IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FLORIDA STATE CONFERENCE OF BRANCHES AND YOUTH UNITS OF THE NAACP, et al., Plaintiffs, v. LAUREL M. LEE, in her official capacity as Secretary of State of Florida, et al., Defendants, and REPUBLICAN NATIONAL COMMITTEE, et al., Intervenor-Defendants.	Case No. 4:21-cv-187

DEFENDANTS' REPLY IN SUPPORT OF
CORRECTED MOTION FOR SUMMARY JUDGMENT[1]

I. PLAINTIFFS FAIL TO CARRY THEIR *ARLINGTON HEIGHTS* BURDEN.[2]

To prevail on their intentional discrimination claims, Plaintiffs must demonstrate SB90 was "unexplainable on grounds other than race." *Vill. of*

[1] Supervisors Hays and Doyle join arguments regarding the VBM-Request Provision and Non-Solicitation Provision.

[2] For the reasons set out in Defendants' motion for summary judgment, Plaintiffs lack standing, ECF-285-1 at 13-16, VRA Section 208 provides no private

Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977). Discriminatory "impact alone is not determinative." *Id*. Plaintiffs have failed to show any triable issue regarding discriminatory intent under *Arlington Heights*.[3]

Proportion of Burden. At no point have Plaintiffs' experts quantified the burden SB90 allegedly imposes on people of color. Although they cite several demographic disparities (*e.g.*, minority voters use public transit more than white voters), they fail to show how these disparities make SB90 more onerous for minority voters. Even if the Court were to credit this conjecture, SB90 is facially race-neutral, which means it is not "invidious…even when [its] burdens purportedly fall disproportionately on a protected class." *Greater Birmingham*, 992 F.3d at 1327. Plaintiffs have challenged SB90, not complex issues relating to societal class disparity; pointing to statistics speaking to the latter does not call into question the motivations of the legislature that enacted the former.

Florida's Past. Caselaw is clear: Plaintiffs may not invoke "old, outdated intentions of previous generations [to] taint [Florida's] legislative action forevermore." *Greater Birmingham*, 992 F.3d at 1325. The legislature enjoys a

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cause of action, ECF-285-1 at 58-59, and Plaintiffs' vagueness and overbreadth claims fail, ECF-285-1 at 67-73.

[3] Courts grant summary judgment where no reasonable factfinder can find discriminatory intent. *Greater Birmingham Ministries v. Sec'y of Ala.*, 992 F.3d 1299, 1321 (11th Cir. 2021).

good-faith presumption that is "not changed by a finding of past discrimination," *Abbott v. Perez*, 138 S.Ct. 2305, 2324 (2018), and history does not ban it "from ever enacting otherwise constitutional laws," *Greater Birmingham*, 992 F.3d at 1325. Failure to connect Florida's history to SB90 enactment guts Plaintiffs' argument.

HB1355, although recent, does not call into question the intent behind SB90. No court deciding whether to preclear HB1355 found it was enacted with discriminatory purpose. *See Florida v. United States*, 885 F. Supp. 2d 299, 351 (D.D.C. 2012). Indeed, as Plaintiffs' expert acknowledges, ECF-306-8 at 13, the evidence did "not demonstrate that the changes [would] deny minorities equal access to the polls" and, accordingly, HB1355's disproportionate effect did not translate to discriminatory intent. *Brown v. Detzner*, 895 F. Supp. 2d 1236, 1246 (M.D. Fla. 2012). This Court's 2018 signature-match case is even less relevant; there, the Court had no occasion to consider, and plainly did not find, that Florida's signature-match law imposed either disparate impact or discriminatory intent. *Democratic Exec. Comm. v. Detzner*, 347 F. Supp. 3d 1017, 1022 (N.D. Fla. 2018). Simply put, this history[4] is "largely unconnected to the passage of [SB90]," *Greater Birmingham*, 992 F.3d at 1324, and therefore creates no triable issue.

[4] Decades-old challenges are also not linked to SB90's passage. As Plaintiffs' expert acknowledges, the court ultimately ruled Florida's 2002 redistricting plan was constitutional under the Fourteenth Amendment and Section 2, ECF-306-8 at 14; *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Fla. 2002), and the Florida Supreme

Legislative Processes. Nothing about SB90's enactment was procedurally unusual. Plaintiffs' complaints about a rushed legislative process, limited debate, and use of strike-all amendments, are ultimately just complaints about Florida's standard legislative process,[5] *see* ECF-283-25 at 189:1-5, 186:11-21; ECF-283-24 at 216, that cannot "overcome the presumption of legislative good faith," *Abbott*, 138 S.Ct. at 2328-29; *Brown*, 895 F. Supp. 2d at 1246-47. Nor does Florida's successful 2020 election morph SB90 into a substantive departure; "deterring voter fraud is a legitimate policy on which to enact an election law, even in the absence of any record evidence of voter fraud." *Greater Birmingham*, 992 F.3d at 1334. Florida (commendably) wants to continue its recent history of free, fair, and secure elections, and it is "not required to prove that voter fraud exists," *id*., before acting prophylactically to maintain this success.[6] In any event, SOEs have testified voter fraud in Florida did indeed occur, including in 2020,[7] and even isolated instances

Court's ruling that the 2012 map had to be redrawn "did not rest on a claim of racial discrimination," ECF-306-8 at 15.

[5] If anything, the only departure from the ordinary legislative process in SB90 was at Plaintiffs' urging. *See* https://twitter.com/stevebousquet/status/1387399280852447234.

[6] Certainly, "a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Brnovich v. Democratic Nat'l Comm.*, 141 S.Ct. 2321, 2348 (2021).

[7] *E.g.*, ECF-283-27 at 33:9-24; ECF-323-7 at 50:25-52:7; ECF-323-5 at 34:17-21; ECF-323-4 at 106:17-21; ECF-283-24 at 48:2-50:12.

can cast doubt on, for example, Florida municipal elections that occasionally turn on a single vote. ECF-323-3 at 134:2-135:13; ECF-323-2 at 145:21-147:5. Many supervisors believe one instance of voter fraud is one too many, *e.g.*, ECF-323-4 at 87:11-14; ECF-323-7 at 155:6-9; ECF-323-2 at 147:6-9; ECF-323-3 at 135:14-17, and the State's agreement is not evidence of discriminatory intent.

Contemporaneous Statements. As set out in Defendants' motion for summary judgment, Florida takes pains to make voting safe, secure, and accessible to everyone eligible to vote a ballot.[8] Given these accommodations, a statement that failing to vote might be caused by failure to prepare or to take initiative says nothing about race whatsoever. Plaintiffs fail to cite a single legislative statement referring to race at all, and asking this Court to cast far-fetched aspersions regarding hidden racial animus on Florida's lawmakers has no basis whatsoever in law or fact. It cannot create a genuine question of fact.

Disparate Impact Knowledge. Mere "speculations and accusations of…[SB90's] opponents simply do not support an inference of the kind of racial

[8] As numerous SOEs confirmed, it is easy to vote in Florida today, particularly in juxtaposition with voting options available historically. *See* ECF-323-7 at 144:21-145:2 (affirming that "even with [SB90] in effect" it is "easy to vote in Lee County," and "voters have more options than they have ever had in the past to cast their ballot"); ECF-283-27 at 138:1-139:5 ("[W]e have made voting so easy…I don't know what else you can do[.]"); ECF-323-8 at 141:2-5; ECF-323-3 at 139:25-140:3; *see also* ECF-283-1 at 6, 9. Florida today has among the most lenient voting standards nationwide. ECF-283-1 at 6-8; *cf. Brnovich*, 141 S.Ct. at 2330 (finding no Section 2 violation where "Arizona law generally makes it very easy to vote").

animus discussed in…*Arlington Heights*." *Butts v. N.Y.C.*, 779 F.2d 141, 147 (2d Cir. 1985). For this reason (and those in Defendants' motion, ECF-285-1 at 26-31), Plaintiffs cannot demonstrate foreseeability and knowledge of disparate impact.

Less Discriminatory Alternatives. Plaintiffs presuppose, without support, that SB90 is more discriminatory than the status quo. They fail to support this proposition, and also fail to mention that Florida's legislature chose the least restrictive iteration of the three it considered. *See* ECF-285-1 at 32-33.

Accordingly, Plaintiffs' intentional-discrimination claims fail.

II. PLAINTIFFS' VRA SECTION 2 CLAIMS FAIL.

VRA Section 2 prohibits states from "den[ying] or abridg[ing] of the right…to vote on account of race or color," 52 U.S.C. § 10301(a), and claims are assessed based on "the totality of circumstances," *id*. § 10301(b). The key is whether the process is "equally open to participation." *Brnovich*, 141 S.Ct. at 2337-38. Because the totality of circumstances raises no triable issue regarding SB90's compliance with Section 2, the Court should grant summary judgment for Defendants.

A. The *Brnovich* Guideposts Favor Summary Judgment.

Minimal burden/multiple opportunities. In *Brnovich*, the Court held that "[m]ere inconvenience" cannot sustain a Section 2 violation because "every voting rule imposes a burden of some sort." *Id.* at 2338. Although Plaintiffs gloss over this distinction, it remains true and applies to each provision they challenge.

For example, dropboxes at some locations might be available for less time in future elections. But any alleged drop-box inconvenience is *de minimis*, considering the myriad ways Floridians can vote. Requiring a person to visit a dropbox during business hours when he would prefer to use it at midnight is the sort of inconvenience that does not suffice under *Brnovich*. The dropbox-voting process remains "equally open" to that voter—especially considering availability of VBM, voting in person (either during early voting or on election day), or voting at a different dropbox. Regardless, Florida is one of only ten states that require dropboxes. ECF-283-1 at 19. Consequently, truncated hours alone is not a legally sufficient burden.

Post-1982 evolution in Florida's voting laws. "[I]n 1982[,] States typically required nearly all voters to cast their ballots in person on election day," *Brnovich*, 141 S.Ct. at 2338. Since 1982, Florida has made voting easier by, *inter alia*, offering at least eight early voting days, allowing no-excuse VBM without a notary/witness requirement, and providing dropboxes. ECF-285-1 at 38–39. Because Plaintiffs fail to address Florida's significant expansion of voting opportunities since 1982, *see* ECF-313 at 72, this guidepost favors Defendants.

Minimal disparate impact. The "mere fact that there is some disparity does not necessarily mean that a system is not equally open [or] does not give everyone an equal opportunity to vote," *Brnovich*, 141 S.Ct. at 2339. In support of their disparate-impact claims, Plaintiffs rely heavily on Dr. Smith. ECF-313 at 18–22.

Despite noting differences between minority and nonminority voting practices in 2020, neither he nor Plaintiffs explain how these alleged discrepancies demonstrate that the franchise is now, given SB90, less open to Black and Hispanic voters. That Black and Hispanic voters used VBM in record numbers during the 2020 Election, *id.* at 18, says nothing about the effect SB90 will have on their ability to vote by mail (especially because Plaintiffs fail to address the pandemic's effect on use of alternative voting methods).

Even if Plaintiffs' expert is correct that SB90 "will reduce the availability of one in four drop boxes" deployed in 2020, *id.*, this neither states nor implies anything about SB90's impact on minority communities; indeed, the impact might be spread evenly throughout all voting demographics. And although Plaintiffs allege "Black and Hispanic voters face longer wait times when casting a ballot in person," *id.* at 48,[9] they do not show why this means SB90 creates "a system [that] is not equally open," *Brnovich*, 141 S.Ct. at 2339.

[9] Plaintiffs cite Dr. Smith's data reflecting Miami-Dade County's early in-person voting in the 2020 General Election to show a higher percentage of Black (23%) and Hispanic (~24%) voters experienced wait times of 30 minutes or more than white voters (17%). ECF-313 at 48. But these isolated statistics obscure the fact that when wait times are averaged out by race for all Miami-Dade voters (using his own data), there is no meaningful disparity: the average wait time for Black voters in the State's most populous county was just 9.26 minutes, compared with 8.61 minutes for white voters and 11.4 minutes for Hispanic voters. ECF-306-20 at 149, Table 19.

Strong state interests. According to the Supreme Court, "[r]ules that are supported by strong state interests" (*e.g.*, preventing voter fraud, "[e]nsuring that every vote is cast freely, without intimidation or undue influence," and maintaining election integrity and confidence) "are less likely to violate §2," *Id.* at 2330–40. Plaintiffs' argument that "no genuine state interest is served by the Challenged Provisions" is mistaken. ECF-313 at 71. On the contrary, these strong state interests are amply supported in the record. *E.g.*, ECF-283-29 at 49:14-21, 58:5-24, 90:19–91:16, 160:9-23. At bottom, the Court has held these interests are valid and important, *Brnovich*, 141 S.Ct. 2321, 2340, 2347–48, and Plaintiffs have offered nothing to call those interests into question.

III. SB90 COMPLIES WITH THE ADA.

Although Plaintiffs accurately recite the elements of an ADA claim (*i.e.*, (1) qualified individual with a disability (2) excluded from participation or denied a benefit (3) because of the disability, *Silberman v. Miami Dade Transit*, 927 F.3d 1123, 1134 (11th Cir. 2019)), the rest of their briefing deteriorates quickly. Two points are worth reiterating at the outset. First, Rule 56(c) mandates "entry of summary judgment…against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Second, the ADA only compels states "to make 'reasonable

modifications' that would not fundamentally alter the nature of the service or activity of the public entity or impose an undue burden." *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1082 (11th Cir. 2007) (quoting *Tennessee v. Lane*, 541 U.S. 509, 531-32 (2004)). Taken together, these principles underscore why Defendants are entitled to summary judgment on each of Plaintiffs' ADA theories.

A. Dropboxes

The entirety of Plaintiffs' drop-box argument depends on conjecture that (1) some supervisors might move dropboxes inside to comply with SB90, and (2) this "will burden voters with disabilities." ECF-313 at 73. In support of the former, they point to *two* of Florida's sixty-seven supervisors who stated they currently plan to move their dropboxes inside and one who already has removed an outdoor dropbox, and then they speculate others might do the same. *See id.* at 74 ("[T]he number of counties that remove outdoor dropboxes is only expected to increase."). They make no attempt to show the three counties they reference (Lake, St. Johns, and Bay) have residents that find it more difficult to use indoor, as opposed to outdoor, dropboxes.[10] Without more, they cannot establish *any* ADA-claim elements.

Assuming, *arguendo*, Plaintiffs could make more than their threadbare

[10] Indeed, neither Mr. Hahr nor Ms. Zukeran live in one of those three counties. ECF-306-25, ¶1; ECF-306-57, ¶1.

speculation that all outdoor dropboxes will inevitability move indoors, summary judgment remains warranted because Plaintiffs have made no attempt to demonstrate the existing accommodations for indoor dropboxes fall below the ADA's "reasonable modification" line. *Bircoll*, 480 F.3d at 1082. Taking as true only for purposes of this motion, their generalization that indoor dropboxes might be "less accessible to many voters with disabilities," ECF-313 at 74, "[t]he ADA's 'reasonable modification' principle…does not require a public entity to employ any and all means to make auxiliary aids and services accessible to persons with disabilities," *Bircoll*, 480 F.3d at 1082. Wherever SOEs decide to place their dropboxes, the dropboxes need only remain "readily accessible to and usable by individuals with disabilities." *Karantsalis v. City of Miami Springs*, 29 Fla. L. Weekly Fed. C 564 (11th Cir. 2021).

Discovery shows the supervisors' indoor voting locations comply with the ADA, and their respective staff assist any disabled voter needing assistance. *E.g.*, ECF-323-1, ¶¶7-9. In other words, because in-person voting indisputably complies with the ADA, so too does indoor dropbox voting.[11] And while Mr. Hahr and Ms. Zukeran prefer the convenience of outdoor dropboxes, their testimony does not establish that current ADA accommodations at their polling places deprive them of

[11] If someday that proves otherwise, Plaintiffs could sue that county to obtain a facility-based ADA accommodation (*e.g.*, help with accessing indoor dropboxes), rather than seeking to enjoin SB90.

their ability to use indoor dropboxes. Because Plaintiffs have offered no legal or factual reason for the Court to conclude otherwise, summary judgment is warranted.

B. Vote-by-Mail Request

Similarly, Plaintiffs cannot show that requiring them to request a VBM ballot every general election (instead of every other general election) "denie[s]" them the "benefits" of the VBM option. 42 U.S.C. § 12132. The ADA does not entitle Plaintiffs to demand the State deploy "any and all means" they prefer. *Bircoll*, 480 F.3d at 1082. "Reasonable modifications" means that, so long as VBM remains "readily accessible to and usable by individuals with disabilities," *Karantsalis*, 29 Fla. L. Weekly Fed. C 564, the State has complied with the ADA.

Plaintiffs cite no case holding (or even hinting) that ADA-compliant access to a state benefit becomes ADA violative if a disabled individual needs to avail him or herself of that benefit every general election instead of every other general election. On its face, claiming a once-every-other-general election VBM request requirement is okay but a once-every-general election VBM request requirement renders VBM "[un]usable" strains all credulity. *Id*. And the existence of other accommodations enshrined in Florida law to assist disabled voters with requesting, accessing, and casting absentee ballots eviscerates any question that Plaintiffs' ADA claim can succeed. *E.g.*, Fla. Stat. § 101.662; *see also* ECF-323-8 at 107:17-108:3.

Plaintiffs make no serious attempt to demonstrate otherwise. The best they offer is Mr. Hahr, who testified he cannot access Marion County's website and, instead, must have his aide drive him to request his VBM ballot in person. ECF-313 at 75-76.[12] This does not render SB90 violative of the ADA (if anything, it perhaps suggests a potential issue with a county's website), because Mr. Hahr never once says the difficulties he faces amount to a "deni[al]" of the VBM "benefit[]." 42 U.S.C. § 12132. Nor does the "additional work" and expenditure of "a lot of energy" Ms. Rogers described. ECF-313 at 76. Simply put, requiring individuals to use the State's ADA-compliant VBM-request procedures once every general election instead of every other general election does not cross the line into the unreasonable.

C. Non-Solicitation

Finally, nothing about the Non-Solicitation Provision conceivably denies any disabled person any benefit. Both Florida and federal law guarantee disabled voters may be accompanied and assisted by a person of their choice at polling locations (including while waiting in line), *see* ECF-323-1 ¶¶5-6, 9 (citing Fla. Stat. § 101.051(1)); all in-person voting locations comply with the ADA, *see id.* ¶¶8-9; and supervisors instruct their staff to help disabled voters with the voting process. *Id.* ¶¶7, 9; ECF-283-24 at 87:19-88:10; ECF-323-2 at 92:3-11. Stacking levels of

[12] Mr. Hahr does not explain why he must request a VBM ballot in person when Florida law also permits voters to make requests in writing or by telephone. Fla. Stat. § 101.051(1).

conjectural fear about longer lines and COVID-19 makes Plaintiffs' arguments more, rather than less, speculative. ECF-313 at 77. They cannot carry their burden with hollow specters like this, and summary judgment for Defendants is therefore warranted.

IV. SECTION 208 DOES NOT PREEMPT THE NON-SOLICITATION PROVISION.

Nothing in Florida law prevents a disabled voter or a voter requiring language assistance from getting help,[13] as required by Section 208. By its plain terms, SB90 does not "limit the aid [disabled voters] can receive," nor will it "prevent voters with disabilities from receiving assistance in the form of food or water from anyone of their choice," ECF-313 at 81-82. *See* ECF-323-1 ¶¶5-6, 9. Plaintiffs' Section 208 claim thus fails as a matter of law.

V. NO TRIABLE ISSUE UNDER *ANDERSON-BURDICK*.

Resolution of *Anderson-Burdick* claims is often appropriate at the summary judgment stage. *E.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008); *Duke v. Massey*, 87 F.3d 1226 (11th Cir. 1996). For the reasons in Defendants' motion, ECF-285-1 at 43-53, summary judgment is warranted.

[13] In fact, Florida law mirrors Section 208 by allowing voters to seek and obtain assistance from persons of their choice. *Compare* Fla. Stat. § 101.051(1) *with* 52 U.S.C. § 10508.

Respectfully submitted, Dated: December 10, 2021.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing complies with the size and font requirements in the local rules. It contains 3,186 words.

/s/ Mohammad Jazil

CERTIFICATE OF SERVICE

I certify that I served the foregoing on all counsel of record through this Court's CM/ECF system.

/s/ Mohammad Jazil