General

Office of the Attorney General
28 Liberty Street
New York, NY 10005
(212) 416-8020
barbara.underwood@ag.ny.gov

Office of the Solicitor General
Office of the Attorney General
for the District of Columbia
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 724-2029
jeremy.girton@dc.gov

August 2022

On behalf of:

ROB BONTA
Attorney General
State of California

WILLIAM TONG
Attorney General
State of Connecticut

KATHLEEN JENNINGS
Attorney General
State of Delaware

KWAME RAOUL
Attorney General
State of Illinois

AARON M. FREY
Attorney General
State of Maine

BRIAN E. FROSH
Attorney General
State of Maryland

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts

DANA NESSEL
Attorney General
State of Michigan

KEITH ELLISON
Attorney General
State of Minnesota

AARON D. FORD
Attorney General
State of Nevada

HECTOR BALDERAS
Attorney General
State of New Mexico

ELLEN F. ROSENBLUM
Attorney General
State of Oregon

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania

PETER NERONHA
Attorney General
State of Rhode Island

ROBERT F. FERGUSON
Attorney General
State of Washington

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/s/ Jeremy R. Girton

JEREMY R. GIRTON

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/s/ Jeremy R. Girton
JEREMY R. GIRTON

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