

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

LEAGUE OF WOMEN VOTERS OF
FLORIDA, INC., et al.,

Plaintiffs,

v.

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

Defendants,

and

REPUBLICAN NATIONAL
COMMITTEE, and NATIONAL
REPUBLICAN SENATORIAL
COMMITTEE,

Intervenor-
Defendants.

Cases Consolidated for Trial:

Nos.: 4:21-cv-186-MW/MAF
4:21-cv-187-MW/MAF
4:21-cv-201-MW/MAF
4:21-cv-242-MW/MAF

**PLAINTIFFS' JOINT BRIEF IN RESPONSE TO COURT'S
ORDER REQUESTING BRIEFING ON SPECIFIC
QUESTIONS RELATED TO *ANDERSON-BURDICK***

Pursuant to the Court’s Order for Briefing on *Anderson-Burdick* (ECF No. 542), Plaintiffs in the above-captioned consolidated cases respond to the Court’s specific questions as follows¹:

FIRST QUESTION (ECF No. 542 at 1-2): What is the best controlling authority from the U.S. Supreme Court or the Eleventh Circuit addressing how courts define “reasonable, nondiscriminatory restrictions,” as that term is used in *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). In other words, to decide if a law is nondiscriminatory, do courts look to the language of the law, the intent behind the law, or the impact that the law has on certain groups?

A law can be discriminatory under the *Anderson-Burdick* test if its language makes it discriminatory, if it was intended to be discriminatory, *or* if it has a disparate impact on certain groups.

First, a law that places a disparate burden on identifiable groups is not a reasonable, nondiscriminatory restriction, even if there is no discriminatory language or evidence of discriminatory intent:

- ***Bush v. Gore*, 531 U.S. 98 (2000):** “Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Id.* at 104-05.
- ***Anderson v. Celebrezze*, 460 U.S. 780 (1983):** A candidate-filing deadline applicable to all presidential candidates not nominated by a major party was not a reasonable, nondiscriminatory restriction because it “place[d] a particular burden on an identifiable segment of Ohio’s independent-minded voters.” *Id.* at 792-94. The Court held “it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status.” It further explained that “[a] burden that falls unequally on new or small political parties or on independent candidates impinges, by

¹ In this joint filing, Plaintiffs address only the specific questions asked by the Court, with the brevity requested by the Court. Plaintiffs do not address other aspects of *Anderson-Burdick* or any issues related to other claims not specifically addressed or implicated by the Court’s questions.

its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties.” *Id.* In reaching these conclusions about disparate burdens, the Court did not point to any evidence of discriminatory intent or to any discriminatory language in the law itself.

- ***Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986):** Citing *Anderson* and holding that Connecticut’s longstanding, facially-neutral statute requiring closed primaries violated the First Amendment because it interfered with the Republican Party’s new plan to conduct an open primary, and thereby inhibited the Party’s freedom of association without a commensurately weighty state interest. *Id.* at 225. The Court reached this conclusion even though such an effect could not have been the intention of the statute, which had been enacted decades before the Republican Party sought to conduct such a primary. *Id.* at 211-12.
- ***Jones v. DeSantis*, 15 F.4th 1062 (11th Cir. 2021):** In the *Anderson-Burdick* context, plaintiffs “need not demonstrate discriminatory intent behind the challenged provision.” *Id.* at 1065-66.
- ***Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007):** Holding that Alabama’s June filing deadline “is a nondiscriminatory restriction” under *Anderson-Burdick*, because it “does not place independent and minor party candidates at a relative disadvantage to major party candidates.” *Id.* at 908-09. This reasoning recognizes that “non-discriminatory” in the *Anderson-Burdick* context includes not imposing disparate burdens.

Second, a law with text that facially discriminates against particular candidates or groups is not a reasonable, non-discriminatory restriction:

- ***Cook v. Gralike*, 531 U.S. 510 (2001):** The Supreme Court, citing *Anderson*, invalidated an election law that required placing pejorative labels (“DISREGARDED VOTERS’ INSTRUCTIONS ON TERM LIMITS” or “DECLINED TO PLEDGE TO SUPPORT TERM LIMITS”) next to candidates who did not support a term limit constitutional amendment. *Id.* Based on the text alone (rather than any other evidence of legislative intent), the Court concluded that the law was “plainly designed to favor candidates who are willing to support the particular form of a term limits amendment set forth in its text and to disfavor those who either oppose term limits entirely or would prefer a different proposal.” *Id.* at 524-25.

Third, a law passed with the intent to discriminate against particular groups cannot qualify as a reasonable, nondiscriminatory restriction under *Anderson-Burdick*. If such a law discriminates on the basis of race, it also violates the Fifteenth Amendment:

- ***City of Mobile v. Bolden*, 446 U.S. 55 (1980)**: “[A]ction by a state that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose.” *Id.* at 62.

What are the best non-controlling persuasive cases on the same question?

Disparate burden suffices; there is no requirement of discriminatory text or intent:

- ***Democratic Executive Committee of Florida v. Lee*, 915 F.3d 1312 (11th Cir. 2019)**: In a stay-panel opinion, the Eleventh Circuit explained that “[t]o establish an undue burden on the right to vote under the *Anderson-Burdick* test, Plaintiffs need not demonstrate discriminatory intent behind the signature-match scheme or the notice provisions because we are considering the constitutionality of a generalized burden on the fundamental right to vote, for which we apply the *Anderson-Burdick* balancing test instead of a traditional equal-protection inquiry.” *Id.* at 1319.²
- ***Hussey v. City of Portland*, 64 F.3d 1260 (9th Cir. 1995)**: Applying *Anderson-Burdick*, the Ninth Circuit held that a generally applicable and facially neutral law was nevertheless unreasonable and discriminatory because, by conditioning a sewer-fee subsidy on a landowner voting for annexation to the City of Portland, the law “disproportionately affects the poor” and “unreasonably interferes” with their right to vote. *Id.* at 1266. The court so concluded without identifying any evidence of a discriminatory intent. *See id.*
- ***Vote Forward v. DeJoy*, 490 F. Supp. 3d 110 (D.D.C. 2020)**: U.S. Postal Service policy changes that adversely affected voters who cast vote-by-mail ballots did not pass the *Anderson-Burdick* test in part because the changes, “while content neutral, . . . place an especially severe burden on voters who

² The Eleventh Circuit has held that “the necessarily tentative and preliminary nature of a stay-panel opinion precludes the opinion from having an effect outside that case.” *Democratic Exec. Comm. of Fla. v. Nat’l Republican Senatorial Comm.*, 950 F.3d 790, 795 (11th Cir. 2020).

have no other reasonable choice than to vote by mail,” such as voters with disabilities. *Id.* at 116-18, 121-28.

- ***North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016)**: Citing *Anderson* for proposition that the legislature cannot “restrict access to the franchise based on the desire to benefit a certain political party,” and holding that “intentionally targeting a particular race’s access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose.” *Id.* at 222-23.

A law passed with the intention of discriminating against particular groups also is not a reasonable, nondiscriminatory restriction:

- ***North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016)**: Citing *Anderson* for the proposition that the legislature cannot “restrict access to the franchise based on the desire to benefit a certain political party.” *Id.* at 222-23.

SECOND QUESTION (ECF No. 542 at 2): What is the best controlling authority from the U.S. Supreme Court or the Eleventh Circuit addressing whether, when considering the burdens SB 90 imposes under *Anderson-Burdick*, this Court considers the challenged provisions together and the cumulative burdens the provisions impose, or this Court considers the challenged provisions separately and the burdens they impose in isolation?

Where plaintiffs challenge multiple election-law provisions that have a cumulative or interlocking effect, the court must consider the cumulative burdens that the provisions, together, impose:

- ***Williams v. Rhodes*, 393 U.S. 23 (1968)**: The Supreme Court invalidated Ohio’s “series of election laws” governing the presidential ballot, explaining that “[t]ogether, these various restrictive measures make it virtually impossible for any party to qualify on the [presidential election] ballot except the Republican and Democratic Parties.” *Id.* at 24-25 (emphasis added).

What are the best non-controlling persuasive cases on the same question?

- ***Clingman v. Beaver*, 544 U.S. 581 (2005) (O’Connor, J., concurring in part and concurring in the judgment)**: “A realistic assessment of regulatory burdens on associational rights would, in an appropriate case, require examination of the cumulative effects of the State’s overall scheme governing

primary elections; and any finding of a more severe burden would trigger more probing review of the justifications offered by the State.” *Id.* at 599.

- ***Graveline v. Benson*, 992 F.3d 524 (6th Cir. 2021)**: In the context of an *Anderson-Burdick* claim, the Sixth Circuit held that “[w]hen plaintiffs allege that a statutory scheme, in combination, imposes a burden on their rights, we must consider ‘the combined effect of the applicable election regulations,’ and not measure the effect of each statute in isolation.” *Id.* at 536 (quoting *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 586 (6th Cir. 2006)).
- ***Esshaki v. Whitmer*, 813 F. App’x 170 (6th Cir. 2020)**: Applying *Anderson-Burdick*, the Sixth Circuit held that “the combination of” challenged Michigan regulations—specifically, “the State’s strict enforcement of the ballot-access provisions” and its COVID-19 stay-at-home order—“imposed a severe burden on the plaintiffs’ ballot access” and thus “violated the First Amendment.” *Id.* at 171.
- ***Republican Party of Arkansas v. Faulkner County, Arkansas*, 49 F.3d 1289 (8th Cir. 1995)**: The Eighth Circuit invalidated two ballot-access provisions under *Anderson-Burdick* because “the combined effect of these requirements impermissibly burdens the First and Fourteenth Amendment associational rights of voters and of the Republican Party.” *Id.* at 1291. The court emphasized that it was not holding that either provision alone was unconstitutional, but only that “the burdens placed on voters and parties by the interaction of the two requirements render the provisions unconstitutional in combination.” *Id.*
- ***Tennessee State Conference of NAACP v. Hargett*, 420 F. Supp. 3d 683 (M.D. Tenn. 2019)**: In an *Anderson-Burdick* challenge, holding that each challenged provision was unconstitutional standing alone and then that the challenged provisions “functioning together, create a cumulative burden that is even more difficult to justify as a constitutional matter.” *Id.* at 710.

While the court must consider the combined burden of the challenged laws, the court’s *Anderson-Burdick* analysis must focus on the effect of the challenged laws, specifically. The existence of other methods of voting does not eliminate the burden from restrictions on one method of voting:

- ***Democratic Executive Committee of Florida v. Lee*, 915 F.3d 1312 (11th Cir. 2019)**: The Eleventh Circuit held, in a stay-panel decision, that signature matching and cure procedures applicable only to voters who voted by mail or

with provisional ballots “impose[d] at least a serious burden on the right to vote,” because those procedures “subject[ed] vote-by-mail and provisional electors to the risk of disenfranchisement,” even though alternatives to voting by mail were available under Florida law. *Id.* at 1319-21.³

Respectfully submitted this 7th day of February, 2022.

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³ See footnote 2 regarding the precedential effect of a stay-panel decision.

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I HEREBY CERTIFY that on February 7, 2022 I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel in the Service List below.

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