No. 22-11133 (Related with Nos. 22-11143, 44, 45)*

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., et al.
Plaintiffs-Appellees,

v.

LAUREL M. LEE, in her official capacity as Secretary of State of Florida, et al.
Defendants-Appellants,

NATIONAL REPUBLICAN SENATORIAL COMMITTEE and
REPUBLICAN NATIONAL COMMITTEE,
Intervenor-Defendants–Appellants.

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

TIME-SENSITIVE MOTION FOR
STAY PENDING APPEAL

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* Appellants filed notices of appeal in four district court cases that were consolidated for trial, so there are four appellate court dockets—22-11133, 22-11143, 22-11144, 22-1145. Only one of these dockets—22-111333—is currently open. This motion applies to all four.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Per Rule 26.1 and Circuit Rule 26.1, Appellants certify that the following have an interest in the outcome of this appeal:

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242. Swan, Leslie, *Defendant*
243. Tarpley, Carlton, *Attorney for Plaintiffs-Appellees*
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245. Todd, Stephen, *Attorney for Defendant*
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247. Tuetken, Adam, *Attorney for Amicus*
248. Turner, Ron, *Defendant*
249. UnidosUS, *Plaintiff-Appellee*
250. Valdes, Michael, *Attorney for Defendant*
251. Vicari, Kelly, *Attorney for Defendant*
252. Villane, Tappie, *Defendant*
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254. Walker, Gertrude, *Defendant*
255. Walker, Mark, *District Court Judge*
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259. White, Christina, *Defendant*
260. Wilcox, Wesley, *Defendant*
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262. Wright, Brenda, *Attorney for Plaintiffs-Appellees*
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264. Zender, Thomas, *Attorney for Plaintiffs-Appellees*

The Republican National Committee and National Republican Senatorial Committee have no parent corporation, and no corporation owns 10% or more of their stock. No publicly traded company or corporation has an interest in the outcome of this case or appeal. Per Circuit Rule 26.1-2(c), Appellants certify that the CIP contained in this motion is complete.

Dated: April 11, 2022

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/s/ Tyler R. Green
Counsel for RNC and NRSC

/s/ Andy Bardos
Counsel for Supervisors Hays & Doyle

/s/ Henry C. Whitaker
Counsel for Attorney General Moody

INTRODUCTION

"Our founding charter never contemplated that federal courts would dictate the manner of conducting elections." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1269 (11th Cir. 2020). Yet Florida's elections are now dictated by a single judge in Tallahassee. Chief Judge Walker has subjected the entire State of Florida to preclearance—something that, even before *Shelby County*, the Voting Rights Act didn't do. *See Jurisdictions Previously Covered by Section 5*, DOJ, bit.ly/3Obni3o (VRA covered only 5 Florida counties). Why? Because Chief Judge Walker decided that a handful of the 32 sections in Senate Bill 90 simply had to be intended to discriminate against black Floridians.

That is not remotely true. The decision below will likely be reversed—a fate it seems to embrace, as it openly criticizes the Supreme Court for believing we live in a "post-racial society," for "gutting" preclearance, for placing the VRA "under siege," and for applying *Purcell* hypocritically. Op.3, 44, 263. The court's discrimination ruling does not honor this Court's precedent in *Greater Birmingham* or even *mention* the presumption of legislative good faith. Its preclearance remedy is even worse. The court ordered that remedy knowing it would block provisions of a bill that the legislature just passed, one of which repeals part of SB90. And preclearance forces Florida to get its laws preapproved by the same judge who just called its elections director a liar, Op.118, 212-14, and who obliquely compared Florida's leaders to Vladimir Putin, Op.1 n.1.

The decision below should be stayed pending appeal. Because statewide elections are fast approaching, Appellants respectfully ask this Court to rule **as soon as possible**.

BACKGROUND

Florida makes it easy to vote. Floridians can vote in person on election day—the only method available for most of our nation's history. *Brnovich v. DNC*, 141 S. Ct. 2321, 2339 (2021). Floridians can also vote by mail, with no special excuse needed, for more than 30 days before an election. Fla. Stat. §101.62(1), (4)(b). And they can vote early for 8-14 days. §101.657(1)(d). The State *mandates* the use of drop boxes. §101.69(2)(a).

Yet the 2020 elections presented new challenges nationwide. Administered during a global pandemic, 2020 saw an unprecedented surge in mail voting. Before the election, a record number of lawsuits were filed, charging States who enforced their written laws with "disenfranchise[ment]." *E.g.*, *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020). The few lawsuits that succeeded, and the many *Purcell* violations that had to be stayed, took a toll on voter confidence nationwide. *See Republican Party of Penn. v. Degraffenreid*, 141 S. Ct. 732, 735, 737 (2021) (Thomas, J., dissental); *DNC v. Wis. State Leg.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurral).

In response to 2020, many States reformed their election laws. Their main goals were to restore voter confidence and to articulate clear rules that would govern mail voting without sacrificing election integrity. *See Brnovich*, 141 S. Ct. at 2348 ("Fraud is a real risk that accompanies mail-in voting.").

Governor DeSantis signed SB90 in May 2021. The bill has 32 substantive sections, most of which have never been challenged. Plaintiffs filed four lawsuits here: *League of Women Voters* (No. 4:21-cv-186), *NAACP* (No. 4:21-cv-187), *Florida Rising*

(No. 4:21-cv-201), and *Harriett Tubman* (No. 4:21-cv-242). The district court permanently enjoined four provisions:

1. **Dropbox provisions**, §101.69: Prohibits the use of dropboxes outside of regular voting hours and requires dropboxes to be continuously monitored by an election official during those hours.

2. **Registration-delivery provision**, §97.0575(3)(a): Requires third-party voter registration organizations (3PVROs) to deliver voter-registration applications to the county where the applicant resides within 14 days or before registration closes.

3. **Registration-disclaimer provision**, §97.0575(3)(a): Requires 3PVROs to inform applicants that their applications might not be delivered on time and that they can register themselves in person, online, or by mail.

4. **Solicitation provision**, §102.031(4)(a)-(b): Defines prohibited solicitation to include "engaging in any activity with the intent to influence or effect of influencing a voter" in or near a polling place.

No plaintiff alleged that the registration-disclaimer provision was intentionally discriminatory. Op.12. The plaintiffs in *NAACP* and *Florida Rising* challenged the other three provisions on that ground. The plaintiffs in *League of Women Voters* and *Harriett Tubman*, however, never alleged intentional racial discrimination, brought claims under the Voting Rights Act, or sought preclearance.

After a bench trial, the district court ruled that the dropbox, solicitation, and registration-delivery provisions intentionally discriminate against black voters, and thus violate the Fourteenth Amendment, Fifteenth Amendment, and VRA. Op.134-36. Applying the multi-factor test from *Arlington Heights*, the court surveyed Florida's "history of racial discrimination" starting with the Civil War. Op.42-45. It then asserted that

Florida has repeatedly "target[ed] Black voters because of their affiliation with the Democratic party," mostly citing lawsuits where courts found that Florida *didn't* engage in intentional discrimination. *E.g.*, Op.52, 60, 64. The court also found that the procedures used to pass SB90 didn't cut "one way or the other," Op.83, while dismissing concerns over "voter confidence" and "fraud" as unpersuasive, Op.70-75. In terms of legislators' statements, the court largely dismissed their relevance. Op.84-88, 129.

Crucially to the court, it thought the challenged provisions had disparate impacts on black voters because it believed those voters are currently more likely to use drop-boxes, register through 3PVROs, and wait in long lines. Op.116. The court relied on Plaintiffs' experts, though it acknowledged the significant limitations in their methods and findings. Op.90-104, 109-15. The court further speculated that the Florida legislature—all of it—knew about these disparate impacts based on the election director's "face and body language" at a Zoom trial, a floor statement where one Republican *denied* that SB90 would have disparate impacts, and the criticisms of Democratic legislators. Op.88-89, 116-21. It also faulted the legislature for rejecting "less discriminatory alternatives" offered by Democrats, including "doing nothing." Op.122-25.

Based on its intentional-discrimination ruling, the district court not only permanently enjoined the laws, but also barred Florida from "enacting" any law "governing 3PVROs, drop boxes, or 'line warming' activities" without preclearing it with Chief Judge Walker. Op.281. The court admitted that "[t]he parties treat[ed] [preclearance] as an afterthought," giving it less than six total pages of briefing. Op.270. But the court

failed to note that, despite asking the parties for supplemental briefing on countless topics, it never once asked for more briefing on preclearance. *E.g.*, *League* Docs. 471, 542, 543, 554, 630, 636, 657, 659. Nor did it conduct a remedial hearing. The court instead applied the multi-factor test from *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990). It didn't apply *Shelby County*, except to criticize that opinion as wrong. Op.44, 273-74. The court stressed that §3(c) of the VRA allows courts to order preclearance, and it held that preclearance was plainly constitutional under Congress's authority to "'make or alter'" States' regulations of federal congressional elections. Op.280 (quoting U.S. Const. art. I, §4, cl. 1).

As for the registration-disclaimer provision, the district court ruled that it compelled speech in violation of the First Amendment. Op.218. The court acknowledged that the Florida legislature had since passed SB524—a bill that, once signed by the governor, will "moo[t] Plaintiffs' claims challenging the registration disclaimer." Op.190, 258. In fact, it cited SB524 *against* the State, contending that its less restrictive alternative proved that the registration-disclaimer provision "is not narrowly tailored." Op.215-16. But instead of staying its hand, the court enjoined the registration-disclaimer provision. Its preclearance order now means that SB524's repeal of the registration-disclaimer *cannot* come into force without the court's blessing. In other words, the court invalidated a provision that "[a]ll agree" would "likely become moot soon," and blocked enforcement of the legislation that would moot it. Op.190.

Finally, as an alternative ground for invalidating SB90's solicitation provision, the district court deemed that provision vague and overbroad. According to Plaintiffs, this provision regulates speech to the extent it prevents them from giving voters in line food, water, and other tangible items. Op.182-83. The district court not only agreed, but held that this defect made the provision *facially* unconstitutional. Op.157-87.

The district court then denied a stay pending appeal. Op.268-69. It criticized the "all-powerful" *Purcell* principle as "wholly judge-made" and accused certain Justices of applying it hypocritically. Op.261-68. It refused to apply that principle here because SB90 is a "new" law, Plaintiffs challenged it immediately, Plaintiffs prevailed on the merits, and "the closest election is roughly five months away." Op. 261-68. Two supervisors also testified, according to the court, that enjoining SB90 would adversely affect them only "'a little.'" Op.266-67. The district court did not appreciate that elections are *currently* happening in Miami-Dade County, that statewide primaries begin in only three months, and that registrations must be processed, poll workers trained, and dropboxes sited well before then.

ARGUMENT

Stays pending appeal turn on four factors:

1. the likelihood the moving party will prevail on the merits;
2. the prospect of irreparable injury to the moving party if relief is withheld;
3. the possibility of harm to other parties if relief is granted; and
4. the public interest.

11th Cir. R. 27-1. In "election cases," courts also must consider the *Purcell* principle. *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurral) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). In the 2020 cycle, these factors "consistently pointed … in one direction—allowing the States to run their own elections." *New Ga. Project*, 976 F.3d at 1283. They point that direction in 2022.

I. Movants will likely prevail on appeal.

The district court ruled that three provisions of SB90 are intentionally discriminatory, that Florida should be put in preclearance, that the registration-disclaimer provision should be invalidated despite its impending repeal, and that the solicitation provision is overbroad and vague. This Court will likely disagree on each point.

A. Intentional racial discrimination

This Court will likely reverse the district court's ruling that three provisions of SB90 were passed with racially discriminatory intent. A detailed critique of the district court's 288-page opinion will have to wait for the appellate briefs. For now, two obvious errors warrant a stay. First, the district court didn't *mention*, let alone apply, "the presumption of legislative good faith." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Second, the district court didn't apply recent precedents clarifying the scope of *Arlington Heights*—most notably, this Court's decision in *Greater Birmingham*.

The district court "failed to apply—or even mention—the presumption of legislative good faith to which the [legislature] was entitled." *N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 303 (4th Cir. 2020). The words "good faith" don't even appear

in the opinion. And the district court repeatedly presumed *bad* faith. It assumed that SB90's proponents intended to impose disparate impacts on black Floridians, instead of crediting their denials that any such impacts would occur. Op.88; *see also Personnel Admin. v. Feeney*, 442 U.S. 256, 279 (1979) (rejecting that "awareness of consequences" shows discriminatory intent anyway). And although the law does not require legislators to justify election laws with specific evidence, *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009), the court used the supposed lack of record evidence to discredit the legislators' concerns with voter confidence and fraud as pretextual shams. Op.131. It also found that Florida would continue discriminating in the future based solely on the fact that "the Governor's Mansion and the Legislature are controlled by [the Republican] party." Op.277.

At a more granular level, the district court applied *Arlington Heights* without honoring the ways that subsequent precedents have refined that test. After criticizing those precedents or citing them at an extremely high level, the district court never applied the Supreme Court's decision in *Brnovich* or this Court's decision in *Greater Birmingham*. It thus committed several fatal errors:

- *Greater Birmingham* holds that the relevant "historical background" is "the precise circumstances surrounding the passing of the [challenged] law." 992 F.3d at 1325-26; *accord Bronovich*, 141 S. Ct. 2335. Yet the district court's historical analysis consisted of events disconnected from SB90, dating back to the Civil War. Op.42-45.

- *Greater Birmingham* emphasizes that "combatting voter fraud" and "increasing confidence in elections" are "valid neutral justifications" that dispel an

inference of discrimination, "even in the absence of any record evidence." 992 F.3d at 1327, 1334 & n.47; *accord Brnovich*, 141 S. Ct. at 2348. Yet the district court chalked these interests up to unproven, illegitimate pretexts. Op.131-32.

- *Brnovich* warns courts not to conflate "partisan motives" with "racial motives." 141 S. Ct. at 2349. And it warns courts not to use "differences in employment, wealth, and education" to invalidate state election laws based solely on "disparate impact." *Id.* at 2343; *accord Greater Birmingham*, 992 F.3d at 1327. Yet these flawed lines of reasoning comprise virtually all the district court's analysis.

- *Greater Birmingham* reminds courts that disparate impacts must be so "stark" that they reveal a pattern "unexplainable on grounds other than race." 992 F.3d at 1322. The district court found nothing like that. Its data suggested, at most, miniscule differences in how black Floridians voted before SB90. *E.g.*, Op.90-116. The data didn't purport to be reverse causal. And it was admittedly "limited," "unclear," "not necessarily representative," and "not statistically significant." Op.97-98, 100-12.

- *Greater Birmingham* does not fault legislatures for rejecting "the alternative option[s] that Plaintiffs would have preferred." 992 F.3d at 1327. But the district court faulted the legislature for rejecting opponents' amendments and their attempts to outright kill SB90. Op.122-25. That opponents' "preferred rule did not prevail ... does not suggest that the resulting rule violates the Constitution." *Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1193 n.8 (9th Cir. 2021).

- *Greater Birmingham* rejects the relevance of statements from single legislators, especially comments unrelated to the law in question. 992 F.3d at 1324-25. Yet the district court seemingly gave such comments "marginal" weight. Op.129.

For any or all of these reasons, the district court's ruling on intentional discrimination will not survive this appeal.

B. Preclearance

Because the district court erred in finding intentional discrimination, its preclearance remedy necessarily falls. Section 3(c) does not apply unless "violations of the

fourteenth or fifteenth amendment have occurred," 52 U.S.C. §10302(c)—meaning violations of the "protections against *intentional racial discrimination* in voting." *Perez v. Abbott*, 390 F. Supp. 3d 803, 814-18 (W.D. Tex. 2019) (emphasis added); *accord Veasey v. Abbott*, 888 F.3d 792, 801 (5th Cir. 2018). But even apart from being unsupported by a legitimate finding of liability, the district court's imposition of preclearance has independent flaws.

When deciding whether to impose that drastic remedy, the district court applied the wrong standard. It followed the Eastern District of Arkansas's decades-old decision in *Jeffers*. But this Court must follow *Shelby County*, which made clear that preclearance is "a drastic departure" from federalism and equal sovereignty. 570 U.S. 529, 535 (2013). Whether through Congress or the courts, the "Federal Government does not … have a general right to review and veto state enactments before they go into effect." *Id.* at 542; *see also Rizzo v. Goode*, 423 U.S. 362, 379 (1976) (federal courts must give "appropriate consideration … to principles of federalism in determining the availability and scope of equitable relief"). Under *Shelby County*, preclearance is unconstitutional absent "exceptional conditions." 570 U.S. at 545, 556-57; *see Perez*, 390 F. Supp. 3d at 819 ("In the wake of *Shelby County*, courts have been hesitant to grant §3(c) relief.").

The district court never attempted to find "exceptional conditions" of the kind referenced in *Shelby County*. They don't exist. *See Shelby Cnty.*, 570 U.S. at 551, 554. Indeed, they've long been gone in Florida, which was never subject to statewide preclearance—even in 1965. And today, black Floridians register and vote at rates of 58% and

52%—comparable to Oregon and far exceeding States like Colorado, Massachusetts, Minnesota, and Washington. *See Table 4b, Reported Voting & Registration, by Sex, Race and Hispanic Origin, for States: November 2020*, Census Bureau, bit.ly/37qgCgA. Nor could the district court sidestep preclearance's constitutional problems by pointing to Congress's authority over congressional elections. Op.279-80. Congress didn't use that power to enact the VRA, that power does not reach state elections or presidential elections, and no congressional power can used to violate basic principles of federalism. *See South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966); *McPherson v. Blacker*, 146 U.S. 1, 35 (1892); *Printz v. United States*, 521 U.S. 898, 923-24 (1997).

But under any standard, preclearance was wildly inappropriate here. SB90 is not the kind of law that could trigger preclearance: Plaintiffs didn't challenge most of the bill, only two groups even alleged intentional discrimination, and the district court *rejected* many of those allegations. Nor is Florida a repeat offender: The best the district court could muster was a string of cases where courts held that Florida *didn't* engage in racial discrimination. Op.52-65. At worst, the district court should have held that preclearance is "not necessary here in light of [its] injunction." *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 241 (4th Cir. 2016). Florida has no history of evading court orders. The district court stressed Florida's past compliance. Op.6-7 & n.4. And its one supposed counterexample—SB524—is hardly "a mockery of the rule of law." Op.279. It outright repeals one of the challenged provisions, a registration disclaimer that Plaintiffs never alleged was racially discriminatory to begin with, *see* Op.12. And forcing these

parties to litigate preclearance issues saves no more time or money than ordinary litigation. *Cf.* Op.278-89. If anything, it *increases* the costs since provisions of law must be precleared that otherwise would not have been challenged.

Far from a "rarely used" remedy for the most "'systematic and deliberate'" cases of discrimination, the district court's reasoning would make preclearance the norm in voting-rights cases. *Conway Sch. Dist. v. Wilhoit*, 854 F. Supp. 1430, 1442 (E.D. Ark. 1994). That the court reached for this blunderbuss remedy—effectively putting Florida in a decade-long federal receivership—is reason enough to stay its order.

C. Registration disclaimer

This Court will likely vacate the district court's injunction against the registration disclaimer. Op.218. Appellants disagree that this provision violates the First Amendment. *See* Op.202-18 (recounting Appellants' arguments). But the Court need not resolve that debate because the Florida legislature passed SB524, which repeals it. Governor DeSantis plans to sign SB524 imminently. No one disputes that it will moot the parties' dispute over the registration disclaimer. Op.190. The only thing stopping it is the district court's preclearance order. Once that relief is stayed, all of SB524 will go into effect, mooting Plaintiffs' claims and prompting this Court to vacate that part of the district court's order. *Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 868 F.3d 1248, 1271 n.24 (11th Cir. 2017) (en banc).

The district court's contrary course was an abuse of discretion. Far from constitutional avoidance, it reached out to strike down a statute that was about to be repealed.

The imminent repeal was at least a reason to hold this claim in abeyance or enter a partial stay, rather than ruling before Governor DeSantis could sign the bill and then barring the relevant provision from taking immediate effect. Because a stay will end this dispute without a constitutional ruling or an intrusion on Florida's elections, this Court should enter one.

D. Solicitation provision

Lastly, the solicitation provision is not vague or overbroad, let alone *facially* so. Though a facially vague law needn't be vague in every application, it must be vague in "the vast majority" of applications. *Hill v. Colorado*, 530 U.S. 703, 733 (2000). A facially vague statute, in other words, must be "utterly devoid of a standard of conduct so that it simply has no core." *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225, 1228 (11th Cir. 1982).

The solicitation provision has a clear core. It bans "solicit[ing]" voters who are inside or near the polling place. Fla. Stat. §102.031(4)(a). The word "solicit" is common to the law and not vague. *Sun-Sentinel Co. v. City of Hollywood*, 274 F. Supp. 2d 1323, 1333 (S.D. Fla. 2003). And SB90 does not make it facially vague by specifying that it includes "engaging in any activity with the intent to influence or effect of influencing a voter." Fla. Stat. §102.031(4)(b). That phrase is clarified by the long list of examples that precede it, including "seeking … any vote," "distributing … campaign material," and "selling … any item." *Id.*; *see United States v. Williams*, 553 U.S. 285, 294 (2008). And its "intent" requirement further reduces any facial vagueness. *Hill*, 530 U.S. at 732. In context and everyday meaning, the solicitation provision is clear: it allows "voters [to] focus on

the important decisions immediately at hand." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1888 (2018). As even the district court observed, it "shield[s] voters from … common annoyances" and deters the "taint of fraud or intimidation." Op.176.

For similar reasons, the solicitation provision is not facially overbroad. A facially overbroad law must lack a "'plainly legitimate sweep.'" *Cheshire Bridge Holdings, LLC v. City of Atlanta*, 15 F.4th 1362, 1377 (11th Cir. 2021). The district court made no such determination here. Even if some applications violated the First Amendment, the vast majority don't. No one disputes that the statute can be applied to pure conduct, like bribes. Or commercial speech, like selling goods. Or outright electioneering. In fact, the statute is incapable of overbreadth because it applies only in or near polling places during voting hours—*i.e.*, nonpublic forums. *Hodge v. Talkin*, 799 F.3d 1145, 1171 (D.C. Cir. 2015). As the Supreme Court explained in *Mansky*, its decision in *Burson v. Freeman* didn't resolve whether the areas "*surrounding* a polling place qualify as a nonpublic forum," but history and tradition reveal that areas "in *and around* polling places" are precisely that. 138 S. Ct. at 1886, 1883 (second emphasis added).

Even as applied to Plaintiffs, the solicitation provision is constitutional. Plaintiffs claim they want to distribute food and water to voters waiting in line within 150 feet of the polling place. Florida could reasonably determine that this task should be left to "nonpartisan" election officials. Fla. Stat. §102.031(4)(b). And distributing food and water is not speech. *See Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1292 (11th Cir. 2021) ("[M]ost social-service food sharing events will not be

expressive."). Though it can be in unique contexts, that context is missing here. *Burns v. Town of Palm Beach*, 999 F.3d 1317, 1343-47 (11th Cir. 2021). Giving a voter food or water could mean "Stay in line" or "Thanks for voting," but it could also mean "You look thirsty/hungry," "It's hot/cold outside," "We'd like to get rid of these extras," "Come visit our church," "Would you like to buy some water?", "Try this free sample," or "Vote for my candidate." As the district court acknowledged, *see* Op.163-67, a voter cannot tell which message is being expressed without additional speech—a telltale sign that the conduct is "not inherently expressive." *Rumsfeld v. FAIR*, 547 U.S. 47, 66 (2006).

The district court never explained why providing food and water to people waiting in line communicates this message but literally helping people vote does not. *See accord Feldman v. Ariz. Sec'y of State's Off.*, 840 F.3d 1057, 1084 (9th Cir. 2016) ("facilitating voting" is not speech); *Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018) (collecting and returning absentee ballots is not speech). Plaintiffs submitted no such evidence. That they subjectively intend to express a message and that other people thank them for the free food and water, *see* Op.164-65, is not enough.

II. Under the *Purcell* principle, the equities alone require a stay.

"[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox, Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). But in election cases, that observation dictates the remaining stay factors.

Purcell teaches that staying the district court's order prevents the "seriou[s] and irreparabl[e] harm" of barring Florida from "conducting this year's elections pursuant to a statute enacted by the Legislature." *New Ga. Project*, 976 F.3d at 1283. And it alleviates other irreparable harms, including administrative burdens and voter confusion. *Wis. State Legislature*, 141 S. Ct. at 31 (Kavanaugh, J., concurral); *Purcell*, 549 U.S. at 4-5. These widespread harms to *most* voters dwarf any harm to *individual* plaintiffs, whose victory is at worst delayed pending appeal. *Milligan*, 142 S. Ct. at 882 (Kavanaugh, J., concurral). And avoiding these harms serves "the public interest in orderly elections." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944-45 (2018). "Simply put, a stay preserves the status quo and promotes confidence in our electoral system—assuring voters that all will play by the same, legislatively enacted rules." *New Ga. Project*, 976 F.3d at 1284.

Importantly, *Purcell* is a sufficient basis to grant a stay. The Supreme Court has invoked it while expressing "no opinion" on the merits, *Purcell*, 549 U.S. at 5; where the plaintiffs had "a fair prospect of success," *Milligan*, 142 S. Ct. at 881 n.2 (Kavanaugh, J., concurral); and even where the challenged law was "invalid," *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). These applications reflect the long-established principle that, where the equities heavily favor a stay, courts need not decide whether the appellant will *likely* succeed on the merits. *See LabMD, Inc. v. FTC*, 678 F. App'x 816, 819 (11th Cir. 2016). It's enough that the appeal will raise "a serious legal question." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. Unit A 1981).

The district court didn't say that this appeal is unserious. It declined to follow *Purcell* because "the closest election is roughly five months away," "Plaintiffs have not delayed," and two supervisors testified that an injunction wouldn't burden them much. Op.265-68. None of that is true. Nor is the district court's reasoning entitled to deference. This Court is not reviewing the district court's denial of a stay, but rather must make "an equitable judgment of [its] own." *Trump v. IRAP*, 137 S. Ct. 2080, 2087 (2017). It should make a different call.

The district court's order falls squarely within *Purcell*'s forbidden window. Issued on March 31, the order came *in the middle* of two elections in Miami-Dade County. *See Municipal Elections*, Miami-Dade Cnty. (Mar. 15, 2022), bit.ly/3r4w09y (elections ending on April 5 and April 12). Though Florida's statewide primaries are in August, absentee voting starts in early July. *Election Dates*, Fla. DOE, bit.ly/3pMYrbx (last visited Apr. 7, 2022). Three months from the start of voting is too close under *Purcell*. *E.g.*, *Milligan*, 142 S. Ct. at 888 (Kagan, J., dissental) (four months); *Thompson v. DeWine*, 2020 WL 3456705 (2020) (six months). Indeed, the district court enjoined provisions governing voter registration, which is currently underway for the August primaries. *See Election Dates*. As are trainings for the poll workers who must implement the solicitation rules, plus the selection of early voting sites (and thus dropboxes).

It is the district court's injunction, not SB90, that changes the status quo under *Purcell*. SB90 is not new: It was passed over a year ago, and it has already been applied to a congressional election in January 2022, several state legislative primaries in January,

several state legislative elections in March, and numerous municipal elections in March. *See, e.g.*, *Special Elections Archive*, Fla. DOE, bit.ly/3I0g8dK (last visited Apr. 11, 2022); *Special Elections*, Fla. DOE, bit.ly/3CyYBIt (last visited Apr. 11, 2022); *Election Dates and Deadlines*, Palm Beach Cnty. Elections, bit.ly/3hXoVCI (last visited Apr. 11, 2022). Even if SB90 were new, "[i]t is one thing for state legislatures to alter their own election rules …. It is quite another thing for a federal district court to swoop in and alter carefully considered and democratically enacted state election rules." *Wis. State Legislature*, 141 S. Ct. at 31 (Kavanaugh, J., concurring). After preparing to implement SB90, officials now must "understand the court's injunction, then devise plans to implement that late-breaking injunction, and then determine as necessary how best to inform [others]." *Id.* Mix in the need for a "conflicting" stay order on appeal and the risk of "voter confusion" and the "consequent incentive to remain away from the polls" is high. *Purcell*, 549 U.S. at 4-5.

Nor does it matter that Plaintiffs quickly sued Florida. Though they quickly filed their *complaints*, Plaintiffs didn't move for preliminary injunctions or even summary judgment on all claims; they chose to go to trial, running the risk that a judgment would issue close to the 2022 elections. And *Purcell* is mostly "focused on the date of court orders," not the date of plaintiffs' filings. *Feldman v. Reagan*, 843 F.3d 366, 410 (9th Cir. 2016) (O'Scannlain, J., dissental). The Supreme Court has invoked *Purcell* where the plaintiffs sued a year before the election, *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014); six weeks after the challenged law passed, *Ariz. Sec'y of State's Office*

v. Feldman, 137 S. Ct. 446 (2016); and even "'hours" after the challenged law passed, *Milligan*, 142 S. Ct. at 888 (Kagan, J., dissental). Applying *Purcell* in these cases furthered the core principle of "allow[ing] the States to run their own elections." *New Ga. Project*, 976 F.3d at 1283.

Finally, *Purcell* cannot be defeated by the equivocal testimony of two supervisors. Those supervisors represent counties whose policies largely mirrored SB90's dropbox and solicitation requirements; they cannot speak for the counties whose preparations will be disrupted by the district court's injunction. *See* Tr.3156-68, 3496-501. Nor should two supervisors override Florida's chief election officer, its attorney general, two other supervisors, and a major political party—all of whom are seeking a stay under *Purcell*.

At most, the two supervisors could speak to the effect of a stay on election "administration" within their two counties. Op.267. But *Purcell* is equally, if not more, concerned with voter confusion and electoral confidence. Those "essential" interests are certainly implicated by a last-minute injunction wrongly accusing the State of intentionally suppressing the votes of racial minorities, *see Purcell*, 549 U.S. at 4-5, and subjecting the State to preclearance for the next decade, *see Shelby Cnty.*, 570 U.S. at 544-45.

CONCLUSION

This Court should grant a stay pending appeal as soon as reasonably possible.

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CERTIFICATE OF COMPLIANCE

This motion complies with Rule 27(d)(2)(A) because it contains 5,046 words, excluding the parts that can be excluded. This motion also complies with Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: April 11, 2022 */s/ Mohammad O. Jazil*

CERTIFICATE OF SERVICE

I filed this motion with the Court via ECF. I also served via e-mail a copy of this motion on all counsel of record identified in the service list that follows.

Dated: April 11, 2022 */s/ Mohammad O. Jazil*

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