UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., et al., *Plaintiffs*, v. CORD BYRD,[1] in his official capacity as Florida Secretary of State, et al., *Defendants*, REPUBLICAN NATIONAL COMMITTEE and NATIONAL REPUBLICAN SENATORIAL COMMITTEE, *Intervenor-Defendants.*	No. 4:21-cv-186-MW-MAF No. 4:21-cv-187-MW-MAF No. 4:21-cv-201-MW-MAF No. 4:21-cv-242-MW-MAF

THE SECRETARY'S POST-REMAND BRIEF

[1] Secretary Byrd has been "automatically substituted as a party." Fed. R. Civ. P. 25(d).

Introduction

Mere inconveniences aren't severe voting burdens. One election avenue can't be viewed in isolation. Promoting election security, uniformity, voter assistance, and voter confidence aren't just important governmental interests—they are compelling. So are ensuring that voter-registration forms get timely submitted by 3PVROs and freeing supervisors of elections from the difficulty of having to sort out-of-county forms dumped by 3PVROs. For these reasons, the Drop-Box Provision and the Registration-Delivery Provision pass the *Anderson-Burdick* gauntlet unscathed. Regardless of Plaintiffs' purported burdens, the provisions serve compelling governmental interests, are narrowly tailored, and outweigh Plaintiffs' purported burdens.

This Court should reject Plaintiffs' challenge to the two provisions.

Background

I. Florida makes it easy to register to vote. Floridians can register to vote through an online portal, the federal postcard application, or by picking up blank forms available at their local supervisor of elections office, libraries, and even the local Walmart. Fla. Stat. §§ 97.052(1)(b), 97.052, 97.053, 97.057, 97.0575, 97.058, 97.0583, 97.05831. Registered 3PVROs can also help applicants fill out and deliver the forms. Fla. Stat. § 97.0575(1), (3). Forms, moreover, can be delivered by mail or in person.

Florida makes it easy to vote, too. Floridians can do it in any one of three ways. *First*, they can vote in person on election day. *Second*, they can vote by mail for more than 30 days before an election, and return completed ballots through the mail,

commercial carriers like FedEx and UPS, their chosen designees, or drop box. *See* Fla. Stat. § 101.62(1), (4)(b). Or *third*, they can vote early at any early-voting site within their county. *See* Fla. Stat. § 101.657(1)(b), (d).

With Florida's ease of registering and voting comes risks of and related to voter fraud, election security, and administrative inconsistency. *See, e.g.*, Tr.3413:15-22 (discussing fraud complaints). That was true for drop boxes and 3PVRO efforts. Thus, the Florida Legislature passed, and the Governor approved, SB90. In relevant part, the bill contained two provisions:

- The Drop-Box Provision, which generally prohibits the use of drop boxes outside of regular voting hours and requires drop boxes to be continuously monitored by an employee of the supervisor of elections during those hours.
- The Registration-Delivery Provision, which requires 3PVROs to deliver voter-registration applications to the supervisor of elections in the county where an applicant resides within 14 days or before registration closes, whichever is earlier.

Again, neither of these provisions were passed or approved in a vacuum.

II. Start with the Drop-Box Provision. The record in this case shows that the 2020 election cycle was the first time that drop boxes were used statewide. *See* Fla. Stat. § 101.69(2) (2019). The statute then in effect prompted endless questions about its meaning. *E.g.*, Tr.3438:19-25. The State was also aware of acts of vandalism with drop boxes in the run-up to the 2020 general election. *E.g.*, Tr.3439:6-12. This confluence of questions and concerns prompted the State to issue guidance concerning its interpretation of the statute. Tr.3438:2-17.

Not all of the supervisors followed the resulting guidance. Tr.3439:1-3. SB90's sponsor in the Florida House voiced his frustrations about this lack of "uniformity." Exh.429 at Tr.9:24 – 10:5; *see also* Exh.426 at Tr.68:7-22. Even Democratic Representative Tant, when speaking of her home county, said that she "love[d] the fact that our lockboxes were manned," because that "go[es] a lot to some of the concerns about ballot harvesting," "security overnight," and assisting voters at the point at which the ballot was cast. Exh.1596 at Tr.116:14 – 117:2, 117:18-20. Representative Tant encouraged reform that would require other supervisors to do the same. *Id.*

The need for uniformity and security were two reasons that animated the State's interest in the Drop-Box Provision. The State's election director testified to this effect. Tr.3400:18 – 3401:9. Supervisor Doyle echoed the security concerns when discussing why he discontinued the use of unmanned, 24-hour drop boxes. Tr.3202:20 – 3203:24. Supervisor White, whose office followed the State's guidance, which was codified in the Drop-Box Provision, summed up the benefits. She explained that its requirements (1) serve as "an added layer of security" either to deter incidents or ensure there are witnesses to any incident, Tr.3154:2-15; (2) "aid[] in voter confidence" because her constituents appreciate handing their ballots to an actual person, Tr.3154:16-20; and (3) ensure that her staff can remind voters to sign the outer envelope of their ballot, which contributed to a decrease in the rejection rate for ballots. Tr.3155:15 – 3156:2; Exh.390. And, given the State's 7 P.M. election-day deadline for receipt of ballots, "staff is

instructed" to approach those waiting to deposit their ballots and to take "the ballots of all of those voters that are waiting in line." Tr.3156:23 – 3157:6.

III. The Registration-Delivery Provision wasn't created in a vacuum, either. There had been numerous complaints of 3PVROs missing the "book closing" deadline by submitting voter-registration forms after the final day to register to vote for an upcoming election. *E.g.*, Tr.3421:25 – 3422:3; Exh.1556 at 7-24, 45-46, 51-52, 57-62, 73-74, 123-24; *see also* Tr.3164:18-25; *cf.* Exh.1562 (binder compiling summary of voter registration issue); Exh.1561 (summarizing same); Exh.1556 (binder compiling 3PVRO complaints); Exh.1555 (summarizing same). The Registration-Delivery Provision was designed to make sure that registration forms get submitted on time, and that a handful of supervisors aren't processing registration forms for voters who may reside elsewhere. *E.g.*, Tr.3164:18-21, 3167:10 – 3168:15. After all, a 3PVRO that submits an untimely form may disenfranchise a voter.

IV. As Plaintiffs recognize in their post-trial brief, Florida has further amended its election laws. After SB90, SB524 was passed and approved. SB90 stated that drop boxes "at an office of the supervisor" could be provided outside of early-voting dates and times, and SB524 stated that a supervisor's "permanent branch office" is an office that "meets the criteria set forth in s. 101.657(1)(a) for branch offices used for early

voting[2] and is open for at least the minimum amount of hours prescribed by s. 98.015(4).[3]" The Secretary has interpreted SB90 and SB524 to mean "that the only locations a supervisor may place" drop boxes "*outside of the hours and days of early voting* are at the supervisor's main office and a permanent branch office that meets the three criteria discussed in" an advisory opinion. Letter from the Office of the Secretary of State, *Re: DE 22-07 Secure Ballot Intake Stations Placed at Offices of the Supervisor of Elections — §§ 101.69(2)(a), 101.657(1), 98.015(4), Florida Statutes* (Oct. 4, 2022) (emphasis in the original); *see also* Doc.763 at 14.[4]

SB7050 was also passed and approved after SB90. Among other things, it reduced from 14 days to 10 days the time for 3PVROs to deliver completed voter-registration forms to supervisors, and increased penalties for late-submitted forms.

Argument

Plaintiffs fail in their challenge to the Drop-Box Provision and the Registration-Delivery Provision. Plaintiffs claim that minor inconveniences constitute severe voting burdens, fail to account for all of the ways that Florida makes it easy to register to vote and vote, and never do provide evidence of the magnitude of any voting-related burden

[2] Under section 101.657(1)(a), "[i]n order for a branch office to be used for early voting, it shall be a permanent facility of the supervisor and shall have been designated and used as such for at least 1 year prior to the election."

[3] Under section 98.015(4), "[a]t a minimum, the office of the supervisor must be open Monday through Friday, excluding legal holidays, for a period of not less than 8 hours per day, beginning no later than 9 a.m."

[4] Docket references are to the upper-left, blue page number, not to the bottom-center, black page number.

on the electorate. Plus, the State's interests in security, uniformity, voter assistance, and voter confidence are compelling governmental interests and outweigh any purported burden.

I. The *Anderson-Burdick* Standard.

Anderson-Burdick balancing is a "flexible standard." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). "Under this" approach, "the level of scrutiny" applied to an election regulation "depends on the severity of the burdens" imposed by the regulation. *Indep. Party of Fla. v. Sec'y, State of Fla.*, 967 F.3d 1277, 1281 (11th Cir. 2020). A regulation that imposes a "[s]evere" burden on voting "must be narrowly tailored to advance a compelling state interest," while a "reasonable, nondiscriminatory" regulation need only be justified by an important governmental interest. *Id.*

Mere "inconvenience[s]" can't tilt the balance. *Brnovich v. DNC*, 141 S. Ct. 2321, 2338 n.11 (2021). After all, every election regulation imposes a burden of some kind:

> Voting takes time and, for almost everyone, some travel, even if only to a nearby mailbox. Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules. . . . [V]oting necessarily requires some effort and compliance with some rules, [and voters] must tolerate the "usual burdens of voting."

Id. at 2338 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U. S. 181, 198 (2008)). Indeed, "[v]oters must" "take reasonable steps and exert some effort to ensure," for example, "that their ballots are submitted on time." *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020). Just because a voter's failure to comply with an

election regulation may require the "reject[ion]" of his "ballot[]" doesn't mean that the regulation per se imposes severe burdens. *Id.* at 1281.

Anderson-Burdick also does not operate as a "one-way ratchet," forever prohibiting States from modifying laws "in a way that might arguably burden some segment of the voting population's right to vote." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 635 (6th Cir. 2016). To the contrary, cognizable burdens under *Anderson-Burdick* must "represent a significant increase over the usual burdens of voting." *Curling v. Raffensperger*, 50 F.4th 1114, 123 (11th Cir. 2022) (quoting *Crawford*, 553 U.S. at 198). They must, for example, pose a significant "risk of disenfranchisement." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1320 (11th Cir. 2019).

Purported burdens can't depend on an isolated reading of certain provisions of the election code; the code as a whole must be considered. *E.g.*, *Brnovich*, 141 S. Ct. at 2344 (considering a State's "political process" as a whole). This was the holding of *New Georgia Project v. Raffensperger*, where the Eleventh Circuit ruled that Georgia's absentee-ballot deadline did "not implicate the right to vote at all," given that "Georgia has provided numerous avenues to mitigate chances that voters will be unable to cast their ballots." 976 F.3d at 1281.

In defending an election regulation, moreover, a State can offer post-hoc rationalizations to justify the regulation. *Mays v. LaRose*, 951 F.3d 775, 789 (6th Cir. 2020). As the Eleventh Circuit put it, "*Anderson* does not require any evidentiary showing or burden of proof to be satisfied by the state government," "[n]or do the

more recent decisions in *Burdick* and *Crawford*." *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009) (citations omitted).

Duke v. Cleland doesn't counsel a different result. 5 F.3d 1399 (11th Cir. 1993). *Duke* was decided on a motion to dismiss, which made it "impossible" for the Eleventh Circuit "to undertake the proper review required by the Supreme Court" and weigh burdens against governmental interests. *Id.* at 1405. True, the court stated (in a footnote) that the "existence of a state interest" "is a matter of proof" that depends on "a factual determination by the district court." *Id.* at 1405 n.6. But this doesn't mean that a State must point to contemporaneous evidence of voter fraud to justify its election regulation. That would be inconsistent with (later) Eleventh Circuit, *Common Cause/Ga.*, 554 F.3d at 1353, and Supreme Court case law, *Brnovich*, 141 S. Ct. at 2348. Instead, *Duke* is best read—not as requiring an "evidentiary showing or burden of proof to be satisfied by the state government," *Common Cause/Ga.*, 554 F.3d at 1353—but as stating that weighing burdens against interests is usually best done after conducting "discovery"—i.e., not on a motion to dismiss, *Duke*, 5 F.3d at 1405.

Weighing burdens against interests is an important aspect of *Anderson-Burdick*: "[h]owever severe the burden," the regulation must be "warranted 'by relevant and legitimate state interests sufficiently weighty to justify the limitation.'" *Indep. Party of Fla.*, 967 F.3d at 1281-82 (quoting *Common Cause/Ga.*, 554 F.3d at 1352). But this "examination offers no license for 'second-guessing and interfering with' state decisions; the Constitution charges States, not federal courts, with designing election

rules." *Curling*, 50 F.4th at 1122 (quoting *New Ga. Project*, 976 F.3d at 1284). *Anderson-Burdick* can't be used as a means to "redline" and replace a reasonable election regulation with a "'better' option offered by" a plaintiff. *Id.* at 1125.

II. Plaintiffs' Challenge to the Drop-Box Provision Fails.

In their post-trial brief, Plaintiffs break down the provision into three "elements": (1) the In-Person Monitoring Requirement, (2) the Hours Restrictions, and (3) the Enforcement Penalty. Doc.763 at 11. Plaintiffs claim that each element imposes severe burdens on the right to vote and isn't sufficiently justified by governmental interests. Plaintiffs are wrong.

As an initial matter, though, note that Plaintiffs don't challenge SB524's change to Florida's drop-box rules or the Secretary's subsequent interpretation of SB524. That's because this case concerns a challenge to SB90, not to SB524. Plaintiffs' operative complaints contain no allegations regarding SB524. Plaintiffs neither submitted any evidence of how SB524 affected elections in Florida, and the Secretary had no opportunity to provide evidence relevant to SB524.

Even if Plaintiffs had attempted to challenge SB524, it would be barred. The Eleventh Circuit's remand was for a limited purpose: "for the district court to determine whether the drop-box and registration-delivery provisions [of SB90] unduly burden the right to vote under the First and Fourteenth Amendment." *League of Women Voters of Fla. v. Fla. Sec'y of State*, 66 F.4th 905, 922 (11th Cir. 2023) ("*LWVFL*").

A. Ultimately, for the limited issue now before this Court, Plaintiffs contend that the In-Person Monitoring Requirement will reduce the amount of drop boxes available and will intimidate voters and chill turnout. Doc.763 at 26-30, 36-38. Not so.

Plaintiffs' complaints aren't burdens under *Anderson-Burdick* because Plaintiffs fail to show how the In-Person Monitoring Requirement "implicate[s] the right to vote" when viewed within the context of the broader election code. *New Ga. Project*, 976 F.3d at 1281; *see also Brnovich*, 141 S. Ct. at 2344. Assuming drop-box availability is reduced, as Plaintiffs say, returning a ballot in a drop box is one of *four* different ways a person can submit a vote-by-mail ballot—and vote-by-mail is itself one of *three* different ways to cast a ballot, together with voting in person on election day and voting in person during the early voting period. Because Florida "has provided numerous avenues to mitigate chances that voters will be unable to cast their ballots," *New Ga. Project*, 976 F.3d at 1281, a possible reduction in drop-box availability doesn't burden voting or implicate the right to vote. More specifically, Plaintiffs can't show—and didn't show at trial—that reducing the availability of one of the four methods of returning a vote-by-mail ballot would disenfranchise any voter.

The same is true with Plaintiffs' fears of interacting with others while voting. This is not a cognizable burden under *Anderson-Burdick*; it's just a usual burden of voting. Interacting with other people (including governmental officials) is part of the voting process, be it interacting with others in line during election-day voting or early voting, or (possibly) handing a ballot to a postal worker, commercial carrier, or designee.

The idiosyncratic difficulties of some voters do not mean that "the statute's broad application to *all* [Florida] voters" unconstitutionally burdens their right to vote. *Crawford*, 553 U.S. at 202-03 (emphasis added). To the extent "[d]isparate impact matters under *Anderson-Burdick*," *League of Women Voters of Fla., Inc. v. Lee*, 566 F. Supp. 3d 1238, 1261 (N.D. Fla. 2021), Plaintiffs still must "establish, on an absolute level, the magnitude of the burden on the discrete subgroup," *Mi Familia Vota v. Hobbs*, 608 F. Supp. 3d 827, 846 (D. Ariz. 2022); *see also Mays*, 951 F.3d at 784-85 ("Precedent from this court and the Supreme Court suggests that we must evaluate this burden from the perspective of only affected electors and within the landscape of all opportunities that [the State] provides to vote."). And the few voters who truly cannot interact with another person have myriad other ways to vote.

Indeed, the record shows that Plaintiffs can and have overcome the purported burdens. Some Plaintiffs previously used a monitored drop box without incident, *see, e.g.*, Tr. 116:19 –117:19, and others voted in person without incident, despite the presence of governmental officials, *see, e.g.*, Tr. 172:4-25.

Thus, the In-Person Monitoring Requirement neither burdens nor implicates the right to vote. It passes the *Anderson-Burdick* test.

B. Plaintiffs next contend that the Hours Restrictions will severely burden voters who rely on using drop boxes before early voting, voters who rely on drop boxes to cast their ballots in the last week before the election when it's too late to mail a ballot, and voters who lack flexible schedules. Doc.763 at 30-38.

Again, the Hours Restrictions neither burden nor implicate the right to vote. *New Ga. Project*, 976 F.3d at 1281. Like the In-Person Monitoring Requirement, Plaintiffs fail to account for all of the different ways for Floridians to return their completed ballots or vote—including using commercial carriers and the U.S. Postal Service to return a ballot or using an outside-of-early-voting drop box at a supervisor's office.

Even so, Plaintiffs contend that some voters may have inflexible schedules, which will purportedly make it harder for them to use drop boxes, and that there are some potential issues with using the U.S. Postal Service to deliver ballots. Neither argument moves the needle.

True, some voters may have an inflexible schedule. For example, Mr. Madison alleged scheduling inflexibility, despite his standing tee-times and hours-long dog walks. Tr.711:14-22. But all election regulations impose some sort of timing limitation, and Plaintiffs' claims of inflexibility are made more unconvincing in light of the fact that drop boxes remain available—at the very least—during early voting at any early-voting site within their county. That covers workdays and days off work, even for those with odd schedules or standing tee-times. And "though delays in the postal service *may* (not *will*) delay when some voters" submit their "ballots, all of" the other "avenues" to vote in Florida "remain open to any and all voters." *New Ga. Project*, 976 F.3d at 1281 (emphases in the original).

Plaintiffs' arguments boil down to arguments of convenience. But an "inconvenience" isn't a voting burden. *Brnovich*, 141 S. Ct. at 2338. Nor is using a bit

of foresight and planning in voting. *Id.*; *New Ga. Project*, 976 F.3d at 1282. The "burden on a voter to ensure that" a ballot is timely placed in a drop box "is not meaningfully smaller than the burden of" ensuring "that a ballot is postmarked by Election Day." *New Ga. Project*, 976 F.3d at 1282. Which is to say, it's no burden at all.

C. Plaintiffs contend that the Drop-Box Provision, as a whole, severely burdens disabled voters. Doc.763 at 38-41. To begin, Plaintiffs' arguments should be made in an ADA-style cause of action, not an *Anderson-Burdick* one. Under the *Anderson-Burdick* test, Plaintiffs must prove that the Drop-Box Provision imposes a "significant increase over the usual burdens of voting" for "most voters." *Crawford*, 553 U.S. at 198. The burdens that Plaintiffs claim for a small class of voters are "irrelevant" because they are "'special burden[s] on' some voters," not categorical burdens on all voters. *Id.* at 204 (Scalia, J., concurring) (citation omitted).

The *Anderson-Burdick* test wasn't designed to account for burdens on only disabled voters, which differ from ordinary or even severe burdens on voters generally. Even so, Plaintiffs' arguments are unconvincing, again, for the reasons explained above. The right to vote isn't implicated by the Drop-Box Provision. *New Ga. Project*, 976 F.3d at 1281. Even if a disabled voter has a limited schedule, Doc.763 at 39, or "incontinence" issues "caused by chronic complications from surgery," Doc.763 at 40, or parking issues, Doc.763 at 40-41, or anxiety issues, Doc.763 at 41, that disabled voter—who still wishes to use the drop-box method of voting, despite the other ways

to return a ballot or vote—can still have a designee return his ballot via drop box. *See, e.g.*, Fla. Stat. § 101.051.

D. Finally, Plaintiffs argue that the Drop-Box Provision isn't sufficiently justified by governmental interests in security, uniformity, voter assistance, and voter confidence. Plaintiffs make two main errors with their argument. *First*, Plaintiffs discount how one governmental interest interacts with and reinforces another. Voters are assisted by uniform election rules and administration, and voter confidence is boosted by election security. The Court can't view those interests in isolation. The interests interact with one another, as made clear through the testimony of election officials like Director Matthews (on uniformity), *e.g.*, Tr.3400:16 – 3401:9, and Supervisors White and Doyle (on security and the confidence engendered by staffed drop boxes), *e.g.*, Tr.3154:2-20, 3202:20-25.

Second, the governmental interests here are compelling: the State has a "compelling interest in preserving the integrity of its election process," which includes maintaining voter "[c]onfidence" and preventing "[v]oter fraud," *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)), as well as "compelling interests" in "maintaining" election "fairness, honesty, and order," and "avoiding confusion, deception, and even frustration of the democratic process," *Green v. Mortham*, 155 F.3d 1332, 1335 (11th Cir. 1998) (quoting *Burdick*, 504 U.S. at 433, and *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)). The Drop-Box Provision, with its three elements, meets those ends.

1. The Drop-Box Provision prevents fraud and promotes security. As the Eleventh Circuit held, "the record" here "includes undisputed evidence of fraud" and shows that SB90's sponsors were concerned about fraud and security. *LWVFL*, 66 F.4th at 925-28. The In-Person Monitoring Provision prevents fraud and promotes security by requiring a person—not merely a camera—to guard against individuals who wish to tamper with a drop box and potentially destroy ballots. The record identifies instances where drop boxes were tampered with. *See, e.g.*, *id.* at 928; Tr.3439:6-12. And commonsensically, the In-Person Monitoring Provision prophylactically deters bad-actors from committing drop-box fraud, tampering, and the like. *E.g.*, Tr.3154:2-11, 3401:5-9. The Hours Restriction promotes security by imposing a range of dates and times where drop boxes can be available, as opposed to the largely unregulated and non-standard drop-box dates and times before SB90. And the Enforcement Penalty promotes security by ensuring that supervisors actually enforce SB90's ballot-security measures, such as the In-Person Monitoring Requirement.

Plaintiffs offer alternatives to the Drop-Box Provision, like using cameras instead of in-person monitoring. Doc.763 at 43. But the *Anderson-Burdick* standard doesn't permit "second-guessing and interfering with state decisions" or coming up with "better" policy options. *Curling*, 50 F.4th at 1122, 1125. Instead, courts must weigh voting burdens (if any) against governmental interests, not advance policies that Plaintiffs or some supervisors might like. Doc.763 at 44-46. Finally, contrary to Plaintiffs' contentions, the State was aware of acts of vandalism with drop boxes in the

run-up to the 2020 general election, and to the extent that a supervisor didn't experience issues with security, the State doesn't need to wait until a security issue occurs to take reasonable actions. *LWVFL*, 66 F.4th at 925-26.

2. The Drop-Box Provision, including its Hours Restrictions, promotes uniformity. Again, before SB90, drop-box rules and administration were variable. Some supervisors had unmanned boxes, and supervisors had drop-box access that "varied considerably." *LWVFL*, 66 F.4th at 928. The Drop-Box Provision standardizes drop-box rules, and its Enforcement Penalty ensures that the rules are followed and that drop-box administration is uniform.

Plaintiffs "concede" that "there may be a legitimate state interest in promoting uniformity in *minimum* access to drop boxes," but they say that "there is no legitimate state interest in creating laws that 'promote uniformity' by *reducing access*." Doc.763 at 48 n.9 (emphases in the original). Respectfully, this distinction makes no sense: either a regulation promotes uniformity, or it doesn't. Plaintiffs can't create a uniformity exception to regulations they don't like. Here, even Plaintiffs acknowledge that the Drop-Box Provision promotes uniformity.

Still, they try hard to resist this conclusion. For example, they contend that the In-Person Monitoring Requirement "is likely to create further disparities in access to drop boxes," Doc.763 at 49, and that the Hours Restrictions are not uniform because "early voting hours are highly discretionary and variable," Doc.763 at 50. Neither argument is persuasive. Before SB90, supervisors took different "approaches to

monitoring," *LWVFL*, 66 F.4th at 928, and because of SB90, all drop boxes must be monitored—thus promoting uniformity in this respect. And regarding the Hours Restrictions, uniformity doesn't mean absolute rigidity and a lack of discretion. Appellate courts *uniformly* apply an abuse-of-discretion standard of review, despite the standard's variability. Again, it's important to note the lack of drop-box uniformity before SB90. The Hours Restrictions, while allowing some discretion and variability, still standardize dates and times where drop boxes can be provided.

3. The Drop-Box Provision promotes voter assistance. Plaintiffs are wrong in saying that the In-Person Monitoring Requirement can "only" be "conceivably support[ed]" by the interest "in assisting voters." Doc.763 at 51. Voters are assisted by clear election rules (which the Hours Restrictions promote) that are faithfully administered by supervisors (which the Enforcement Penalty promotes). "When an election is close at hand, the rules of the road must be clear and settled." *Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J., concurring in grant of applications for stay). The opposite is chaos, which benefits no one, including voters.

Plaintiffs are also wrong in suggesting that the In-Person Monitoring Requirement won't promote voter assistance. Even Democratic Representative Tant said that it would promote voter assistance. Exh.1596 at Tr.116:14-117:2, 117:18-20. It's commonsensical to conclude that an employee of the supervisor's office can assist voters while protecting a drop box. *E.g.*, Tr.3155:15 – 3156:2, 3400:24 – 3401:4.

Plaintiffs take aim at Supervisor White's testimony that in-person monitoring at drop boxes was responsible for the decreased rate of vote-by-mail ballot rejection in 2020. Doc.763 at 51. They contend that "the county" didn't provide "evidence to that effect." Doc.763 at 51. But Supervisor White's testimony *is evidence*, and in response, Plaintiffs have only speculation: the decreased rate was "instead just as *likely* attributable to the then-new requirement for the 2020 election (as a result of litigation) that Supervisors offer the voter a chance to cure" his or her "signature or prove" his or her "identity if the ballot is missing a signature." Doc.763 at 51-52 (emphasis added). These criticisms aren't convincing.

4. The Drop-Box Provision promotes voter confidence. Supervisor White's testimony supports this conclusion. Doc.763 at 52-53. Still, Plaintiffs rely on self-serving statements of individual Plaintiffs, and they quote statements from legislators for the proposition that the 2020 election was run well and that further election changes weren't needed. But good elections don't tie Florida's hands from improving them. And here, the record is clear—as the Eleventh Circuit recognized—that there were security and administrative issues with drop boxes. The Florida Legislature responded by enacting SB90's Drop-Box Provision. Unquestionably, voter confidence increases when a State, rather than rest on its laurels, responds to election issues and makes election regulations clearer and more uniform.

E. Taking stock, Plaintiffs haven't asserted any actual voting burdens that the Drop-Box Provision imposes. Therefore, the Drop-Box Provision need only be

justified by important governmental interests. After all, the provision is a reasonable election regulation (for the reasons described above), and there isn't sufficient evidence to conclude that the provision has a discriminatory impact (as the Eleventh Circuit found, *LWVFL*, 66 F.4th at 936). Even so, the provision would even satisfy strict scrutiny. As described above, the State's interests are compelling, and the provision was narrowly tailored to meet those interests.

III. Plaintiffs' Challenge to the Registration-Delivery Provision Fails.

In their post-trial brief, Plaintiffs break down the Registration-Delivery Provision into "two operative elements": (1) its requirement that completed voter-registration forms be submitted to the supervisor of elections's office where the applicant resides, and (2) its 14-day submission requirement and penalty for untimely delivered forms. Doc.763 at 5. Here, the first element will be called the "County Requirement," and the second will be called the "Deadline Requirement." Note, though, that the Deadline Requirement has been subsequently amended by SB7050. The 14-day deadline has been changed to 10 days, and the penalties have changed as well.

This Court shouldn't consider the challenge to the Deadline Requirement, for two reasons. *First*, this case is a challenge to SB90, not SB7050. Plaintiffs seek partial relief from SB7050 on remand. They say that "[i]f the Court grants the relief sought concerning SB 90's Registration Delivery Provision, it should also grant relief as to the relevant provisions of SB 7050." *See* Doc.763 at 17. But that route is foreclosed to Plaintiffs because the Eleventh Circuit's remand was for a limited purpose: "for the

district court to determine whether the drop-box and registration-delivery provisions [of SB90] unduly burden the right to vote under the First and Fourteenth Amendment." *LWVFL*, 66 F.4th at 922.

Even if this Court affords relief against SB90, SB7050 still is on the books. Plus, Plaintiffs have submitted no evidence of how SB7050 affects voters, 3PVROs, and election administrators. Instead of evidence of this effect (if any), Plaintiffs offer speculation: "it is reasonable to assume that these provisions make the Registration Delivery Provision even more onerous for 3PVROs than as enacted in SB 90." Doc.763 at 62. No, it is not. Plaintiffs need proof, not assumptions. And, as was the case for Plaintiffs' attempts to challenge SB524, the Secretary has had no opportunity to admit evidence to the contrary.

Second, Plaintiffs can separately challenge SB7050's effects on 3PVROs. Indeed, there is active litigation in this Court doing so. *See, e.g.*, *NAACP v. Byrd*, 4:23-cv-215, Doc.184 (N.D. Fla. 2023). Plaintiffs here can attempt to intervene in that lawsuit, and along with the plaintiffs in those active cases, provide evidence of SB7050's effects (if any) on 3PVROs.

At base, this Court shouldn't allow stale evidence, based on a now-written-over-election regulation, to invalidate a new regulation beyond the scope of the Eleventh Circuit's limited remand. Still, the State will address Plaintiffs' *Anderson-Burdick* arguments.

Plaintiffs conclude that the Registration-Delivery Provision imposes a severe burden on voters, particularly black voters. Doc.763 at 48. But Plaintiffs haven't established that through the evidence in this case.

Plaintiffs fall back on this Court's conclusion, which the Eleventh Circuit didn't overturn, that the provision impacts 3PVROs and that black voters use 3PVROs in a greater proportion than white voters. *League of Women Voters of Fla., Inc. v. Lee*, 595 F. Supp. 3d 1042, 1107-08 (N.D. Fla. 2022); *LWVFL*, 66 F.4th at 937-38. But this conclusion in itself doesn't help Plaintiffs. This earlier conclusion was based on an *Arlington Heights* analysis, not an *Anderson-Burdick* analysis. The former looks to disparate impacts, regardless of magnitude. The latter concerns burdens on the right to vote where the magnitude is a crucial part of the analysis. Even Plaintiffs recognize in another portion of their papers that the *Arlington Heights* and *Anderson-Burdick* analyses are different. Doc.763 at 9 ("The legal standard and relevant evidence when evaluating these provisions under the *Anderson-Burdick* framework is fundamentally different from the standards and evidence used to determine whether the Challenged Provisions were motivated by a racially discriminatory motivation or had a discriminatory impact.").

Another way to look at the problem is this: the earlier *Arlington Heights* conclusion says very little about burdens on voters at large. Some 3PVROs and some voters are affected in some way. But we don't know whether this effect is a ripple or a tidal wave. The evidence in the record doesn't answer the question, one way or the other. Neither this Court nor the Eleventh Circuit said anything on the matter. Plaintiffs haven't

established what the effects—the purported burdens—look like either. Plaintiffs haven't demonstrated, for example, how many voters won't be registered to vote because of the County Requirement or Deadline Requirement—white, black, Latino voter, or otherwise. That matters: every election regulation imposes an effect, an impact, a burden of some kind. *See, e.g.*, *Brnovich*, 141 S. Ct. at 2338; *Crawford*, 553 U. S. at 198. Yet only *severe* burdens trigger strict scrutiny under *Anderson-Burdick*, and there's no evidence of such a burden in this case.

Relatedly, Plaintiffs haven't properly considered the Registration-Delivery Provision within the larger context of the election code. They haven't established or quantified how many voters won't be registered to vote *and won't register to vote using an alternative registration method*, like registering online, filling out and delivering an application themselves, or using the mail. Again, that matters: Plaintiffs' burdens must be viewed in light of all of the ways that a voter may register to vote; a burden on registration would be severe, for example, if there was only one means to register and that one means was the subject of State regulation. Yet, in Florida, 3PVROs are but one of several means to register. Plaintiffs fail to adequately appreciate that. At most, they offer up some difficulties that voters *may* encounter in using the alternative methods, like that the mail may delay a registration return. Doc.763 at 58-59. This simply isn't enough. *See New Ga. Project*, 976 F.3d at 1281 ("[D]elays in the postal service *may* (not *will*) delay when some voters" submit their registration).

As such, the Registration-Delivery Provision need only be justified by an important governmental interest. It easily surpasses that bar—and even surpasses strict scrutiny, though such scrutiny doesn't apply here.

When reviewing the record, the Eleventh Circuit approved of multiple motivations and governmental interests animating the Registration-Delivery Provision. *LWVFL*, 66 F.4th at 930-31. Those motivations included that the provision is "a 'good commonsense regulation,'" that it "was a legislative 'priority'" of Mr. Ramba's client (the supervisors), and that 3PVROs were "turning in voter-registration forms after the registration deadline" and "would deposit large numbers of registration forms in populous counties, burdening the supervisors with the task of 'separat[ing] out their files for them.'" *Id.* at 930. These and other problems harmed voters, deterred voters, and burdened election officials. *Id.* And there's more of that evidence that the Eleventh Circuit didn't discuss. Director Matthews and the Department of State, for example, spoke with the Florida Legislature about "third-party voter registration organizations," Tr.3397:13-24, 3402:18-22, and the Florida Legislature wanted to "know about third-party voter registration organizations," Tr.3409:25.

Plaintiffs state that the "record is clear that no other contemporaneous justifications were offered for these provisions of SB 90," other than cleaning up the election code and purportedly responding to a lawsuit. Doc.763 at 64. But contemporaneous justifications aren't limited to things said or done on the legislative record. Even *Arlington Heights* recognizes this. *See Vill. of Arlington Heights v. Metro. Hous.*

Dev. Corp., 429 U.S. 252, 268 (1977) (distinguishing between "contemporary statements by members of the decisionmaking body," and "minutes of its meetings, or reports," all of which are appropriate evidence). Instead, State justifications must be "genuine, not hypothesized or invented post hoc in response to litigation." *United States v. Virgina*, 518 U.S. 515, 533 (1996) (applying intermediary scrutiny). Conversations and other shared concerns are not hypothesized or post hoc.

Here, there was genuine evidence that 3PVROs were delivering forms late, thus creating a distinct likelihood of disenfranchising voters. And there was genuine evidence that supervisors were having a difficult time sorting through 3PVRO-submitted forms. Both Director Matthews and Mr. Ramba spoke with the Florida Legislature about 3PVRO issues, and 3PVROs were having issues concerning late-submissions and form dumping; specific instances of 3PVROs being dilatory were given to the legislature. *See, e.g.*, Tr.3119:13 – 3120:18, 3397:13-24, 3409:25, 3413:15-22.

As explained above, the State has "compelling interests" in "maintaining" election "fairness, honesty, and order," and "avoiding confusion, deception, and even frustration of the democratic process." *Green*, 155 F.3d at 1335 (cleaned up). That undoubtedly includes making sure 3PVROs don't disenfranchise voters by untimely submitting their registration forms, and includes making sure supervisors can timely process forms.

Plaintiffs doubt the legitimacy and strength of the State's interests. Doc.763 at 66. They claim that the registration-form dumping concerns weren't reflected in the

legislative record and that there wasn't "any corroborating documents or testimony indicating that Mr. Ramba—or anyone else—actually conveyed this interest to the Legislature during consideration of SB 90." Doc.763 at 66. But Mr. Ramba's testimony is evidence, and this Court credited his testimony throughout its final judgment. More is not needed.

Instead, Plaintiffs distract with irrelevant points. They claim that 3PVROs "will require additional compliance processes and additional time to deliver the application to the correct county, which will only delay submission of registration application forms," and that "Mr. Ramba's testimony did not substantiate that any Supervisors wanted" the 3PVRO changes brought about by SB90. Doc.763 at 67. Even if true, neither claim is relevant.

The State's interest is in *supervisors* timely processing registration forms, not the 3PVROs. Supervisors were dealing with "applications that" were "from all over the state" "being handed in to the nearest Supervisor of Election, even though that" was "not an application pertaining to" "their voter constituent." Tr.3426:17-20. This problem "placed an undue burden on a lot of Supervisors of Elections in high metro areas where a voter drive was conducted." Tr.3426:14-15. That two supervisors from big counties (Supervisors White from Miami-Dade and Latimer from Hillsborough) may not have had this problem doesn't mean that the problem didn't exist. Doc.763 at 68.

It's also irrelevant whether certain supervisors wanted the County Requirement or the Deadline Requirement. Again, Mr. Ramba conveyed these concerns to the Florida Legislature as a priority of his organization—representing the interests of the State's 67 supervisors. Tr.3119:8-15.

The Registration-Delivery Provision is narrowly tailored to serve compelling governmental interests. The Deadline Requirement ensures that 3PVROs timely submit registration forms, instead of relying on a nebulous (and easily forgotten) "promptness" requirement. And the County Requirement relieves supervisors of the burden of having to sort out forms that should have been sent to other supervisors. What's more, the law provides a safe harbor for 3PVROs—they can submit completed voter registration forms, regardless of the applicant's county of registration, directly to the Secretary of State. *See* Fla. Stat. § 97.0575 (allowing 3PVROs to deliver completed forms "to the division *or* supervisor of elections in the county in which the applicant resides" (emphasis added)). These run-of-the-mill provisions facilitate efficient election administration and improve voter confidence in Florida's elections.

Conclusion

This Court should reject Plaintiffs' challenge to the Drop-Box Provision and the Registration-Delivery Provision. At bottom, Plaintiffs bear the burden of showing that the provisions unduly burden the right to vote within the context of the broader election code. They haven't done that. Even if they had, the State's interests far outweigh any burdens.

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2024, I electronically filed the foregoing with the Clerk of Court by using CM/ECF, which automatically serves all counsel of record for the parties who have appeared.

/s/ Mohammad O. Jazil
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